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E-Mobility in a Tariff War: EU and USA against China's Electric Cars

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International economic relations are rarely the focus of public debate. However, two decisions in the USA and the EU issued within a few weeks of each other concerning the imposition of additional tariffs on electric cars from China have attracted widespread attention. On May 22, 2024, the United State Trade Representative (USTR) announced the details of an increase in existing additional tariffs on numerous products from China. On June 12, 2024, the European Commission (COM) published a list as preliminary information in an ongoing anti-subsidy investigation against Chinese electric cars, which contained details of planned provisional anti-subsidy (countervailing) duties. In terms of the compliance of these measures with the law of the World Trade Organization (WTO), the US measures are in clear violation, while in the case of the EU measures, it is questionable whether climate protection through the availability of affordable electric cars is sufficiently taken into account.

Electric cars from China and the mobility transition

To a certain extent, anti-dumping and anti-subsidy proceedings are part of the "day-to-day business" of international economic law. It is rather rare for them to attract major media attention. However, the latest headlines and associated far-reaching discussions on tariffs on imported electric cars from China can be explained by growing industrial policy that is concerned with protecting domestic markets, the generally tense relationship with China, and most significantly, the mobility transition in the interests of global climate protection. A key factor here is the goal of, by 2035, only allowing new cars in the EU with either no combustion engine, or at least a CO2-free combustion engine. As electric cars play a central role in this respect, it is, difficult to understand at first glance why trade policy measures that make it harder to import electric cars by increasing their prices, thus making them less attractive to consumers, should be taken. In addition to climate protection aspects, however, the geostrategic relationship with China is also at stake, which in turn puts the "open strategic autonomy" approach that has characterized the EU's trade policy for some time at stake. The current presidential election campaign in the USA adds further complicated dynamics to developments. All of this indicates that there is an extremely complex mixture of different political motives and applicable legal instruments underpinning the current actions. It is therefore necessary to bring legal clarity to the discussion to be able to classify and evaluate the current developments in a well-founded manner. At the same time, the current developments provide an opportunity to critically question

whether sustainability aspects are being accounted for at all in European trade policy and the relevant legal instruments.

Countervailing duties, not punitive duties, in the EU

Even though both the USA and the EU measures are concerned with electric cars from China, there are fundamental differences between the measures taken on both sides of the Atlantic.

At the beginning of October 2023, anti-subsidy proceedings were initiated in the EU regarding the import of battery-powered electric vehicles from the People's Republic of China. The legal basis for this is the Basic Anti-Subsidy Regulation 2016/1037 of 8 June 2016, which essentially implements the WTO Agreement on Subsidies and Countervailing Measures (SCM). The WTO SCM Agreement allows for countervailing measures against the import of subsidized products. The prerequisite for enacting countervailing measures is proving that imported products have been subsidized and that this subsidization caused damage to the domestic industry. Countervailing measures are typically tariffs that exceed the normal tariff rate agreed to under WTO law. This additional burden on the import of goods is intended to compensate for the competitive advantage that the product in question has been afforded due to the subsidization. Anti-subsidy duties - countervailing duties - are therefore never "punitive duties", as is often reported in the media, but serve exclusively to eliminate an existing distortion of competition due to state subsidies. This also applies to anti-dumping duties. They too are only intended to balance out an unfair competitive situation due to a company's private decision to sell goods for export at a price that is below the normal value of these goods. Moreover, WTO and EU subsidy law stipulates that measures other than duties can be taken to ensure fair competition. These include undertakings on the part of the government of the exporting country to eliminate or limit the subsidy or to take other measures to curb its effects. Price commitments by the exporting companies of the products concerned are also possible. Regarding these measures in particular, anti-subsidy law stipulates that there must be a continuous opportunity for consultation with the relevant third country from the initiation of an anti-subsidy investigation. Accordingly, in the case of electric cars, attempts have been made since October of last year to reach an amicable solution to the problem with the Chinese government. This has not yet been successful; federal Minister Habeck's political efforts in China a few weeks ago were part of ongoing consultation processes.

An ex officio procedure

Irrespective of the pros and cons of the anti-subsidy investigation into the import of Chinese electric cars from a political economy perspective, the

procedure represents normality under global economic law. However, there is one special feature about the initiation of these proceedings: anti-dumping and anti-subsidy investigations may only be initiated if there is a corresponding complaint from the Union industry. The relevant EU anti-subsidy legislation presumes that a "Union industry" has filed the complaint for the initiation of proceedings or that the complaint has been filed on its behalf. A "Union industry" is deemed to exist if at least 25% of the total production of the goods involved in the proceeding is represented by the applicants; at the same time, no more than 50% of the companies in the relevant Union industry may oppose the application. This application requirement should ensure that the initiation of an investigation is not determined by the protectionist interests of individual companies. The achievement of a corresponding quorum or, more generally speaking, the support of the European automotive industry with regard to anti-subsidy proceedings against imports of Chinese electric cars apparently caused problems, as is evident from the opposition by major German car manufacturers. The European Commission has therefore resorted to a special provision in anti-subsidy law, which provides that "in special circumstances" the Commission can also initiate an ex officio investigation. There is little meaningful practice on such ex officio initiation of proceedings. In this respect, it is also not clear how "in special circumstances" is to be considered as a prerequisite for ex officio proceedings. At this point, however, the Commission will have to be granted broad, and hardly judicially-reviewable, discretion. Of course, this does not change the fact that initiating ex officio proceedings strains the political sensitivity that already exists in anti-subsidy proceedings even more than it would in other proceedings. The intense economic policy debate in China, and in Germany and the EU as a whole, regarding the anti-subsidy investigation into imports of Chinese electric cars shows this very clearly. It should also be noted that the rationale for initiating ex officio proceedings in anti-subsidy law is to protect the domestic industry in exceptional cases from economic policy reprisals by the third country concerned, which is accused of subsidization. In this respect, the idea of initiating proceedings ex officio is that the EU protects the domestic industry so that it is not forced to file a publicity-effective application to initiate proceedings itself. However, with regard to the subsidy measures against imports of Chinese electric cars, this is not the issue at all. The German automotive industry rejects the corresponding procedure for purely economic reasons. Particularly, there are fears of negative effects on imports of cars that German manufacturers themselves produce in China. Moreover, general considerations of the German automotive industry regarding the importance of international

competition as a driver of innovation also play a role. Whether the rationale of the possibility of initiating ex officio anti-subsidy proceedings applies in such a situation is therefore questionable.

Punitive duties, not countervailing duties in the USA

The situation in the USA is completely different, not only politically, but especially legally: the increases in tariffs on Chinese imports, including electric cars, from the current 25% to 100% that the USTR announced mid-May have nothing to do legally with the WTO anti-subsidy law just described. Instead, the legal basis is Section 301 of the US Trade Act of 1974, which requires the US government to take appropriate measures if, among other things, a trade practice of a third country is deemed "unjustifiable" and trade-restrictive. Moreover, measures may be taken if "an act, policy, or practice of a foreign country" – i.e. the trade practice of a third country – "is unreasonable or discriminatory and burdens or restricts United States commerce". The planned tariff increases are based on measures taken in 2018 under Section 301 on corresponding products. An investigation into allegedly unjustifiable and unreasonable trade practices by China was already initiated at that time, which led to corresponding tariff increases. Additional duties of 25% were levied on more than1000 specific products and product categories. In accordance with the relevant legal requirements, these additional duties were to be reviewed in May 2022. Accordingly, an investigation was initiated which has now been concluded. Per the available investigation report, the previous additional duties have proven to be ineffective and it is therefore the opinion of the USTR that the duties should be increased.

Section 301 market investigations and measures contravene WTO law as they have nothing to do with anti-dumping or anti-subsidy measures. There is no legal avenue in WTO law for taking unilateral measures such as those provided for in Section 301 in the USA. Rather, Article 23 of the WTO Dispute Settlement Understanding (DSU) expressly states that disputes concerning the trade practices of WTO members that are covered by WTO law are to be dealt with exclusively within the multilateral WTO dispute settlement system. Apart from general safeguard measures – which are not at issue here – as well as anti-dumping duties and countervailing measures taken based on the relevant WTO agreements, WTO law imposes a far-reaching ban on unilateral measures. However, this is precisely what Section 301 impedes on, and for a long time the provision was a symbol of so-called "aggressive unilateralism" of the USA. In 1999, a WTO panel made it clear that Section 301 is as such incompatible with WTO law. At the time, the USA made a unilateral declaration, which was binding under international law, stating that Section 301 would not be applied in contravention of WTO

law. However, the US did not adhere to this. The aforementioned proceedings on tariffs on Chinese imports, that have resulted in the recently-announced tariff increases, were already the subject of WTO dispute settlement proceedings initiated by China immediately after the 2018 US measures were adopted. The WTO Panel, which was entrusted with the matter, found a violation of WTO law as a result of the tariff increase. Specifically, the Panel ruled on a violation of the internationally binding tariff determination under WTO law (Art. II:1 GATT) and, as the measures were only taken selectively against China, a violation of the most-favored nation obligation (Art. I:1 GATT). In the Panel proceedings at the time, the USA attempted to justify the measures with reference to public morals (Art. XX lit. a) GATT). However, the panel was unable to accept this. The Panel report on Section 301 measures, which are also the grounds of the recently announced further tariff increases, is convincing and straight-forward. However, since the USA has lodged an appeal with the Appellate Body, which has been unable to make decisions since December 2019 and has de facto ceased to exist since the end of November 2020 due to the lack of elected members, the Panel's report could not become legally binding. While the USA's appeal has thus gone "into the void", this does not change the substantive illegality of the measures in the 2018 case, and therefore implies illegality by extension with regard to the further increases in tariffs that have now been announced.

Overall, this is completely different than the EU legal situation with regard to the announced imposition of duties in the USA. The underlying Section 301 procedure, which is outside the WTO legal system because it is not an anti-dumping or anti-subsidy procedure, yet is generally directed against numerous aspects of Chinese trade policy, as well as the illegality of the selective tariff increases against China, justify actually speaking of punitive tariffs here.

Where is the sustainability, where is the climate protection?

Even if the EU's anti-subsidy investigation into imports of Chinese electric cars is prima facie in line with WTO law, substantial problems remain under EU law. The Treaty of Lisbon (2009) introduced the obligation under EU law to conduct the common commercial policy of the EU "in the context of the principles and objectives of the Union's external action" (Art. 207 para. 1 sentence 2 TFEU). As follows directly from Art. 205 TFEU, this is a comprehensive reference to the objectives and principles of the Union's external action in accordance with Art. 21 TEU. These include sustainability objectives, particularly regarding global environmental protection and sustainable resource management (Art. 21 (2) (f) TEU). All this indicates that measures of the EU's Common Commercial Policy, such as anti-dumping

and anti-subsidy measures, must always be in line with global sustainability goals, including global climate protection. The far-reaching obligations associated with have recently been made very clear by numerous national and international courts in the context of climate change litigation. The EU's anti-dumping and anti-subsidy proceedings have so far had little or no echo of this. The relevant price calculation can, and does, take into account any existing environmental costs. However, the key starting point for taking into account sustainability aspects of the Common Commercial Policy would be the so-called Union interest in the area of trade defense instruments. Specifically, the basic anti-dumping regulation (Art. 21) and the basic anti-subsidy regulation (Art. 31) stipulate that, in addition to the criteria of dumping or subsidy, damage and causality, it must also be examined whether there is an overriding Union interest in taking a corresponding measure. For many years, the Commission has argued that general policy considerations, including environmental protection aspects, cannot be taken into account when considering the Union interest. Rather, only conflicting economic interests in the narrower sense have been considered. This strict perspective is no longer upheld today. The Commission does address issues of sustainability, environmental protection, and climate protection when discussing the Union interest, however, in all known anti-dumping and anti-subsidy cases, the Commission consistently considers economic interests to be predominant with regard to the protection of domestic industry. In several cases, environmental protection aspects consistently take a back seat to economic interests (see e.g. Graphite electrode systems 2021, para. 290 et seq.; Solar glass 2020, para. 242 et seq.; Wind power towers 2021, para. 451 et seq.; Photovoltaic modules 2017, para. 314 et seq.; Glass fiber products 2020, para. 1096 et seq.). It is doubtful whether this practice is in line with the constitutional requirements of EU law to respect sustainability and environmental protection. An actual penetration of the law of trade protection instruments in terms of sustainability aspects has not yet been established. The anti-dumping and anti-subsidy proceedings against imports of solar modules, electric bicycles, and electric cars from China, among other cases, provide a good opportunity to now engage in a more intensive discussion on this topic.

Legality and sustainability

Despite all the legal structuring and depth of detail of the law on trade defense instruments, namely anti-dumping and anti-subsidy law, investigation procedures and, if necessary, the adoption of corresponding measures, remain politically sensitive and therefore also politicized to a certain extent. The EU's trade policy is characterized by the fact that it attempts to operate within the multilateral framework of WTO law. Unfortunately, this is no longer the case in

the US, at least in the context of the practice under Section 301 of the US Trade Act of 1974. The developments described above – particularly regarding the consideration of sustainability aspects in the law on trade defense instruments – should make it clear that there is no way around a strict legal obligation in this economically-sensitive area.

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