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Mexico files a request for WTO consultations concerning China's textiles subsidies

On 15 October 2012, Mexico requested consultations with China concerning several measures supporting Chinese production and exportation of textile and clothing products. The measures consist of, *inter alia*, exemptions and reductions from income tax, value-added tax and municipal taxes; the provision of goods and services that are not of general infrastructure (such as land, electricity, and raw materials for example cotton and polyester, under preferential terms); as well as cash payments from government agencies. In Mexico's view, these measures are inconsistent with China's obligations under the WTO, as they appear to involve both prohibited and actionable subsidies. Mexico alleges that the measures are contingent upon export performance or the use of domestic over imported goods, which are prohibited schemes under WTO rules, and that other measures, even if not expressly prohibited, are causing adverse effects to its interests.

It is not the first time that goods in the textile and clothing sector are at the centre of trade frictions between the two countries, considering the commercial significance of this industry for the two trading partners. A number of Chinese goods in the textile and clothing sector were subject to anti-dumping duties in Mexico for many years before China's accession to the WTO. Under the terms of China's Protocol of Accession to the WTO, Mexico reserved the right to continue imposing anti-dumping measures on a range of Chinese products, including textiles and clothing products, for 6 years following China's accession to the WTO, without having to abide by the provisions of either the WTO or China's Protocol of Accession. During the 6 years reservation period, Mexico had eliminated anti-dumping measures on certain products and initiated administrative reviews of the remaining products. The termination of this clause was then agreed in the '*Transitional Agreement on Trade Remedies between People's Republic of China and the United States of Mexico*', signed on June 1st, 2008 in Arequipa, Peru, which allowed Mexico to maintain duties on textile and clothing products until December 2011.

In its request for consultations, Mexico indicated a wide range of measures allegedly constituting both prohibited and actionable subsidies within the meaning of the WTO Agreement on Subsidies and Countervailing Measures (hereinafter the ASCM). Prohibited subsidies under the ASCM are those which are: (i) contingent upon export; or (ii) contingent upon the use of domestic over imported goods. According to Mexico's request for consultations, China currently maintains both types of measures to the benefit of its domestic producers and exporters. For these types of subsidies, Article 4 of the ASCM provides for a set of specific remedies. These include, *inter alia*: special or additional procedural rules with shortened time limits for panel and Appellate Body proceedings and a provision on the immediate establishment of the panel. According to these rules, where the measure at stake is found to be a prohibited subsidy, the WTO Member maintaining such measure shall withdraw it without delay. Mexico's request also includes a number of support schemes to Chinese producers allegedly causing serious prejudice to its interests, and therefore '*actionable*' under WTO rules. In particular, Mexico claims that these alleged

subsidies are causing, *inter alia*, trade displacement of its exports to the US, within the meaning of Article 6.3(b) and (c), 6.4 and 6.5 of the ASCM. Indeed, Chinese and Mexican exporters of textile products compete in international markets, particularly in the US, where China has become the leading provider of textile products. Mexico is seeking to consolidate its position as an exporter of these products, mainly to the US. Lastly, Mexico also claims that some of the measures maintained by China related to cotton are inconsistent with its commitments under the WTO Agreement on Agriculture.

In accordance with Article 4 of the WTO Dispute Settlement Understanding, the aim of the consultations is for the two WTO Members to try to reach a mutually satisfactory solution. However, if the parties are unable to resolve the dispute at the consultations stage Mexico, as the complaining party, is entitled to request the establishment of a panel for the further resolution of the controversy. If a WTO panel were to find that China is indeed illegally subsidising its textile industry, it would request China to withdraw its measures. If China were then to fail to do so, Mexico could obtain authorisation from WTO Members to apply countermeasures, in the form of suspensions of commercial concessions against China. This dispute stands to have a significant impact not only for Mexican producers and exporters of textile and clothing products, but also for third countries' producers and exporters competing with Chinese products, and should be carefully monitored by all businesses in the textile and clothing sector.

The EU Commission reportedly found no evidence of subsidy or dumping in bioethanol from the US

Informed sources have declared that the EU will likely close ongoing anti-subsidy and anti-dumping investigations on bioethanol imports from the US, on the grounds that no evidence of such imports being either subsidised or dumped has been found. These investigations were initiated on 25 November 2011, after the European Producers Union of Renewable Ethanol Association (hereinafter, ePURE) lodged a complaint requesting the EU Commission to investigate whether bioethanol originating in the US and imported into the EU was benefiting from illegal subsidies and/or was being dumped. The complaint brought by ePURE provided *prima facie* evidence that the volume and prices of bioethanol originating in the US and imported into the EU had a negative impact on the EU industry, and resulted in '*substantial adverse effects on the overall performance and financial situation*' thereof.

In its complaint, ePURE alleged that US producers of bioethanol benefited from a subsidy scheme at both federal and state level. The complainant alleged that the federal support scheme envisaged tax credit measures for the production and sale of bioethanol in the form of either (i) excise tax credits, or (ii) income tax credits. In particular, the '*Volumetric Ethanol Excise Tax Credit*' (hereinafter, VEETC) was a scheme consisting of a tax credit of 45 USD cents per gallon of pure ethanol blended with gasoline (for further background on the VEETC, see Trade Perspectives, Issue No. 23 of 20 December 2010), which was in force until the end of 2011. The bioethanol support scheme also included the '*Small Ethanol Producer Tax Credit*', which envisaged a tax credit of 10 USD cents per gallon of ethanol produced. Pursuant to Article 10 of *Council Regulation (EC) No. 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community*, the EU Commission launched an anti-subsidy investigation aimed at establishing whether 1) the bioethanol imports from the US benefited from a countervailable subsidy; 2) the EU industry suffered injury; 3) there was a causal link between the injury and the subsidised imports; and 4) the imposition of countervailing duties was not against the interests of the EU.

In light of the *interim* conclusions of the anti-subsidy investigation at issue, which were only disclosed to interested parties, the EU Commission published on 23 August 2012

Commission Regulation (EU) No. 771/2012 of 23 August 2012 making imports of bioethanol originating in the United States of America subject to registration in application of Article 24(5) of Council Regulation (EC) No. 597/2009 on protection against subsidised imports from countries not members of the European Community, which provides for the registration at customs, as of 24 August 2012 and for a period of nine months, of all imports of US bioethanol into the EU. The purpose of such measure is to ensure that, in the event that the US reintroduces the subsidy scheme (found to be no longer conferring a benefit at the time of the investigation, and therefore not giving rise to the imposition of '*provisional*' countervailing duties) the '*provisional*' countervailing duty would apply, with retroactive effects, to those registered imports.

In addition, ePURE also claimed that the EU bioethanol industry was suffering the adverse effects of the imports of bioethanol from the US being dumped. In accordance with Article 5 of *Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community* (*i.e.*, the EU basic Anti-dumping Regulation), the EU Commission opened an anti-dumping investigation aimed at determining whether 1) US bioethanol exporting producers engaged in dumping; 2) the EU industry suffered material injury; 3) there was a causal link between the dumping and the injury found; and 4) the imposition of anti-dumping measures would not be against the EU's interests. In this regard, the aforementioned informed sources maintain that the EU Commission's investigation has not found conclusive data that US exports of bioethanol were '*made at dumped prices*' and that the investigation is to terminate without the imposition of any '*provisional*' anti-dumping duties.

The EU currently maintains countervailing and anti-dumping duties on biodiesel imports from the US (since July 2009) and Canada (since May 2011), and is conducting an anti-dumping investigation on imports of biodiesel from Argentina and Indonesia. This latter investigation has been initiated on the basis of the alleged prejudice claimed by the EU industry by reason of export taxes maintained by these two countries on raw materials used to produce biofuels. Furthermore, earlier this year Brazil announced the launch of a subsidies programme to support its domestic production of ethanol, which will undoubtedly contribute to further complicate and distort the already complex situation in the sphere of international trade of biofuels. Companies operating in the sector of biofuels are advised to monitor these developments as they stand to have repercussions on the competition among the various biofuels on the EU market.

EU General Court confirms decision of the OHIM and finds likelihood of confusion between BIMBO DOUGHNUTS and earlier DOGHNUTS mark

In its judgment of 10 October 2012, in Case T-569/10 Bimbo SA v Office for Harmonisation in the Internal Market (hereinafter, OHIM), the EU General Court established that there is a likelihood of confusion between the proposed Community trade mark for BIMBO DOUGHNUTS and an earlier Spanish mark for DOGHNUTS, both for pastry and bakery products.

On 25 May 2006, Bimbo SA, the Spanish subsidiary of the Mexican Bimbo Group, one of the world's largest baking companies, filed an application for registration of a Community trade mark (*i.e.*, for the word sign BIMBO DOUGHNUTS) with the OHIM under *Council Regulation (EC) No. 40/94 of on the Community trade mark* (replaced in the meantime by *Council Regulation (EC) No. 207/2009 on the Community trade mark*). The goods for which registration was sought are in Class 30 of the *Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks* of 15 June 1957, as revised and amended, and include the following: '*pastry and bakery products, specially doughnuts*'. After Bimbo SA's Community trade mark application was published in

the Community Trade Marks Bulletin, the Spanish company Panrico SL (now Panrico SA) filed a notice of opposition pursuant to Article 42 of Regulation No. 40/94 (now Article 41 of Regulation No. 207/2009) to the registration of the mark applied for, on the basis of a number of earlier Spanish and international word and figurative trademarks, in particular, the Spanish word mark DOGHNUTS, registered on 18 June 1994 for goods within Class 30 (including '*round-shaped dough biscuits*').

After the OHIM's Opposition Division allowed the opposition and refused the application for registration of a Community trade mark, Bimbo SA filed an appeal against the decision of the Opposition Division with OHIM, under Articles 58 to 64 of *Regulation (EC) No. 207/2009*. The appeal was dismissed by OHIM's Fourth Board of Appeal, merely comparing the trade mark applied for with the earlier Spanish word mark DOGHNUTS and concluding on that basis that there was a likelihood of confusion within the meaning of Article 8(1)(b) of *Regulation (EC) No. 207/2009*. In particular, the Board of Appeal noted that '*doughnut*' was an English word meaning a '*ring-shaped small spongy cake made of dough*', which does not exist in Spanish, where its equivalents are '*dónut*' or '*rosquilla*'. The Court of Appeal held that, for the average Spanish consumer (excluding those who speak English), the word '*doughnut*' did not describe the goods in question or their qualities and did not have any particular connotation in relation to them. Both terms DOUGHNUT and DOGHNUT would be perceived as a foreign or fantasy term by most consumers. Taking account of the average distinctiveness of the earlier trade mark, the Board of Appeal concluded that, owing to the average degree of visual and phonetic similarity between the signs, there was a likelihood of confusion on the part of the relevant consumers for all the goods at issue, which were found to be identical.

As provided in Article 8(1)(b) of *Regulation (EC) No. 207/2009*, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for is not to be registered if, because of its identity with, or similarity to, the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks, there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected. Under Article 8(2)(a)(ii) of *Regulation (EC) No. 207/2009*, earlier trademarks include trademarks registered in an EU Member State with a date of application for registration which is earlier than the date of application for registration of the Community trade mark.

This judgment is relevant for a number of reasons. The EU General Court confirmed its case-law, that the risk that the public might believe that the goods or services in question come from the same undertaking or from economically-linked undertakings constitutes a likelihood of confusion. According to that same jurisprudence, the likelihood of confusion must be assessed globally, according to the relevant public's perception of the signs and goods or services concerned and taking into account all factors relevant to the circumstances of the case, in particular the interdependence between the similarity of the signs and that of the goods or services designated. The EU General Court confirmed the decision of the OHIM's Board of Appeal in that the goods concerned were everyday products and that the relevant public thus consisted of average consumers, and that since the earlier trade mark was a Spanish mark, the likelihood of confusion had to be assessed by reference to the Spanish public.

The applicant, Bimbo SA, argued that the word '*doghnuts*' is descriptive and devoid of distinctive character. In that regard, the EU General Court noted that the word '*doghnuts*', like '*doughnuts*', has no meaning for the part of the relevant Spanish public, which is not familiar with English and that the word '*doghnuts*' will thus be regarded, like the word '*doughnuts*', as a fanciful or foreign term. Furthermore, the EU General Court observed, in line with its settled jurisprudence, that a finding that the word '*doghnuts*', which comprises the earlier trade mark (*i.e.*, a registered and protected national mark), is descriptive or devoid of distinctive character in relation to the goods in question would not be compatible either

with the coexistence of Community trademarks and national trademarks or with Article 8(1)(b) of *Regulation (EC) No. 207/2009*, read in conjunction with Article 8(2)(a)(ii).

With regard to Bimbo SA's argument that the term '*bimbo*' is the dominant element in the trade mark applied for, the EU General Court confirmed that, according to its case-law, where goods or services are identical there may be a likelihood of confusion on the part of the public where the contested sign is composed by juxtaposing the company name of another party and a registered mark, which has normal distinctiveness and which, without alone determining the overall impression conveyed by the composite sign, still has an independent distinctive role therein. The EU General Court held that there may also be a likelihood of confusion in a case in which the earlier mark is not reproduced identically in the later mark. In the case at stake, the '*doughnuts*' element, which is almost identical to the earlier trade mark (*i.e.*, just a '*u*' has been added), has an independent distinctive role in the mark applied for. Contrary to what Bimbo SA claimed, the EU General Court held that the element is not devoid of distinctive character, but on the contrary has average distinctive character for the part of the relevant public which is not familiar with English. Furthermore, since the '*doughnuts*' element is wholly meaningless for that consumer, the mark applied for (*i.e.*, BIMBO DOUGHNUTS) does not form a unitary whole or a logical unit on its own in which the '*doughnuts*' element would be merged. The part of the relevant public, which is not familiar with English, will not be able to understand the sign at issue as meaning that the goods concerned are doughnuts produced by the undertaking Bimbo or by the proprietor of the trade mark BIMBO.

In conclusion, the Mexican group cannot market BIMBO DOUGHNUTS in the EU. According to reports, the Bimbo Group is intending to appeal the judgment of the EU General Court. Under Article 256(1) of the Treaty on the Functioning of the European Union, decisions given by the General Court may be appealed to the Court of Justice on points of law only. Article 56 of the Statute of the Court of Justice of the European Union establishes that the final decisions of the EU General Court may be appealed before the Court of Justice, within two months of the notification of the decision appealed against.

Reports indicate that negotiations on the International Services Agreement, an initiative of the WTO-linked '*Real Good Friends of Services*' Group, may begin early next year

The '*Real Good Friends of Services*' (hereinafter, RGFS) sub-group of WTO Members met earlier this month to continue discussions on a proposed International Services Agreement (hereinafter, ISA). The group, which includes the EU and the US, as well as Australia, Canada, Chile, Chinese Taipei, Colombia, Hong Kong, Japan, Korea, Mexico, New Zealand, Norway, Pakistan, Switzerland and, most recently, Costa Rica, Israel, Panama, Peru and Turkey, hopes to proceed beyond the impasse of the Doha Round of Multilateral Trade Negotiations in order to lower barriers in what is currently the most dynamic sector of world trade. The group aims both at consolidating and building on the commitments so far entered into by WTO Members through their respective bilateral and regional agreements in the context of a single framework of internationally agreed rules and standards. While the group has stressed that any agreement will need to be comprehensive and substantial, without the '*a priori*' exclusion of any sector or mode of supply, it has been reported that the services sectors of banking, distribution and logistics, energy and environment, telecommunications, insurance, legal, accounting and construction will all benefit from inclusion in this agreement. Negotiations on an ISA could be launched as early as the beginning of next year.

As the discussions are still at the exploratory stage, uncertainties remain on the form and scope of such an agreement, not least as to whether it will be formed within or outside the confines of the WTO. While there are two options available to the group, it is likely that the

pursuing of an agreement in the context of a multi-party free trade agreement, as foreseen in Article V of the WTO General Agreement on Trade in Services (hereinafter, GATS), will be favoured since negotiating an agreement within the confines of the WTO (through a Plurilateral Agreement) would require approval from three fourths of WTO Members, pursuant to Article IX(3) of the Marrakesh Agreement. The structure of the agreement, namely whether it could take the form of either a positive list, where only areas concessions agreed on are included; or a negative list, where services are liberalised unless otherwise specifically provided, also remains to be decided (see Trade Perspectives, Issue No. 10 of 17 May 2012).

It has been reported that, in relation to services Modes 1 to 3 (which cover cross-border supply of services, consumption abroad, and services provided through the commercial presence of a supplier in another territory, respectively) discussions are being held on retaining the existing level of liberalisation and the removal of barriers to establishment. Further discussions are also expected in order to determine whether so-called '*ratchet-in*' or '*stand-still*' clauses will be included. Through the latter, parties would bind existing levels of openness and refrain from creating new obstacles to trade in services by indicating only the existing reservations or limitations to market access and/or national treatment. The former would require that, where a country undertakes autonomous liberalisation in a sector subject to commitments, this treatment would have to be granted to all other participating countries, in addition to becoming permanent. Although the inclusion of such a term would inevitably speed up the negotiation process in that it eliminates any need for re-negotiation, such a clause could discourage countries from later becoming party to the ISA, since the current GATS does not go as far in its regulation of services. It remains to be seen if either clause can be introduced in view of the fact that a clear aim of the RGFS is to encourage other WTO Members to join, with a view to making services agreements more acceptable and multilateral agreements more easily obtainable in the long run. Reports that the ISA will be based on the principles of the GATS appear to support this aim, as do reports that the general consensus is in favour of introducing minimum standards in order to provide parameters for new participants.

Given that the RGFS initiative could provide significant commercial advantages in the area of services to the participating countries, particularly considering that services now represent a key component of both developed and developing economies, it is hoped that this prospective agreement may, in creating a general acceptance of services liberalisation, encourage WTO Members where barriers to trade services remain fairly high, such as Brazil, China, India, South Africa and other developing countries to join negotiations when they begin next year.

Recently Adopted EU Legislation

Market Access

- *Commission Implementing Regulation (EU) No. 947/2012 of 12 October 2012 amending Council Regulation (EC) No. 2368/2002 implementing the Kimberley Process certification scheme for the international trade in rough diamonds*

- *Commission Regulation (EU) No. 932/2012 of 3 October 2012 implementing Directive 2009/125/EC of the European Parliament and of the Council with regard to ecodesign requirements for household tumble driers*

- *Council Decision of 24 September 2012 on the signing, on behalf of the European Union, of the Agreement in the form of an Exchange of Letters between the European Union and the United States of America pursuant to*

Article XXIV:6 and Article XXVIII of the General Agreement on Tariffs and Trade (GATT) 1994 relating to the modification of concessions in the schedules of the Republic of Bulgaria and Romania in the course of their accession to the European Union

Trade Remedies

- *Council Implementing Regulation (EU) No. 924/2012 of 4 October 2012 amending Regulation (EC) No. 91/2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China*

Customs Law

- *Council Decision of 24 September 2012 on the signing, on behalf of the Union, of the Agreement between the European Union and Canada on customs cooperation with respect to matters related to supply chain security*

Food and Agricultural Law

- *Commission Implementing Regulation (EU) No. 957/2012 of 17 October 2012 amending Annex I to Regulation (EU) No. 605/2010 as regards the deletion of the entry for the Netherlands Antilles in the list of third countries from which the introduction into the Union of consignments of raw milk and dairy products is authorised*

- *Commission Implementing Regulation (EU) No. 948/2012 of 15 October 2012 repealing Regulation (EC) No. 1180/2008 establishing a system for the communication of information on certain supplies of beef, veal and pigmeat to the territory of the Russian Federation*

Other

- *Council Decision of 15 October 2012 concerning the signing, on behalf of the Union, of the Agreement between the European Union and the Republic of Cape Verde on facilitating the issue of short-stay visas to citizens of the Republic of Cape Verde and of the European Union*

- *Council Decision of 10 October 2012 on the conclusion of the Agreement between the European Union and the People's Democratic Republic of Algeria on scientific and technological cooperation*

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