



## IMPACT OF ANTI-DUMPING DUTY ON SOLAR ENERGY INDUSTRY

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### Abstract

*International trade has seen two contrasting approaches – free trade and protectionism. Dumping is a common form of price discrimination while anti-dumping is the protection provided to the importing country against dumping by the exporters. The Indian solar energy industry recently saw the initiation of anti-dumping investigations against the dumping of solar cells and modules by China, Taiwan and Malaysia. The National Solar Mission has set a target of 100GW solar energy by 2022. Imposition of anti-dumping duties could jeopardise the achievement of this ambitious target. While the solar product manufacturers would get a much wanted relief, the solar energy producers would be impacted by the higher prices of the solar products, resulting in higher project costs and tariffs, and a question mark on the viability of the project. This research paper studies the impact that anti-dumping duties, if imposed, would have on the solar energy industry. It analyses the current scenario and explores whether a solution exists which would address the issues of the solar energy producers as well as the solar product manufacturers.*

**Keywords:** *Dumping, GATT, export price, WTO, anti-dumping duties, discriminatory pricing, solar energy industry, viability, targets, efficiency*

### INTRODUCTION

International trade is the lifeline for all countries and consumers in today's world. It allows consumers to avail of goods and services which are not available or those which cannot be efficiently produced in their own country. There are two contrasting views regarding international trade depending on the level of control placed on the trade. Free trade is a laissez-faire approach with no restrictions on trade. Nothing is required to be done to protect or promote trade, as the market forces will do so automatically. On the other hand, protectionism believes that international trade needs to be regulated to ensure that the markets function properly. Protectionism exists in the form of tariffs, subsidies and quotas.

Dumping is the most common form of price discrimination. It is defined as a situation where the price of a product when sold in the importing country is less than the price of the same product in the market of the exporting country.<sup>1</sup> The definition of dumping according to The General Agreement on Tariffs and Trade (GATT) is "The sale of products for export at a price less than the 'normal value' where normal value means roughly the price for which those same products are sold on the 'home' or exporting market."<sup>2</sup> The *normal value* is the comparable price at which the goods are sold in the domestic market of the exporting country. If the normal value cannot be

<sup>1</sup> JUDITH CZAKO ET AL., A HANDBOOK ON ANTI-DUMPING INVESTIGATIONS (Cambridge University Press 2003)

<sup>2</sup> *Technical Information on anti-dumping*, WORLD TRADE ORGANISATION, [https://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_info\\_e.htm](https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm) (last visited 1 November, 2017)



determined through domestic sales, the Agreement provides for two alternate methods:

- Comparable representative export price to an appropriate third country.
- Cost of production in the country of origin with reasonable addition for administrative, selling and general costs and for profits.

The *export price* of the goods imported into India is the price which is paid or payable for the goods by the first independent buyer.<sup>3</sup>

The concept of dumping cannot be actually considered as illegal or unethical. Producers may sell their goods and services in different markets at different rates depending on the influence of the market forces, which vary from time to time. Adam Smith had quoted: "If a foreign country can supply us with commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage."<sup>4</sup> However, dumping is considered an unfair trade practice as it can cause or threaten to cause material injury to the importing markets. There are different types of dumping. *Sporadic dumping* is an occasional sale of commodity below cost in order to offload any surplus material in the international market. *Predatory dumping* is the sale of goods at a very low cost in order

to drive the producers of the importing market out of business, after which prices are raised to take advantage of its monopoly situation. *Persistent dumping* is the tendency of a domestic monopolist to continuously sell goods at a higher price in the domestic market as compared to international market, in order to compete with the foreign producers.

Anti-dumping is a protective mechanism adopted by importing countries against dumping by the exporting countries. It acts as a protection as well as a counter against unfair competition. The World Trade Organization (WTO) discourages protectionist trade policies. However, it allows anti-dumping measures to provide relief to importing countries against dumping by foreign countries. The anti-dumping provisions of WTO are available in GATT Article VI and the Uruguay Round Agreement on Anti-dumping, formally the Agreement on Implementation of Article VI.<sup>5</sup> The Agreement contains detailed and specific provisions related to the process and methods for establishing the existence of dumping and injury to the domestic industry.

The Indian legislation is contained in the Customs Tariff Act, 1975 in Section 9A and 9B as amended in 1995. Further regulations are provided in the Anti-Dumping Rules [Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995]. These two regulations are compliant with the WTO Agreement and contain the entire framework required on

<sup>3</sup> Rajkumar Dubey, *India: Anti-Dumping Laws In India*, MONDAQ, <http://www.mondaq.com/india/x/25707/agriculture+land+law/AntiDumping+Laws+In+India>(last visited 17 November, 2017)

<sup>4</sup> 4 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 29-40 (Edwin Cannan ed., London: Methuen & Co., Ltd. 1776) (5<sup>th</sup> ed. 1904)

<sup>5</sup>*Supra* note 3



matters related to dumping such as substantive rules, and rules relating to procedures, administration, practice and regulatory mechanism. The Ministry of Commerce is the Designated Authority for conducting investigations into Anti-dumping issues. The Ministry of Finance is responsible for imposition and collection of duties imposed or recommended by the Adjudicating authority.<sup>6</sup>

The Directorate General of Anti-Dumping and Allied Duties (DGAD) is responsible for administering the anti-dumping, anti-subsidies and countervailing measures in India. It functions under the Ministry of Commerce and is headed by the “Designated Authority”, a quasi-judicial authority under the Customs Act 1962, appointed by the Central Government.<sup>7</sup> The Designated Authority is of the level of Additional Secretary and is advised on costing issues by Principal Adviser (Cost) and one Joint Secretary. Additionally there are 15 investigating and costing officers with different levels of experience to conduct investigations. The DGAD is the single body for initiating required action for investigations and subsequent imposition of anti-dumping duties (ADD). Based on the recommendations of the DGAD, Ministry of Commerce, the duty is imposed by the Ministry of Finance. The law has a provision for appeal against the anti-dumping order before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), which is a

judicial tribunal. The CESTAT reviews the final recommendations and measures and is independent of the administrative authorities.<sup>8</sup> The Tribunal is consistent with the provisions of WTO which requires independent tribunals for the appeals against final recommendations and reviews. The appeal to CESTAT should be filed within 90 days.

Between 1992 and October 31, 2016, anti-dumping investigations were initiated into 352 products. The countries which figure prominently in the investigations are China, European Union, Taiwan, Korea, Japan, USA, Singapore, Russia and others. Anti-dumping duties levied on major product categories include chemicals and petrochemicals, pharmaceuticals, fibres/yarns, steel and other metals and consumer goods.<sup>9</sup>

## ANTI-DUMPING DUTY AND THE SOLAR ENERGY INDUSTRY

### • *The Solar Energy Industry*

India is a relatively new entrant in its efforts to harness the power of the sun as a sustainable source of energy. The National Solar Mission was launched just seven years ago, in 2010. It set a target of adding 20 GW of solar energy by 2022. In 2015, the Mission increased the target five-fold to 100 GW. This target is both ambitious as well as modest, taking into account India's projected rise in energy demand. Energy

<sup>6</sup>Supra note 3

<sup>7</sup> Aradhna Aggarwal, *Anti-Dumping Law And Practice: An Indian Perspective*, INDIAN COUNCIL FOR RESEARCH ON INTERNATIONAL ECONOMIC RELATIONS (APRIL, 2002)

<sup>8</sup>Supra note 7

<sup>9</sup>Ministry of Commerce & Industry, Government of India, *Towards Sustainable And Lasting Growth*, at 129 (Annual Report 2016-17) [http://commerce.gov.in/writereaddata/uploadedfile/MOC\\_636281140249481285\\_annual\\_report\\_16\\_17\\_eng.pdf](http://commerce.gov.in/writereaddata/uploadedfile/MOC_636281140249481285_annual_report_16_17_eng.pdf)



consumption has increased two fold since 2000, even though 240 million still do not have access to electricity.<sup>10</sup>

Renewable energy accounts for more than 18% of the total installed capacity, out of which the share of solar energy is nearly 4.5%. Within renewable energy, solar accounts for almost 25% of the total installed capacity. According to data published by the Central Electricity Authority, solar power accounted for 13.5 billion units (BU) during financial year 2016-17, as against 7.4 BU during the previous financial year.<sup>11</sup> In spite of the impressive growth in the industry, the solar power generated accounted for only 1.09% of the total power generated in the country, while within the renewable energy sources it came to 16.5%. Over 5.5 GW of solar has been installed year-to-date, taking the total cumulative installations to over 15 GW in August 2017. It is expected that around 10 GW of solar will be installed in calendar year 2017 while another 8 GW is expected in 2018. The solar project pipeline in India is around 13 GW.<sup>12</sup>

The indigenous manufacturing capacity is around 3 GW for solar PV cells and around

7-8 GW for solar PV modules. If we take into consideration the current solar energy capacity, India will need around 15-20 GW every year for the next five years in order to achieve the target of 100 GW by 2022.<sup>13</sup>

The domestic manufacturing setup is not at all equipped in terms of capacity to cater to the targets, particularly the solar cells.

It is under this backdrop that that investigation has been initiated to levy anti-dumping duty (ADD) on imports of solar cells and modules.

• ***Anti-Dumping Duty on Solar Product Imports – Initiation of Investigation***

The Indian Solar Manufacturers Association on behalf of various Indian manufacturers filed an application before the DGAD for initiating anti-dumping investigation and imposition of anti-dumping duties on import of “Solar cells whether or not assembled partially or fully in Modules or Panels or on glass or some other substrates” which originate in or are exported from China PR, Taiwan and Malaysia.<sup>14</sup> The petitioners claimed prima facie evidence existed of dumping of these goods from the originating countries and its linkage to the injury being caused to the domestic industry.

<sup>10</sup>Ministry of New and Renewable Energy and Press Information Bureau, Government of India, *Year End Review* (December, 2016) <http://pib.nic.in/newsite/PrintRelease.aspx?relid=155612>

<sup>11</sup> *Indian Solar Market – September 2017 Market Drivers and Challenges*, MERCOM COMMUNICATIONS INDIA, [https://www.renewableenergyindiaexpo.com/Portals/18/PDF\\_Files/REI%20Expo%20-%20India%20Solar%20Market%20Update%20-%20Whitepaper%20by%20Mercom%20India.pdf](https://www.renewableenergyindiaexpo.com/Portals/18/PDF_Files/REI%20Expo%20-%20India%20Solar%20Market%20Update%20-%20Whitepaper%20by%20Mercom%20India.pdf) (last visited 25 October, 2017)

<sup>12</sup>*Supra* note 11

<sup>13</sup> Armin Rosencranz and Kamakshi Puri, *Why Increasing India's Solar Energy Capacity Won't Work*, THE WIRE, March 17, 2017 available at <https://thewire.in/116842/solar-energy-india-capacity/> (last visited 11 November, 2017)

<sup>14</sup> Government of India, Ministry of Commerce & Industry, Directorate General of Anti-Dumping & Allied Duties, F.No.-6/30/2017-DGAD (July 21, 2017) available at <http://www.dgtr.gov.in/sites/default/files/SOLAR%20CELL%20Initiation.compressed.pdf> (last visited 30 October, 2017)



The petitioners claimed that there was no difference between the goods imported from the originating countries and those manufactured in India – they are comparable and should be treated as “like articles”. In the absence of reliable information on the domestic prices of the goods in the originating countries, the Normal values have been estimated taking into account international prices of raw material, production costs and conversion costs of the domestic industry with reasonable adjustment on account of sales, general and administrative expenses and reasonable profit. Export prices for these goods have been claimed on the basis of Impex-Statistic Services data.<sup>15</sup> The normal value on comparison with the export prices at ex-factory level clearly indicates that the goods are being dumped in the Indian market by the originating countries. Evidence has also been submitted regarding the injury to the solar manufacturing industry due to the increased volume of dumped imports, the production and consumption in India of the locally manufactured products, price suppression and price underselling and its impact on profits, return on capital employed and cash flow.

The period of investigation is for a 15 month time frame from April 2016 till June 2017. For analysis of injury to the manufacturers, a period of 3 years from April 2013 till March 2016 and the period of investigation have been considered. DGAD officially accepted the petition in July 2017 and initiated the investigation. The preliminary findings can take up to 12 months. Normally, DGAD does not initiate an investigation unless it is

sure about the validity of the case and therefore there are strong chances that it will recommend ADD on the solar imports. Further, DGAD has not received any objections or further petitions so far from either developers or manufacturers, which is resulting in a strong push towards imposing ADD. Another important point is whether the Ministry of Finance would accept the ADD if they are recommended by the Ministry of Commerce, as they had refused to impose ADD in a previous case in 2014. The US and India have agreed that the last day for the domestic content requirement (DCR) category will be December 14, 2017.<sup>16</sup> The ending of DCR is one of the drivers for pushing the anti-dumping case. This is because domestic manufacturers feel that they do not have any other way to compete with Chinese manufacturers.

- *Analysis*

For the first time in Quarter 2 of 2017, solar tariffs breached the Rs.2.50 per unit rate, making it cheaper than even coal in some cases. Solar tariff of Rs.2.97 per unit was arrived at the Rewa Ultra Mega Solar Park and an even lower tariff of Rs.2.44 per unit at the Bhadla Phase III solar auctions.<sup>17</sup> These rates were arrived at on assumptions that the solar product prices would drop further by 10-15% to around \$0.26-\$0.28 per watt. Their confidence was based on a decline in prices by a steep 26% in 2016 alone. For a bid of Rs.2.44 per unit, the internal rate of return (IRR) is already low at around 7%. Every 10% increase in the prices

<sup>16</sup>Supra note 11

<sup>17</sup> Ksenia Kondratieva, *Anti-dumping duty on solar cells poses risk for recently bid projects*, THE HINDU - BUSINESS LINE (Mumbai Edition), September 13, 2017

<sup>15</sup>Id. note 14



of the solar modules will result in the IRR falling by around 0.7%.<sup>18</sup>

Analysts have already started questioning viability of projects which have been awarded at tariffs below Rs.3.5 per unit. This is based on the rising prices of solar modules sourced from China. The module prices have increased to \$0.35-\$0.36 per watt and more, having been influenced by various factors. These factors include a high domestic demand for the solar panels in China, coupled with a decline in the production of polysilicon.<sup>19</sup> Further, the US recently imposed anti-dumping tariffs on import of solar panels from China. Fearing the increased tariffs, US solar service providers started stocking up on the panels. However, it is generally accepted by industry experts that this is a short term phenomena and prices of the Chinese solar products are expected to stabilise from the beginning of next year. The recently bid projects are not expected to be impacted by the current increase in prices, given that they have long execution deadlines of around 18 months and procurement is expected to start only in the mid of next year. However, it is highly unlikely that the prices will fall to \$0.26 per watt as anticipated by the lowest bidder of Bhadla solar park auction.

The prospect of imposition of ADD on solar cells and modules has made the solar industry jittery. Having seen bids as low as

Rs.2.44 per unit, the DISCOMs are trying to target this rate and negotiate better deals, while module prices are on the rise. The low bids during the reverse auctions were entirely dependent on the cheaper Chinese modules. The solar auction activity has literally come to a standstill, with the August 2017 auction activity falling by 95% to just 76 MW, compared to the activity in June. Without clarity from the regulatory authorities, the industry finds itself in a state of confusion. Any delay in the decision regarding imposing ADD would increase the uncertainty in the industry. If a duty is imposed, there is a doubt whether the DISCOMs would be ready to pay more or they would shift to other sources till such time solar power becomes affordable.<sup>20</sup>

Imposing an ADD of \$0.12 - \$0.15 per watt will result in an increase in the solar power tariff by Rs.0.80 to Rs.1.30 per unit, thereby taking the tariff to Rs.3.50 – Rs.4.00 per unit. This would clearly make it unviable for the DISCOMs, who would be unwilling to buy solar electricity for tariff above Rs.3 per unit. If tariffs increase to this level, one can expect only 30 GW of solar plants to be set up by 2022.

The anti-dumping investigation therefore needs some serious thought, considering the 100 GW target. Prices of solar cell and modules have been decreasing the world over, while tariffs have also reduced due to increased efficiency. While dumping of

<sup>18</sup>Supra note 17

<sup>19</sup> Bhanvi Arora, *Rising Chinese Solar Panel Prices May Put Indian Projects At Risk*, BLOOMBERG QUINT, August 20, 2017 available at <https://www.bloomberquint.com/business/2017/08/20/rising-chinese-solar-panel-prices-may-put-projects-bid-at-record-low-tariff-at-risk> (last visited 28 October, 2017)

<sup>20</sup> Ameeta V Duggal, *How would Anti-Dumping Duty impact India's solar sector?*, THE ECONOMIC TIMES ENERGY WORLD, October 24, 2017 available at <https://energy.economictimes.indiatimes.com/energy-speak/how-would-anti-dumping-duty-impact-india-solar-sector/2660> (last visited 15 November, 2017)



solar products has impacted the solar manufacturing industry, if we take a hard look we observe that in spite of the absence of ADD, the industry grew three times between 2014 and 2017, and the capacity utilisation of the plants increased from 28% to 78% during the same period. Solar power plants using domestic solar products have been subsidised by the Government through Viability Gap Funding (VGF). At such solar plants, a subsidy of Rs.1.75 crore per MW is offered, with the aim of keeping the tariffs competitive.<sup>21</sup> The size and growth of the Indian solar power market is directly related to the tariffs. Any increase in tariffs will impact growth and shrink the size of the market, which is inevitable if ADD is imposed. The domestic manufacturers will then have to bear the brunt of their capacities remaining unutilised. Additionally, in order to ensure that tariffs are competitive, the Government will have to increase VGF.

The Government has initiated a few steps to support the industry. In order to revive the domestic solar manufacturing industry, the Ministry of New & Renewable Energy (MNRE) proposed the development of 7.5 GW of solar using domestically manufactured solar cells, as part of its CPSU program. The Ministry of Power has issued guidelines for large scale projects with a capacity of 5 MW or more. The guidelines include payment guarantees, longer construction timelines, deemed generation benefits and provision for an intermediary procurer. It also offers clarity on the change in law clause. These guidelines aim to

address the challenges faced by many large-scale project developers.

The DGAD had sought the opinion of the Ministry with regard to the anti-dumping petition by the Indian Solar Manufacturers Association, considering that over 90% of the solar products used in the solar projects are imported from the three countries – China, Taiwan and Malaysia. MNRE has replied in their memorandum that the cost of the solar products imported from the three countries was indeed “artificially low”. However, imposing ADD would seriously impact India’s ambitious solar energy programme. Currently, the cost of a solar PV plant is Rs.3.5-4 crore per MW. A 10% add-on per watt would increase the project cost by about 15-20%.<sup>22</sup> The Ministry has advised that if at all ADD has to be imposed, it should be moderate and not exceed \$0.07 per watt, so that project costs would not increase beyond acceptable levels. MNRE has also pointed out that for projects which are under construction, a sudden imposition of ADD would result in increased cost, legal complications and strain on their viability. It also advised that projects where power purchase agreements (PPAs) have been signed or projects where the bidding process has been completed, should be exempted from the anti-dumping orders.

MNRE acknowledged that the domestic solar manufacturing industry was inadequate to achieve the targets. However, it would like to support the industry by imposing a reasonable ADD and introducing a subsidy. The proceeds from the ADD should be

<sup>21</sup>Supra note 20

<sup>22</sup> Kaavya Chandrasekaran, *Renewable ministry cautions anti-dumping body against imposing high duties on imported solar gears*, THE ECONOMIC TIMES, November 26, 2017.



transferred to MNRE by The Finance Ministry. MNRE will further support the domestic manufacturers by providing a production subsidy which would be WTO compliant.

### CONCLUSION

Dumping is actually not an unfair activity. People in poor countries benefit from the lower prices offered and the availability of a variety of new goods. Anti-dumping duties (ADD) are discriminatory in nature and can be misused by the domestic industry to target specific foreign companies whom they consider as rivals. Consumers ultimately suffer as they end up bearing the cost of duty. There are also chances of the domestic producers increasing their prices in order to increase their margins. If the ADD is imposed on an intermediate product, it would adversely impact the prices of the finished products.

Imposing ADD benefits only the domestic producers. While taking a decision, it would be prudent to evaluate whether the increase in profits of the domestic producers is sufficiently large enough to offset the decrease in benefits to the consumers in the country. It has also been argued by some economists that some countries manipulate the anti-dumping laws for economic and political advantages and thereby pose a threat to the free market access that is propagated by WTO/GATT. However, anti-dumping measures do work in situations where exporting countries adopt aggressive dumping in order to gain a significant market share in the importing countries. The ADD in such cases creates a level playing field for the domestic producers and the foreign companies.

In relation to the solar energy industry, the imposition of ADD can be like a double-edged sword. Low solar power tariffs in the range of Rs.2-2.50 per unit can bring about large economic gains to the country. Industries such as steel, cement and aluminium can become very competitive if they have access to low cost solar energy. Private consumption will also increase significantly from the current 60%, which will help to sustain a growth rate of over 7-8%. Electricity demand is increasing at almost 5% every year. At this rate, power generation needs to grow four times by 2040 in order to catch up with the demand.

Imposing ADD on solar products can disrupt India's significant growth in this sector. The target of 100 GW by 2022 could become a missed opportunity. Under such circumstances, the Government has to balance the interests of both – the solar product manufacturers and the solar power producers. Neither sector can be given preferential treatment over the other, if the target set by the National Solar Mission is to be achieved.

The recommendations given by MNRE to DGAD on the anti-dumping investigations are a step in the right direction. If at all ADD is to be imposed, it should be reasonable at around 7 cents per watt so that it would not adversely impact project costs, while providing some relief to the manufacturers. Moreover, projects with PPAs signed or bidding process completed should be exempted from ADD. The proceeds from the ADD should be transferred by the Finance Ministry to MNRE, which would help provide production subsidy to the manufacturers.



Another option that could be considered is the Government recommending a minimum import price for the solar products, as was done for the steel industry. This would help in protecting the solar manufacturing industry and at the same time help it to remain competitive and grow on its own efficiencies.

The above recommendations, if implemented would help balance the interests of both the solar product manufacturers and the solar energy producers. However, the fact remains that the manufacturing sector is just not adequate to meet the ambitious targets. The Government could explore building a solar product manufacturing ecosystem along with an efficient supply chain system. It could also review the benefits and subsidies that have been provided to the manufacturers as well as producers and make appropriate changes to provide the much required thrust to the industry.

India is on the threshold of a big transformation. There is a huge potential for tapping renewable energy in India and the future lies with solar. The suggestions given above would help in aiming for a timely achievement of the ambitious target.

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