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Subsidiarity principle as new safeguard measure for GMO approvals in EU Member States?

On 2 March 2010, the EU Commission announced its intention to propose by the summer new legislation to permit EU Member States to decide whether to cultivate genetically modified organisms (hereinafter, GMOs) or not. Under the current legal framework, the EU Commission just adopted two decisions concerning the Genetically Modified Amflora potato, and three decisions on the placing on the market of three GM maize products for food and feed uses (see Trade Perspectives Issue No. 5 of 12 March 2010).

Following the political guidelines of the EU Commission President, Mr. Barroso, of September 2009, the EU Health and Consumer Policy Commissioner, Mr. Dalli, has been asked to come forward with a proposal by the summer setting out how an EU authorisation system on GMOs, based on science, can be combined with freedom for EU Member States to decide whether or not they wish to cultivate GM crops on their territory. Mr. Dalli noted that, in parallel to the recent authorisation decisions which are based on a series of favourable safety assessments carried out over the years by the European Food Safety Authority (hereinafter, EFSA), the EU Commission has launched a 'reflection' on how to combine an EU authorisation system based on science with the freedom of EU Member States to decide on the cultivation of GMOs.

In his policy guidelines for the next EU Commission '*Setting our priorities in a longer term perspective: A vision for EU 2020*', Mr. Barroso had pleaded under the header '*… making subsidiarity work for Europe*', that to make the EU work best, the principle of subsidiarity should be applied effectively. As an example he mentioned the area of GMOs regulation, where it should be possible to combine an EU authorisation system, based on science, with freedom for EU Member States to decide whether or not they wish to cultivate GM crops on their territory. He remarked that the Lisbon Treaty puts in place new procedures to allow national Parliaments to intervene if they have concerns about subsidiarity. More importantly, a much clearer doctrine should be developed on how to decide when action needs to be taken at the EU level, where the balance should lie between EU-level tools and national level tools, and what expectations should be placed on EU Member States implementing EU policy in their own countries.

Article 5(3) of the Treaty on European Union (*i.e.*, the Lisbon Treaty, *ex* Article 5 TEC) provides that "*Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.*"

Such a system, where a science-oriented EU authorisation scheme on GMOs is combined with the freedom of EU Member States to decide whether or not they wish to cultivate GM crops on their territory, would seem to be afflicted by an inherent contradiction: on the one hand, the authorisation of GMOs, involving the competences for agriculture, approximation of laws and consumer protection (*i.e.,* measures in the veterinary and phytosanitary fields, which have as their direct objective the protection of public health) is an area which falls within the shared competences of

EU and its Member States, while, on the other hand, EU international trade policy, which would be affected by permitting EU Member States to *'opt out'* when it comes to the authorisation of GMOs, is an area which falls within the exclusive competence of the EU. The EU Commission, therefore, appears to have been tasked with a complex and legally challenging assignment. In fact, setting up a system based on science and leaving, at the same time, EU Member States with the freedom to respect it or not appears to be a task equivalent to the squaring of a circle.

Most critically, from an international trade perspective, it appears that the '*opt out*' system envisaged above would permit EU Member States to establish powerful barriers to trade as the cultivation of certain GMOs might not be authorised and could even lead, once more, to a *de facto* moratorium. In the *EU – Biotech Products* dispute, a WTO panel condemned an EU-level *de facto* moratorium on the approval of GM products. Under the new scheme, it appears that an EU authorisation might be granted but the EU Member States could still be allowed to block the cultivation of the GM product. The proposal on a new EU GMOs authorisation scheme is awaited with a great degree of curiosity and impatience by traders, scholars, GM company executives, government officials and lawyers, in order to see how the contradictions indicated above will be reconciled and to what extent the current procedures for the cultivation and marketing of GM crops will be rendered more onerous.

The EU Commission is considering opening an anti-subsidy investigation on Chinese coated fine paper

Media reports indicate that, on 1 April 2010, the EU Commission received a complaint, made jointly by some of the biggest EU paper companies, to investigate into subsidies granted by the Chinese Government to domestic producers of coated fine paper, intended for high-quality prints.

The alleged request for an anti-subsidy investigation follows closely the anti-dumping investigation against imports of coated fine paper from China, which was recently initiated by the EU Commission after the receipt of a complaint on 4 January 2010 from CEPIFINE, the European Association of Fine Paper Manufacturers. The request also closely follows the decision of the US Department of Commerce, on 2 March 2010, to impose preliminary countervailing duties on Chinese imports of coated paper, intended for high-quality print graphics using sheet-fed presses. The US Department of Commerce decision was triggered by the existence of concrete indications of subsidisation, reportedly including, *inter alia*, preferential lending and income tax programmes, VAT exemptions for imported capital equipment, and tax credits for the purchase of equipment produced domestically.

The EU anti-subsidy rules are based on the WTO Agreement on Subsidies and Countervailing Measures and aim at preventing the distortion of competition in the EU market, which could result from the imports of subsidised products from third countries. According to such rules, a subsidy is deemed to exist if a benefit is conferred to a recipient as a result of a financial contribution made by, or on behalf of, a government or a public body. Countervailing measures can be imposed by the EU against imported subsidised products, provided that: the conferred subsidy is specific; there is an injury sustained by the like-EU-industry; a causal link is proved between the subsidy and the injury; and the imposition of measures to offset the subsidy does not run counter to the EU interest.

In more detail, the procedure for the imposition of EU countervailing measures is triggered by the lodging of an anti-subsidy complaint with the EU Commission by the affected EU industry. The complaint must contain *prima facie* evidence that a third country subsidises companies or industries exporting a product to the EU and that this practice causes injury to the EU industry. Upon receipt of the complaint, the EU Commission must decide within 45 days on whether to initiate an investigation. In case it decides to do so, it engages in a process of collection and examination of information, mainly through the sending out of questionnaires and by conducting on-site inspections. Shortly after that, the EU Commission proceeds to making a number of preliminary findings on whether to continue the investigation while imposing provisional

countervailing duties, continue it without the imposition of provisional duties, or terminate it completely, and it invites all interested parties to comment on its decision. Taking into account the comments received, it continues the investigation and makes its final findings, inviting, once more, any comments from interested parties. As a final step of the procedure, the EU Commission proposes to the EU Council either the definitive imposition of the countervailing measures, or the termination of the procedure without any measures imposed. The entire procedure, starting from the initiation of the investigation until the Council decision, cannot exceed the timeframe of 13 months.

The possibility that the EU Commission does not proceed with the complaint is quite remote as, according to reports, the EU coated paper industry has provided it with solid evidence on the case, including figures showing how severely its business has been affected by the upsurge of imports of Chinese coated paper: from 65,000 metric tons in 2006 to 220,000 in 2009. Should the EU Commission decide to proceed with the investigation, it will be particularly interesting to see whether it will also attempt to address the highly controversial issue of the undervalued Chinese currency through its decision to impose countervailing duties. Its stance on the subject has so far been enigmatic, urging some to claim that it intends to await for the US reaction first. The US, on its part, is currently examining its industry's arguments that China uses the undervalued Yuan as a means to subsidise the exports of coated paper and, if it were to finally decide to co-estimate the latter in the final countervailing duties, it would be the first time that the US uses trade remedies to address currency manipulation.

The controversy over the imposition of carbon border taxes

The use of carbon border taxes has traditionally been one of the most controversial issues in the climate change agenda. Two current evolutions have, once again, fueled the spark, bringing the discussion to the forefront: the decision of the French government, in March, to abandon its much advertised plan on the creation of a carbon tax on domestic energy and road fuels and the threat made by India, in April, to resort to the WTO should the EU decide to introduce carbon border taxes in the context of its environmental policy.

Carbon border taxes are imposed on products imported from countries with laxer environmental regulations in order to even out the competitive advantage that producers situated in such countries enjoy. In particular, the imposition of border measures is intended to address the competitiveness concerns arising from the cost that the industries in the country imposing such measures are facing in order to comply with stricter environmental standards. The views of the WTO Member States are clearly divided on this issue, with mostly developed countries, on the one side, consistently promoting the idea and Brazil, South Africa, India and China, on the other, intensively opposing it.

The compatibility of these measures with WTO rules is a matter of concern. The GATT prohibits WTO Members from imposing tariffs and charges in excess of the level committed in the Schedules of Concessions. In addition, the GATT prohibits levying internal taxes or charges in excess of those applied to like domestic products. Nevertheless, it allows WTO Members to impose charges and internal taxes that are not in excess of taxes applied to the like domestic products. A difficulty when assessing whether the charge levied on the imported product is equivalent to that applied to the domestic product arises where, for example, the importing country does not maintain a simple tax scheme, but a more complex emissions trading scheme.

If judged incompatible with one of the aforementioned GATT provisions, the WTO legality of carbon border taxes could still be justified as necessary to protect human, animal or plant life or health, or relating to the conservation of exhaustible natural resources (Article XX (b) and (g) of the GATT). Both exceptions are subject to strict requirements and so far, in the majority of WTO cases, WTO Members have failed to justify their environment-related measures under them. In particular, in relation to the test of Article XX (b), carbon border taxes would probably fail to

measure up to the necessity test, as their primary goal is to restore a level-playing field for the domestic producers who are required to pay a tax that producers of third countries are not. Reports indicate that, until today, no such tax has been imposed. In July, the US House of Representatives passed a bill imposing taxes on products from countries failing to cap greenhouse gas emissions (see Trade Perspectives Issue No. 14 of 17 July 2010).

The US requests the establishment of a WTO panel in the Philippines – Taxes on distilled spirits dispute

On 26 March 2010, the US requested the establishment of a WTO panel in relation to the taxes applied on imported distilled spirits by the Philippines.

The Philippines' regime of taxation of distilled spirits has been the object of repeated criticisms in recent times. The US requested consultations with the Philippines on 14 January of 2010. The consultations were held on 23 February 2010, but the parties were not able to resolve the dispute amicably. Before the US, the EU had requested WTO consultations against the Philippines' excise tax regime on distilled spirits (see Trade Perspectives, Issue No. 16 of 4 September 2009). Similarly to the dispute initiated by the US, consultations did not lead to a mutually agreed solution and the EU requested the establishment of a WTO panel on 10 December 2009. The panel was established on 19 January 2010.

According to the EU and the US, the Philippines' regime subjects imported spirits to higher taxes than those applicable to domestically-produced spirits. Whereas a flat tax rate is imposed on the latter, imported spirits are subject to taxes ranging from 10 to 50 (10 to 40 according to the US) times higher than those being applied to Filipino competitors. The EU and the US requests for the establishment of a WTO panel target the same measures. Both requests allege that a number of measures imposed by the Philippines are violating the Philippines' obligations under the GATT, in particular, the first and second sentence of Article III:2 as the imposition of excise duties on imported liquors has allegedly raised barriers to trade. In particular, the US alleges that the taxes imposed by the Philippines on distilled spirits made from materials indigenous to the Philippines (*i.e.*, sugar, coconut and palm) are significantly lower than those which are applied to imported distilled spirits. According to the US request, the tax rate also depends on whether the product from which the spirit is distilled is produced commercially in the country where it is processed into distilled spirits.

In particular, on the basis of the requests for the establishment of the WTO panel, the Philippines' regime appears to impose a double requirement for imported distilled products to benefit from the lower tax rate applied to domestically-produced distilled products: (i) that the distilled products are processed from the raw materials listed in the Philippines' regulations at stake; and (ii) that such materials be commercially produced in the country where they are processed into distilled spirits. The US and the EU exports of spirits to the Philippines do not appear to meet those requirements. As a result, they are subject to a different, more onerous, tax regime. This appears to constitute discrimination as imported and domestically produced spirits are taxed differently, even though, according to the EU and the US, they are 'directly competitive, substitutable products' as well as 'like products' within the meaning of the first and second sentences of Article III:2 of the GATT.

It is not the first time that the WTO dispute settlement mechanism has been resorted to for cases of unequal taxing of wines and spirits. In the three cases of *Japan - Alcoholic Beverages*, *Chile - Taxes on Alcoholic Beverages* and *Korea - Taxes on Alcoholic Beverages*, the respondent countries were condemned for having imposed different tax regimes on imported products than what was being applied to the domestically produced like products (see Trade Perspectives, Issue No. 16 of 4 September 2009).

The US is one of the biggest exporters of distilled spirits. In particular, between 2006 and 2009, such exports accounted for an average of more than 1 billion USD per year. However, reports

indicate that, since 2003, no more than 5 per cent of the distilled products on the Philippines market were imported ones, including from the US. The Philippines' spirits market is one of the largest in the Asia-Pacific region and represents enormous growth potential. This undoubtedly explains the recent WTO disputes.

The WTO Dispute Settlement Body will consider the US request during its next meeting. On the basis of Article 10 of the WTO Dispute Settlement Understanding, the EU and the US disputes could be brought under a single WTO panel.

Recently Adopted EU Legislation

- *Commission Decision of 6 April 2010 amending Decision 2009/296/EC establishing a specific control and inspection programme related to the recovery of bluefin tuna in the Eastern Atlantic and the Mediterranean (notified under document C(2010) 2060)*

- *Commission Regulation (EU) No. 291/2010 of 31 March 2010 correcting Regulations (EC) No. 437/2009, (EC) No. 438/2009 and (EC) No. 1064/2009 as regards the end-use procedure laid down for imports of certain agricultural products under tariff quotas*

- *Implementing Regulation of the Council (EU) No. 270/2010 of 29 March 2010 amending Regulation (EC) No. 452/2007 imposing a definitive anti-dumping duty on imports of ironing boards originating, inter alia, in the People's Republic of China*

- *Council Decision of 29 March 2010 amending and extending Decision 2007/641/EC on the conclusion of consultations with the Republic of Fiji Islands under Article 96 of the ACP-EC Partnership Agreement and Article 37 of the Development Cooperation Instrument*