

WTO Moot Court Question

1 May 2014

Energitia – Measures Relating the Green Energy Scheme (Complaint by Greenata)

1. **Energitia** is a developing country Member which joined the WTO in 2001. Over the past 20 years, Energitia has focused on developing its domestic manufacturing industries in a variety of sectors such as automobile, chemical and textile. Farming is also an important sector in Energitia's economy. The drive and motivation for success of the Energitian government, combined with the hard work of the Energitian people, enabled Energitia to emerge as one of the fastest growing economies in the world. However, a huge disparity in the level of income and development still exists between urban and rural areas. The lack of stable electricity supply is one of the most serious problems in many poor rural areas of Energitia.
2. As a result of heavy reliance by the manufacturing industries in Energitia on conventional energy sources such as coal and gas, Energitia is now faced with serious environmental challenges, particularly a high level of Green House Gas (GHG) emission in all of its major cities. Air quality has deteriorated so rapidly that it is endangering the health of its citizens and the citizens of neighboring countries. In Energitia's rural areas with big farming industries, poor management of animal waste has also caused environmental damages such as groundwater contamination and air pollution. To ameliorate the situation and to rapidly develop its own green energy industry and assist LDCs with similar environmental challenges, the Energitian federal government started encouraging its state governments to develop green energy policies at the state level.
3. Hana is one of the biggest states in Energitia with booming industrial and farming (mostly cattle) sectors. Over 50 manufacturing factories of different sizes are located in central Hana, and most farms are located in the outskirts of Hana. Like other big states in Energitia, Hana has been struggling with the severely polluted air caused by the GHG emissions from factories and cattle farms. Scientific studies have shown that the methane gas generated by livestock causes much worse environmental harms than any other sources of GHG emissions.
4. Following the Energitian government's green energy policy, and to reduce the level of GHG emissions as much and rapidly as possible, the Government of Hana adopted the Green Energy Scheme (GES) in 2010. The GES contains a voluminous set of rules and regulations relating to green energy policy.

5. In legislating the GES, the Government of Hana reviewed various interests expressed by different government agencies. For one, the Hana Minister of Energy and Infrastructure clarified that in designing and adopting a green energy measure, the first priority should be developing an independent green energy industry so as to equip Hana with the necessary technology and capacity to generate sufficient green energy for the entire state of Hana as well as a neighboring state of Bada without having to rely on foreign technologies. Bada is a small rural state next to Hana and has been fighting against poverty and a limited access to electricity. The Minister of Trade and Industry also believes that achieving the objective of developing Hana's own green energy industry would help make Energitia become competitive in the international green energy market. At the same time, the Hana Minister of Environment emphasizes the urgency of a rapid reduction of GHG emissions as much as possible, even if that would mean, at least in the short term, the need to rely on imported green energy generation technologies.
6. The electricity supply system in Hana is controlled and managed by the Hana Power Authority (HPA), a government agency of the state of Hana. The HPA is also in charge of supplying electricity to the state of Bada. In managing the electrical system in Hana and Bada, the HPA, inter alia, controls the supply of electricity into the central grid and its subsequent transmission and distribution to consumers. Until 2010 when conventional fuels were the main electricity generation sources in Hana, the electricity generation market was dominated by state-owned entities. Since the introduction of the GES, however, Hana has been promoting the participation of private entities, including foreign investors, in its electricity generation market.
7. As part of the GES, the Government of Hana has decided to promote the renewable electricity generation technologies using the methane gas / biogas (i.e. anaerobic digestion technology) and solar PV. Particularly the biogas generated by cow belching, flatulence, and manure in its farming industry has been the focus of Hana's green energy development strategy given the size and importance of the farming sector in Hana and the significant degree of harm it causes to the environment. The anaerobic digestion technology enables cow belch, flatulence, and manure to be converted into renewable energy by capturing and processing the methane gas (biogas) generated by cows in a machine called a digester. The anaerobic digestion technology is relatively new in the green energy market and would require a high level of investment in R&D to become a meaningful source of renewable energy in Hana. Like some other renewable energy technologies such as solar PV, the anaerobic digestion technology has very high capital costs, very low operating costs, and fewer economies of scale as compared to conventional energy technologies such as coal and gas.
8. To expedite the development of renewable energy technologies, particularly the anaerobic digestion technology, the Government of Hana adopted the Bioenergy Programme 2011 (BP 2011). The HPA oversees the BP 2011 through the application of a standard set of rules, standard contracts and

standard pricing on energy generation technologies. Specifically the BP 2011 is centered around a feed-in tariff (FIT) scheme by providing qualifying green energy generators with access to the Hana electricity grid; fixed long-term contracts; and guaranteed prices that cover the extremely high costs of the renewable energy generation technologies.

9. Participation in the BP 2011 is open to facilities located in Hana that generate electricity exclusively from green energy sources that satisfy all of the specific eligibility requirements set out in the BP 2011. A qualifying generator will be required to, inter alia, build, operate and maintain the approved renewable energy electricity generation facility, in accordance with all relevant laws and regulations, and deliver the produced electricity into the Hana electricity system. In return, the generator will be remunerated, over the term of the particular Contract, in accordance with a standard Contract Price established by the HPA. Specifically, qualifying generators of electricity are paid a guaranteed price per kWh of electricity delivered into the Hana electrical system under 30 year contracts with the HPA.
10. The guaranteed prices for electricity generators under the BP 2011 contracts are determined based on the principle of cost recovery and a margin of return. The prices paid to electricity generators under the non-BP 2011 contracts are determined based on a competitive bidding process. These prices are described in the tables below.

	<i>Guaranteed price paid to renewable energy generators</i>	Electricity price collected from <i>wholesale</i> consumers (industrial level)	Electricity price collected from <i>retail</i> consumers
Cow belching, flatulence and manure	20 cents / kWh	Price determined based on the Hana Hourly Electricity Price (HHEP) and cost adjustments	15 cents / kWh
Solar energy	13 cents / kWh	(ranges between 10-14 cents / kWh)	

	Price paid by HPA to other electricity generators	Electricity price collected from <i>wholesale</i> consumers (industrial level)	Electricity price collected from <i>retail</i> consumers
Coal	Price determined based on a competitive bidding process (ranges between 6-11 cents / kWh)	Price determined based on the HHEP and cost adjustments	15 cents / kWh
Gas		(ranges between 10-14 cents / kWh)	

11. To determine the wholesale price for electricity, the HPA add (i) the Hourly Hana Energy Price (HHEP) for the electricity in question based on the cost of that electricity through a computer-automated market mechanism and (ii) the costs associated with the services of transmission and market operation. The mechanism for calculating the HHEP is not based on the principle of cost recovery and a margin of return. Rather, the HHEP is determined by using a supply and demand matrix specific to the situation in the Hana electricity market. The HPA collects electricity payments from consumers and distributes them to electricity generators according to the terms and conditions of the contracts. The qualifying electricity generators under the BP 2011 contracts receive the guaranteed prices as indicated above, which are set to cover, inter alia, the very high R&D costs of the renewable energy technologies.
12. Participation in the BP 2011 by facilities using the anaerobic digestion technology is, however, limited to the electricity generated by the manure of cows born and raised in Hana (the Hana cow requirement). The Government of Hana is of the view that cow manure generated by cows born and raised in Hana works better for the efficient processing of the methane gas in a digester than that from other cows because of the high temperature required of cow manure when processing. It is not guaranteed that the temperature of the manure when it is produced can be maintained in the importation process. The Government of Hana also believes that using cow manure produced from cows born and raised in Hana will be essential in ensuring the environmentally friendly disposal of cow manure in the large territory of Hana. Hana is, however, exceptionally allowing the use of cow manure generated by cows in its neighboring states, including Bada.
13. **Greenata** is a developed country WTO Member and shares its southern border with Engertia. Although certain aspects of its electricity market are also managed by a government agency, electricity has been generated, distributed and supplied mostly by private entities in the last 20 years. Further, Greenata's renewable energy market is more developed than Engertia's in terms of its level of capacity and technology. Under the Greenata Electricity Act 2008, the price for electricity generated by renewable energy generators is determined through a competitive bidding process although certain minimum bid prices are set respectively for solar and marine generators (see the table below). The contract periods range between 1-5 years. The Electricity Act 2008 also requires the wholesale consumers of electricity to source 50% of their total electricity purchases from solar and marine energy generators.

	Prices paid to energy generators	Electricity prices collected from <i>wholesale</i> consumers (industrial level)	Electricity prices collected from retail consumers
Solar energy	Price determined through a competitive bidding process (with the minimum price set at 12 cents / kWh)	Determined based on the recovery of costs and margin (ranges between 9-15 cents / kWh)	Determined based on the recovery of costs and margin (ranges between 17-20 cents / kWh)
Marine energy	Price determined through a competitive bidding process (with the minimum price set at 14 cents / kWh)		
Hydro-electric and gas	Price determined through a competitive bidding process without minimum price (ranges between 5-7 cents / kWh)		

14. Greenata is an active advocate of global environmental issues, including clean air. In fact, Greenata's solar energy generation industry is one of the biggest exporters of solar PV technology and equipment in the global solar energy market. More recently, Greenata has also been exploring marine power as another new renewable energy source. However, the use of the anaerobic digestion technology has been quite limited in Greenata.
15. In light of Energitia's growing renewable electricity market, a large number of businesses from Greenata started investing in the renewable energy market in Energitia and increased their exports of solar energy generation equipment to Energitia. Upon learning Energitia's strategy to develop the anaerobic digestion technology, livestock farms in Greenata in particular were hoping to export its cow and chicken manure to Energitia. Relying on its internal scientific research results, Greenata considers that chicken manure can be as an effective renewable energy source as cow manure. However, because of the Hana cow requirement under the BP 2011, farmers in Greenata have not been able to export their livestock (both cow and chicken) manure. Furthermore, the Greenatan farmers claim that the Hana cow requirement also accounts for a recent decline in their cattle exports to Energitia.
16. On 9 September 2013, Greenata requested consultations with Energitia on the WTO consistency of the measures adopted by the state of Hana under the GES in 2010 and 2011. Greenanta considers that the Hana cow requirement is inconsistent with Energitia's obligations under Articles III:4 and/or XI:1 of the

GATT 1994. It further contends that the GES is both a specific subsidy and a prohibited subsidy inconsistent with the obligations under the Agreement on Subsidies and Countervailing Measures (ASCM).

17. After the consultations failed, on 11 November 2013, Greenata submitted its request for the establishment of a panel. The contents of the panel request are almost identical to those of Greenata's request for consultations dated 9 September 2013. In its panel request for the first time, however, Greenata specifically refers to the BP 2011 with respect to its subsidy claims under the ASCM.
18. As a preliminary matter, Energitia requests the Panel to dismiss the dispute on the grounds that Greenata's request for the establishment of a panel is inconsistent with the requirements under relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). Substantively, Energitia submits that the Hana cow requirement is consistent with its obligations under the WTO, but even if not, they are fully justified under Article XX(b) and/or (g) of the GATT 1994. Energitia further contends that the GES is in compliance with the obligations under the ASCM. Were the GES is found inconsistent with the ASCM, however, Energitia contends that the GES, which purports to develop an independent green electricity generation system for Hana and Bada, is justified under Article XX(a) and (b) of the GATT 1994.
19. The DSB established a panel at its meeting of 15 January 2014 and the WTO Director-General decided on the composition of the Panel on 28 February 2014. At its organizational meeting on 3 March 2014, the Panel decided that there would only be one round of written submissions and one meeting of the parties with the Panel.
20. The written submissions of both Greenata, the complainant, and Energitia, the respondent, are due on xxx. The meeting of the parties with the Panel will take place on xxx.