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Argentina, Brazil and India are contemplating a WTO challenge of the EU's REACH Regulation

It appears that India is exploring, together with Argentina and Brazil, the possibility of challenging EU's Regulation (EC) No. 1907/2006 of the European Parliament and of the EU Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (hereinafter, REACH), which entered into force on 1 July 2007.

The REACH Regulation replaced over 40 scattered directives and regulations concerning the treatment of chemical substances and mixtures on the European market. It requires companies that manufacture or import chemical substances to make a risk assessment of their manufacture and use. Under the REACH Regulation, it is up to such players to take the necessary measures to manage the risks. Therefore, the REACH Regulation establishes a system of self-assessment, reversing the burden of proof from public authorities to the industry for ensuring the safety of chemicals. REACH covers chemical substances, on their own, in preparations or in articles (except those that are explicitly excluded in Article 2). It concerns the manufacture, importation, placing on the market and the use of such substances.

The REACH Regulation requires that chemical substances, manufactured or imported for more than one tonne per year, be registered in a central database. This procedure calls for companies to provide relevant information about the substance and its use. The registration started in June 2008. Special transitional rules are foreseen for so called 'phase-in substances' (*e.g.*, substances listed in the European Inventory of Existing Commercial Chemical Substances (EINECS)), that were pre-registered before December 2009. For such phase-in substances, the regulation provides for different registration deadlines. They are determined to be on 1 December 2010 for all substances that are manufactured or imported for more than 1000 tonne per year, CMR (*i.e.*, carcinogens, mutagens and reproductive toxins) substances or very aquatic toxic substances; 1 June 2013 for substances manufactured or imported for more than 100, but less than 1000 tonnes per year; and 1 June 2018 manufactured or imported for more than one tonne, but less than 100 tonnes per year.

The registration is subject to evaluation. In particular, the European Chemicals Agency carries-out a 'dossier evaluation' concerning the testing proposals made by the industry and the compliance with the registration requirements. In addition, the European Chemicals Agency conducts a 'substance evaluation'. If substances are found to possess properties of very high concern, they will be made subject to authorisation, which goes through different phases. Firstly, a list of candidate substances of very high concern for authorisation is published, on which the EU Commission ultimately decides. Substances of very high concern are, *inter alia*, CMRs, PBTs (*i.e.*, persistent, bioaccumulative and toxic substances) and vPvBS (*i.e.*, very persistent and very bioaccumulative substances). Subsequently, the applicants for authorisation of such substances have to show that the risks associated with their use are adequately controlled or are outweighed by socio-economic benefits. In addition, applicants have to provide an analysis of whether there are safer alternative substances or technologies. If this is the case, applicants have to prepare substitution plans. If not, applicants have to provide information on research and development activities. This process can either lead to the authorisation of a substance or to a restriction or prohibition on the manufacture, the placing on the market or the use of certain dangerous

substances. The EU Commission may amend or withdraw the authorisation on review if substitutes have become available.

Argentina, Brazil and India appear to consider REACH requirements as restricting trade and leading to increased costs of exports to the EU. In fact, according to the regulation, only EU companies can get access to the registration procedure for chemical substances. Therefore, to be able to have their substances registered, non-EU companies have to either rely on the importer or designate an 'only representative' that will act on their behalf. The fact that no direct access to the registration system is granted to non-EU companies could be seen as a violation of the national treatment provision under Article 2.1 of the WTO Agreement on Technical Barriers to Trade (hereinafter, TBT Agreement) under which, in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like domestic products. In addition, the information that has to accompany the application for registration (*i.e.*, a substantive technical dossier and a chemical safety report) requires time and effort to be gathered. Under Article 2.2 of the TBT Agreement, such requirements have to be assessed carefully to make sure that they are not more trade restrictive than necessary to fulfil the legitimate objective of the REACH Regulation, taking into account that non-fulfilment would lead to a ban of the substance on the European market. Legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; the protection of human health or safety, animal or plant life or health, or the environment. The EU established in the regulation that such measures were taken for the protection of human health and the environment.

Non-EU exporters of chemical substances need to familiarise themselves with which substances are considered to be of very high concern and therefore linked to stringent registration requirements. The requirements established by the REACH regulation are (*per se*) technical barriers to trade, which are WTO-consistent to the extent that they are proportionate to the legitimate objectives they intend to fulfil. The legitimacy of the objectives of the REACH Regulation is difficult to challenge. However, the regulation appears to put non-EU businesses at a disadvantageous position *vis-à-vis* EU companies. In fact, non-EU operators must face all additional costs related to the impossibility of directly accessing the registration system. If they want to comply with the regulation and avoid a ban, non-EU companies have to either rely on third parties (*i.e.*, the importer or the designated 'only representative') to register their substances or set up an establishment in the EU. Both options imply additional costs. To this, it must be added that non-EU operators may be reluctant to share information, which can be of a proprietary and/or confidential nature, with importers or other companies acting as representatives. A WTO case could clarify the interpretation of the requirements of the TBT Agreement as applied to the REACH Regulation.

French initiative towards a 'GMO-free' labelling of foodstuffs

The *Haut Conseil des Biotechnologies*, the French government's advisory council on biotechnology, has made recommendations for a voluntary GMO-free labelling system which may become French law in 2010. Current EU food labelling law does not provide for requirements for a 'GMO-free' labelling of foodstuffs. It only sets out when products do have to be labelled as 'containing GMOs'.

Food must carry a label which refers to the presence of GMOs. This is established in Section 2 of Regulation (EC) No. 1829/2003 on genetically modified food and feed. In the case of pre-packaged products consisting of, or containing, GMOs, the list of ingredients must indicate 'genetically modified' or 'produced from genetically modified [name of the organism]'. In the case of products without packaging, these words must still be clearly displayed in close proximity to the product (such as on a note on the supermarket shelf).

However, these labelling requirements do not apply to foods containing material which contains, consists of or is produced from GMOs in a proportion no higher than 0.9% of the food ingredients considered individually or food consisting of a single ingredient, provided that this presence is adventitious or technically unavoidable (Article 12 (2) of Regulation (EC) No. 1829/2003 on genetically modified food and feed). In order to establish that the presence of this material is adventitious or technically unavoidable, operators must be in a position to supply evidence to satisfy the competent authorities that they have taken appropriate steps to avoid the presence of such material. Furthermore, the labelling requirements do not apply to products or their ingredients produced 'with the help of' GMOs (for example ingredients produced with the help of processing aids such as GM enzymes must not be declared as such - bakery products produced with the help of amylase) or to meat and dairy products of animals fed with GM feed.

As to the 0.9% threshold, Regulation (EC) No. 1829/2003 provides that, despite the fact that some operators avoid using genetically modified food and feed, such material may be present in minute traces in conventional food and feed as a result of adventitious or technically unavoidable presence during seed production, cultivation, harvest, transport or processing. In such cases, this food or feed should not be subject to the labelling requirements. In order to achieve this objective, a threshold should be established for the adventitious or technically unavoidable presence of genetically modified material in foods or feed.

French Law (*LOI n. 2008-595 du 25 juin 2008 relative aux organismes génétiquement modifiés*) guarantees the freedom to consume and to produce with or without GMOs (*«liberté de consommer et de produire avec ou sans OGM»*). The French *Haut Conseil des Biotechnologies* now recommends a threshold of less than 0.1% for genetically modified material (GM ADN) in plant products and animal products which could then be labelled as 'GMO-free', or in the case of animal products as 'fed with GMO-free feed' or 'derived from animals fed without GM feed', and honey as 'biotech-free'. The *Haut Conseil* expressed that setting a '*technically achievable and socially acceptable'* threshold would benefit both food manufacturers and producers that take steps to avoid GM ingredients, while giving consumers the information necessary to choose GMO-free products. The council has also suggested a label for those products in the *"grey area"* that contain between 0.1% and 0.9% GM ingredients and it has invited comments to determine how such a label could best be worded.

This French initiative raises a number of questions. In the absence of an EU-wide harmonisation, the principle of free movement of goods provides that products which can be marketed freely in one EU Member State can freely circulate within the EU. Will, for example, the German authorities accept French products labelled as 'GM-free' although they contain 0.1% GM material?

The aim of the French initiative is to facilitate consumers' choice. But is there not a risk of consumers being misled by diverging national requirements for a 'GM-free' labelling? A consumer may also ask himself whether products which are not labelled as 'GM free' automatically contain GMOs. Article 2 of Directive (EC) No. 2000/13 of the European Parliament and of the EC Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs provides that labelling must not mislead the purchaser as to the characteristics of the foodstuff and among other things, in particular, as to its nature, identity, properties, composition, method of production and manufacturing.

Although the French initiative seems to have been welcomed by the food industry, an EU-wide regulation appears to be preferable in order to avoid disparities in the internal market and to avoid the risk that consumers are misled.

EU Commission proposes a 15 months extension for anti-dumping duties on Chinese and Vietnamese footwear

On 30 November 2009, the EU Commission submitted a proposal to the EU Council extending the imposition of definitive anti-dumping duties on imports of certain footwear with uppers of leather originating in Vietnam and China for 15 more months. The levels of duties proposed are the same as those in force under the definitive duties, ranging from 9.7% (for the company Golden Step, subject to an individual rate) and 16.5% for imports from China and set at 10% for imports from Vietnam

Definitive duties on imports of Chinese and Vietnamese footwear were originally imposed by the EU Council on 5 October 2006 for an initial period of two years. An expiry review was initiated on 7 October 2008 upon request by the European Confederation of the Footwear Industry (see Trade Perspectives, Issue No. 20 of 30 October 2009). As the outcome of the review revealed that there is likelihood that injurious dumping will continue after the expiry of the duties, the EU Commission has submitted a proposal to the EU Council for the extension of the imposition of duties on footwear products from China and Vietnam.

The purpose of the expiry reviews is to find whether the expiry of the anti-dumping measures would likely lead to a continuation or recurrence of dumping and injury. According to the EC Anti-dumping Regulation, the likelihood of the continuation or recurrence of dumping and injury may be determined by (i) evidence of continued dumping and injury; (ii) evidence that the removal of injury is partly or solely due to the existence of the measures; or (iii) evidence that the circumstances of the exporters or market conditions are such that they would indicate the likelihood of further injurious dumping. The investigation revealed, *inter alia*, that exports of footwear from both China and Vietnam have continued to be made at dumped prices throughout the investigation period used for the review (*i.e.*, 1 July 2007 to 30 June 2008, when the original duties were in place). In addition, following an assessment based on the expected prices and volumes of imports, the EU Commission concluded that, should the measure lapse, imports would continue to enter the EU market in large volumes and be sold at dumped prices. Evidence was provided by an assessment of factors such as the relative level of prices, the availability of spare capacities, circumvention practices and the ability to switch from the production of other footwear products to the product concerned. On injury, the investigation revealed that, albeit a partial recovery of the Community industry, injury was not totally removed, continued in the investigation period of the review and was likely to continue for short/medium term, until the Community industry's adjustment process would be completed. As the likelihood of the continuation of injury was found only until such process is completed, the duration of the extended measures will be limited to 15 months, instead of the five years allowed by the EU Anti-dumping Regulation.

Strong divisions among EU Member States remain in relation to the extension of anti-dumping duties on footwear. When the Anti-dumping Committee was first consulted on 19 November 2009, a majority of 15 EU Member States (out of 27) opposed the Commission's proposal. However, at the following meeting of 3 December, with the abstention of Austria, Germany and Malta, the Commission's proposal was endorsed by the Anti-dumping Committee. Although the opinion of the Anti-dumping Committee is not binding, because it is composed of representatives of EU Member States, its vote will give indication of the outcome of the vote at the EU Council, which ultimately has to adopt the Commission's proposal on 22 December 2009. The change in the position of Austria, Germany and Malta was probably the result of intense lobbying by the Community industry and the EU Member States sponsoring the European manufacturers. The new duties will have to enter into force as of 3 January 2010.

The extension of the duties might attract further challenge from Chinese and Vietnamese exporters before the European Courts, or, through their Governments, litigation at the WTO level. On 9 December 2009, the EC General Court (first instance) issued a judgment rejecting claims from Chinese exporters of footwear challenging the original EU Council regulation imposing the definitive anti-dumping duties.

The Byrd amendment still lingers around

Reports indicate that on 4 December 2009, La-Z-Boy, a US manufacturer of furniture, has received 3 million USD to offset injury caused by dumping from Chinese exporters of wooden bedroom furniture.

Such payments are issued under the US Continued Dumping and Subsidy Offset Act of 28 October 2000 (hereinafter, the Offset Act), which amends Title VII of the US Tariff Act of 1930, better known as the 'Byrd amendment'. The Offset Act required duties assessed pursuant to a countervailing duty order, an anti-dumping duty order, or a finding under the Antidumping Act of 1921, to be distributed on an annual basis to the affected domestic producers for 'qualifying expenditures'. In practice, US Customs collected the anti-dumping duties and placed them into special accounts, which were opened for each anti-dumping or anti-subsidy procedure. At the end of each fiscal year, the money was distributed among those domestic producers participating in proceedings that were terminated with the imposition of duties.

In 2001, upon request from Australia, Brazil, Canada, Chile, the EU, India, Indonesia, Japan, Korea, Mexico and Thailand, a WTO panel ruled that such payments were in violation of the US obligations under the WTO Agreements. The finding was confirmed by the Appellate Body in 2003. In particular, the WTO panel and the Appellate Body ruled that the US violated the GATT, the WTO Agreement on Implementation of Article VI of the GATT and the WTO Agreement on Subsidies and Countervailing Measures as the payments of the duties to the affected domestic producers constituted a non-permissible 'specific action' against dumping or a subsidy. Finally, on 8 February 2006, the Offset Act was repealed by the Deficit Reduction Omnibus Reconciliation Act.

However, the repeal did not have an immediate effect. In fact, it is effective only in relation to duties paid after 30 September 2007. The reason why US affected domestic producers still receive payments pursuant to the Offset Act provisions has to be found in the fact that all duties on entries of goods made and filed before 1 October 2007 are still distributed as if the Offset Act had never been repealed. Such delay can be explained by the fact that the processing of these duties is still trapped in domestic proceedings. It is expected that the effects of the Offset Act will gradually disappear. However, as this is not yet the case, the EU announced on 28 April 2009 that it would extend the suspension of concessions and other obligations under the GATT in accordance with the decision of the Arbitrator (pursuant to Article 22.6 of the WTO Dispute Settlement Understanding), circulated on 31 August 2004. Japan equally announced such extension of countermeasures on 18 August 2009.

These payments provide a competitive advantage to US manufacturers as they constitute a revenue stream, and arguably subsidies, which may continue for several more years. It is not only the La-Z-Boy company that will receive such payments. According to the list concerning the 'Preliminary Continued Dumping and Subsidy Offset Act Amounts Available as of 30/04/2009' for the fiscal year of 2009, close to 200 cases are still active under the Offset Act.

Recently Adopted EC Legislation

- *Council implementing Regulation (EU) No. 1202/2009 of 7 December 2009 imposing a definitive anti-dumping duty on imports of furfuryl alcohol originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EC) No. 384/96*

- *Commission Regulation (EC) No. 1167/2009 of 30 November 2009 refusing to authorise certain health claims made on foods and referring to the reduction of disease risk and to children's development and health*

- *Commission Regulation (EC) No. 1168/2009 of 30 November 2009 refusing to authorise a health claim made on foods, other than those referring to the reduction of disease risk and to children's development and health*

- *Commission Regulation (EC) No. 1170/2009 of 30 November 2009 amending Directive 2002/46/EC of the European Parliament and of Council and Regulation (EC) No 1925/2006 of the European Parliament and of the Council as regards the lists of vitamin and minerals and their forms that can be added to foods, including food supplements*

- *Commission Decision of 30 November 2009 granting certain parties an exemption from the extension to certain bicycle parts of the anti-dumping duty on bicycles originating in the People's Republic of China imposed by Council Regulation (EEC) No. 2474/93, last maintained and amended by Regulation (EC) No. 1095/2005, and lifting the suspension of the payment of the anti-dumping duty extended to certain bicycle parts originating in the People's Republic of China granted to certain parties pursuant to Commission Regulation (EC) No. 88/97 (notified under document C(2009) 9406)*

- *Commission Regulation (EC) No. 1194/2009 of 30 November 2009 amending Regulation (EC) No. 1702/2003 laying down implementing rules for the airworthiness and environmental certification of aircraft and related products, parts and appliances as well as for certification of design and production organizations*

- *Council Regulation (EC) No. 1186/2009 of 16 November 2009 setting up a Community system of reliefs from customs duty*

- *Council Decision of 5 May 2009 on the signature and provisional application of the Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the SADC EPA States, of the other part*