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## NATIONAL TREATMENT PRINCIPLE IN THE LIGHT OF THE INDIA SOLAR PANELS DISPUTE CASE

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### Introduction

With every year passing by, climate change is considered as the rising concern for the entire world. Due to an increase in temperature, adverse environmental effects have been caused which led to detrimental effects and challenges for the market, leading to a wide search for alternate sources of energy. As per several research done globally, majority of Carbon-Dioxide emissions are caused by electricity generation through fossil fuels, and to combat such emission, alternate sources of fuels via renewable energy is prominent and is upcoming due to its abundant properties. Regardless of that, there are challenges that are still challenges faced while using renewable sources of energy such as- **High Capital Cost and less return on investment as compared to fossil fuels.**

To combat this Governments across the globe have resorted to grant renewable energy subsidies to several companies to build such an energy sector that implements and uses that technology to reduce carbon emissions. **Domestic Content Requirements (DCR's)** are provisions that help in **development of the industrial sectors of a nation**, and in this case, those of the renewable energy sector.

In regards to **subsidiaries that are granted** by governments to the companies in their nations, the WTO **regulates** this very activity by the **Agreement on Subsidies and Countervailing Measures (ACSM)** which overlooks such activities.

In the Solar Panels Dispute Case, India had decided to give renewable energy subsidies to certain renewable energy industries for the manufacturer of solar panels under the **Jawaharlal Nehru National Solar Mission (JNNSM)**. The United States of America on the other hand, was aggrieved by this policy decision of India and the **favouritism it showed towards its domestic industries**, thereby harming the scope of success of US based industries manufacturing solar panels. The same was then challenged by USA in WTO under ASCM.

## Issues Faced

The prominent issues in the present case regarding the Solar Panels subsidiaries being granted to Indian domestic manufacturers while no leeway for Foreign Industries was-

- a. Analysis of the decision of the WTO, where it **ruled against India undermines the country's efforts to promote use of clean energy.**
- b. How did India **avoid implementing protectionist policies like DCR**, which were against its international commitments since they distorted competition.

## GATT & WTO Principles Applicable

- a. Agreement on Subsidies and Countervailing Measures (ACSM) overlooks and regulates the aspect of countries providing subsidiaries to domestic industries.
- b. Article XX GATT provides a list of exceptions that is applicable to member states other than the obligations that they have to follow.
- c. Article XX(b) GATT allows member nations to undertake trade restrictive measures that are necessary to protect human, animal or plant health/life.
- d. Article XX(g) GATT allows member nations to take such measures that would result in- 'Conservation of exhaustible natural resources'.
- e. Article III:4 GATT states that all WTO members shall provide equal treatment to the goods that are originating from other countries, they are to be treated at par with the goods that are manufactured within their own country.
- f. Article 2 TRIMS Agreement provide a notice to all WTO members to not use any trade-related measure which contradicts the provision of Art. III GATT (violation of principle of national treatment).

## Subsidies & ACSM

The ACSM is a mechanism of the World Trade Organization where it prohibits subsidies being granted by nations to their domestic industries, which might cause adverse effects on

international trade. As per ASCM a **subsidy needs to have the following criteria** for it to be considered-

- a. Financial Contribution
- b. Confer a benefit
- c. Specific cause

Such a financial contribution given by the government to the industries needs to **confer a benefit** and such benefit needs to be determined **in respect to the benchmark rate** which is the current prevalent rate in the market. While the first two criteria are fulfilled, what is also important is that only those subsidies that are specific to a **certain cause** are subject to the rules and regulations of ASCM. In this case the Indian government was providing subsidies to the domestic industries **responsible for manufacture of the solar panels**.

While Subsidies are a method of improving and boosting national production, but in light of GATT and WTO, it at times **causes harm or injuries to other members** who are affected due to the adverse low prices faced in the country by the domestic manufacturers.

**Prejudice** exists if one of the four grounds under **Article 6 of ASCM** are proven-

- a. The subsidy must result in a **decrease in another member's exports** of a comparable product in the subsidizing member's market.
- b. The subsidy must have an **impact comparable to that of another participant** in a third-country market.
- c. The subsidy must result in a **substantial drop in prices**, which causes the member nation in the same market to suffer a loss.
- d. The product's **global market share must steadily rise** as a result of the subsidy in comparison to the average share over the previous three years.

Subsidies, which are less trade restrictive than other policies implemented by nations, are the best way to preserve the equilibrium between the right to regulate and free trade. Subsidies are thought to be more effective tools for trade policy. Trade-distorting policies like tariffs, quotas,

and complete bans affect both production and consumption directly, making them more distorting than domestic policy measures like subsidies. They only impact production and not consumption, subsidies have a lower potential to disrupt trade. Furthermore, properly implemented subsidies have the power to address market imperfections and encourage ecologically responsible behaviour.

### Analysis

In the entire case as has been presented, the claims of the United States regarding violation of the principle of national treatment under GATT and TRIMs Agreement by India was met with a defence under **Article XX(j) of GATT** regarding- 'essential to the acquisition or distribution of products in general or local short supply'. The principle however was **formulated during the time of World War II** to ensure efficient and smooth flow of equipment and raw materials but nations all across who were members. Since then, this particular provision was never used, and therefore reliance was not placed on such a defence by the panel and the appellate body. The domestic content criteria for solar cells and modules, which are a requirement for selling electricity to the government, were determined by the Panel to be trade-related investment policies. According to the Panel's agreement with previous panel reports, measures that include **domestic content requirements are inherently "trade-related"** since they encourage the use of domestic goods over imported ones, which has an impact on commerce.

Although the National Treatment Principle does not apply to laws, regulations governing the procurement of products for governmental purposes by governmental agencies, but USA and the panel of WTO held that electricity which is to be purchased by the government is not related competitively unlike solar cells and modules which are subject to favouritism as shown by India by this step. The same was supported by the Appellate Body as; - If the acquired goods are **"like" or "in competitive relationship"** with the discriminatory items, then GATT is relevant, as stated in Art. III:8(a). But in this instance, **discrimination was applied to the solar cells and modules rather than the government-purchased electricity.**

The Appellate Body concluded by pinpointing that even though **international instruments** like UN Framework Convention on Climate Change, Rio Declaration on Environment and Development, etc. even after being adopted by India, are not part of the domestic legal system (law and regulations) of India and have **no effect in India** which entails application of Article

XX(d). The laws and regulations which have been taken as a reliance upon by India are not aimed at- '*ensuring the sustainable development and obligations relating to climate change.*'

Even if such international instruments are to be implemented in national/domestic laws of the nation, there are **certain conditions that are to be fulfilled** and assessment by the nations to ensure that the same is allowed-

- a. Degree of normativity of instrument
- b. Degree of specificity
- c. Is the rule enforceable before the law
- d. Is the rule adopted by a competent authority
- e. Form and title of legal instrument
- f. Sanctions that accompany the relevant rule

India tried to defend its stance by pinpointing at several other examples of renewable energy programmes in the states of Minnesota, Delaware, Massachusetts etc. where benefits were offered to companies using renewable energy equipment and in certain instances additional rebate was also granted to companies using a 'significant component' manufactured by a firm with a 'significant Massachusetts presence'. All of this took place, even though USA with all these policies of theirs violated Article 3.1, 3.2 of ASCM (WTO).

The WTO **ruled against India in February 2016 for violating the TRIMs and GATT**. It held that, "In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment," and requested India to "bring its measures into conformity with its obligations under the TRIMs Agreement and the GATT 1994."

## Conclusion

It is impossible to overstate the importance of DCR-based renewable energy subsidies in achieving both industrial and environmental goals. Subsidies for renewable energy can be extremely important in boosting the renewable energy industry and so addressing the widely

acknowledged challenge of climate change. For developing countries like India, who aim to establish a domestic renewable energy sector for the sustainable production of green electricity and enjoy the many advantages that come with it, such **DCR-based subsidies are especially crucial.**

Unfortunately, as per the ASCM governing all subsidies, it does not exempt any measures that might be undertaken which are beneficial for the environment, such as renewable energy subsidies. Thus, it is probable that the WTO will find renewable energy subsidies based on DCRs—like those provided by India under the JNNSM—to be in violation of the ASCM and that they will need to be removed as a result.

Regardless of the outcome of the case, the personal point of view of the author is that, on such an aspect of change in legislations, that would lead to balancing out of competition in the market, while giving equal opportunities to all competitors. It is important to note that such policy undertaken by India will lead to a **positive impact in the energy sector of India**, which would help it to **achieve its goal of domestic electricity requirement, while minimising Carbon Dioxide emission due to less dependence on coal.**

The WTO must take into account the inclusion of comparable environmental exceptions in the ASCM, given that there are environmental exceptions of some sort in other regimes besides subsidies. Subsidies are increasingly being used as a **method to promote renewable energy**, and there is a substantial **overlap between them and raising environmental awareness.** In the current day, where climate change is regarded as a serious environmental issue, this will guarantee that the ASCM is up to date.

In a recent case, similar to that of this one, India had filed a claim for a dispute in the WTO against the **United States for violating provisions of the Trade Related Investment Measures Agreement and Subsidies and Countervailing Measures Agreement** by domestic content requirements and subsidies that were given by the governments of states of Washington, California, Montana etc. The WTO **panel held US to be in the wrong of not following the National Treatment Principle under Article III:4**, where foreign producers need to be treated at par with domestic producers. Such a ruling provided India a major leverage in response to the 2014 trade dispute initiated by USA which was ruled against India, and therefore has led to a **tit-for-tat response in international trade disputes.**

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