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The EU Commission proposes a ban on international trade in Atlantic bluefin tuna

On 22 February 2010, the European Commission proposed that the EU should support a ban on the international trade of Atlantic bluefin tuna, starting from 2011. Such ban would be realised within the framework of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereinafter, CITES). CITES contains an Appendix I, which includes all species threatened with extinction which are or may be affected by trade. If bluefin tuna were to be included in this list, its trading would be subject to a strict regulation that in fact, will result in a ban on international trade, with the objective of not further endangering the survival of the bluefin tuna. The EU is not a party to CITES, but the aims of this Convention are enforced in the EU through the EU Wild Life Regulations (*i.e.*, *inter alia*, Council Regulation (EC) No. 338/1997 of 9 December 1996 protecting species of wild fauna and flora by regulating the trade therein (hereinafter, Regulation (EC) No. 338/1997) and Commission Regulation (EC) No. 865/2006 laying down detailed rules concerning the implementation of Council Regulation (EC) No. 338/1997). Annex A to Regulation (EC) No. 338/1997, which has the same purpose as Appendix I to CITES, includes all the species, which can be found in that Appendix I, except when the EU has entered a reservation. In addition, Annex A contains species for which the EU applies stricter regulations than CITES and species that are not included in CITES (*i.e.*, *inter alia*, species that are, or may be, in demand for utilisation in the EU or for international trade and which are either threatened with extinction or so rare that any level of trade would imperil the survival of the species).

If bluefin tuna were to be included in Appendix I of the CITES, and therefore in Annex A of Regulation (EC) No. 338/1997, the introduction of bluefin tuna in the EU would be subject to a number of conditions. An import permit issued by the management authority of the EU Member State of destination has to be presented at the border customs office at the moment of entry. Such permit can only be issued when, *inter alia*, the introduction of the bluefin tuna into the EU has no harmful effect on the conservation status of the bluefin tuna. Similarly, documentary evidence must be provided that the bluefin tuna has been captured in accordance with the legislation on the protection of the species listed in CITES (*i.e.*, through an export permit or a re-export certificate issued by the competent authority of the country of export or re-export). The management authority must be satisfied that the specimen is not used primarily for commercial purposes and that there are no other factors relating to the conservation of the species which play against the issuance of the import permit. Also, the export or re-export of the bluefin tuna from the EU would be subject to a number of conditions. An export permit or re-export certificate would be required. An export permit may only be issued when, *inter alia*, the competent scientific authority has advised in writing that the capture or collection of the bluefin tuna in the wild or their export will have no harmful effect on the conservation status of the species or on the context of the territory occupied by the relevant population of the species and documentary evidence is provided that the bluefin tuna is obtained in accordance with the legislation in force on the protection of the bluefin tuna.

Considering that such requirements are very strict, the import into and the export from the EU of Atlantic bluefin tuna would become very difficult. The measure, be it at the international level or even just at EU level, would undoubtedly result into a powerful barrier to trade in bluefin tuna. The argument can be made that it may be tantamount to a violation of GATT Article XI, as it will likely constitute a quantitative restriction to trade. However, the measure could be justified under GATT Article XX, which establishes that, for certain legitimate purposes (*i.e.*, protection of animal life or

conservation of exhaustible natural resources), certain trade restrictive measures may nevertheless be allowed if they are not administered in an arbitrary or unjustifiable and discriminatory manner or as a disguised restriction on international trade. In particular, the EU could decide to justify the trade ban under GATT Article XX(b), if the measure were to be deemed necessary to protect animal life or health, or under GATT Article XX(g), with regards to the conservation of exhaustible natural resources. As Article XX(b) GATT requires a necessity test, it could be easier to defend the measure through GATT Article XX(g). In fact, it is worth noting that in *US – Shrimp*, the WTO Appellate Body found that both living and non-living resources can be considered as natural resources within the meaning of GATT Article XX(g). For them to also be labelled as 'exhaustible', the fact that the particular specie, which is the object of the trade restrictive measure, is included in Appendix I of CITES constitutes a confirmation to that extent. Furthermore, there should be a substantial relationship between the measure at stake and the legitimate policy of conserving exhaustible natural resources.

The proposed EU measure would affect trade in bluefin tuna on a large scale. The demand for it is particularly high (for example) in Japan and other Asian Countries due to the thriving sushi industry. Consumers will have to resort to other types of tuna, like the yellowfin tuna, which is close in appearance and quality, but more commonly found. However, as the EU Commission proposal states that such a ban would only be effective as of 2011, concerns have been voiced about the adequacy of the measure and whether this would not encourage excessive fishing up to the date of entry into force of the EU ban. The position of the Commission has to first be endorsed by EU Member States, before the proposal can be communicated to the Secretariat of CITES. If this measure were to make it to the level of CITES, the CITES Standing Committee would then have to decide on the listing of the bluefin tuna in Appendix I within 12 months. Such decision has to take into account the latest scientific information available on the situation of the stock of bluefin tuna and the assessment of the adequacy of the measures which were adopted by the International Commission for the Conservation of Atlantic Tunas (ICCAT). Besides the obvious commercial and industrial implications of such EU measure, the matter also looks poised to become another controversial tug-of-war between noble environmental objectives and the application of equally important international trade rules and environmental exceptions under the WTO system.

Revised guidance document on EU food law published

At its meeting of 26 January 2010, the EU Standing Committee on the Food Chain and Animal Health (the regulatory committee made up of representatives of the EU Member States which assists the EU Commission in the development of food safety measures) has approved a revised version of the guidance document on Articles 11, 12, 14, 17, 18 and 19 of Regulation (EC) No. 178/2002 of the European Parliament and of the EU Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (hereinafter, 'the Regulation'). One of the Regulation's objectives is to establish common definitions and to lay down overarching guiding principles and legitimate objectives for food law in order to ensure a high level of health protection and an effective functioning of the internal market. The provisions addressed in the guidance document concern the following issues: imports and exports of food and feed (*i.e.*, Articles 11 and 12 of the Regulation); food safety requirements (*i.e.*, Article 14 thereof); responsibilities (*i.e.*, Article 17 thereof); traceability (*i.e.*, Article 18 thereof); and withdrawal, recall and notifications (*i.e.*, Articles 19 and 20 thereof). The original guidance document was approved on 20 December 2004 after a process of discussions of general issues relating to the implementation and application of the Regulation with representatives from EU Member States, producers, industry, commerce and consumers. In the now revised document, new versions of selected sections of Articles 12, 18 and 19 were drafted with a view of simplifying, clarifying and completing them. For instance, the section of Article 14 on food safety requirements is new.

In detail, the revised section on Article 12 specifies which food safety rules have to be applied for foodstuffs to be exported to third countries. The document states that it is necessary to ensure that

food and feed exported or re-exported from the EU comply with EU law or the requirements set up by the importing country and that the rationale of this provision is to prevent the 'exportation of crisis.' The document provides that, when a new risk arises, not all countries are likely to have set up relevant safety requirements to prevent this risk and that, even where there is express agreement of the importing country, food and feed that are considered injurious to health or unsafe for consumption may in no event be exported or re-exported. The substantial change to the section on Article 19 (withdrawals and recalls) has to be seen in context of the new section on Article 14, which elaborates on the criteria to be used in assessing whether a food should be considered safe. For the section on Article 18 (traceability), the guidance document simplifies the list of information which an operator has to keep and reviews the duration for which documentation has to be kept (a general rule of 5 years should apply).

In relation to traceability (Article 18) and imports (Article 11), the guidance document establishes that the traceability provisions of the Regulation do not apply outside of the EU and that traceability covers all stages of production, processing and distribution in the EU, namely from the EU importer up to retail level, excluding, however, supply to the final consumer. The guidance document further develops that Article 11, which requires that food and feed imported into the EU comply with the relevant requirements of EU food law, should not be construed as extending the traceability requirement to food business operators in third countries. Therefore, exporters in trading partner countries cannot be legally required to fulfil the traceability requirement imposed within the EU (unless there are special bilateral agreements for certain sensitive products or where there are specific EU legal requirements, for example in the veterinary sector). The EU importer must just be able to identify from whom the product was exported in the third country. However, the document recognises that it is common practice among some EU food business operators to request trading partners to meet the traceability requirements even beyond the 'one-step-back-one-step-forward' principle. It should be noted that these occasional requirements are part of the (private) contractual arrangements between operators and are by no means mandated by the Regulation.

The guidance document, which has been published on the EU Commission's website and not in the Official Journal, emphasises that it aims at assisting all players in the food chain to better understand and to apply correctly and in a uniform way the Regulation. In disputes arising over questions of interpretation of terms and concepts of EU food law, the guidance document provides valuable details. However, it is also noted that the document has no formal legal status and that, in the event of a dispute, ultimate responsibility for the interpretation of EU law rests with the Court of Justice of the EU.

China considers 'Buy China' policy for governmental investment projects

Recently, the Chinese Government announced that a new economic stimulus package is being considered which would put in place a certain 'Buy China' policy for government procurement to boost the domestic production of certain products.

The statement was released that persons involved in governmental investment projects are encouraged to purchase domestically-made products unless it is not possible to obtain them in China at reasonable commercial conditions. Therefore, government authorisation would be required in certain cases when developers of projects, which are backed by the Chinese Government, want to import foreign goods. In particular, it appears that Chinese authorities are considering to draw-up a number of strategies and regulations that would favour Chinese production in certain areas of the technology industry, *inter alia*, computers, green energy, communication, office equipment, software and energy-efficient products. Earlier, the Chinese authorities announced that they were considering to create a number of regulations that would increase the amount of domestically-produced cars in government procurement to more than 50 per cent, by issuing requirements concerning the environmentally friendly usage and price limitations (*i.e.*, it appears that ordinary vehicles of all government departments must have an

engine displacement up to 1.8 litres and a price below 160,000 Yuan, which are requirements that seem to favour domestically-produced cars).

A number of countries allege that China violates its WTO obligations as such measures would inhibit international trade. However, China has not yet signed the plurilateral WTO Agreement on Government Procurement. It only is an observer to it since 21 February 2002 and the negotiations to join are still on-going. If China were to sign this agreement, it would have to comply with Article III thereof, concerning national treatment and non-discrimination. These provisions state, *inter alia*, that, with respect to all laws, regulations, procedures and practices regarding government procurement, each Party has to accord to the products, services and suppliers of other Parties, treatment no less favourable than that accorded to domestic products, services and suppliers and that accorded to products, services and suppliers of any other Party. Five rounds of negotiations concerning China's accession to the WTO Agreement on Government Procurement have been held, but the talks are moving slowly.

However, there are other legal avenues that could be considered by WTO Members opposing China's proposed measures. During the negotiations of China's accession to the WTO, China stated that all government entities at the central and sub-national level, as well as any of its public entities other than those engaged in exclusively commercial activities, would conduct their procurement in a transparent manner. In addition, China committed that all foreign suppliers would be provided with the equal opportunity to participate in that procurement pursuant to the MFN principle of GATT Article I. In addition, China has to ensure that import purchasing procedures of state trading enterprises are fully transparent, and in compliance with the WTO Agreement. It also has to refrain from taking any measures to influence or direct state trading enterprises as to the quantity, value or country of origin of goods purchased or sold, except when in accordance with the WTO Agreement. Furthermore, in GATT Article XVII on state trading enterprises, it is established that such enterprises should conduct their activities of purchases and sales in accordance with commercial considerations and in line with the provisions of the GATT (particularly GATT Article III concerning national treatment). As an alternative, but more limited in its field of action, the WTO Agreement on Trade Related Investment Measures (TRIMs) could also be considered as a ground for review of China's policies. Under the TRIMs Agreement, in fact, any such measure would have to be in accordance with GATT Articles III (national treatment) and XI (quantitative restrictions).

The commercial implications for exporters to China could be considerably big as they may be excluded (or discriminated) from entering into government procurement bids, while the Chinese Government is typically the biggest purchaser of technological products. Third Governments and affected industries should closely monitor China's further actions and the expected reactions of WTO Members to such measures and trade-related policies. These types of policies have been increasingly appealing to a number of governments that have recently decided to stimulate their economies and domestic markets. While it is understandable that their fiscal injections aim first and foremost to provide domestic support to home constituencies, they cannot come at the expense of the fundamental principles of the international trading system (*i.e.*, MFN and NT) and cannot arbitrarily take away other WTO Members' commercial opportunities.

Recently Adopted EU Legislation

- *Commission Decision of 24 February 2010 terminating the anti-dumping proceeding concerning imports of certain ring binder mechanisms originating in Thailand*

- *Implementing Regulation of the Council (EU) No. 157/2010 of 22 February 2010 imposing a definitive anti-dumping duty on imports of certain ring binder mechanisms originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EC) No. 384/96*

- *Implementing Regulation of the Council (EU) No. 151/2010 of 22 February 2010 terminating the partial interim review of the anti-dumping measures applicable to imports of certain tungsten electrodes originating in the People's Republic of China*

- *Implementing Regulation (EU) No. 143/2010 of the Council of 15 February 2010 temporarily withdrawing the special incentive arrangement for sustainable development and good governance provided for under Regulation (EC) No. 732/2008 with respect to the Democratic Socialist Republic of Sri Lanka*

- *Implementing Regulation of the Council (EU) No. 126/2010 of 11 February 2010 extending the suspension of the definitive anti-dumping duty imposed by Regulation (EC) No. 1683/2004 on imports of glyphosate originating in the People's Republic of China*

- *Council Decision of 10 November 2009 on the conclusion of an Agreement in the form of a Protocol between the European Community and the Republic of Tunisia establishing a dispute settlement mechanism applicable to disputes under the trade provisions of the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part*