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The US requests WTO consultations with China over subsidies on wind power equipment

On 6 January 2011, the US circulated a request for WTO consultations with China concerning subsidies granted by China to manufacturers of wind power equipment. The request for consultations follows an investigation conducted by the United States Trade Representative (hereinafter, USTR) under Section 302 of the Trade Act of 1974, triggered by a petition from the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (hereinafter, USW) filed in September 2010, requesting the US administration to launch a formal investigation into Chinese support to its clean-energy technology sector. With the lodging of the request for consultations, the US formally initiated a WTO dispute settlement proceeding.

The US request for consultation targets China's *Notice of the Ministry of Finance on Issuing the Provisional Measure on Administration of Special Fund for Industrialization of Wind Power Equipment*. This measure, introduced in August 2008, appears to provide support to manufacturers of wind turbine generator systems through the provision of subsidies geared to production levels and contingent upon the use of Chinese over imported parts and components. The US argues that, inasmuch as these subsidies include a domestic content requirement, they violate Article 3 of the WTO Agreement Subsidies and Countervailing Measures (hereinafter, ASCM). The US also alleges that China violated the notification requirements embodied in the ASCM and has not complied with the obligation to make available a translation of these measures into one of the WTO official languages, as provided in the Accession Protocol of China to the WTO.

Article 3 of the ASCM effectively classifies the subsidies tied to domestic content requirements as 'prohibited' subsidies. The other type of subsidies which are also prohibited is that of export subsidies. For these types of subsidies, Article 4 of the ASCM provides for a set of specific of remedies, of which the US has availed itself in this proceeding. These include, *inter alia*: a requirement to include in the request for consultation a statement of available evidence as to the existence and nature of the prohibited subsidy; special or additional procedural rules with shortened time limits for panel and Appellate Body proceedings; and a provision on the immediate establishment of the panel. According to these rules, where the measure at stake is found to be a prohibited subsidy, the WTO Member maintaining such measure shall withdraw it without delay.

Within roughly three months from the request for consultations submitted by Japan concerning Ontario's feed-in-tariff programme (see Trade Perspectives, Issue No. 17 of 24 September 2010), another dispute concerning support given to the renewable energy industry is being brought to the WTO. Similarly to the Canadian measures, the Chinese ones

appear to include domestic content requirements, in this case specifically aimed at supporting local manufacturers of renewable energy equipment. However, differently from Ontario's scheme, where local content requirements are tied to favourable long-term contracts to developers of green energy projects that include generous feed-in tariffs, the Chinese measures appear to directly subject the provision of grants to domestic purchase. With WTO Members increasingly adopting measures to support and enhance their renewable energy industry as part of their climate change mitigation policies, the renewable energy market is becoming more and more lucrative, attracting huge investments. However, the compatibility of governmental support with existing WTO rules and the principle of fair competition is more and more a matter of concern and contention, leading to trade frictions as well as discussions on the opportunity of providing for an explicit exception to trade rules for purposes of climate change mitigation. According to press reports, the USW claims that Chinese subsidies affect the competitiveness of US firms in the Chinese market. On the other hand, China's renewable energy capacity has increased over the years – turning China into one of the world's largest renewable energy providers – and Chinese firms are among the leaders in the production of 'environmental' equipment.

If a WTO panel were to find that China is indeed illegally subsidising its industry through grants tied to domestic content requirements, it would request China to withdraw its measures. If China were then to fail to do so, the US could obtain authorisation from WTO Members to apply countermeasures, in the form of suspensions of commercial concessions, against China. According to press reports, the US could also file additional cases against China's support measures to the renewable energy sector. The USW petition to the USTR pointed to a much wider range of measures, including subsidies, maintained by China to support its renewable energy industry than the ones that are object of the US request for consultations. Companies involved in the renewable energy sector should closely follow the outcome of the dispute, which stands to have a great impact on current and future governmental support programmes.

The European Commission reports that complex SPS controls on imports of food need to be streamlined

On 21 December 2010, the European Commission submitted a report to the EU Parliament and the Council on the effectiveness and consistency of sanitary and phytosanitary controls on imports of food, feed, animals and plants. The EU Commission, which had been invited by the Council in December 2008 to produce such report (along with proposals, if appropriate), concluded that, above all, the sanitary and phytosanitary controls in place serve to ensure that these imports are safe. Nevertheless, import control procedures need to be streamlined. The report also emphasises that, in relation to food imports, the EU meticulously respects the provisions of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter, the SPS Agreement).

Great attention is given to risks associated with trade in agricultural products given the potential threats to human, animal or plant health. If such risks are not controlled, disruptions to trade can occur whereby markets can disappear overnight and the confidence of consumers in food markets and the ability of governments to manage them can be questioned. This is why import controls are important. While the EU is largely self-sufficient in most food products, it needs to import certain commodities as there is either little or no EU production, such as for tea, coffee, spices, tropical fruits and cocoa, or because EU production falls short of demand, as is the case for fish and animal feed. By contrast, the EU imports very low quantities of animal products, such as meat. In the period 2007-2009, the EU imported food and feed valued EUR 85 billion, which makes it the world's largest importer. The EU food industry (*i.e.*, the EU's largest manufacturing sector, with a global

annual turnover of EUR 900 billion and employing over 4 million people) needs reliable imports from around the world.

Regulation (EC) No. 882/2004 (*i.e.*, the Official Food and Feed Controls Regulation) establishes the overall legislative framework for official controls carried out by national competent authorities in the EU Member States and by the European Commission to ensure compliance with food and feed law, with animal health and welfare rules, and (to a certain extent) with plant health provisions. In relation to imported products, the Official Food and Feed Controls Regulation provides the general principles underlying the establishment of import conditions, the recognition of equivalence, the approval of pre-export controls carried out by third countries' competent authorities, and the recognition that certain commodities may require specific controls prior to their introduction into the territory of the EU. In addition, detailed provisions governing imports have been established in a large number of sectoral acts in areas such as plant health, seeds, zoonoses, the control and eradication of animal diseases, animal by-products, food and feed hygiene, genetically modified food and feed, residues and contaminants, additives and many others.

Import control rules and procedures differ greatly depending on the sector. Live animals and products of animal origin (such as meat, eggs and fish) and animal products not intended for human consumption are considered to represent a high risk because they can be vectors for the transmission of diseases to both livestock and humans and can only enter the EU through approved border inspection posts under strictly harmonised import conditions. These require that such imports be sourced from approved third countries, from approved or registered establishments, and with a veterinary certificate accompanying the consignments. Live plants and certain plant products must be accompanied by an official phytosanitary certificate delivered by the competent authority of the third country before they can be introduced into the EU. For a number of specific products from specific regions, enhanced control procedures are in place under Commission Regulation (EC) No. 669/2009 as regards the increased level of official controls on imports of certain feed and food of non-animal origin, such as in the case of peanuts from Brazil (due to the eventual presence of aflatoxins).

For the future of import controls, the EU Commission report identifies the following challenges: the identification of food borne diseases, food and feed contamination, evolving technologies such as biotechnology, nanotechnology and new generations of food and feed ingredients, bio-terrorism (with the potential use of food borne viruses and pathogens) and illegal and fraudulent trade in foodstuffs. In the view of the Commission, to date the current system, built on a risk and evidence-based approach to import controls, has worked well. It is, however, a system with different approaches towards the controls of food, feed, animals and plants which can be very complex for those implementing the controls. The Commission has, therefore, identified a need to streamline the control system in place by improving the assessment of risk and the consistency and efficiency of the mechanisms in place, without, however, questioning the basic assumptions upon which they are built. This should allow for more coherence and integration between the different control mechanisms in place.

As to actual proposals, the report is somehow vague, when it states that '*a number of new and innovative steps will be taken to consider how the current system can evolve towards a more efficient mechanism for the handling of coordinated import controls at EU borders*'. Most of these changes will be found in planned amendments to the Official Food and Feed Controls Regulation. However, new animal health and plant health legislation is also under consideration. The intention seems to be to simplify the existing framework for enforcement cooperation within which the Commission and EU Member States carry out their respective control activities. It will also seek to be consistent with the provisions of the new EU Modernised Customs Code, which is due to enter into force in 2013. The Commission goes on stating that '*in operational terms, this will require the improvement of current tools, and*

the possible development of new ones, to allow risk management decisions on imported products to fully take into account the risk profile of a given product, its associated hazard (the relevance of which may be evaluated with the assistance of EFSA) and origin'. To ensure that all imported products are subject to conditions and controls directly proportionate to the risk that they pose, the Commission reports that no major overhaul of existing legislation is needed. However, through the review and consolidation of various existing acts, it will strive to bring more coherence to import controls, particularly for the benefit of those that implement them (*i.e.*, EU Member States and business operators). The Commission argues that a more holistic approach will serve to reinforce the efficiency of the EU's import control regime, ensure an optimal allocation of resources, and make it easier to promote and defend the EU regulatory model.

In relation to international trade, the EU Commission's report declares that EU controls are consistent with standards set by international standard-setting bodies active in the field of food safety and animal and plant health, namely the Codex Alimentarius Commission, the World Organisation for Animal Health (OIE) and the International Plant Protection Convention (IPPC), as provided for by the SPS Agreement and that, as one of the world's largest traders in food and feed, the EU is committed to comply with its international obligations. In particular, the EU is also aware that its requirements often serve as benchmarks for international trade and carry a huge impact on developing countries, many of which are highly dependent on access to European markets.

The SPS Agreement provides that, while governments have the right to establish their own levels of protection and may adopt sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, these are only permissible where they can be proved to be science-based, proportional, non-discriminatory and/or based on international standards. Therefore, third country governments and food business operators should observe carefully any steps actually taken by the EU (as being said, the current report is somewhat vague) and address (or challenge) the potentially indiscriminate use of disproportionate or unscientific SPS measures, or measures not based on international standards. Under the SPS Agreement, any WTO Member has also the right to request its trading partners to discuss the recognition of equivalence or other trade facilitation tools such as mutual recognition. These are certainly important issues when it comes to the impact on trade of import controls on food, feed, animals and plants.

The US raises concerns about China's restrictions on rare earth exports

On December 2010, the USTR has released a new report that raises continuing concerns about China's export restrictions of rare earth elements. Rare earth elements are a group of 17 chemical elements, including dysprosium, scandium and lutetium. They were originally described as 'rare' because their chemical structure was poorly understood and they were difficult to extract from the rocks in which they were found. Rare earth elements are used in the manufacturing processes of high-tech electronics, military hardware, and of green energy products, including hybrid cars.

China appears to control 97 per cent of the global supply of rare earth elements and it appears to use export quotas and taxes to limit the exportation of these substances. According to reports, China reduced the export quotas for such materials by 40 per cent in 2010 and plans to cut its export quotas further in 2011. China will also likely increase export taxes on rare earth elements in 2011. Both of these measures will further restrict the supply of rare earth elements to the global market.

The US claims that China's restrictions of rare earth element exports have boosted global prices for these substances. The US further claims that the increased price of importing

these substances has hindered efforts by other countries to develop their clean technology industries. China has stated that it restricts exports of rare earth elements for environmental reasons and in order to manage supplies. By contrast, the USTR claims that China limits rare earth element exports in order to protect China's domestic industries. The USTR's report suggests that China's rare earth export restraints have particularly affected China's regional trading partners, noting that in September 2010 China reportedly imposed a *de facto* ban on all exports of rare earth elements to Japan. The US most recently urged China to eliminate its export restraints on rare earth elements during a December 2010 meeting of the US – China Joint Commission on Commerce and Trade.

China's export restrictions and export taxes on raw materials are already the object of an ongoing WTO dispute initiated by the US, the EU and Mexico. In that dispute (*i.e.*, *China – Measures Related to the Exportation of Various Raw Materials*), the US alleged that China's export restrictions on certain raw materials listed in the request for consultations constitute a breach of China's WTO commitments, in particular, those under Articles VIII, X and XI of the General Agreement on Tariffs and Trade (hereinafter, GATT) and those found in the Accession Protocol of China to the WTO (see Trade Perspectives, Issue No. 21 of 13 November 2009). In this Protocol, China committed to eliminate all taxes and charges applied to its exports, unless specifically provided for in Annex 6 of the Protocol (*i.e.*, Products Subject to Export Duty). China also committed to eliminate and not to introduce, re-introduce, or apply, non-tariff measures (with some exceptions).

Similar allegations could be brought in relation to the restrictions on rare earth exports. Export restrictions and export quotas are inconsistent under Article XI:1 of the GATT, which prohibits WTO Members from applying quantitative restrictions on the importation and exportation of goods. In relation to export taxes and export charges, because of the uncertainty on whether they are disciplined under WTO Agreements (see Trade Perspectives, Issue No. 21 of 13 November 2009), WTO Members have increasingly demanded acceding Members to undertake commitments regarding such measures in their Accession Protocols.

China may respond to a possible claim by the United States in several ways. First, China could refer to paragraph 2(b) of Article XI of the GATT. This provision permits export restrictions which are necessary for the application of standards or regulations for the classification, grading or marketing of commodities in international trade. There is currently little WTO case law on the application Article XI(2)(b). One panel report (*i.e.*, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*), permitted Canada to maintain export restrictions on certain fish, as the fish were 'commodities' and the regulations dealt with 'standards' and 'marketing'. China could argue that rare earth elements are also 'commodities' and that its efforts to improve production standards in its domestic rare earth element industry constitute regulations dealing with 'standards' and 'marketing'. Second, China may argue that Article XX(g) of the GATT allows WTO Members to adopt measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

China has stated that its measures are intended to preserve rare earth element reserves. In maintaining these reserves and limiting export levels, China may be attempting to induce downward price pressures on rare earth elements in its domestic market. This would assist its domestic industry to remain more competitive in sectors which intensively utilise rare earth elements. These include many green technology industries, such as solar power equipment manufacturing. Restricting the price of such production inputs in green technology industries could minimise overall production prices and help China to maintain a competitive export sector. By helping to restrict domestic industrial input prices, China's policy could be viewed as conferring indirect subsidies to these domestic industries in

violation of WTO rules, notably those of the ASCM. To fall within the scope of the ASCM, China's measures must comply with the definition of a 'subsidy' provided in Article 1 thereof. In particular, China's export restrictions and fiscal policies must be found to confer a benefit (albeit indirectly) to the domestic industries that use the products covered by the restrictions and fiscal policies, and must qualify as a financial contribution within the meaning of Article 1.1(a)(1) of the ASCM. In the dispute *US – Measures Treating Export Restraints as Subsidies*, an attempt was made to bring export restrictions under the scope of the ASCM. In that dispute, the panel, asked to consider whether export restraints could be seen as subsidies under Article 1 of the ASCM, found that the export restrictions did not qualify as a financial contribution.

Business parties with an interest in mineral importation, electronics production, and green technology development should monitor this story closely for further developments. The release of the panel report on *China – Measures Related to the Exportation of Various Raw Materials* later in 2011 may provide further clues on how a WTO dispute resolution panel would likely resolve the legal issues present in the rare earth elements dispute.

The US may have violated the GATS by raising visa fees

Allegations have been made that the US may have violated its commitments under the General Agreement on Trade in Services (hereinafter, GATS) by raising fees for certain categories of visas. The fee increases apply to category H-1B and L1 visas. These categories concern, respectively, visas for skilled foreign professionals or students, and visas for the temporary transfer of foreign corporate professionals from foreign to US operations. The fees were enacted under the Mexican Border Protection Bill signed by US President Barack Obama in 2010. The Act increased the fee for H-1B visas by 2,000 USD and by 2,250 USD for L-1 visas, but only for employers that employ 50 or more employees in the US and have more than 50 per cent of their employees holding H-1B or L-1 status. These fee hikes appear to directly affect Indian technology companies such as Wipro, Tata, Infosys, and Satyam, which employ thousands of Indian nationals and other foreign workers in their US offices.

A report released by the National Foundation for American Policy concludes that the H-1B and L-1 fee increases may violate the United States' WTO commitments under GATS. The report notes that the '*United States specifically committed in its GATS schedule to allow the temporary entry and stay of individuals under the H-1B and L-1 visa provisions, as they existed when the United States joined the GATS in 1994. Accordingly, additionally restricting the availability of H-1B and L-1 visas could violate this commitment*'. Money from the new fees will be transferred to the US Treasury and is part of legislation to strengthen border security. The report notes, however, that Congress' overall intent was not to reduce the budget deficit, but rather to decrease the availability of the visas. India accordingly contends that the visa fee increases under this legislation are discriminatory and restrictive. India has announced that it will approach the WTO on this issue.

The GATS applies to all measures adopted by WTO Members which affect trade in services falling into four categories or modes of services supply. The applicable modes in this dispute are mode III – the supply of services by a supplier in a first WTO Member country to a second WTO Member country, through commercial presence in the territory of the second WTO Member country; and mode IV – the supply of a service by a supplier in a first WTO Member country through the presence of natural persons in a second WTO Member country.

The US made a specific commitment under its GATS Services Schedule to allow the temporary admission of specialty workers under the H-1B and L-1 visa provisions. Adopting measures which may impair the benefits flowing to other WTO Members under these GATS

commitments would violate the US obligations under paragraph 4 of the Annex on Movement of Natural Persons Supplying Services under the Agreement (hereinafter, Annex on mode IV). Paragraph 4 of the GATS Annex on mode IV allows each WTO Member to regulate the flow of foreign workers into each WTO Member's own territory so long as these restrictions do not nullify or impair the benefits flowing from the WTO Member's GATS commitments to other WTO Members. In this controversy, India has claimed that the US mode IV commitments granted India the benefit of having temporary access to the US for India's skilled corporate workers. India has alleged that the US visa fee increases have substantially increased the cost of purchasing certain American visas, and that this impairs or reduces the benefits India previously enjoyed under the US GATS commitments.

The new visa fees may also violate the United States' general commitment under Article VI(i) of the GATS to ensure that '*all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner*'. It is unlikely that the stated justification for the fee increases (*i.e.*, decreasing the availability of L-1 and H-1B visas) would be found to be reasonable by a WTO dispute settlement panel. Indeed, during the original negotiations to bring services within the international trading system and secure a multilateral services agreement, restrictions on work visas were explicitly recognised by the US as a mode IV non-tariff barrier.

The Appellate Body's ruling in *China – Publications and Audiovisual Products*, a December 2009 decision regarding a GATS dispute between the US and China, suggests that the US could be unsuccessful in defending its new visa fees if India were to invoke the WTO dispute settlement mechanism to resolve the dispute. India might argue that the visa fee hikes violate the US GATS mode IV commitments and it might note that its affected workers fall under the US GATS Schedule for *intra*-corporate transferees, which includes the positions of managers, executives and specialists. Based on Article 31 of the Vienna Convention on the Law of Treaties, India might argue that, in interpreting this section of the US GATS Schedule, reference should be made to the ordinary meaning of the phrase '*intra-corporate transferees*.' This phrase is potentially open to broad interpretation. However, according to *China – Publications and Audiovisual Products*, a panel would not be required to determine the exact meaning of the term, but rather to assess the '*relevant meaning of the word or term*', given the context of the dispute. A panel may conclude that the relevant meaning of '*intra-corporate transferees*' includes the Indian corporate specialists affected by the visa fee hikes.

The dispute arising from the US visa fee hikes demonstrates that companies which utilize H-1B, L-1, or other visas to enable their employees to provide services in the US or another WTO Member should be alert to visa fee increases. Such fee changes may constitute a violation of WTO Member's commitments under GATS and be valid grounds to seek a legal challenge under WTO rules. Business parties that make use of foreign work visas should continue to follow this dispute closely.

Recently Adopted EU Legislation

Market Access

- *Commission Regulation (EU) No 1226/2010 of 20 December 2010 amending Council Regulation (EC) No 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment*

- *Commission Regulation (EU) No 1245/2010 of 21 December 2010 opening Union tariff quotas for 2011 for sheep, goats, sheepmeat and goatmeat*

- *Commission Regulation (EU) No 1248/2010 of 21 December 2010 opening the tariff quota for the year 2011 for the importation into the European Union of certain goods originating in Norway resulting from the processing of agricultural products covered by Council Regulation (EC) No 1216/2009*

- *Council Regulation (EU) No 1264/2010 of 20 December 2010 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*

Trade Remedies

- *Notice of the impending expiry of certain anti-dumping measures*

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- *Commission Regulation (EU) No 1261/2010 of 22 December 2010 imposing a provisional countervailing duty on imports of certain stainless steel bars originating in India*

- *Notice of the impending expiry of certain anti-dumping measures*

- *Council Implementing Regulation (EU) No 1243/2010 of 20 December 2010 imposing a definitive anti-dumping duty on imports of ironing boards originating in the People's Republic of China produced by Since Hardware (Guangzhou) Co., Ltd.*

- *Council Implementing Regulation (EU) No 1241/2010 of 20 December 2010 amending Regulation (EC) No 452/2007 imposing a definitive anti-dumping duty on imports of ironing boards originating, inter alia, in the People's Republic of China*

- *Notice of the impending expiry of certain anti-dumping measures*

- *Council Implementing Regulation (EU) No 1242/2010 of 20 December 2010 imposing a definitive anti-dumping duty on imports of synthetic fibre ropes originating in India following an expiry review pursuant to Article 11(2) of Regulation (EC) No 1225/2009*

- *Notice of the impending expiry of certain anti-dumping measures*

- *Notice of initiation of an anti-dumping proceeding concerning imports of certain graphite electrode systems originating in the People's Republic of China*

Customs Law

- *Commission Regulation (EU) No11/2011 of 7 January 2011 amending certain regulations on the classification of goods in the Combined Nomenclature*

- *Commission Regulation (EU) No 1228/2010 of 15 December 2010 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff*

- *Council Regulation (EU) No 1265/2010 of 20 December 2010 amending Regulation (EC) No 1255/96 temporarily suspending the autonomous Common Customs Tariff duties on certain industrial, agricultural and fishery products*

Food Law

- *Commission Regulation (EU) No 15/2011 of 10 January 2011 amending Regulation (EC) No 2074/2005 as regards recognised testing methods for detecting marine biotoxins in live bivalve molluscs*

- *Commission Regulation (EU) No 1266/2010 of 22 December 2010 amending Directive 2007/68/EC as regards labelling requirements for wines*

- *Commission Regulation (EU) No 16/2011 of 10 January 2011 laying down implementing measures for the Rapid alert system for food and feed*

Trade-Related Intellectual Property Rights

- *Commission Regulation (EU) No 14/2011 of 10 January 2011 approving non-minor amendments to the specification for a name entered in the register of protected designations of origin and protected geographical indications (Limone di Sorrento (PGI))*

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