Renewable Energy and International Trade: Lessons for Africa

By:

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Introduction

World Trade Organization (WTO) member states are moving towards increased reliance on renewable energy and are enacting domestic policies to encourage investment in renewable energy technology. These domestic policies have not escaped the scrutiny of other WTO members, who in some cases have commenced dispute resolution processes to resolve claims of non-compliance with WTO Agreements. This commentary discusses relevant decisions of the WTO dispute resolution bodies and the possible effect of these decisions on renewable energy in Africa.

The Canada Decisions

In the *Canada decisions*, that is, *Canada-Certain Measures Affecting the Renewable Energy Generation Sector*WT/DS412/AB/R and *Canada-Measures Relating to the Feed in Tariff Program* WT/DS426/AB/R, the appellate body pronounced itself on the Feed-in Tariff programme (FIT) meant to encourage use of renewable energy in the state of Ontario. It was alledged that the minimum required domestic content levels of the FIT programme were inconsistent with Article 2.1 of Agreement on Trade Related Investment Measures (TRIMs), Article III:4 of the General Agreement on Tariffs and Trade 1994 (GATT) and Articles 3.1 (b) and 3.2 of the Agreement on Subsidies and Countervailing Measures (SCM).

With regard to the TRIMs and the GATT, the appellate body found that the domestic content requirements could not be classified as laws, regulations or requirements governing procurement by governmental agencies of electricity within the meaning of Article III:8 (a) of the GATT. Further, that the minimum required domestic content levels provided in the FIT programme were inconsistent with the conditions prescribed in Article III:8 (a) of the GATT. On the basis of the above reasons, it was held that the minimum required domestic content levels were inconsistent with Article 2.1 of TRIMs and III:4 of the GATT.

Although the appellate body found that the FIT programme and related contracts were government purchases within the meaning of Article 1.1 (a) of the SCM and subsequently reversed the panel's finding that Japan had failed to prove that the FIT programme conferred a benefit within the meaning of Article 1.1 (b) of the SCM, it was unable to complete the analysis on whether the FIT programme was inconsistent with Article 3.1 (b) and 3.2 of the SCM.

The India Decision

In the subsequent decision of *India-Certain Measures Relating to Solar Cells and Solar Modules*, the appellate body relied on the *Canada decisions* to hold that the domestic content requirements enacted by India, that directed solar power developers to use solar cells and modules made in India, were not covered by the derogations in Article III:8(a) of the GATT and were therefore inconsistent with Article 2.1 of the TRIMs and III:4 of the GATT.

The appellate body also found that Article XX (J) of the GATT could not justify India's domestic content requirements, as solar cells and modules were not products in general or local short supply in India. Additionally, India could also not rely on Article XX (d) as its domestic content requirements could not be defined as laws and regulations within the meaning of this provision.

The United States Decision

In a recent dispute, *United States — Certain Measures Relating to the Renewable Energy Sector,* India sought to challenge incentives providing domestic content requirements and subsidies for renewable energy in the states of Washington, California, Montana, Massachusetts, Connecticut, Michigan, Delaware and Minnesota.

The panel found that the challenged measures were inconsistent with requirements under Article III:4 of the GATT, as they accorded less favourable treatment to imported products. Unfortunately, the panel exercised judicial economy with regard to the SCM and TRIMs provisions. In terms of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the panel found that the challenged measures impaired benefits accruing to India under the GATT. This dispute is currently before the appellate body.

Effect on Renewable Energy in Africa

The above decisions will impact renewable energy development and uptake in Africa. According to the International Energy Agency report, *Global Energy Review 2020, The impacts of the Covid-19 crisis on global energy demand and CO2 emissions*, renewable energy was generally resilient to COVID-19 and did not suffer substantial decline in demand as that reported across other energy sources. Increasingly, countries are investing in renewable energy as an important component of the domestic energy mix. The International Renewable Energy Agency report, *Africa 2030: Roadmap for a Renewable Energy Future*, predicts that by 2030, modern renewable energy will contribute about 22% to the continent's total final energy consumption.

In light of the above decisions from the WTO, African countries will have to draft

their renewable energy policies in a manner that is consistent with WTO law. Incentives provided to encourage investment in the renewable energy sector, should be informed by lessons learnt from the above WTO decisions. Similarly, incentives that are anchored in government purchase of renewable energy and domestic content requirements should be subjected to the rigorous tests provided in the GATT, SCM and TRIMs. With regard to solar energy, domestic content requirements may be an easy sale as there are relatively few manufacturers of solar cells on the continent. Proactive policy revision will possibly reduce WTO compliance challenges that may affect renewable energy development and uptake in Africa.

Conclusion

In the above decisions, it is evident that WTO member states are faced with conflicting international and domestic considerations in their attempts to encourage increased use of renewable energy. The appellate body is also hesitant to accept both domestic and international environmental conservation regulations as justification for non-compliance with WTO national treatment obligations.

While the WTO is yet to witness a dispute from Africa on renewable energy, it is only a matter of time. The sector is highly competitive and several countries appear to be involved in a race to lead innovation and development of renewable energy. Incentives to developers in Africa are likely to receive more than a quick glance and will attract substantial interest. African governments should proactively anticipate WTO compliance inquiries and review their policy frameworks for domestic content rules and government purchases of renewable energy.

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