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## The EC, Mexico and the US request the establishment of a WTO panel on China's export restrictions on raw materials

On 4 November 2009, the EC, the US and Mexico have requested the establishment of a WTO Panel related to Chinese export restrictions on raw materials, in the form of export quotas, export duties and additional export restraints. The EC and the US requests for WTO consultations were circulated on 25 June 2009. Mexico decided to join consultations at a later stage. The three WTO Members allege, *inter alia*, that China's imposition of export duties on certain raw materials (*i.e.,* bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorus and zinc), which can be used for the manufacturing of aluminium, cars, light bulbs, microchips, mobile phones, pesticides, planes, steel and other products, violates its WTO obligations under the Accession Protocol of China to the WTO.

Whereas quantitative export restrictions are covered by Article XI of the GATT, export restrictions in the form of export duties are not regulated by the WTO. An earlier attempt was made to bring such measures under the scope of the WTO Agreement on Subsidies and Countervailing Measures in the case *US – Measures Treating Export Restraints as Subsidies*. In that dispute, the Panel was asked to consider whether export restraints could be seen as subsidies under Article 1 of the WTO Agreement on Subsidies and Countervailing Measures, for which two conditions have to be fulfilled (*i.e.*, the export tax imposed on certain products should confer a benefit upon domestic industries that use such products and, in addition, it should meet the requirements to qualify as a financial contribution). Whereas in the case at stake the first condition was deemed to have been fulfilled, the second one was deemed not to have occurred, *inter alia*, because the Panel considered that not only the effect of the measure has to be taken into account, but also the fact that 'an explicit and affirmative action, be it a delegation or command, is needed'. Therefore, the Panel rejected such attempt.

Because this grey area of interpretation affected Members' rights and obligations under the relevant WTO Agreements, WTO Members increasingly demanded acceding Members to undertake commitments regarding such measures in their Accession Protocols. According to the Panel in the WTO case on *China – Measures Affecting Imports of Automobile Parts*, the Accession Protocol is to be considered as an integral part of the WTO Agreement. In Paragraph 11 of the Accession Protocol of China to the WTO, it is stated that China has to eliminate all such export taxes and charges unless they are specifically provided for in Annex 6 of said Accession Protocol. The Annex 6 contains a list of 84 products that can be subjected to export duties up to a maximum level of export duty rates, which is specified therein. In addition, China confirmed that it would not increase the applied rates, except under exceptional circumstances, in which case China would consult with the affected member prior to such proposed increases. Furthermore, in its Accession Protocol to the WTO and in the Working Party Report, China committed to progressively liberalise the availability and scope of the right to trade in these products. The EC, the US and Mexico allege that China is in violation of the above mentioned obligations because of the imposition of duty rates, 'temporary' export duty rates and/or 'special' export duty rates of various magnitude on raw materials that either are not in the above mentioned Annex 6 or that exceed the maximum rates designated in Annex 6. In addition, the three complainants claim that the bidding system, used by China to allocate export quotas, requires enterprises to pay a charge in order to export these materials, which allegedly is similar to an export duty.

Export subsidies have a number of obvious commercial consequences. Chinese traders in these raw materials of basic products find themselves in a constant state of fierce downward domestic competition as they are forced to sell their products on the internal market. This causes prices on the internal market to be isolated from the world prices and be kept artificially low, while they are very high on world markets as a consequence of (*inter alia*) China's export taxes. Countries like the EC, Mexico and the US are highly dependent on the imports of raw materials. In particular, the EC in its *Raw Materials Initiative* (2008) states that its objective is to 'secure reliable and undistorted access to raw materials, as it is increasingly becoming an important factor for the EC's competitiveness.' Because of the export restrictions, foreign importers have only limited (and expensive) access to Chinese raw materials, with the consequence that Chinese products manufactured with the lower-priced raw materials enjoy a competitive advantage compared to the products made outside of China. These indirect subsidies, like those conferred by other countries through so-called differential export taxes (DETs), are increasingly becoming a matter of contention among WTO Members and this case, if fought out to the end within the WTO dispute settlement mechanism, may provide much needed clarification and interpretative guidance. Key questions will be whether such trade and fiscal policies do confer a benefit (albeit indirectly) to the domestic industries that use such products and, whether such export taxes or restrictions do amount to financial contributions. Commercial operators involved in this trade or in other sectors where similar policies are maintained should follow with attention the evolution of such dispute.

## Which future for the EC 'Made-in' Regulation?

Discussions within the EC Council on the approval of the EC Commission proposal for a Council Regulation on the introduction in the EC of mandatory origin marks for certain products imported from third countries resumed in the recent weeks. The proposal (*i.e.*, Proposal for a Council Regulation on the indication of the country of origin of certain products imported from third countries [SEC(2005) 1657]) was approved by the EC Commission in December 2005 following an extensive consultation process involving relevant stakeholders. However, due to the lack of the necessary support from all EC Member States, the proposal was never approved.

Origin marks are permanent signs indicating the country of origin of the products on which they are appended (*i.e.*, 'made-in' indications and labels). Currently, there is no EC legislation making origin marking mandatory and there is no common definition of the scope of the 'made-in' requirement. The proposal, that applies only to imported products and does not require marks of origin for EC products, requires that origin of the imported goods be determined according to the EC non-preferential rules of origin. The coverage of origin marking requirement is limited to imports of certain industrial products, in particular of textile products, footwear, leather, ceramics, glassware, jewellery, furniture and brushes. In addition, origin marking is intended to apply to such imports from all countries except the Parties to the EEA (*i.e.*, Iceland, Lichtenstein and Norway), Turkey and overseas territories of the EC. This specific exclusion is already likely to result into discrimination vis-à-vis other countries and regions with which the EC has concluded free trade agreements.

The EC Commission's proposal to introduce mandatory origin marks is aimed at ensuring transparency and informed purchase by consumers in the EC and reducing the incidence of false or misleading information relating to country of origin of the imported products. In addition, in consideration of the fact that most of the EC's trading partners (such as, *inter alia*, Canada, Japan and the US) already have legislation imposing mandatory origin requirements to which EC exporters must adjust, the EC mandatory origin requirement is intended to create a level playing field for the EC industry. Lastly, by increasing transparency and correct information on the origin of goods, the introduction of marks of origin is supposed to make, in the words of the proposal, 'demanding Community standards work in favour of the Community industry products'. Under such reasoning, the 'made in the EU' label should work as a guarantee of quality, highlighting the value-added of EC products.

Under the proposal, 'made-in' coincides with the place where the product is wholly obtained or was subject to its last substantial transformation. However, it is debatable whether an indication of origin based on non-preferential rules of origin would fulfil the objective of protecting consumers' desire for information and avoidance of deception, reducing the incidence of false or misleading information relating to country of origin of the imported products. Rather, it appears that such objectives could be undermined by the use of rules of origin as the criterion to apply the mark or origin.

Rules or origin are, as such, deceptive for the consumers. This is shown, first, by the fact that on one same product, two sets of rules of origin are applicable (*i.e.*, the preferential and non-preferential rules of origin). The very interaction between preferential and non-preferential rules of origin is likely to cause problems in relation to the application of the origin marking to products coming from countries that enjoy preferential treatment in the EC and whose origin is determined, for the purposes of granting the trade preference, according to preferential rules of origin.

In addition, within the same sector (*e.g.*, textiles) the processing required to grant origin varies from product to product because rules of origin are often tailored to protect production processes of the particular products that they apply to. Lastly, they often result in arbitrary and discriminatory practices and constitute restrictive barriers to trade.

Therefore, if the objective is that of ensuring transparency and informed purchases by the consumers, rules of origin should not be used as the basis to determine origin for purposes of the 'origin marking', as these are diverse, differently-designed and inherently-deceptive and their operation cannot be constrained or artificially 'harmonised' within the words 'made-in'. The issue is also one of definition: what should the words 'made-in' specifically refer to? 'Made-in' appears to comprise the entire production process, from the raw material to the finished product. In reality, this often involves a number of steps and inputs that take place in different countries. Rules of origin say nothing, for example, of where the production processes take place, or on the origin of the materials necessary to produce the good, or where the design of a particular article was made. Yet, what will confer to the product the 'made-in' mark of origin will be the place where the last substantial transformation took place, which reflects only one part (often minor) of the production process.

What the proposal appears to be aimed at is the protection of specific industrial processes. In particular, it appears to reward those industries that have maintained production processes in the EC and that are deemed to continue producing using local artisanal traditions, know-how, skills and quality inputs, and maybe even adherence to environmental standards, labour standards and social standards. However, these legitimate objectives can arguably be best guaranteed and pursued through other, better-suited trade policies, such as truly informative labelling schemes (for instance, visual markings could guarantee to consumers that certain standards have been followed in the making of the product) or by using additional terms that can better communicate to consumer what exactly took place in the EC (*i.e.*, 'designed in', 'assembled in with products coming from', 'fully manufactured in', etc.). Doubts remain also with respect to the actual commercial value of a 'made-in EU' type of label as opposed to, for example, 'made-in Italy', 'made-in Germany', etc., which often have true value in the minds of consumers that prefer to buy Italian clothing or German machinery, but not necessarily the other way around. Geographical origins transmit an idea of quality. This is best exemplified by the agricultural GIs, which are a lot more sophisticated and articulated instruments. As such, they have true commercial value in the minds of consumers and are based on detailed specification, not on deceptive and arbitrary rules of origin that most consumers will never be able to understand or even read.

The proposal on origin marking has faced the criticism of several EC Member States which claim that the marks of origin pose administrative burdens and additional costs to traders and industry and that are aimed at protectionist intents as they would facilitate boycotting of imports from third countries. Some aspects of the proposal are currently being discussed within the EC Council. In addition, to overcome objections and evaluate the application of the scheme, the EC Commission

is proposing to initiate a pilot project on origin marking, which would cover on voluntary basis and for a limited period of time particular products such as textiles, footwear or ceramics. The consumers' reaction to the voluntary scheme will determine whether the EC proposal will be able to meet its objectives.

## EC Commission imposes increased official controls on imports of pears from Turkey

On 5 November 2009, EC Member States unanimously endorsed, within the EC Standing Committee on the Food Chain and Animal Health (SCoFCAH), a draft Commission Decision imposing special conditions and increased official controls governing the imports of pears originating in or consigned from Turkey after in the controls conducted in recent months repeatedly indicated high levels (up to 15.7 mg/kg) of the insecticide amitraz in Turkish pears. In October, at least 3.8 tons of Turkish pears were destroyed in Germany after high residues of amitraz were found. The levels of amitraz were exceeding the EC Maximum Residue Level (hereinafter, MRL) of 0.05 mg/kg and also the Acute Reference Dose (ARfD) of 0,01 mg/kg body weight which, as set by the WHO, is defined as an estimate of the amount of a substance in food or drinking water that can be ingested in a period of 24 hours or less without appreciable health risks to the consumer. According to the decision, from now on EC Member States should control at importation at least 10 per cent of consignments of pears originating in Turkey for the presence of amitraz. Consignments already on the market should also be subject to adequate official controls. National food safety bodies must carry-out documentary, identity and physical checks, including laboratory analysis on fresh pears from Turkey. Shipments will be detained while awaiting test results.

These measures were approved as 'emergency measures' under the procedure laid down in Article 53(1) of Regulation (EC) No. 178/2002 under which the EC can adopt 'emergency measures for food and feed imported from a third country in order to protect human health, animal health or the environment, where the risk cannot be contained satisfactorily by means of measures taken by the Member States individually'. The insecticide amitraz is no longer authorised in the EC Member States. Authorisations for plant protection products containing amitraz were withdrawn as of 12 August 2004 by Commission Decision No. 2004/141/EC of 12 February 2004. In relation to the limited use on pear trees after harvest, the UK and Portugal were allowed to maintain in force authorisations for amitraz (as essential use) until 30 June 2007 since, at that moment, no alternatives were available. The EC's MRL of 0.05 mg/kg for amitraz in pears was set by Commission Directive (EC) No. 2005/46/EC of 8 July 2005. This directive states that EC's MRLs and the levels recommended by the Codex Alimentarius are fixed and evaluated following similar procedures and that the limited Codex MRLs for amitraz have been considered in the setting of the MRLs. The Codex MRL for amitraz in pome fruits (*i.e.*, apple, pear, etc.) is 0.5 mg/kg, 10 times higher than the EC MRL. However, the recent tests on Turkish pears exceeded also the Codex MRL (and the Turkish MRL of 0.5 mg/kg).

But is the problem of amitraz in pears really new? The EC Rapid Alert System for Food and Feed (RASFF) Annual Report for 2008 states that 'with 178 notifications, RASFF notifications about pesticide residues remain at a high level. A significant increase in reporting was noted for amitraz in pears (32) from Turkey. The sharp increase in notifications for amitraz in pears can be in part explained by the inclusion of pears in the pesticide monitoring plans of Germany and Austria.' In March 2009, the EC Food and Veterinary Office (hereinafter, FVO) undertook a mission to Turkey to evaluate controls of pesticides in food of plant origin intended for export to the EC. The mission report concludes, *inter alia*, that only few laboratories authorised for pesticide residues analysis for EC export have amitraz in their analytical scope. Furthermore, those laboratories did not test for amitraz' metabolites as required by EC law and the limit of detection does not always reach the EC MRL of 0.05 mg/kg. The report also noted that alternatives to amitraz were available. In relation to this 'negative situation', the Turkish authorities announced their intention to adopt measures against non-complying exporters and to improve laboratory analyses. However, the FVO mission report which clearly identified the problem is not the only surprising background to the newly-

adopted 'emergency measures' on Turkish pears. On 24 July 2009, the EC Commission adopted Regulation (EC) No. 669/2009 implementing Regulation (EC) No. 882/2004 of the European Parliament and of the EC Council as regards the increased level of official controls on imports of certain feed and food of non-animal origin and amending Decision 2006/504/EC. It applies as of 25 January 2010. This regulation aims at enhancing import controls on a number of food items in a bid to counter 'known or emerging risks' of contamination and lists for the first time which products are to come under extra scrutiny. The list also identifies countries of origin that will trigger the enhanced inspections and outlines the potential hazard from them, including Basmati rice from both India and Pakistan (aflatoxins); peanuts from various countries including Argentina, Brazil, Ghana and India (aflatoxins); bananas from the Dominican Republic (pesticide residues); chilli, chilli products, curcama and palm oil for human consumption from 'all third countries' (Sudan dyes); a number of spices from India (aflatoxins); certain vegetables from Turkey for pesticides (methomyl and oxamyl), from Thailand (organo-phosphorus pesticide residues) and, not surprisingly, pears from Turkey for the pesticide amitraz. This regulation lays down rules concerning the increased level of official controls to be carried-out at the points of entry on imports of the food of non-animal origin which is listed. For Turkish pears, the regulation requires a frequency of physical and identity checks of 10 per cent, exactly the frequency established in the 'emergency measures'.

To be reassured that the EC Commission is aware of the problem, Commission Regulation (EC) No. 901/2009 of 28 September 2009 concerning the coordinated multiannual control programme for 2010, 2011 and 2012 to ensure compliance with maximum levels of and to assess the consumer exposure to pesticide residues in and on food of plant and animal origin, states that EC Member States shall take and analyse samples for certain product/pesticide residue combinations including amitraz and its metabolites in pears. According to Eurostat data for 2007, with about 430,000 tonnes of vegetables and 690,000 tonnes of fruit, Turkey was the second largest exporter of fruits and vegetables to the EC. This figure includes 5,900 tonnes of apples, pears and quinces. The Turkish General Directorate for Protection and Control under the Ministry of Agriculture and Rural Affairs informs that pears are grown on 21,000 hectares. Therefore, exports of fruits and vegetables, and pears in particular, are of significant importance for the Turkish economy. Traders of this commodity are advised to control their suppliers and ensure that amitraz is no longer used or used according to Good Agricultural Practices GAP. In addition, as the emergency measures will be reviewed on a fortnightly basis, they should also regularly test and cooperate with the authorities to address the problem. It is difficult to assess whether high MRLs of amitraz in pears are more dangerous (and thus require emergency measures) than high MRLs in other food products. From a mere trade perspective, the hope is that the discretion which seems to be enjoyed by EC authorities is used with the sole objective of the protection of consumers and not also to pursue a trade protectionist agenda.

## The changes to EC trade policy after the Lisbon Treaty enters into force

Following the signature of the Czech President Vaclav Klaus on 3 November 2009, the Lisbon Treaty now stands to enter into force on 1 December 2009. The Lisbon Treaty will re-shape the institutional landscape by, *inter alia*, merging the three pillars of the European Union (hereinafter, 'the EU') together, providing for a more stable presidency of the EU Council for a duration of two and a half years and giving more powers to the European Parliament.

On 26 June 2007, after a two year reflection period following the failure of the Constitutional Treaty, the EC Council provided the mandate for the Inter-Governmental Conference to draw up a Reform Treaty that would amend the Treaty on the European Union and the Treaty Establishing the European Community (which is called now 'Treaty on the Functioning of the Union'). As of the entry into force of the Lisbon Treaty, the EU will have legal personality and the word 'Community' will be replaced by 'Union' throughout all the treaties. This has as the consequence that the EU will be able to be part of an international convention or be a member of an international organisation (currently, for instance, it is the 'European Communities' that are formally a WTO Member).

The Lisbon Treaty brings about a number of changes in the area of external trade policy of the EU. In particular, the external trade policy is brought under the same heading of external action by the EU, which includes foreign and security policy, the common security and defence policy, humanitarian aid and international agreements. This means that the external trade policy shall be conducted in the context of the principles and objectives of the EU external action.

The scope of the common commercial policy will include, inter alia, in addition to policies affecting trade in goods, policies relating to trade in services, the commercial aspects of intellectual property and foreign direct investment. These sectors are now brought under the exclusive competence of the EU. The EU Council will decide by qualified majority, with few exceptions where unanimity will be required. In particular, unanimity will still be required for the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, where such agreements include provisions for which unanimity is required for the adoption of internal rules. In addition, unanimity will be required, in certain cases, for the negotiation and conclusion of agreements in the field of trade in cultural and audiovisual services and in the field of trade in social, education and health services.

In addition, the role of the European Parliament in relation to the adoption of legislation concerning trade issues will increase through the Lisbon Treaty. The European Parliament and the EU Council will co-decide regulations defining the 'framework' for the implementation of the EU external trade policy. Although it is not clear which kind of trade policy acts are included under the concept of 'framework', such term could appear to comprise all regulations affecting trade policies that are currently adopted by the EC Council. In addition, during the trade negotiations, the EU Commission will regularly inform the European Parliament and the negotiated trade agreement can only be concluded by the Council if the European Parliament has given its consent to do so. However, the European Parliament cannot modify or change the negotiated result and, even though it will be consulted before launching multilateral or FTA negotiations, it does not have a final vote in the decision on whether to launch such negotiations.

Whereas the EU stands to increase its competences, the Parliament will be more involved in matters concerning trade policy. Although the concrete extent of such involvement remains to be further examined, European industries and the business sector should consider the Parliament's role when drawing up their strategies aimed at influencing policy makers and at achieving a balanced outcome of trade negotiations.

## Recently Adopted EC Legislation:

- *Commission Regulation (EC) No. 1051/2009 of 3 November 2009 concerning the classification of certain goods in the Combined Nomenclature*

- *Commission Decision of 30 October 2009 authorising the placing on the market of products containing, consisting of, or produced from genetically modified maize MON 89034 (MON-89Ø34-3) pursuant to Regulation (EC) No. 1829/2003 of the European Parliament and of the Council (notified under document C(2009) 8383)*

- *Commission Decision of 30 October 2009 authorising the placing on the market of products containing, consisting of, or produced from genetically modified maize MON 88017 (MON-88Ø17-3) pursuant to Regulation (EC) No. 1829/2003 of the European Parliament and of the Council (notified under document C(2009) 8384)*

- *Commission Decision of 30 October 2009 authorising the placing on the market of products containing, consisting of, or produced from genetically modified maize 59122xNK603 (DAS-59122-7xMON-ØØ6Ø3-6) pursuant to Regulation (EC) No. 1829/2003 of the European Parliament and of the Council (notified under document C(2009) 8386)*

- *Commission Decision of 29 October 2009 amending Decision 2002/994/EC concerning certain protective measures with regard to the products of animal origin imported from China (notified under document C(2009) 8243)*

- *Commission Regulation (EC) No. 1050/2009 of 28 October 2009 amending Annexes II and III to Regulation (EC) No. 396/2005 of the European Parliament and of the Council as regards maximum residue levels for azoxystrobin, acetamiprid, clomazone, cyflufenamid, emamectin benzoate, famoxadone, fenbutatin oxide, flufenoxuron, fluopicolide, indoxacarb, ioxynil, mepanipyrim, prothioconazole, pyridalyl, thiacloprid and trifloxystrobin in or on certain products*

- *Council Regulation (EC) No. 1061/2009 of 19 October 2009 establishing common rules for exports*

- *Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products*

FratiniVergano specializes in European and international law, notably WTO and EC trade law, EC agricultural and food law, EC competition and internal market law, EC regulation and public affairs. For more information, please contact us at:

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