China - US subsidy disputes: speculating on ‘local content’

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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’?