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The WTO panel in the dispute *US – Poultry Imports from China* issued its report

On 29 September 2010, the WTO panel in the dispute on *US - Poultry Imports from China* issued its report. The panel upheld China's claims concluding that the prohibition of the use of funds by the US Government to proceed with food safety inspections on Chinese poultry products operated as a quantitative restriction and discriminatory measure, resulting in its inconsistency with the WTO General Agreement on Tariffs and Trade (hereinafter, the GATT) and with the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter, the SPS Agreement). The panel also found that the GATT violation could not be justified on the basis of the protection of human health.

This dispute has its origins in 2004, when the outbreak of the 'bird flu' led the US and China to impose restrictions on each others' poultry products. Even though both Countries decided to lift such measures later that year, the US ultimately continued to apply its restrictions on the basis of safety concerns about Chinese poultry. In particular, Section 727 of the US Agriculture Appropriations Act 2009 (hereinafter, Section 727) prevents the United States' Department of Agriculture (hereinafter, the USDA) from using US Government funds to establish or implement rules that allow the importation of poultry products from China, including those products that had already been declared eligible to be imported by the US food safety authorities. Before the panel, China argued that Section 727 was a sanitary measure which accorded less favourable treatment to Chinese poultry products than that it accorded to poultry products from other WTO Members. In addition, China affirmed that this discriminatory treatment had no scientific basis and that the limitation of USDA actions for the lack of funds was, in fact, a quantitative restriction to all poultry products from China.

The panel found that the Section 727 constituted an SPS measure within the terms of the SPS Agreement, as it dealt with food safety controls, inspection and approvals. In particular, the panel found that Section 727 was inconsistent with Articles 5.1 and 5.2 of the SPS Agreement, because the US did not present a risk-based assessment which took into account the factors set forth in Article 5.2 (*inter alia*, scientific evidence and relevant processed and production methods of Chinese poultry products). The panel also concluded that the Section 727 was maintained without scientific evidence, in violation of Article 2.2 of the SPS Agreement.

In addition, the US measure was found to be inconsistent with Article 5.5 of the SPS Agreement. According to the panel, there was an arbitrary or unjustifiable distinction in what the US considered the appropriate level of protection for poultry products from China and what it considered for poultry products from other WTO Members. The panel considered that the different approach used to tackle the risk of potentially-unsafe poultry based purely on the origin of the product (*i.e.*, from China), without a specific risk assessment, had no scientific basis. Therefore, this arbitrary or unjustifiable distinction was also a form of discrimination against China. This discrimination, as stated by the panel, implies the violation of Article 2.3 of the SPS

Agreement, since the measure as a whole (*i.e.* Section 727) treats China in a discriminatory manner, as compared to the treatment accorded to other WTO Members where the same safety conditions prevail.

With regard to the US obligations under the GATT, the panel stated that the limitation on the action by USDA to proceed with the safety requirements for the importation of poultry products from China had the effect of a quantitative restriction, since, in practice, no poultry product could be imported from China into the US without the fulfilment of these procedures, resulting in a violation to Article XI:1 of GATT. The same measure was found to be discriminatory within the terms of Article I:1 of GATT, as the restriction applied formally and exclusively to products from China, in violation of the most-favoured-nation principle.

As Section 727 was found inconsistent with the SPS Agreement, the violation of the GATT was found not to be justified. The US failed to demonstrate the necessity and the scientific basis for the implementation of the measure at issue. Therefore, the panel found that the violation of the GATT could not be justified by the US as a means to protect human health within the terms of Article XX(b) of the GATT. As Section 727 had already expired in the course of panel proceedings, the panel did not issue any recommendation for the US to bring its system into conformity with WTO obligations. The panel declared that its findings should clarify the obligations raised in this dispute and provide some predictability for future cases dealing with the same or similar matters. This is particularly the case with respect to the ever-increasing list of “creative” restrictions and for purposes of the interpretative guidance on which measures may be considered as ‘other measures’ under GATT Article XI:1 and, by analogy, Article 4(2) of the Agreement on Agriculture.

The panel report can be appealed by the US and China within 60 days from its circulation. On the other hand, there are allegations that China reacted to the US measures by imposing duties on chicken imports and it recently announced that the minimum levels of those duties would be increased. These duties will affect primarily US producers, which export around 75% of the poultry imported by China. The commercial implications of this dispute stand to impact producers from around the world that directly compete with US and Chinese producers, as the US prepares new legislation and China appears to be considering increasing its duties on the importation of poultry products.

The US aims at considering currency undervaluation as a countervailable subsidy

During a meeting with Brazilian industrial leaders on 27 September 2010, the Brazilian Finance Minister voiced his concerns about the existence of an ‘International Currency War’. He mentioned specific occasions where countries like Japan and China, among other developed and developing countries, intervened on their own currencies in order to devalue them so as to (*inter alia*) increase the competitiveness of their exports. The minister’s speech signalled the apprehension of the Brazilian Government and, according to observers, its intention to implement currency policies to tackle the steady appreciation of the Real (*i.e.*, Brazil’s currency), which has contributed to the overall increase of imports and decrease of exports in Brazil.

The issue of governmental intervention on the national currency valuation is not recent and has always played a significant role in trade relations and global markets. By keeping the value of currency artificially low, countries are able to maintain the price of their goods at a competitive level on the world market. Therefore, exchange rate manipulation can be a powerful mechanism to offset differences in comparative advantages between countries, or even to undermine the use of tariff barriers and other trade policy mechanisms. Moreover, currency manipulation affects the world economy, generates unpredictability and risks for the business sector, and triggers commercial 'retaliations' in a tit-for-tat game where the overall result is negative to global welfare and to the recovery markets from the global economic crisis.

For the last few months, the US has been exerting great pressure on China for it to tackle and correct the artificial undervaluation of the Yuan (*i.e.*, China's currency). Such undervaluation has been confirmed by the International Monetary Fund, with the Yuan said to be set at around 60% of its actual value. The discussion between the US and China on currency manipulation is of great economic and trade relevance, particularly in relation to whether or not WTO Members may legitimately react to such practice in order to avoid or counter the unfair competition caused by artificial devaluation.

Recently, the US announced the proposal for an amendment of the Tariff Act of 1930, in order to tackle the manipulation of currency exchange rates by other countries. The US proposal, embodied in the Currency Reform for Fair Trade Act (H.R. 2378), would allow the US Commerce Department to treat '*fundamentally undervalued currencies*' as a countervailable subsidy under US law. In particular, the Currency Reform for Fair Trade Act requires the US investigating authority to: '*(1) determine, based on certain requirements, whether the exchange rate of the currency of an exporting country is fundamentally and actionably undervalued or overvalued (misaligned) against the USD for an 18-month period; and (2) take certain actions under a countervailing duty or antidumping duty proceeding to offset such misalignment in cases of an affirmative determination*'.

According to the proposed amendment, countervailing duties could be imposed if the currency considered fundamentally undervalued is, in any given case, determined to be a countervailable subsidy. To qualify as a countervailable subsidy, countries' currency manipulation would have to meet certain subsidy features, such as the existence of a financial contribution, the conferral of a benefit, and specificity. The latter appears particularly difficult to prove in such a theoretical instance, as currency undervaluation affects all companies established in a given country (as well as individuals). However, specificity is presumed in local content subsidies and export subsidies. In relation to this, the requirements to meet export contingency appear looser in the case of subsidies in the form of undervalued currency, as the US proposal provides that *'[i]n the case of a subsidy relating to a fundamentally undervalued currency, the fact that the subsidy may also be provided in circumstances not involving export shall not, for that reason alone, mean that the subsidy cannot be considered contingent upon export performance*'.

Therefore, in light of this proposed provision, even if the undervaluation of the Yuan were to be considered as not directly related to the exports of producers established in China, it could still be deemed to amount to a subsidy contingent to export within the terms of the US proposal, and, consequently, countervailable. The question is whether this idea of export contingency would be considered compatible with the WTO Agreement on Subsidies and Countervailing Measures (hereinafter, ASCM). Under the WTO, *de facto* export contingency will be found when '*the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance is in fact tied to actual or anticipated exportation or export earnings*'. In addition, the ASCM clarifies that '*[t]he mere fact that a subsidy is granted to enterprises which export shall not, for that reason alone, be considered to be an export subsidy…*' (within the meaning of the ASCM).

The US proposal of amendment has already passed the House of Representatives, but the Senate will not examine it before the US mid-term elections in November this year. The warning by the Brazilian Finance Minister must be taken into account by the business sector, especially in relation to future decisions on the allocation of resources and production in third countries. The result of the Chinese currency manipulation and the approval of the US measure might have consequences in the final price of Chinese products used as an input for producers outside China, or even for the industries established in China. If the US (and possibly other countries) is/are successful to tackle the undervaluation of the Yuan by means of trade defence instruments, industries established in China may be forced to relocate to other countries where the costs of production are also cheap but where there is no currency manipulation, and this would change the patterns of trade and also the conditions of competition on the global market.

The EU Commission plans to ban the addition of sugar to fruit juices

On 21 September 2010, following requests from the European fruit industry and in line with the EU policy of reducing added sugars in products and promoting a balanced diet, the EU Commission adopted a proposal to amend Council Directive 2001/112/EC relating to fruit juices and certain similar products intended for human consumption (hereinafter, the Directive). The proposal provides for banning the addition of sugar to fruit juices, while the addition of sugar would be allowed for nectars and some very specific products covered by the Directive, provided that the labelling of products clearly specifies such addition.

The proposal adapts the Directive to technological progress and takes into account developments (such as quality factors and labelling requirements) in relevant international standards, in particular the Codex Alimentarius standard for fruit juices and nectars (Codex Standard 247-2005) and the Code of Practice of the European Fruit Juice Association (hereinafter, AIJN).

The draft provides for the removal of sugar from the list of authorised ingredients. The new Article 3(4) of the Directive would provide that only "*nectars and specific products of Annex III (i.a., vruchtendrank, Süßmost, succo e polpa, sumo e polpa, æblemost and äpplemust) may be sweetened by the addition of sugars or honey. The sales name shall include the word 'sweetened' or 'with added sugar', followed by an indication of the maximum quantity of sugar added, calculated as dry matter and expressed in grams per litre*". The current Article 3(4) of the Directive provides that "*for fruit juices which have been sweetened by the addition of sugars, the sales name shall include the word 'sweetened' or 'with added sugar*". As to the permitted amount of added sugars, point II.1 of Annex I to the Directive currently establishes that for fruit juices, concentrated fruit juices and dehydrated/powdered fruit juice, other than pear or grape juice, the addition of sugars is authorised for sweetening purposes, while the quantity of sugars added, expressed as dry matter, may not exceed 150 g per litre of juice.

Although, in practice, very few juices seem to contain added sugars, and those that do normally indicate so clearly on the label, the fact that the addition of sugar to juices is, in general, permitted can cause confusion among consumers. The EU Commission's proposal, therefore, should give consumers confidence that fruit juices do not contain added sugar.

Further to the prohibition of added sugars, the draft reaffirms the distinction between fruit juice and fruit juice from concentrate; it simplifies the provisions on the restitution of flavour and aroma; and it includes tomatoes in the list of fruits used for fruit juice production. Biologically, tomatoes are fruits, not vegetables. Contrary to the Codex Alimentarius' Standard 247-2005, the Directive does not currently consider tomatoes as fruit. The proposal provides that salt, spices and aromatic herbs may be added to tomato juice and tomato juice from concentrate.

The EU's fruit juice market represents 10% of the total consumption of non-alcoholic drinks. The production of fruit juice from concentrates (87.6%) is predominant as compared to juice produced directly from fruit (12.4%). Fruit and fruit juice concentrates (in particular, orange juice) are mainly imported from Brazil. As for fruit juice produced directly from fruit, the EU market is mainly supplied by Spain and Brazil. According to AIJN, the EU juice and nectars market reached 11.3 billion litres in 2009. Sales of 100% fruit juice accounted for two-thirds of total consumption at 7.5 billion litres, while nectars with a juice content of 25-99% accounted for 3.8 billion litres.

The proposed directive will follow the ordinary legislative procedure provided for by the Treaty on the Functioning of the European Union. The proposal will now be considered by the European Parliament and the EU Council, which may be able to reach a decision in 12 months. A *rapporteur* at the European Parliament has not been appointed yet. The process may be further delayed if a second reading is required.

The EU and Malaysia launch FTA talks

On 5 October 2010, the EU and Malaysia formally launched negotiations for a free trade agreement (hereinafter, FTA). The FTA will be, in the intentions of the negotiators, a comprehensive agreement covering tariffs, non-tariff barriers, as well as, *inter alia*, provisions on investment, intellectual property rights, competition and sustainable development.

Malaysia is the second member of the Association of Southeast Nations (hereinafter, ASEAN, which includes, in addition to Malaysia, Brunei Darussalam, Cambodia, Indonesia, Laos, Myanmar, the Philippines, Singapore, Thailand and Vietnam) with which the EU has officially launched bilateral FTA talks. In July 2007, negotiations were launched between the EU and ASEAN. However, as negotiations stalled, in December 2009 EU Member States authorized the EU Commission to pursue negotiations with individual ASEAN Member States. So far, the EU formally launched bilateral negotiations only with Singapore (see Trade Perspectives, Issue No. 5 of 12 March 2010) and is seeking the commencement of FTA talks with Indonesia, the Philippines, Thailand and Vietnam. According to the EU, these bilateral FTAs should ultimately provide a stepping-stone for a future agreement within the regional context.

EU statistics report that Malaysia is the EU's second trading partner inside ASEAN, behind Singapore, with bilateral trade in goods reaching EURO 24 billion in 2009. EU's exports of goods to Malaysia reached EURO 9.7 billion in 2009, while exports of services amounted to EURO 2.6 billion in 2008. Reports suggest that the EU aims at increasing access for the EU automotive sector by easing or eliminating barriers that Malaysia is currently applying to protect its car industry, as well as for EU alcoholic drinks. In addition, the EU is going to pursue greater services liberalisation, aiming at lifting the foreign equity caps that Malaysia currently applies in the financial services sector (30%) and in other services sectors (20%). Malaysia, in turn, hopes to attract greater foreign direct investment from the EU.

Assuming that the EU's FTAs with ASEAN Countries will be modelled on the recently-signed EU-Korea FTA, the deal between the EU and Malaysia should result in deep tariff cuts, regulation of non-tariff barriers, and include provisions on investment, intellectual property rights, competition and sustainable development. In relation to the latter issue, negotiations may provide an opportunity to discuss and solve the thorny issue of the sustainability criteria in the EU Renewable Energy Directive (see Trade Perspectives, Issue No. 10, 21 May 2010).

In particular, the EU Renewable Energy Directive establishes mandatory national overall targets and measures for the use of energy from renewable sources in order to reduce CO^2 emissions and to achieve the EU's climate change and energy policy objectives. *Inter alia*, it introduces sustainability criteria for biofuels (used for transport purposes) and bioliquids (used for electricity, heating and cooling purposes) based on the life cycle greenhouse gas emissions of biofuels and the land used to produce biofuels and bioliquids. These sustainability criteria have been perceived by a number of stakeholders, including Malaysia, as possible barriers to trade. In particular, earlier this year, Malaysia voiced its concerns that such criteria might effectively lead up to an EU ban of biofuel produced from palm oil and a violation of Article XI of the GATT.

Recently Adopted EU Legislation

- *Commission Regulation (EU) No 886/2010 of 7 October 2010 entering a name in the register of protected designations of origin and protected geographical indications [Prleška tünka (PGI)]*
- *Commission Regulation (EU) No 880/2010 of 6 October 2010 approving non-minor amendments to the specification for a name entered in the register of protected designations of origin and protected geographical indications (Cappero di Pantelleria (PGI))*
- *Commission Regulation (EU) No 877/2010 of 5 October 2010 amending Regulation (EU) No 869/2010 fixing the import duties in the cereals sector applicable from 1 October 2010*
- *Council Implementing Regulation (EU) No 855/2010 of 27 September 2010 amending Regulation (EC) No 1631/2005 imposing a definitive anti-dumping duty on imports of trichloroisocyanuric acid originating, inter alia, in the People's Republic of China*
- *Council Implementing Regulation (EU) No 856/2010 of 27 September 2010 terminating the partial interim review of Regulation (EC) No 661/2008 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia*
- *Council Implementing Regulation (EU) No 857/2010 of 27 September 2010 imposing a definitive countervailing duty and collecting definitely the provisional duty imposed on imports of certain polyethylene terephthalate originating in Iran, Pakistan and the United Arab Emirates*
- *Commission Regulation (EU) No 850/2010 of 27 September 2010 initiating a 'new exporter' review of Council Regulation (EC) No 1659/2005 imposing a definitive anti-dumping duty on imports of certain magnesia bricks originating in the People's Republic of China, repealing the duty with regard to imports from one exporter in this country and making these imports subject to registration*

Ignacio Carreño, Eugenia Laurenza, Anna Martelloni, Natália S. Ruschel and Paolo R. Vergano contributed to this issue.