

China - US subsidy disputes: speculating on 'local content'

Dr Luca Rubini

(Birmingham Law School)



XI BIICL-IIEL WTO Conference

May 25, 2011

What in common?

- United Steelworkers s 301 petition
- *China - Wind* (DS 419)
- *Canada - Renewable Energy* (DS 412)
- *China - US Grain Oriented Flat-rolled Electrical Steel* (DS 419)

Legality of local-content

- Local content subsidies are prohibited by SCM Article 3
- Straightforward, isn't it? Not that easy!
- 'Green' subsidies as case-study
- 'Local content' important industrial policy tool
 - positive environmental impact?
- Are local content subsidies justifiable? Legal analysis doesn't stop at SCM Art 3

GATT Article XX: applicability

- Is GATT Article XX applicable **beyond** GATT and to ASCM?
 - Various arguments in favour and against
 - Case-law not clear
 - Will it happen?
 - Litigation on the rise (what after 'local content' cases?)
 - Negotiations inconclusive
 - Credible 'policy argument' (gap in the system)
 - Onus on dispute settlement (activism vs compulsory jurisdiction)
 - What role by China as GATT XX user? Big player for 'green' economy (but not only) - attracts/generates litigation
 - First-best option = specific carve-out

GATT Article XX: application

- Assuming GATT Article XX is in principle applicable to the ASCM, can it help in justifying **discriminatory** subsidies like local content?
 - Can a discriminatory measure be *necessary* (letter (b))?
 - What circumstances would exclude *unjustifiable* and *arbitrary* discrimination under the chapeau?
- What ultimately matters, for a 'green' subsidy including local content, is the latter's contribution to environmental protection which has to emerge from the circumstances

China - Wind Art XX defence

- Re *China - Wind*, Howse suggested that China might have (had) a plausible environmental argument to defend its local content subsidy:
 - limited possibility of technology transfer,
 - exceptionally great demands for alternative energy, and
 - 'life and death' environmental situation behind those needs

EU PreussenElektra

- German FIT system: pricing law **and** purchase obligation
- ECJ found no State aid for lack of cost-to-government but concluded that
 - the purchase obligation was equivalent to a quota, restricting market access from non-German RE electricity
 - It could be justified because of its environmental credentials and nature of electricity market (lack of certification of origin)
- Conclusion: discriminatory environmental 'subsidy' was justified

Inconsistencies?

- First inconsistency
 - Purchase obligation, *ancillary* FIT element, *may* privilege local sourcing of RE
 - If so, *equivalent* to local content
 - > Why are FITs schemes universally praised and local content so controversial?
- Second inconsistency
 - Local content is *equivalent* to a production subsidy (Sykes)
 - > Why local content prohibited, production subsidies permitted (actionable)?

Conclusions

- China as key economic *and* litigation player
- ‘Subsidies in various shapes and sizes’ raise innovative issues, going beyond subsidy laws (eg GATT Article XX)
- A consistent approach for discriminatory subsidies?
- After ‘local content’?