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Japan requests WTO consultations with Canada on Ontario's feed-in tariff programme

On 13 September 2010, Japan requested WTO consultations with Canada concerning the feed-in tariff programme applied by the Canadian province of Ontario to renewable sources of energy. Japan had already raised the issue in previous meetings of the WTO Committee on Subsidies and Countervailing Measures (see Trade Perspectives, Issue No. 9 of 7 May 2010). With its request for consultations, Japan formally initiated a WTO dispute settlement proceeding.

Feed-in tariff schemes are among the most popular measures that countries are currently employing as part of their efforts to combat climate change and to promote the development and use of renewable sources of energy. Such schemes consist in governmentally-fixed above-market price tariffs that grid system operators or utility companies must pay for renewable energy fed into the national electricity grid by a private independent producer. The aim of these schemes is to stimulate the production of renewable energy by providing substantial benefits to the operators of installations which generate renewable energy. Currently, a number of both developed and developing countries apply such schemes. The WTO compatibility of feed-in tariff schemes is debated, in particular the extent to which such schemes may entail elements of subsidization which may not be compatible with the provisions of the WTO Agreement on Subsidies and Countervailing Measures (see Trade Perspectives, Issue No. 9 of 7 May 2010).

In the WTO complaint just lodged, Japan's claims mostly target the domestic content requirement embodied in Ontario's feed-in tariff programme. In particular, the programme, introduced in 2009 under the Green Energy and Green Economy Act, provides long-term contracts to developers of green energy projects subject to the inclusion of a fixed percentage of goods and services originating in Ontario. This percentage amounts to 40% and 50% of goods and services used, respectively, in 'small' (*i.e.*, below or equal to 10 kW) and 'large' (*i.e.*, over 10kW) solar projects and to 25% of goods and services in 'large' (higher than10kW) wind projects, and is set to increase over time depending on the milestone date for commercial operation (*i.e.*, 60% as of 2011 for solar projects and 50% as of 2012 for wind projects).

Japan claims that the programme, with its domestic content requirement, violates a number of provisions of various WTO Agreements, notably the national treatment obligations under Article III:4 and III:5 of the General Agreement on Tariffs and Trade (hereinafter, GATT), the relevant provisions of the Agreement on Trade-Related Investment Measures (hereinafter, TRIMs Agreement) and the provisions of the WTO Agreement on Subsidies and Countervailing Measures (hereinafter, ASCM). According to Japan, Ontario's scheme, with its domestic content requirement, discriminates against foreign producers and exporters of equipment for renewable energy generation facilities, in violation of Article III:4 and Article 2.1 of the TRIMs Agreement. In addition, Japan claims that the feed-in tariff scheme with its domestic content requirement,

appears to result in internal quantitative regulations relating to the mixture, processing or use of a specified amount or proportion of equipment for renewable energy generation facilities, requiring that equipment for renewable energy generation facilities be supplied from Ontario sources, within the meaning of Article III:5 of the GATT.

Lastly, Japan considers that the domestic content requirement constitutes a prohibited subsidy within the meaning of Article 3.1(b) and Article 3.2 of the ASCM. In effect, the ASCM lists as 'prohibited subsidies' those subsidies that are contingent, in law or in fact, upon the use of domestic over imported goods. However, the WTO definition of a subsidy requires the existence of a financial contribution or a form of income or price support, conferring a benefit. To prove the existence of a financial contribution or a form of income or price support in a feed-in tariff programme is perhaps one of most interesting aspects of Japan's claim. In feed-in tariff schemes, the intervention of the government is generally limited to the setting of the prices, which is an act of market regulation and does not appear to involve a financial contribution within the meaning of Article 1.1(a) of the ASCM. Perhaps for this reason Japan's claim also indicates that the Canadian measures be assessed as a form of price support within the meaning of Article 1.1(a)(2) of the ASCM and Article XVI of the GATT. Academics have suggested that feed-in tariffs be assessed as constituting a form of price support within the meaning of Article 1.1(a)(2) of the ASCM and Article XVI of the GATT, as they keep prices artificially high to the benefit of renewable energy producers. However, only one GATT report has in the past addressed the notion of price or income support, suggesting that income or price support could only constitute a subsidy when it involved a cost to government. As such interpretation is very narrow, panels faced with subsidy claims have more easily resorted to the concept of 'financial contribution' in assessing the existence of a subsidy.

The outcome of this dispute is likely to have a great impact on the industry of renewable energy, as WTO Members are increasingly resorting to climate mitigation policies and industries are positioning themselves in the global market of renewable energy. Ontario's generous feed-in tariff programme attracted huge investments in the province by companies wishing to benefit of the favourable conditions to develop their capacity and by companies interested in selling equipment to such energy developers. Reports suggest that one of the reasons behind Japan's complaint lies in the discomfort of Japanese companies active in the renewable energy market for the impact that such scheme will have on the development of their competitors, some of which, it appears, have already obtained huge contracts for the development of their capacity in Ontario. Such reports also suggest that these contracts could affect other companies' access to the province's market, due to the province's limited capacity to transmit electricity to consumers' homes. Another key aspect of the dispute is whether the panel will find that feed-in tariff schemes do indeed constitute a financial contribution within the meaning of the WTO ASCM. Such finding could force a number of other WTO Members to revise their schemes, particularly where feed-in tariffs are coupled with elements of prohibited subsidisation.

The EU adopts new approach to GMO cultivation

On 13 July 2010, the EU Commission adopted a new approach to GMO cultivation through combined measures including a Communication, a Recommendation and a proposal for amendment of the Directive (EC) No. 2001/18 of 12 March 2001 (hereinafter, the Directive). According to such new approach, EU Member States will have more flexibility to apply measures to tackle the impact of GMOs' co-existence with conventional and organic crops. This flexibility enables EU Member States to impose partial or, if the proposal for amendment is accepted, total restrictions on GMO cultivation, considering the importance of producer and

consumer choice, as well as the specific agricultural, social and economic aspects of each Member State.

The new EU Commission's approach is independent from the existent EU authorisation system for GMOs, which is based on scientific grounds of environmental and health risk assessment. The authorisation of importation and marketing of GMOs will continue to be decided and regulated at the EU level and will not be affected. Only the GMO cultivation and the particular issues of co-existence will be decided by individual EU Member States, based on grounds other than scientific studies for health and environment protection.

EU Member States are entitled to take co-existence measures to avoid the unintended presence of GMOs in conventional and organic crops, as provided in Article 26a of the Directive on deliberate release of GMOs into the environment. These measures are usually implemented in coordination with other EU legislation concerning the traceability and labelling of GMOs, so that the choice of producers and consumers in this regard is respected. A minimum threshold of GMOs presence in food and feed is established in Article 21.3 of the same Directive, complemented by Articles 12 and 24 of the Regulation (EC) No. 1829/2003 of 22 September 2003 (hereinafter, the Regulation). Thus, products with traces of authorised GMOs in proportions no higher than 0.9% are not subject to the specific labelling requirements set out in the Regulation. As a result, the interest to avoid adventitious presence of GMOs in food and feed is, inter alia, related to the potential economic impact that it can cause on farmers that opted to cultivate conventional and organic crops and receive a premium price for their products having lower or no traces of GMOs. Some EU Member States established higher thresholds than 0.9%, or even labels for 'GMO-free' products under their national regulation. However, these Member States argued that their regulatory margin to monitor the co-existence and guarantee the sufficient levels of purity of crops was limited, essentially diminished by the high and disproportionate administrative costs necessary to achieve their objective of protecting conventional and organic farming, as well as avoiding economic damages to producers.

In response to these concerns, the EU Commission Communication and the Recommendation set out non-binding guidelines for EU Member States to develop national co-existence measures in accordance with the Directive. Among other considerations, it is emphasised that the measures, including restrictions of GMO cultivation from specific areas, should be proportionate to the pursued objective, without being unnecessary burdensome to farmers, producers, cooperatives or operators of any type of crops. In particular, for the restriction of GMO cultivation from large areas, EU Member States also have to demonstrate that other measures are not sufficient to avoid the unintended presence of GMOs in other types of crops.

With regard to the amendment of the Directive, the language emphasises the subsidiarity principle, stated in Article 5(3) of the Treaty on European Union, in order to balance the legal certainty and transparency of the EU authorisation system with the needs of EU Member States for more flexibility and policy space on GMO cultivation and co-existence matters. These needs were reflected in the previous experience of those EU Member States which banned the GMO cultivation from their territories without the scientific justification required by EU legislation, and allegedly based such measures on safeguard or emergency clauses. Hence, to prevent the use of measures by Member States without scientific justifications, the new approach to GMO cultivation is a separate legal framework from the EU authorisation system, which will give EU Member States the freedom to decide on the total restriction of GMO cultivation in their territories. The decision cannot be based on scientific grounds related to health and environmental protection and must be in conformity to EU Treaties and the international obligations undertaken by the EU and its Member States. Consequently, EU Member States'

decisions and the EU authorisation system are compatible, since neither the EU authorisations for GMOs, nor the scientific assessment by EFSA, will be put in question. To be noted that, in this perspective, the importation, marketing and freedom of transit of authorised GMOs cannot be affected by EU Member States' decisions.

For instance, as stated in the Communication, the reasons to prohibit the GMO cultivation could vary from agronomic justifications about the difficulties to ensure co-existence, to political or economic motivations such as meeting the GMO-free market, or even to achieve broader national policy goals of biodiversity. With respect to the international obligations of the EU, in particular the ones under the WTO, the new approach cannot discriminate between national and imported GMO products and among foreign products to be cultivated (Articles I and III:4 of the GATT). Other obligations like the freedom of transit for GMO products (Article V of GATT) must also be observed.

Questions may be raised by economic operators, farmers and producers with regard to their economic interests in the investment and potential production or cultivation of GMOs in EU Members States. For example, the applicants for EU authorisation of GMOs, which were registered before the GMO cultivation approach was adopted (and that are still under analysis), might not be negatively impacted. However, applicants may be damaged if their intent is or was to cultivate GMOs in one of the EU Member States that will implement restrictions or prohibitions based on the new legal framework. The public debate on this issue is still ongoing within EU Member States and will likely intensify at the national, regional and local levels. For this reason, producers, consumers and economic operators should be aware of the ongoing discussions in order to be able to protect their commercial interests in the decision making process of further national regulation. In as much as GMOs that have been authorised and registered for use at EU level may be prohibited for cultivation in specific EU Member States, such outcomes will be seen as trade barriers. Whether these trade barriers will muster a scrutiny of WTO consistency, it remains to be seen and will likely be the result of future WTO dispute settlement proceedings.

Oral statements delivered at the WTO in the US - COOL dispute

On 14 and 15 September 2010, the US, Canada and Mexico and the third parties involved in the WTO disputes on US - Certain Country of Origin Labelling (hereinafter, COOL) had the opportunity to make their oral statements before the WTO panel. The parties emphasised their main arguments already stated in the written submissions and were questioned on many issues by the panel.

Canada requested for the establishment of a WTO panel on 7 October 2009, followed by a request from Mexico, lodged two days after. A single panel was established on 19 November 2009. The complainants allege that the US provisions on mandatory country of origin labelling provided, *inter alia*, in the Agricultural Marketing Act of 1946, as amended by the Farm Bill of 2008 and as implemented through the Interim Final Rule of 28 July 2008, violate certain WTO obligations under the Agreement on Technical Barriers to Trade (hereinafter, TBT Agreement), the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter, SPS Agreement), the GATT and the Agreement on Rules of Origin. The measures include the obligation to inform consumers at the retail level of the country of origin in respect of specific products, including beef and pork. To be recognised with exclusive US origin, the products can only be derived from an animal that was exclusively born, raised and slaughtered in the US.

This excludes the possibility of beef or pork derived from livestock that is exported to the US for feed or immediate slaughter to be labelled with the US origin.

Marks of origin are permitted under GATT Article IX as long as, inter alia, they are not discriminatory and do not unreasonably increase the costs of products. In this case, Canada's main arguments appear to be that the measures at issue unreasonably increase the costs for the downstream packing and retailing industry, as a result of the labelling of meat from Canadian livestock and of the segregation used to monitor the animals born and raised in Canada but slaughtered in the US. Consequently, Canada affirms that the exports of animals and products from Canada to the US are adversely affected as US producers will be influenced in their decisions by the additional costs related to these products. Therefore, Canada argues that less favourable treatment is being accorded to Canadian products, in violation to Article III:4 of the GATT. Based on the same facts, Canada alleges that the US COOL system is more trade restrictive than necessary within the terms of Article 2 of the TBT Agreement. In particular, Canada considers that the COOL system is not based on a relevant international standard and that other alternative measures, less burdensome and less costly to retailers and downstream industry, could be applied and implemented by the US authorities.

In its defence, the US appears to argue that the COOL system is necessary to ensure correct and meaningful information to consumers about meat and other food products. The US emphasises that segregation is not a requirement provided in the measures at issue, which consist only in labelling requirements addressed to retailers. In addition, the US says that possible additional costs to downstream industry are the consequence of independent decisions about methods and controls taken by private market actors, whose actions are not regulated by the measures at issue. In this sense, the US also appears to claim that the measures are necessary to achieve the objective of informing consumers and preventing confusion about the origin of the products.

The WTO disputes on the COOL system of the US still have a long way to go. A second oral hearing will take place in December 2010 and the final panel report is scheduled for July 2011. However, it is clear that its outcome will likely provide additional guidance and interpretative tools to draw the dividing line between measures that seek to avoid consumers' confusion and deception (on one side) and measures that may largely be intended or result in disguised barriers to trade and protection of domestic industries (on the other side).

EU Council authorises signature of the EU-South Korea Free Trade Agreement

On 16 September 2010, with the achievement of Italy's consent, the EU Council authorised the signature of the EU-South Korea Free Trade Agreement (hereinafter, FTA) and agreed on its provisional application as of 1 July 2011. The 27 EU Member States, the EU Commission and the South Korean counterpart are expected to officially sign the FTA on 6 October 2010, at an EU-South Korea Summit.

Negotiations between the two parties were officially launched in May 2007 and were conducted, for the EU, by the EU Commission, on the basis of a mandate approved by the EU Council. The agreement was initialled on 15 October 2009. The EU Council's authorisation for signing the agreement was expected at an EU Council meeting on 10 September 2010. However, at that meeting Italy withheld its consent.

With provisions covering tariff elimination on industrial and agricultural products, non-tariff barriers, market access for services trade and regulatory issues, the FTA is the most ambitious agreement negotiated by the EU so far, and follows a comparably ambitious agreement concluded by the US and South Korea (*i.e.*, the KORUS). Particularly contentious issues during the negotiations were the increase of the acceptable foreign content level from 40% to 45% for the granting of preferential treatment to imports of cars and the maintenance of Korea's duty draw back system through which it refunds manufacturers of the duties paid on the importation into Korea of parts and components of the final products upon the latter's exportation (see Trade Perspectives, Issue No. 6 of 27 March 2009).

Italy's concerns related to the impact that the agreement will have on its car industry and it requested the possibility of invoking a regional safeguard measure that could be triggered by Italy alone and a 15-months delay in the implementation of the agreement, to grant to its car industry more time to adjust to the competition. The FTA provides for a bilateral safeguard clause according to which the Parties to the agreement may suspend further reductions of the customs duty rate of a product, or increase up to the MFN rate the duty rate of a product, should the liberalisation of trade between them lead to a situation of import surges, causing or threatening to cause serious injury to their relevant domestic industries. The mechanism requires the adoption of EU internal legislation to further detail certain procedural aspects, such as the initiation of the safeguard investigation or the rights of the parties involved. An EU Commission proposal for the implementing regulation is being assessed by the EU Parliament and EU Council in the so-called co-decision procedure.

A compromise solution was reached at the EU Council meeting that took place on 16 September 2010, where EU Members States agreed to delay the application of the FTA by six months (*i.e.*, to 1 July 2011 from the originally planned date of 1 January 2011). On that date, the FTA will be provisionally applied, provided that the EU Parliament has given its consent to the agreement and that the EU legislation implementing the bilateral safeguard clause of the EU-South Korea FTA is in force. The latter condition appears to be also part of the deal struck at the EU Council to obtain Italy's consent.

The possibility that a safeguard clause be applied regionally, by one or more EU Member States, is one of the changes introduced by the EU Parliament's International Trade Committee (see Trade Perspectives, Issue No. 13 of 2 July 2010) to the EU Commission's proposal. However, this appears to remain among the controversial issues on which the EU Parliament and the EU Council need to find an agreement. In its decision of 16 September 2010, the EU Council agreed 'on the importance of an effective safeguard which provides protection in the case of sudden surges of imports in sensitive sectors, including small cars'. It is not clear whether this will lead to the acceptance of the regional applicability of the bilateral safeguard clause, as requested by Italy.

Provided that the EU Parliament gives its consent to the agreement, and that the implementing legislation concerning the bilateral safeguard is in force, the FTA will be provisionally in force as of 1 July 2011. Certain sectors stand to benefit greatly from the opportunities offered by the FTA. The FTA is supposed to quickly eliminate 1.6 billion EURO worth of Korean import duties annually for EU exporters of industrial and agricultural products. The EU Commission estimates that European machinery exporters will save 450 million EURO annually in duty payments and that EU exporters of agricultural products will save 380 million EURO annually on duties for agricultural products. Other products, such as wine and cheese exports will enjoy duty free and tariff-free quotas (respectively) as the FTA enters into force. The FTA is also intended to procure new market access opportunities for EU services industries.

Recently Adopted EU Legislation

- *Commission Regulation (EU) No 837/2010 of 23 September 2010 amending Regulation (EC) No 1418/2007 concerning the export for recovery of certain waste to certain non-OECD countries*

- *Commission Regulation (EU) No 826/2010 of 20 September 2010 derogating from Regulation (EU) No 1272/2009 as regards buying-in and sales of butter and skimmed milk powder*

- *Commission Regulation (EU) No 817/2010 of 16 September 2010 laying down detailed rules pursuant to Council Regulation (EC) No 1234/2007 as regards requirements for the granting of export refunds related to the welfare of live bovine animals during transport*

- *Commission Regulation (EU) No 810/2010 of 15 September 2010 amending Regulation (EU) No 206/2010 laying down lists of third countries, territories or parts thereof authorised for the introduction into the European Union of certain animals and fresh meat and the veterinary certification requirements*

- *Commission Regulation (EU) No 811/2010 of 15 September 2010 making imports of wireless wide area networking (WWAN) modems originating in the People's Republic of China subject to registration in application of Article 24(5) of Council Regulation (EC) No 597/2009 on protection against subsidised imports from countries not members of the European Community*

- *Commission Regulation (EU) No 812/2010 of 15 September 2010 imposing a provisional anti-dumping duty on imports of certain continuous filament glass fibre products originating in the People's Republic of China*

- *Council Implementing Regulation (EU) No 805/2010 of 13 September 2010 re-imposing a definitive anti-dumping duty on imports of ironing boards originating in the People's Republic of China, manufactured by Foshan Shunde Yongjian Housewares and Hardware Co. Ltd, Foshan*