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Increasing WTO litigation concerning governmental support to green energies: the US challenges India's programme and all parties appeal Canada's scheme

On 6 February 2013, the US filed a request for consultations with India before the WTO Dispute Settlement Body (hereinafter, DSB), regarding India's national policy for solar energy, which the US claims to embody local content requirements that discriminate against foreign producers. According to the US, the Indian '*Jawaharlal Nahru National Solar Mission*' (hereinafter, NSM) requires that, in order to participate and maintain power purchase agreements under it, solar power developers purchase and use solar cells and solar modules of domestic origin, which arguably confers benefits and advantages to Indian domestic producers to the detriment of the US (and foreign) industry, in a WTO-inconsistent manner.

India launched its NSM programme in 2010, with the aim of deploying 20,000MW of solar panels through an interconnected grid by 2022. According to India's Ministry of New and Renewable Energy, the NSM was designed to reduce the cost of solar power generation in the country, by means of (i) a long term policy; (ii) large scale deployment goals; (iii) intensive research and development; and (iv) domestic production of critical raw materials, components and products.

In its request for consultations, the US claimed that the Indian scheme violates a number of provisions under WTO law, notably the national treatment obligation under Article III:4 of the WTO General Agreement on Tariffs and Trade (hereinafter, GATT), as well as the relevant provisions under the WTO Agreement on Trade-Related Investment Measures (hereinafter, TRIMs Agreement), inasmuch as the measures at hand arguably qualify as investment measures related to trade in goods that are inconsistent with Article III of the GATT. In addition, the US claims that India's NSM programme is inconsistent with the WTO Agreement on Subsidies and Countervailing Measures (hereinafter, ASCM), insofar as it confers a prohibited subsidy to its domestic producers. In particular, the US argues that, in requiring that producers in India purchase and use solar cells and solar modules of Indian origin in order to participate and benefit from the NSM scheme, India is providing a subsidy that is '*contingent...upon the use of domestic over imported goods*', the granting of which is contrary to Articles 3.1(b) and 3.2 of the ASCM. In the alternative, the US argues that the NSM qualifies as an actionable subsidy under Articles 5(c), 6.3(a) and 6.3(c) of the ASCM, inasmuch as it causes serious prejudice to US interests by hindering US imports, as well as having the effect of a significant price undercutting in the relevant sector. Finally, the US also claims that India failed to observe its obligation to notify the subsidy to other WTO Members, as mandated under Article 25 of the ASCM.

This new challenge comes amid a context of growing doubts concerning the extent to which countries are allowed to provide support to their renewable energy sectors. Energy programmes incorporating local content requirements are often adopted by countries on the grounds that they constitute effective tools to pursue a number of legitimate objectives, *inter*

alia, the improvement of their industry's environmental friendliness, the fostering of economic development, as well as investment and employment in the related sectors of their domestic markets. However, such schemes may also have other (perhaps unwanted) implications, such as resulting in an increase of the costs of energy, leading to a reduction of competition, or eventually restricting trade in a WTO-inconsistent fashion. Indeed, a number of controversies involving governmental support for the promotion of green energy are currently being litigated at WTO-level.

In particular, the disputes concerning local content requirements under the '*feed-in tariff*' (hereinafter, FIT) programme adopted by the Canadian province of Ontario (*i.e*., *Canada – Renewable Energy* and *Canada – Feed-in Tariff Program*) have recently been appealed by Canada and cross-appealed by the complainants (*i.e.*, Japan and the EU, respectively). In its reports, issued in the form of a single document, the panel found that the FIT scheme was in violation of Canada's national treatment obligations under the GATT and the TRIMs Agreement. Conversely, the panel established no violation of the ASCM, inasmuch as it found that the '*financial contribution*' at hand, in the shape of a government purchase of goods within the meaning of Article 1.1(a)1(iii) of the ASCM, did not confer a '*benefit*' as provided in Article 1.1(b) of the ASCM, so that the scheme did not qualify as a subsidy within the meaning of the ASCM (see Trade Perspectives, Issue No. 1 of 11 January 2013). In their respective notifications of appeal, Canada contested the panel's findings that the FIT programme involves a purchase of goods by a government for the purpose of commercial resale, which prevents it from qualifying for the exemption from the national treatment requirements envisaged by Article III:8(a) of the GATT. As for Japan and the EU, they appealed the report on the grounds that the panel erred in its findings relating to the GATT, TRIMs Agreement and ASCM, namely in finding that no '*benefit*' was conferred, and asked the Appellate Body to modify the panel's report and complete the legal analysis accordingly.

Interestingly, the panel report included a dissenting opinion concerning the question of whether the prices paid to renewable energy producers in Ontario, which were higher than those paid to producers of conventional energies, amounted to a '*benefit*'. The '*dissenting*' panellist adopted the view that, when considering that the inherently high costs of solar and wind power energy would not *per se* have attracted investment, the governmental FIT programme could be presumed to confer a '*benefit*'. The disagreement among the panellists possibly illustrates the wider policy debate on governmental support to green energy schemes, which has recently lead to a remarkable number of trade frictions. The assessment of the WTO-compatibility of these measures becomes particularly complex and contentious in the context of subsidies, where the determination of the existence of a '*benefit*' is based on a comparison with the market benchmark. In situations where strong governmental intervention heavily distorts the market, an objective analysis and comparison thereof becomes a difficult task.

Indeed, concerns have been raised that WTO rules on subsidies may not allow for the adoption of effective measures for the promotion of green energy in a manner that is consistent with WTO law, and that an exemption for green subsidies that foster renewable energies and further the fight against climate change might be a desirable development. In the meantime, companies operating in the sector of green energies are advised to monitor the cases currently being litigated at the WTO, since they are likely to influence future developments in the area of governmental support to green energy in international trade.

The EU Commission seeks a mandate to join plurilateral negotiations on services

On 15 February 2013, the EU Commission requested a mandate from the EU Council to negotiate a new international services agreement. These negotiations are set to follow previous talks among the '*Really Good Friends of Services*' (hereinafter, RGFS) group of 21

WTO Members, including Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, Hong Kong China, Iceland, Israel, Korea, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, Switzerland, Turkey and the US, which are interested in overcoming the stalemate in negotiations at WTO level with a view to liberalising international trade in services in the immediate future.

The RGFS group is currently holding talks on the basis of a decision of the WTO's Eighth Ministerial Conference, held in December 2011, that trade agreements may be concluded prior to the conclusion of the Doha Development round of multilateral trade talks. In line with this, the RGFS reached a collective compromise in October 2012 on the probable framework and scope that this agreement will take and has indicated that its parties were likely to adopt a '*hybrid approach*', under which market access commitments would be scheduled under a positive list, and national treatment would apply on a horizontal basis to all services sectors and modes of supply, with the possibility of Members to list exemptions thereto in their respective national schedules.

The EU has stipulated that any such agreement should be compatible with the General Agreement on Trade in Services (hereinafter, GATS) and conducted on the basis of Article V of the GATS. In particular, Article V:1(a) of the GATS allows for multiparty agreements where they have '*substantial sectoral coverage*'. A footnote thereof explains that '*[t]his condition is understood in terms of number of sectors, volume of trade affected, and modes of supply. In order to meet this requirement, agreements should not provide for the a priori exclusion of any mode of supply*'. It is hoped by the RGFS group that negotiating along the lines of the GATS will encourage other WTO Members, which have been active in the Doha negotiations, to later join this agreement. The RGFS group also wishes to leave open the possibility that the system one day be incorporated into the WTO framework. Negotiations will be left open at all times to new participants. Both the EU and the US have indicated that they are particularly eager to encourage the so-called '*BRICS*' countries (*i.e.*, Brazil, Russia, India, China and South Africa) to join the agreement. These countries have, in the past, been relatively sceptical about such initiative, on the basis that a plurilateral approach may undermine any further (multilateral) progress within the Doha Round.

The EU's insistence on establishing a positive list of services to be liberalised by all Members only in areas where concessions have been explicitly agreed appears to have been taken on board by the RGFS group so far, with the group eschewing the more ambitious negative list approach proposed by the US. The EU Commission has stated that the agreement will indeed be ambitious and will cover all services sectors, including information and communications technology (hereinafter, ICT), logistics and transport, and financial services. The EU is also eager that substantive rules on trade in services be developed in addition to market access, such as rules relating to government procurement of services, licensing procedures or non-discriminatory access to communication networks and the independence of regulators. Similarly, the EU has suggested that the agreement include rules on the cross-border transfer of information, postal and courier services, the temporary movement of natural persons and subsidies.

This liberalisation could substantially benefit trade in services, since barriers to global trade in this area remain high, especially in emerging countries, and particularly considering that approximately 60% of the costs resulting from barriers to trade in services are to be found in RGFS group Members themselves. Although it remains unclear how wide-reaching the commitments to be secured in this agreement will actually be, this liberalisation may be less relevant for EU service providers that trade with countries or regions with which the EU has already concluded, or is in the process of concluding, a free trade agreement (hereinafter, FTA) that incorporates a services chapter, such as the EU-Singapore, EU-Korea and EU-Canada (hereinafter, CETA) FTAs.

It is expected that the EU Commission will obtain its mandate from the EU Council to negotiate in the near future, considering that the EU Council, in its Council Conclusions on 8 February 2013, has already stated that '*the EU looks forward to forthcoming negotiations on services*'. All stakeholders should monitor the negotiation of this agreement, once the mandate has been secured by the EU Commission, in order to ensure that their specific commercial objectives (both offensive and defensive) are pursued and reached by the EU. The EU Commission, for its part, is expected to be closely monitored by the EU Parliament, which is adamant to make full use of its prerogatives under Article 218(10) of the Treaty on the Functioning of the European Union (TFEU), particularly in light of the ACTA precedent, where the EU Commission was strongly criticised for not having kept the EU Parliament immediately and fully informed at all stages of the negotiations.

The EU and the US may initiate formal negotiations on a comprehensive transatlantic trade and investment partnership

On 13 February 2013, the EU and the US decided to launch negotiations on a comprehensive FTA (*i.e.,* a Transatlantic Trade and Investment Partnership, hereinafter, TTIP), following the recommendations of the EU-US High Level Working Group on Jobs and Growth (hereinafter, HLWG). Informed sources indicate that the EU will define its negotiating strategy in March, in order to initiate the first formal round of negotiations with the US in June this year. Both countries reportedly stated that the TTIP can be completed within the next two years.

The exploratory process began at the EU-US Summit on 28 November 2011, where both countries requested to the Transatlantic Economic Council (*i.e.,* the political body established in 2007 to advance economic integration and government cooperation between the EU and the US) to agree on the establishment of a HLWG aimed at identifying and assessing options for strengthening the EU-US trade and investment relationship, especially in those areas with the highest potential to support jobs and growth. On 11 February 2013, the HLWG made a final recommendation (hereinafter, the Report) to the EU and the US to initiate their internal procedures necessary to launch negotiations on a TTIP. The Report's analysis included the potential elimination, reduction or prevention of barriers to trade in goods, services, investment and non-tariff barriers (hereinafter, NTBs) in all categories of economic activity, as well as the increased compatibility of regulations, standards and rules on shared global issues. The HLWG concluded that a TTIP that were to address the abovementioned issues would provide significant mutual benefits. The Report recommends that negotiations on a TTIP should aim at achieving ambitious outcomes in three broad areas: 1) market access, including tariffs, services, investment and procurement; 2) regulatory issues and NTBs; and 3) rules addressing shared global trade challenges and opportunities.

In particular, the Report recommends that, in the area of market access, both parties should aim at eventually eliminating all duties on bilateral trade, where a '*substantial'* elimination should be done upon the agreement's entry into force. The most sensitive sectors could be initially left out, but the remaining tariffs should be removed in a short period of time thereafter. In the area of trade in services, the EU-US agreement would aim at binding liberalisation to the highest levels achieved in each country's respective agreements with other trading partners, while trying to increase market access. With respect to investment, the HLWG recommends that the highest level of liberalisation and standards of protection should be included in the TTIP. Access to government procurement opportunities should be '*substantially improved*' by the TTIP at all levels of government and on the basis of national treatment. The EU and the US already have the world's largest economic relationship, with trade in goods and services alone amounting to EUR 2 billion a day, according to estimates from the European Commission, which means that current trade is approximately EUR 700

billion annually. Additionally, their tariffs' average is already low (*i.e.*, 5.2 % and 3.5 %, respectively, for the EU and the US). Therefore, the major gains from a future EU-US agreement will likely come from the removal of NTBs and from the harmonisation of their different regulatory regimes. Currently, the major trade irritants between the two trading blocs appear to concern in relation to agricultural products, particularly in relation to issues such as genetically engineered crops, pathogen-reduction treatments in poultry and the use of safe feed additives such as *ractopamine* in beef and pork. Other problematic issues between the EU and the US relate to food safety, consumer protection and environmental standards.

The HLWG also recommends that the EU and the US include provisions that serve to reduce unnecessary costs and administrative delays stemming for regulation, suggesting to the parties to establish provisions or annexes with additional commitments intended to promote regulatory compatibility in specific goods and services sectors. In particular, according to the Report, the EU and the US should try to achieve greater regulatory harmonisation between them. Finally, both parties will also focus on rules aimed at strengthening the multilateral trading system such as labour and environmental convergence and intellectual property rights. Other issues that are expected to be addressed by the parties are the so-called '*21st century*' topics (*i.e.,* trade-related areas on customs and trade facilitation, competition policy, state-owned enterprises, access to raw materials and energy, small- and medium-sized enterprises, etc.).

Business parties with an interest in these major trade markets should monitor closely the developments towards a possible EU-US TTIP and actively work with their respective governments and trade negotiators to ensure that the full list of current trade impediments and future commercial objectives are on the negotiating table when TTIP talks start.

Recently Adopted EU Legislation

Market Access

- *Commission Implementing Regulation (EU) No. 131/2013 of 15 February 2013 laying down exceptional measures as regards the release of out-of-quota sugar and isoglucose on the Union market at reduced surplus levy during the 2012/2013 marketing year*

- *Commission Implementing Regulation (EU) No. 125/2013 of 13 February 2013 amending Regulation (EC) No. 1235/2008 laying down detailed rules for implementation of Council Regulation (EC) No. 834/2007 as regards the arrangements for imports of organic products from third countries*

Trade Remedies

- *Council Implementing Regulation (EU) No. 157/2013 of 18 February 2013 imposing a definitive anti-dumping duty on imports of bioethanol originating in the United States of America*

- *Commission Decision of 13 February 2013 terminating the anti-dumping proceeding concerning imports of welded tubes, pipes and hollow profiles of square or rectangular cross-section, of iron other than cast iron or steel other*

than stainless originating in the former Yugoslav Republic of Macedonia, Turkey and Ukraine

- *Commission Decision of 13 February 2013 terminating the anti-dumping proceeding concerning imports of white phosphorus, also called elemental or yellow phosphorus, originating in the Republic of Kazakhstan*

Customs Law

- *Commission Implementing Regulation (EU) No. 162/2013 of 21 February 2013 amending the Annex to Regulation (EC) No. 3199/93 on the mutual recognition of procedures for the complete denaturing of alcohol for the purposes of exemption from excise duty*

- *Commission Delegated Regulation (EU) No. 155/2013 of 18 December 2012 establishing rules related to the procedure for granting the special incentive arrangement for sustainable development and good governance under Regulation (EU) No. 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preferences*

Food and Agricultural Law

- *Commission Regulation (EU) No. 122/2013 of 12 February 2013 amending Regulation (EC) No. 1950/2006 establishing, in accordance with Directive 2001/82/EC of the European Parliament and of the Council on the Community code relating to veterinary medicinal products, a list of substances essential for the treatment of equidae*

- *Commission Implementing Regulation (EU) No. 139/2013 of 7 January 2013 laying down animal health conditions for imports of certain birds into the Union and the quarantine conditions thereof*

Other

- *Commission Regulation (EU) No. 109/2013 of 29 January 2013 amending Regulation (EC) No. 748/2009 on the list of aircraft operators that performed an aviation activity listed in Annex I to Directive 2003/87/EC of the European Parliament and of the Council on or after 1 January 2006 specifying the administering Member State for each aircraft operator also taking into consideration the expansion of the Union emission trading scheme to EEA-EFTA countries*

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