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The WTO Appellate Body upholds the panel's ruling in *EC - Fasteners from China*

On 15 July 2011, the WTO Appellate Body issued its final report in the case *European Communities - Definitive Anti-dumping Measures on Certain Iron or Steel Fasteners from China* (hereinafter, *EC - Fasteners from China*). The dispute was initially launched by China with a request for WTO consultations on 31 July 2009. China had claimed, *inter alia*, that Article 9(5) of *Council Regulation (EC) No. 384/96* (hereinafter, the EU Basic Anti-dumping Regulation) is inconsistent with WTO law.

Article 9(5) of the EU Basic Anti-dumping Regulation provides that an anti-dumping duty will normally be determined for each supplier except (i) where it is '*impracticable*' to specify a duty for each supplier; and (ii) where the provisions for non-market economy countries (*i.e.*, countries in which domestic prices are controlled by the State) apply. In these cases, Article 9(5) of the EU Basic Anti-dumping Regulation permits a single '*country-wide*' duty to be applied to all suppliers and imports from that country. However, Article 9(5) allows an individual duty to be specified for producers from non-market economy countries, so long as the producers meet five criteria regarding market-based business practices (*i.e.*, the '*individual treatment test*') set out in that provision. China challenged Article 9(5) of the EU Basic Anti-dumping Regulation regarding the specification of individual and country-wide duties for non-market economy suppliers, including the '*individual treatment test*'. China claimed that this provision violates WTO law both '*as such*' and '*as applied*' to certain iron or steel fasteners imported from China.

The Panel found that, with respect to producers based in WTO Members with non-market economies, Article 9(5) of the EU Basic Anti-dumping Regulation is inconsistent with, *inter alia*, Articles 6.10 and 9.2 of the WTO Anti-dumping Agreement (*i.e.*, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994), Article I:1 of the General Agreement on Tariffs and Trade (GATT), and Article XVI:4 of the WTO Agreement. The Panel first determined that Article 9(5) of the EU Basic Anti-dumping Regulation operates in a manner such that it not only determines whether a non-market economy producer will be subjected to an individual or country-wide duty, but also whether the EU Commission will calculate an individual dumping margin for that producer. The Panel then concluded that Article 9(5) of the EU Basic Anti-dumping Regulation violates the general obligation to calculate individual dumping margins contained in Article 6.10 of the WTO Anti-dumping Agreement, because it conditions the calculation of individual dumping margins, and the imposition of individual duties, on the fulfilment of five criteria contained in Article 9(5) of the EU Basic Anti-dumping Regulation. The Panel also ruled that Article 9(5) of the EU Basic Anti-dumping Regulation is inconsistent with the obligation under Article 9.2 of the WTO Anti-dumping Agreement to '*name the supplier or suppliers of the product*' against which anti-dumping duties are imposed, unless '*it is impracticable to name all these suppliers*'. In addition, the Panel found that Article 9(5) of the EU Basic Anti-dumping

Regulation violates the most-favoured nation principle in Article I:1 of the GATT, as its application would, in certain situations, result in imports of the same product from different WTO Members being treated differently in EU anti-dumping investigations. Moreover, the Panel stated that the EU had acted inconsistently with Article XVI:4 of the WTO Agreement by '*failing to ensure the conformity of its laws, regulations and administrative procedures with its obligations under the relevant Agreements*'. Both China and the EU appealed these findings.

The Appellate Body upheld the Panel's major findings. The Appellate Body agreed with the Panel's findings that Article 9(5) of the EU Basic Anti-dumping Regulation is inconsistent, '*as such*', with Articles 6.10 and 9.2 of the WTO Anti-dumping Agreement because it conditions the determination of individual dumping margins, and the imposition of individual anti-dumping duties, on the fulfilment of the '*individual treatment test*' contained in that provision. The Appellate Body ruled that the '*individual treatment test*' is not capable of determining whether one or more exporters should be deemed a single entity for the purposes of Articles 6.10 and 9.2 of the WTO Anti-dumping Agreement. The Appellate Body further agreed with the Panel that Article 6.10 of the WTO Anti-dumping Agreement requires an investigating authority to calculate individual dumping margins for each foreign exporter or producer, and that Article 9(5) of the EU Basic Anti-dumping Regulation does not fall under any applicable exception to this rule. The Appellate Body did, however, state that '*there may be circumstances where exporters and producers from [non-market economies] may be considered as a single entity*' for the purposes of Article 6.10 and 9.2 of the WTO Anti-dumping Agreement. Yet, the Appellate Body ruled that this '*cannot be presumed*', and it must '*be determined by the investigating authorities on the basis of facts and evidence submitted or gathered in the investigation*'.

The Appellate Body's ruling in *EC - Fasteners from China* has significant implications for EU anti-dumping law and EU industries which may, in the future, seek to have anti-dumping duties imposed against China and other non-market economies. Between 1 January and 30 June 2011, 4 of the 6 new anti-dumping investigations initiated by the EU Commission target imports from China or Belarus, both considered to be non-market economies. Based on the Appellate Body's ruling, the EU may now have to amend Article 9(5) of the EU Basic Anti-dumping Regulation in order to comply with WTO law, and the EU Commission may be reluctant to initiate further anti-dumping investigations against non-market economy countries until the EU Basic Anti-dumping Regulation has been amended. *EC - Fasteners from China* makes clear that in the future the EU Commission will be unable to automatically treat exporters and producers from non-market economy countries not qualifying for individual treatment as a single entity for the purposes of calculating dumping margins and anti-dumping duties. Yet the Appellate Body did, as noted above, recognise that there may nevertheless be situations where exporters and producers from non-market economy countries may be considered to be a single entity for the purpose of determining dumping margins and anti-dumping duties. Commercial parties and traders with an interest in the Chinese market, or a potential vulnerability to Chinese and other non-market economies' exports, should monitor closely the EU's response to the ruling in *EC - Fasteners from China.*

The WTO Dispute Settlement Body establishes a panel to examine measures applied by Canada in its renewable energy sector

At its meeting on 20 July 2011, the WTO Dispute Settlement Body (hereinafter, DSB) established a WTO panel, following Japan's request of 1 June 2011, to examine the WTO consistency of the '*feed-in tariff programme*' applied by the Canadian province of Ontario to renewable sources of energy. The two countries held consultations on 25 October 2010 (see

Trade Perspectives, Issues No. 17 of 24 September 2010 and No. 12 of 17 June 2011 on the trend to increasingly involve the WTO dispute settlement system in disputes concerning subsidies granted to renewable energy industries), which did not result in a mutually satisfactory solution. As a result, the dispute has now been referred to the adjudicative phase of panel proceedings.

'*Feed-in tariff schemes*' are measures employed by countries as part of their efforts to combat climate change and to promote the development and use of renewable sources of energy (see Trade Perspectives, Issue No. 9 of 7 May 2010). They consist of government-fixed, above-the-market price tariffs that grid system operators or utility companies must pay to independent producers as renewable energy is fed into the national electricity grid. The aim of these schemes is to stimulate the production of renewable energy by providing substantial benefits to the operators of installations that generate renewable energy.

Ontario's '*feed-in tariff programme*' couples the benefits of the scheme with a domestic content requirement, by providing long-term contracts to developers of green energy projects, subject to the inclusion of a fixed percentage of goods and services originating in Ontario. It is this aspect of the scheme that Japan is challenging before the WTO. In its request for the establishment of a WTO panel, Japan claimed that the scheme provides prohibited subsidies, discriminates *vis-à-vis* imported equipment for renewable energy generation facilities, and constitutes a trade-related investment measure inconsistent with the GATT (for more details, see Trade Perspectives, Issue No. 12 of 17 June 2011).

Commenting on the panel proceedings, the Ontario Government stated that it is confident that its legislation and the '*feed-in tariff programme*' are consistent with WTO rules, and it added that Ontario's programme is not different from '*feed-in tariffs*' that have been used by several other WTO Members (without, however, specifying what countries and schemes it was referring to). Australia, China, Chinese Taipei, the EU, Honduras, Korea, Norway and the US reserved their third-party rights in the proceedings. Panel proceedings should last no more than nine months from the establishment of the panel. If the report is appealed, the total timeframe indicated by the WTO rules for a WTO dispute is 12 months. However, the actual average timeframe of a WTO dispute at the panel stage is around 14 months.

Canada's (*i.e.*, Ontario's) '*feed-in tariff programme*' is reportedly also likely to be challenged under the North American Free Trade Agreement (hereinafter, NAFTA). It appears, in fact, that a US renewable energy company is threatening legal action against the Canadian Government, alleging that Ontario's green energy programme violates NAFTA rules. The company contends that two of its wind projects were placed at a competitive disadvantage for 20-year power purchase contracts contrary to NAFTA rules, in particular certain provisions in the investment chapter: NAFTA Article 1102, by providing more favourable treatment to a domestic company in like circumstances; NAFTA Article 1103, by providing more favourable treatment to a non-NAFTA party in like circumstances; NAFTA Article 1105, inasmuch as the provincial Government directed the Ontario Power Authority to change the rules for awarding Power Purchase Agreements under the '*feed-in tariff programme*'; and NAFTA Article 1106, by imposing a variety of prohibited Canadian and Ontario content requirements and '*buy local*' performance requirements. The filing of a formal NAFTA Notice of Arbitration (*i.e.*, the second notice which formally initiates the arbitration) is expected after 3 October 2011.

'*Feed-in tariffs*' are currently the world's most widespread national renewable energy policy scheme. However, domestic content requirements, as allegedly applied by Canada's province of Ontario within its '*feed-in tariff programme*', may violate bilateral or multilateral trade agreements. As '*feed-in tariff schemes*' gain popularity in the promotion of green energy, such developments must be monitored closely in order to ensure that, while they achieve the all-important objective of lowering carbon emissions and stimulating the use of

renewable sources of energy, they do not constitute unnecessary barriers to trade, and do not discriminate between imported and domestic products.

The EU adopts a '*technical low level presence*' of non-approved GM material in imported feed

On 24 June 2011, the EU Commission adopted *Regulation (EU) No. 619/2011 laying down the methods of sampling and analysis for the official control of feed as regards presence of genetically modified material for which an authorisation procedure is pending or the authorisation of which has expired* (hereinafter, the Regulation).

The Regulation harmonises sampling and testing controls in EU Member States. Prior to this Regulation, EU food and feed legislation did not provide rules for controlling the presence in feed of material that contains, consists of, or is produced from, genetically modified organisms (GMOs) undergoing EU authorisation, or for which the authorisation has expired. In the absence of such rules, the official laboratories and competent authorities in EU Member States have applied different methods of sampling and different rules for the interpretation of the results of the analytical tests, which may have led to different conclusions as regards the compliance of a product with *Regulation (EC) No. 1829/2003 on genetically modified food and feed*. As a result of this situation, economic operators have been faced with legal uncertainty when importing feed.

Most importantly, the new Regulation defines the Minimum Required Performance Limit (MRPL) as the lowest amount or concentration of GM material in a sample that has to be reliably detected and confirmed by official laboratories. This limit is set at '*0.1% related to mass fraction of GM material in feed',* with a standard deviation less than, or equal to, 25%. Further to a valid EFSA application under Article 17 of Regulation (EC) No. 1829/2003 (or an expired authorisation under Article 20 of Regulation (EC) No. 1829/2003), the Regulation requires that: 1) the GM material is authorised for commercialisation in a non-EU country; 2) it has not been identified by EFSA as having adverse effects (at the level of 0.1%); 3) the quantitative methods of analysis were published by the EU reference laboratory; and 4) certified reference material is available to EU Member States and third parties.

What does this regulatory development mean in practice? GMO admixtures of up to 0.125% (considering the standard deviation) of the mass of feed will be accepted for importation into the EU. FEFAC (*i.e.*, the European Compound Feed Manufacturers' Federation) welcomed the adoption of a '*technical low level presence*' of non-approved GM material in imported feed materials. As an essential supplement for the EU's livestock and feed sector, the EU imports different maize products (4 million tonnes imported in the 2008-09 season) and soybean products (33 million tonnes in soya meal equivalents in the 2008-09 season), mainly from Argentina, Brazil and the US (countries which plant GMOs). However, trade problems resulting from the so-called '*asynchronous approval*' of GM crops in the EU and in key export countries will remain a serious threat to supplies in the EU livestock and feed sectors. Due to the cultivation of new GM crops, which are not currently undergoing the EU authorisation process, feed products derived from these cultures have not yet and may not receive EU approval prior to harvest in Brazil or the US. Therefore, the EU feed sector may soon lose access to maize products from Brazil and the US and possibly to soy products from Brazil. As noted above, the '*technical low level presence*' rule does not apply if these new GM crops have no authorisation procedure pending in the EU.

Another issue is that the '*technical low level presence*' does not apply to imported food. According to the EU Commission, in comparison with other sectors related to the production of foodstuffs, the importation of feed has a higher likelihood of GM presence. However, GM

material may enter the food chain, as it seems that there is not always segregation between the food and feed chains. In order to produce food additives and ingredients, manufacturers may source feed grade raw materials (of, for example, soy or maize origin) from different countries or different markets in producing countries. For companies sourcing in countries where the use of GMOs is widespread, this could lead to unauthorised GM presence in foodstuffs (which would, however, be legal in feed).

The adoption of a '*technical low level presence*' for non-approved GM material in imported feed provides certain sectors with more legal clarity, but it does not resolve the question of the '*asynchronous approval*' of new GM crops, which are not simultaneously approved worldwide. This has an impact on international trade, in particular, when a '*zero tolerance*' policy is applied (as in EU food law), and may result in rejections of imports that contain only traces of such unapproved GM material.

The EU Commission outlines challenges of the next decade in the area of food safety, including environmental sustainability of the food chain

The EU Commissioner responsible for Health and Consumer Policy, Mr. John Dalli, outlined on 13 July 2011 the challenges of the next decade for EU food safety. Besides referring to the recent E-coli crisis and the related crisis management role played by the EU Commission, the Commissioner looked at four areas (*i.e.*, food hygiene, controls, plant health and GMOs) where reviews of the respective regulatory frameworks are planned or already ongoing. Furthermore, other areas of focus of EU food policy will be '*food waste minimisation*' and '*food packaging optimisation*'. Overall, the principle that '*prevention is better than the cure*' shall remain the basis for the entire EU food safety legislative framework.

Further to the review of the EU food hygiene legislation, the EU legislative framework on controls will be subject to changes. To truly deliver a '*farm to fork*' approach in the area of controls, the EU Commission intends to use the review to create a fully integrated approach to official controls across the entire food chain, which would include plant health and seed rules (the rules on animal health and welfare are already covered by food control legislation). In relation to import controls (see also Trade Perspectives, Issue No. 1 of 14 January 2011), the EU review will seek to ensure a more harmonised approach at the EU level. In particular, the EU is seeking to modernise the rules allowing the approval of the specific pre-export checks that a third country carries out on goods prior to their export to the EU. The third area of revision concerns animal and plant health law, while the fourth relates to GMOs. The EU Parliament adopted in first reading on 5 July 2011 the report on the proposal on GMO cultivation (amendment to *Directive 2001/18/EC on the deliberate release into the environment of GMOs*), which allows EU Member States to restrict or prohibit GMO cultivation in part or all of their territory. Now, the EU Council has to take a first-reading position on this report which, *inter alia*, states that EU Member States are granted freedom to restrict or prohibit the cultivation of GMOs on their territory on grounds relating to environmental or other legitimate factors, such as socio-economic impacts. Initially, possible legitimate factors which were discussed included public morality, public order, or ethics (see Trade Perspectives, Issue No. 8 of 21 April 2011).

In the policy area of '*sustainability*', the EU Commission adopted in January 2011 the *EU 2020 Resource Efficiency Flagship*, presenting a strategic framework for a more sustainable and efficient use of natural resources, including food. The EU Commission wants to focus its regulatory initiatives during the next few years on '*food waste minimisation*' and '*food packaging optimisation*', two issues that are linked because optimised food packaging can limit the generation of food waste. Producing and consuming food in a sustainable way, by

means of reducing the environmental impact and improving the food chain's resource efficiency, is clearly a major challenge. Resource efficiency has already been addressed in several of the EU's food chain policies. For example, EU legislation on animal by-products permits some of these to be used for other purposes (rather than being destroyed as waste), such as cosmetics, pharmaceuticals, medical devices and other technical products (*i.e.*, fertilisers, soil improvers, oleo-chemical products, photographic paper coating, *etc.*), energy and bio-fuels. EU feed legislation ensures that by-products of the food industry can be used as feed.

Food packaging has a direct environmental impact because it consumes resources while being manufactured, while being transported, and when it is disposed of. EU legislation regulates the prevention of packaging waste, the re-use of packaging, and the recovery and recycling of packaging waste. There is also EU legislation in place to ensure that materials and articles in contact with food are safe, and to allow the safe recycling of plastic into food contact materials. The EU Commission's priority for improving the sustainability of the food chain is reducing food waste without compromising food safety. Food waste is considered a striking example of inefficient use of resources. According to FAO estimates for the year 2011, about one-third of food produced for human consumption is wasted globally (approximately 1.3 billion tonnes of food waste per year). An EU-funded study estimated that, in Europe alone, about 89 million tonnes of food are wasted each year and that, without additional prevention policies, food waste could be expected to rise in Europe to about 126 million tonnes by 2020.

EU food law and policy is constantly evolving. Ever more so, EU food law and policy is increasingly entangled with an array of other important policies such as environmental sustainability, energy efficiency and security, climate change mitigation, ethics and morals, *etc*. All of these policies inevitably have an impact on trade and look poised to result, at best, in trade distortions, non-tariff barriers and high compliance costs for producers, traders and third countries. Needless to say that many such policies will be developed by the EU and its Member States on the back of legitimate, strong and convincing objectives and arguments. Others, inevitably, may hide or accommodate protectionist stands and be considered by some to be of dubious legitimacy, disproportionate nature, and possibly WTO inconsistent. EU trading partners and operators active in these areas of ongoing and future EU regulation should carefully monitor all legislative proposals and EU initiatives in order to minimise compliance costs and, if need be, activate the necessary instruments to protect their rights.

Recently Adopted EU Legislation

Market Access

- *Commission Implementing Regulation (EU) No. 742/2011 of 27 July 2011 on the issue of licences for importing rice under the tariff quotas opened for the July 2011 subperiod by Regulation (EC) No. 327/98*

- *Commission Implementing Regulation (EU) No. 695/2011 of 19 July 2011 on the issue of import licences and the allocation of import rights for applications lodged during the first seven days of July 2011 under the tariff quotas opened by Regulation (EC) No. 616/2007 for poultrymeat*

- *Commission Implementing Regulation (EU) No. 696/2011 of 19 July 2011 on the issue of import licences for applications submitted in the first seven days of*

July 2011 under the tariff quota for high-quality beef administered by Regulation (EC) No. 620/2009

- *Commission Implementing Regulation (EU) No. 697/2011 of 19 July 2011 on the issue of licences for the import of garlic in the subperiod from 1 September 2011 to 30 November 2011*

- *Commission Implementing Regulation (EU) No. 698/2011 of 19 July 2011 fixing the allocation coefficient for the issuing of import licences applied for from 1 to 7 July 2011 for sugar products under certain tariff quotas and suspending submission of applications for such licences*

- *Council Decision of 18 July 2011 on the signing, on behalf of the Union, of the Agreement between the European Union and New Zealand amending the Agreement on mutual recognition in relation to conformity assessment between the European Community and New Zealand*

Trade Remedies

- *Council Implementing Regulation (EU) No. 723/2011 of 18 July 2011 extending the definitive anti-dumping duty imposed by Regulation (EC) No. 91/2009 on imports of certain iron or steel fasteners originating in the People's Republic of China to imports of certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not*

- *Notice of initiation of a partial interim review of the anti-dumping measures applicable to imports of certain seamless pipes and tubes of iron or steel originating in Ukraine*

- *Notice of initiation of an anti-dumping proceeding concerning imports of tartaric acid originating in the People's Republic of China, limited to one Chinese exporting producer, Hangzhou Bioking Biochemical Engineering Co., Ltd.*

- *Notice of initiation of a partial interim review of the anti-dumping measures applicable to imports of tartaric acid originating in the People's Republic of China*

- *Notice of initiation of an anti-dumping proceeding concerning imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China*

- *Notice of initiation of an expiry review of the anti-dumping measures applicable to imports of lever arch mechanisms originating in the People's Republic of China*

Food and Agricultural Law

- *Commission Implementing Regulation (EU) No. 739/2011 of 27 July 2011 amending Annex I to Regulation (EC) No. 854/2004 of the European Parliament and of the Council laying down specific rules for the organisation of officials controls on products of animal origin intended for human consumption*

- *Commission Implementing Regulation (EU) No. 728/2011 of 25 July 2011 amending the representative prices and additional import duties for certain products in the sugar sector fixed by Regulation (EU) No. 867/2010 for the 2010/11 marketing year*

- *Commission Implementing Regulation (EU) No. 726/2011 of 25 July 2011 amending Implementing Regulation (EU) No. 543/2011 as regards the trigger levels for additional duties on apples*

- *Commission Implementing Regulation (EU) No. 722/2011 of 22 July 2011 amending the representative prices and additional import duties for certain products in the sugar sector fixed by Regulation (EU) No. 867/2010 for the 2010/11 marketing year*

- *Commission Implementing Regulation (EU) No. 711/2011 of 20 July 2011 fixing representative prices in the poultrymeat and egg sectors and for egg albumin, and amending Regulation (EC) No. 1484/95*

- *Commission Implementing Regulation (EU) No. 690/2011 of 18 July 2011 amending the representative prices and additional import duties for certain products in the sugar sector fixed by Regulation (EU) No. 867/2010 for the 2010/11 marketing year*

- *Commission Implementing Regulation (EU) No. 685/2011 of 15 July 2011 amending the representative prices and additional import duties for certain products in the sugar sector fixed by Regulation (EU) No. 867/2010 for the 2010/11 marketing year*

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Please note that Trade Perspectives© will take an editorial break during the WTO's August recess and will resume its fortnightly publication schedule on 9 September 2011. We thank you for your continued interest in Trade Perspectives© and look forward to starting again with renewed energy and enthusiasm our dialogues on international trade as of this Fall.

The Trade Perspectives© Team

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