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Negotiated alternatives to the EU's anti-dumping measure against Chinese solar panels: will they be WTO consistent?

Following the official announcement on 4 June 2013 by the EU Commission that it would be imposing provisional anti-dumping duties on solar panels imported from China, the EU and China have reportedly held negotiations to reach an agreement within the meaning of Article 8 of the EU Basic Anti-dumping Regulation (*i.e., Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community*). This provision establishes that, after a provisional affirmative determination of dumping and injury has been made, the EU Commission may accept satisfactory voluntary undertaking offers submitted by exporters.

The provisional anti-dumping duties are imposed within the framework of an investigation initiated on 6 September 2012 and on the basis of a phased-in approach: between 5 June 2013 and 5 August 2013, the duties amount to 11.8% *ad valorem* and, from 6 August 2013 until the final determination (expected on 5 December 2013), duties will vary between 37.3% and 67.9% *ad valorem*. This phased-in approach is primarily aimed at avoiding the market disruptions that may be caused by the immediate enforcement of the full duties, but it is also intended to open a new phase providing, in EU Commissioner De Gucht's words, '*a window of opportunity*' for the EU Commission and Chinese exporters to reach a negotiated solution in the form of price undertakings (see Trade Perspectives, Issue No. 12 of 14 June 2013).

Echoing a provision included in Article 8 of the WTO Anti-dumping Agreement, Article 8 of the EU Basic Anti-dumping Regulation provides that the EU Commission and exporters may, following the provisional affirmative determination of dumping and injury, agree on voluntary undertakings, which lead to the non-application of provisional or definitive anti-dumping duties to the goods exported by such companies. Price undertakings may result in a revision of export prices or in the termination of exports at dumped prices. In any case, the EU Basic Anti-dumping Regulation foresees that prices must not exceed the level that is necessary to eliminate the dumping margin, or the level necessary to eliminate injury to the domestic industry, whichever is lower (in application of the lesser duty rule). On the procedural side, the Anti-dumping Committee (composed of representatives of EU Member States and chaired by the EU Commission) needs to be consulted prior to the EU Commission accepting any undertaking. When the anti-dumping investigation concludes with a negative finding on the existence of dumping or injury, the price undertaking will automatically lapse.

In the framework of negotiations on price undertakings, China has been reported to consider offering that a quota of its annual exports of solar components to the EU be sold at no less than costs of production, upon the condition that such exports be subject by the EU to either zero or low anti-dumping duties. In practical terms, it appears that, under the terms of such arrangement, Chinese exporters would be raising their prices up to (at least) production costs for in-quota exports, which would be subject to low or no anti-dumping duties, while the

out-of-quota exports would be subject to anti-dumping duties, according to the applicable rules.

Concerns may arise with respect to the compatibility with WTO law of schemes similar to those (reportedly) being negotiated by China and the EU, especially in light of the WTO prohibition of voluntary export restraints (hereinafter, VERs). VERs are arrangements between an exporting and an importing country, whereby they agree to limit the amount of exports at a predetermined level. VERs, adopted with the purpose of increasing prices of the goods in question in the importing market, were relatively common in the pre-WTO era, where they were often adopted as an alternative (a less costly one in terms of the procedures and the economic and compensatory costs) to safeguard actions. However, this kind of measures was outlawed by virtue of Article 11(1)(b) of the WTO Agreement on Safeguards. This provision does not define VERs; however, it indicates that examples of such measures include, *inter alia*, export-price or import-price monitoring systems and export or import surveillance, all of which afford protection.

A GATT *Report by the Chairman of the Council to the Fortieth Session of the Contracting Parties* concerning safeguards, dated 23 November 1984, (hereinafter, the GATT Report) provides insight, which is relevant and useful to assess measures that could potentially constitute VERs. It referred to VERs as '*grey area*' actions that, due to their selective application, do not respect the principle of non-discrimination under Article XIX of the GATT and, where implemented against instances of unfair trading (*i.e.*, dumping and subsidisation), they are not taken in conformity with the strict requirements affecting the imposition of anti-dumping and countervailing duties.

In relevant part, the GATT Report noted that export restrictions are generally prohibited under Article XI of the GATT, unless covered by an exception. The applicability of Article XI to VERs was later confirmed by the GATT Panel in *Japan-Semiconductors*, which found that a scheme by which Japan was *de facto* requiring certain Japanese producers and exporters of semiconductors not to export such products at prices below company-specific costs, in the implementation of a bilateral agreement with the US on trade in semiconductors *inter alia* intended to suspend anti-dumping procedures in the US, constituted an export restriction within the meaning of Article XI:1 of the GATT.

Notably, the GATT Report noted that measures limiting exports only to certain contracting parties are, in any case, (also) contrary to the provisions of Article XIII of the GATT, on the administration of quotas. In this respect, the GATT Report recognised that VERs are, in fact, import restrictions that are administered by the exporting country, which would be only in conformity with the GATT if they were justified under a particular exception to Article XI and administered according to the non-discrimination rules foreseen under Article XIII. The mentioned report also highlighted that many VERs were, in fact, intended to respond to situations of subsidy or dumping and that, even in such instances, they evade the requirements of the GATT when they do not respect the conditions foreseen therein for the application of anti-dumping or countervailing duties. The GATT Panel in *Japan-Semiconductors*, when assessing the existence of a possible violation of Article VI of the GATT, which the EU (the claimant in this dispute) had also invoked, found that Article VI of the GATT did not provide a justification for measures restricting the exportation or sale for export of a product inconsistently with Article XI:1 and that, while Article VI provided importing countries with the right to levy anti-dumping duties subject to certain specific conditions, it was silent on actions that could be taken by exporting countries. Therefore, an anti-dumping action cannot constitute justification for a departure from the provisions of Article XI and does not allow countries to put in place export schemes.

The proposed Chinese measure, as reportedly described, would not, in principle, limit the overall amount of exports. Rather, the (reportedly) proposed scheme would operate like a

tariff-rate quota regime, with a more favourable duty (*i.e*., zero or low anti-dumping duties) for in-quota imports of solar panels and higher duties for any over-the-quota imports. However, on the basis of the relevant disciplines of the GATT, it can be argued that the WTO consistency of the scheme, which the EU and China are reportedly contemplating, may be questioned and would appear to depend on whether: (i) the measures have an overall limiting effect on trade (if so, they would be inconsistent with Article XI); (ii) the undertakings are offered by and/or negotiated with (Chinese) exporting companies, and not a WTO Member (*i.e.*, China); (iii) the quota is administered in a non-discriminatory manner, this provision applying also to the *de facto* tariff-rate quota implemented by China; (iv) the measures are applied following an affirmative determination of injurious dumping (which is indeed the case with respect to solar panels, following the EU investigations); and (v) price increases are limited to the level that is considered necessary to eliminate the margin of dumping (or, in the case of the EU, to remove injury, whichever is the lowest).

In conclusion, the negotiations that are reportedly taking place between the EU and China and the negotiated solutions that are reportedly being considered appear to be potentially leading to scenarios of dubious WTO consistency, particularly if the agreed schemes will trigger the application of the relevant WTO rules and interpretative guidance on VERs and tariff-rate quotas. '*Negotiated solutions*' are always positive outcomes in international trading relations, provided that they do not diminish the rights of WTO Members and, critically (albeit indirectly), those of the companies and economic operators that are caught in the middle of countries' trade defence measures and '*negotiated solutions*'. In this case, it seems that the elements for a best-selling '*summer drama*' are all there: alleged (and provisionally confirmed) unfair trading practices in the solar panel industry, '*tit-for-tat*' retaliatory investigations in the wine sector, the temptation of politicians and negotiating countries to solve the matter with creative schemes and good old '*horse-trading*'. Let's just hope that the '*summer drama*' does not turn into a '*comedy*' that disregards and makes a mockery of the applicable WTO rules. The actors involved, the companies affected and the large public observing the '*show*' should remain vigilant and ensure that any solution be not only politically and commercially acceptable, but also legally sound.

The long-standing dispute on rum trademark between the EU and the US in light of the bilateral trade negotiations

On 25 June 2013, at the latest meeting of the WTO Dispute Settlement Body (hereinafter, DSB), the EU reportedly demanded that the US puts an end to its long-standing failure to comply with the rulings and recommendations of the WTO DSB in the dispute *US-Section 211 Appropriations Act*. Sources indicate that the EU's position was supported by Cuba and China, none of them participants to the dispute, as well as by other WTO Members. The case at hand revolves around Section 211 of the US *Omnibus Appropriations Act* of 1998 (hereinafter, Section 211), which was adopted in the aftermath of a US domestic dispute concerning the '*Havana Club*' rum trademark between an American company and a joint venture between a Cuban government trading agency and an EU company in the context of the US-Cuba relations.

The WTO dispute stems from a 1999 complaint lodged by the European Communities (currently, the EU) alleging that Section 211, which did not allow Cuba, Cuban nationals or other interested nationals, to register or renew trademarks in the US without the consent of the original owner (*i.e*., previous to the confiscation by the Cuban regime), was WTO-inconsistent. In addition, the EU claimed that Section 211 provided that rights arising from such trademark could not be recognised or enforced in the US without the consent of the original owner, which allegedly rendered the measure inconsistent with a number of provisions of the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (hereinafter, TRIPs Agreement). The report of the Panel, as modified by the Appellate Body

and adopted by the WTO DSB in 2002, concluded that Section 211 violated the US obligations of national treatment and most-favoured-nation, as codified under Articles 3.1 (in conjunction with Article 2(1) of the Paris Convention) and 4 of the TRIPs Agreement, respectively. Broadly, the Appellate Body found that Section 211 granted less favourable treatment to Cuban nationals and their successors-in-interest than that it accorded to non-Cuban, including US, nationals and their successors-in-interest.

Following the adoption of the report, the US and the EU agreed on a deadline for the US to implement the recommendations contained therein by amending its legislation accordingly. This deadline was repeatedly extended by the Parties, and eventually settled on 30 June 2005. After the US failed to bring its legislation in line with the DSB's ruling by that date, the Parties circulated an understanding whereby, possibly anticipating potential retaliatory action, they agreed that, should the EU decide to request to suspend concessions or other obligations (*i.e.*, to '*retaliate*') against the US in accordance with Article 22.2 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (the Dispute Settlement Understanding, hereinafter, DSU), it would notify the US of such decision in advance, and consultations between the Parties would be conducted prior to the filing of the request. Conversely, the US committed not to challenge such request by the EU on grounds that the 30-day period specified in Article 22.6 of the DSU had expired.

Following the circulation of the understanding between the Parties, the US has been regularly circulating status reports on the progress of the implementation of the DSB's recommendations, as provided in Article 21.6 of the DSU. The report presented at the latest meeting of the WTO DSB, like the previous ones, states that relevant legislation to comply with the DSB's recommendations has been introduced in the US Congress, and that the US '*will continue to work on a solution that would resolve this matter*'. In this light, sources indicate that more tangible results are now being demanded by the EU.

It remains to be seen whether the US lack of compliance may result in any consequence. Although the dispute could follow its course under the WTO and lead to retaliatory action by the EU, its aftermath might as well migrate to alternative *fora*, such as the Transatlantic Trade and Investment Partnership (hereinafter, TTIP) negotiations, where the US failure to comply would arguably provide the EU with a useful '*bargaining chip*' and, therefore, place the EU in an advantageous position *vis-à-vis* its negotiating partner. In any case, it is in the interest of companies involved in transatlantic trade to closely monitor any coming developments in this regard. Although the ongoing TTIP talks certainly provide for new *momentum* to tackle such issue, private entities should not abandon the instruments accorded by *fora* like the WTO, where they could work with Governments to have their interests duly represented and safeguarded.

EU adopts new rules for foods for vulnerable consumers, such as infants, young children, gluten intolerant and ill people, while the question of whether and how to regulate sportsmen food has been postponed

The regulatory framework in the EU for foodstuffs, which have been denominated so far as '*foodstuffs for particular nutritional uses*' (also known as '*dietetic foods*' *or* '*PARNUTS*') is undergoing significant changes. These foodstuffs are defined as '*foodstuffs which, owing to their special composition or manufacturing process, are clearly distinguishable from foodstuffs for normal consumption, which are suitable for their claimed nutritional purposes and which are marketed in such a way as to indicate such suitability*'. On 12 June 2013, the EU Parliament and the Council adopted *Regulation (EU) No. 609/2013 of on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control*. The objective of *Regulation (EU) No. 609/2013* is to keep current compositional and labelling rules for infant and follow-on *formulae*, processed cereal-based

foods and other baby foods and foods for special medical purposes; and to replace the current three lists with a single EU list of substances that can be added to these foods including minerals and vitamins. *Regulation (EU) No. 609/2013* also abolishes the notion of '*foodstuffs for particular nutritional uses*'.

Regulation (EU) No. 609/2013 consolidates and repeals a number of legislative acts: *Directive 2009/39/EC of the European Parliament and of the Council on foodstuffs intended for particular nutritional uses; Council Directive 92/52/EEC on infant formulae and follow-on formulae intended for export to third countries*; *Commission Directive 96/8/EC on foods intended for use in energy-restricted diets for weight reduction*; *Commission Directive 1999/21/EC on dietary foods for special medical purposes*; *Commission Directive 2006/125/EC with respect to processed cereal-based foods and baby foods for infants and young children; Commission Directive 2006/141/EC laying down harmonised rules with respect to infant formulae and follow-on formulae*; *Commission Regulation (EC) No. 41/2009 concerning the composition and labelling of foodstuffs suitable for people intolerant to gluten;* and *Commission Regulation (EC) No. 953/2009 on substances that may be added for specific nutritional purposes in foods for particular nutritional uses. Regulation (EU) No. 609/2013* applies from 20 July 2016, with the exception of some elements, which apply already from 19 July 2013: specific compositional and information requirements and an EU list set out in the Annex to *Regulation (EU) No. 609/2013,* which contains the following elements: the category of food to which certain substances may be added; the name, the description of the substance and, where appropriate, the specification of its form; the conditions of use of the substance; and the purity criteria applicable to the substance

Directive 2009/39/EC, which remains in force until 19 July 2016, lays down general rules on the composition and preparation of foods that are specially designed to meet the particular nutritional requirements of the persons for whom they are intended: vulnerable consumers, such as infants, young children, gluten intolerant and ill people. The majority of the substantive provisions laid down in *Directive 2009/39/EC* date back to 1977. *Directive 2009/39/EC* also provides for general labelling requirements, including that such foods must bear an indication of their suitability for the nutritional purposes being claimed. The general compositional and labelling requirements laid down in *Directive 2009/39/EC* are complemented by a number of measures, which are applicable to specific categories of food: foods intended for use in energy-restricted diets for weight reduction; dietary foods for special medical purposes; processed cereal-based foods and baby foods for infants and young children, infant formulae and follow-on *formulae*. The legislative framework for foods for particular nutritional uses is completed by rules concerning the composition and labelling of foodstuffs suitable for people intolerant to gluten; on infant *formulae* and follow-on *formulae* intended for export to third countries; and on substances that may be added for specific nutritional purposes in foods for particular nutritional uses.

A particular emphasis needs to be placed on the category of the so-called '*foods for sportsmen*'. *Regulation (EU) No. 609/2013* was adopted on 11 June 2013 by an EU Parliament legislative resolution on the Council position at first reading. In relation to foods intended for sportsmen, the EU Commission originally proposed to leave them out of the scope of the proposed Regulation and to have them covered exclusively by general food legislation (and in particular the *Regulation (EC) No. 1924/2006 of the European Parliament and of the Council on nutrition and health claims made on foods*). The EU Parliament, in its first reading position, agreed with the EU Commission that these products should fall out of the scope of the Regulation, but called on the EU Commission to assess the need to review general food law in this regard. The Council agreed in its position to leave these products out of the scope of the proposed Regulation, but introduced amendments requiring the EU Commission to draft a report on the necessity, if any, of specific rules for these products with the possibility to accompany this report with a legislative proposal. The Council's request for

a report is seen as a compromise. It was agreed that, in the meantime, these products should remain out of the scope of *Regulation (EU) No. 609/2013*.

Directive 2009/39/EC and its predecessor (*Council Directive 89/398/EEC on the approximation of the laws of the Member States relating to foodstuffs intended for particular nutritional uses*) both provided that specific provisions might be adopted regarding the following two specific categories of food falling within the broad definition of foodstuffs for particular nutritional uses: '*food intended to meet the expenditure of intense muscular effort, especially for sportsmen*' and '*food for persons suffering from carbohydrate metabolism disorders (diabetes)*'. With regard to food intended to meet the expenditure of intense muscular effort, especially for sportsmen, no successful conclusion could be reached over the years on the development of specific provisions due to widely diverging views among the EU Member States and stakeholders concerning the scope of specific legislation, the number of subcategories of food to be included, the criteria for establishing compositional requirements and the potential impact on innovation in product development. Therefore, *Regulation (EU) No. 609/2013* states that specific provisions should not be developed at this stage. Meanwhile, on the basis of requests submitted by food business operators, relevant claims have been considered for authorisation in accordance with *Regulation (EC) No. 1924/2006*. However, *Regulation (EU) No. 609/2013* provides that the EU Commission should, after consulting the European Food Safety Authority, submit to the EU Parliament and to the Council, by 20 July 2015, a report on the necessity, if any, of provisions concerning food intended for sportsmen in order to ensure an adequate protection of consumers of these foods. Such report may, if necessary, be accompanied by an appropriate legislative proposal.

Currently, depending on its composition, sportsmen food can fall either under legislation for food or medicines (*inter alia*, for products presented as having properties for treating or preventing disease in human beings or products containing substances having the effect of restoring, correcting or modifying physiological functions by exerting a pharmacological, immunological or metabolic action). As no specific harmonising legislation has been adopted under *Directives 2009/39/EC* and *89/398/EEC*, the applicable rules and its interpretation vary considerably within EU Member States in relation to sportsmen food. There is, in fact, no functioning single market of sportsmen foods across the EU. This causes problems to manufacturers when they formulate and/or advertise their products. According to market analysts, the European sports nutrition market has grown by 5.7% between 2009 and 2013. Reportedly, the whole segment of special foods accounts for 1-2% of the total European food market (*i.e.*, about EUR 24 billion).

The specialised food industry, represented by the European Specialist Sports Nutrition Alliance (ESSNA) welcomed the fact that only food for vulnerable people, who really need specific foods for their physiological and nutritional balance, and not sportsmen food, will be covered by *Regulation (EU) No. 609/2013*. However, the European Dietetic Food Industry Association (IDACE) emphasised that work remains to be done in order to complete this basic act and to ensure appropriate legal solutions for several categories of specialised nutrition, including sportsmen food, for which the legislative and regulatory future remains unclear. On the other hand, the European Consumers' Organisation (BEUC) argues that, thanks to the adoption of *Regulation (EU) No. 609/2013,* the sports food industry will no longer be able to market its food as being for '*special medical purposes*', with the consequence that no specific labelling requirements apply for it at EU level. In particular, this food currently does not fall under *Regulation (EC) No. 1924/2006 of the European Parliament and of the Council on nutrition and health claims made on foods*, which provides for strict rules on labelling claims. The possible future regulation (or not) of sportsmen food at EU level will continue to be a controversial matter in the next two years and beyond, depending on the EU Commission's report on that subject due by 20 July 2015.

Recently Adopted EU Legislation

Trade Remedies

- *Commission Regulation (EU) No. 638/2013 of 2 July 2013 terminating the investigation concerning possible circumvention of anti-dumping measures imposed by Council Regulation (EC) No. 925/2009 on imports of certain aluminium foil originating in the People's Republic of China by imports of certain aluminium foil in rolls which are not annealed and of a width exceeding 650 mm originating in the People's Republic of China*

Customs Law

- *Council Regulation (EU) No. 627/2013 of 27 June 2013 amending Regulation (EU) No. 7/2010 opening and providing for the management of autonomous tariff quotas of the Union for certain agricultural and industrial products*

- *Council Regulation (EU) No. 626/2013 of 27 June 2013 amending Regulation (EU) No. 1344/2011 suspending the autonomous Common Customs Tariff duties on certain agricultural, fishery and industrial products*

Food and Agricultural Law

- *Commission Regulation (EU) No. 630/2013 of 28 June 2013 amending the Annexes to Regulation (EC) No. 999/2001 of the European Parliament and of the Council laying down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies*

- *Regulation (EU) No. 609/2013 of the European Parliament and of the Council of 12 June 2013 on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control and repealing Council Directive 92/52/EEC, Commission Directives 96/8/EC, 1999/21/EC, 2006/125/EC and 2006/141/EC, Directive 2009/39/EC of the European Parliament and of the Council and Commission Regulations (EC) No. 41/2009 and (EC) No. 953/2009*

Trade-Related Intellectual Property Rights

- *Regulation (EU) No. 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No. 1383/2003*

Other

- *Commission Regulation (EU) No. 655/2013 of 10 July 2013 laying down common criteria for the justification of claims used in relation to cosmetic products*

- *Regulation (EU) No. 605/2013 of the European Parliament and of the Council of 12 June 2013 amending Council Regulation (EC) No. 1185/2003 on the removal of fins of sharks on board vessels)*

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