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The EU Commission's Trade and Investment Barriers Report for 2012 highlights an increase in legislation containing local content requirements

On 27 February 2012, the EU Commission published its second Trade and Investment Barriers Report ('*TIBR*') and presented it to the EU Council on 1-2 March 2012. The TIBR provides an assessment of the progress achieved and the persistence of trade barriers deemed by the EU Commission to be of major strategic economic importance for EU business. The TIBR, focusing on trade barriers arisen in the markets of the EU's six strategic economic partners (*i.e.*, China, India, Japan, Mercosur (Argentina and Brazil), Russia and the US), is based on the Europe 2020 Strategy.

The TIBR provides an account of the progress achieved on 21 barriers selected in the initial 2011 report. Two barriers removed by India include security requirements for telecommunications equipments and export restrictions on cotton. On 5 March 2012, however, India once again banned all cotton exports with immediate effect, which is a step of great concern for EU textiles businesses, as India remains a main source for cotton products. Progress was also achieved by the EU Commission on removing or partially removing six other trade barriers enacted by the EU's six strategic economic partners. Removal of these barriers shows the progress that the EU Commission is achieving on behalf of EU business.

For remaining barriers, however, no progress was achieved in 2011. In addition, the EU Commission's report highlights a growing tendency among the emerging countries in enacting legislation with local content requirements. These local content requirements are often connected to investment and government procurement to foster industrial development. One such measure highlighted in the TIBR is Brazil's application of an excise tax on industrial products for the automotive sector, which has been reportedly designed to stimulate national production and to guarantee investment. This measure was implemented by Brazil in Decree 7.567, effective as of 16 September 2011, which horizontally increased tax rates by 30% (see Trade Perspectives, Issue No. 19 of 21 October 2011). This decree, however, provides for an exception based upon compliance with a number of local content requirements. To obtain a tax reduction, manufacturers must meet a 65% regional content requirement, invest in innovation and R&D activities in Brazil amounting to at least 0.5% of the manufacturer's total gross revenue, or accomplish 80% of the manufacturer's major production process on the territory of Brazil. This new tax regime has been protested against both in the WTO and Brazilian domestic courts.

Legislation with local content requirements has also increased in developed countries partly due to the global economic crisis that emerged in 2008. The Canadian province of Ontario established a '*feed-in tariff programme*' that coupled the benefits of a '*feed-in tariff scheme*' with a local content requirement (see Trade Perspectives, Issue No. 15 of 29 July 2011 and Issue No. 9 of 7 May 2010). This programme is currently being examined before a WTO panel. Ontario's programme provides long-term contracts to developers of green energy

projects, subject to the inclusion of a fixed percentage of goods and services required to originate in Ontario. Japan and the EU specifically requested the WTO to examine the consistency of the local content requirement included in this '*feed-in tariff programme*' and both are parties to the dispute. '*Feed-in tariffs*' are currently the most widespread national renewable energy policy scheme used globally. However, local content requirements, as applied by Ontario within this '*feed-in tariff programme*', may violate Articles 3.1(b), 3.2 and 1.1 of the Agreement on Subsidies and Countervailing Measures, Article 2.1 of the Agreement on Trade-Related Investment Measures and Article III:4 of the General Agreement on Tariffs and Trade (hereinafter, the GATT).

The outcome of this WTO dispute should provide a better understanding of how the WTO views the rising inclusion of local content requirements in domestic legislation. EU business must be on constant alert for the introduction of such legislation and the potential impact on their investments. In turn, countries must be increasingly aware that local content requirement measures are being looked at with greater scrutiny, especially by the EU.

In a report, the EU Parliament calls for the precautionary principle as a fundamental principle which must guide food safety policy

On 29 February 2012, the EU Parliament's Environment Public Health and Food Safety Committee (ENVI) voted unanimously on the report by the rapporteur Frédérique Ries on a draft EU Commission proposal for a regulation of the European Parliament and of the Council on food intended for infants and young children and on food for special medical purposes. The report agrees with the EU Commission that the legislation on foodstuffs for particular nutritional uses (hereinafter, PARNUTS) needs to be thoroughly reviewed and that the concept of '*dietetic food*', which in most cases means very little from a nutritional point of view, should be abandoned. The EU Commission has proposed that the new framework establishing general provisions should apply only for a limited number of well-established and well-defined categories of food that are considered as essential for certain vulnerable groups of the population (*i.e.*, food intended for infants and young children and food for patients under medical supervision). However, the EU Parliament's report also wants the so-called '*slimming foods*' covered by the framework.

Another novelty in the EU Parliament's report is the introduction of a number of provisions on the precautionary principle. The new Article 6a of the proposal provides that '*where, following an assessment of available scientific information, there are reasonable grounds for concern for the possibility of adverse effects but scientific uncertainty persists, provisional risk management measures may be chosen, necessary to ensure the high level of protection of the vulnerable categories of population specified in this regulation*.' Different from the general requirements for the application of the precautionary principle established in Article 7 of Regulation (EC) No. 178/2002 of the European Parliament and of the Council laying down the general principles and requirements of food law, the proposed rule for provisional risk management measures in relation to PARNUTS does not specify that such measures '*may be adopted, pending further scientific information for a more comprehensive risk assessment*' and only when they are '*proportionate and no more restrictive of trade than is required to achieve the high level of health protection chosen in the EU, regard being had to technical and economic feasibility and other factors regarded as legitimate in the matter under consideration*', and also does not require that the measures be '*reviewed within a reasonable period of time, depending on the nature of the risk to life or health identified and the type of scientific information needed to clarify the scientific uncertainty and to conduct a more comprehensive risk assessment*.' Leaving those boundaries to the application of the precautionary principle out, does it imply that they are not supposed to apply in case of PARNUTS?

According to the EU Parliament's report, the precautionary principle laid down in the new Article 6a, which is one of the fundamental principles that must guide food safety policy, should be taken into account particularly when the EU Commission adopts delegated Regulations under Article 10(2) of the proposal with respect to the following: (a) the specific compositional requirements of PARNUTS; (b) the specific requirements on the use of pesticides in agricultural products intended for the production of PARNUTS and on pesticides residues in PARNUTS; (c) the specific requirements on labelling, presentation and advertising, including the authorisation of nutrition and health claims thereof; (d) the notification procedure for the placing on the market of PARNUTS; (e) the requirements on promotional and commercial practices relating to infant *formulae*; and, (f) the requirements on information to be provided on infant and young child feeding. In its preliminary conclusion, the rapporteur's report states that '*this simplified but more protective legal framework must apply to imported and exported foods alike and makes it easier for the precautionary principle to be applied. If we are to expect the internal market to work properly, we cannot afford to disregard the health of the more vulnerable members of society*.'

An easier application of the precautionary principle, as requested by the EU Parliament's report, seems to imply that the provision on delegated acts is some sort of new legal basis for the application of provisional measures. In other fields of EU food law, a reference to the precautionary principle has been included in the recitals of a legal act, such as in recital 7 of Regulation (EC) No. 1333/2008 of the European Parliament and of the Council on food additives, which provides that '*the approval of food additives should also take into account other actors relevant to the matter under consideration including societal, economic, traditional, ethical and environmental factors, the precautionary principle and the feasibility of controls*.' This appears to be appropriate.

The precautionary principle has also been already applied in the context of specifically vulnerable parts of the population. An EU-wide suspension of the manufacture of infant feeding bottles with Bisphenol A (hereinafter, BPA) was adopted by Commission Directive 2011/8/EU of 28 January 2011 amending Directive 2002/72/EC relating to plastic materials and articles intended to come into contact with foodstuffs as regards the restriction of use of BPA in plastic infant feeding bottles. The preamble of Directive 2011/8/EU explicitly states that the restrictions on BPA are being imposed based on the precautionary principle set out in Article 7 of Regulation (EC) No. 178/2002 and that even where the risk, notably to human health, has not yet been fully demonstrated, it is appropriate to reduce infants' exposure to BPA as much as reasonably achievable, until further scientific data is available to clarify the toxicological relevance of some observed effects of BPA (see Trade Perspectives, Issues No. 22 of 3 December 2010, and No. 19 of 21 October 2011).

The question is whether there is a need for a specific provision on provisional risk management measures based on the precautionary principle when there is already a legal basis in the general EU food law. In addition, when the requirements for the application of provisional measures appear to be less strict (*i.e.*, without some boundaries: see above) than in the general rule, it does not appear to contribute to legal clarity when it comes to the application of measures based on the precautionary principle. The adoption of a uniform basis throughout the EU for the use of the precautionary principle in Regulation (EC) No. 178/2002 has been deemed necessary to avoid barriers to the free movement of food or feed. Different standards in sector-specific legislation do not appear appropriate.

The EU Parliament's plenary sitting (1st reading) of the proposal is scheduled for 22 May 2012, which is prior to the EU Council adopting its position. Further to the controversy of re-introducing '*slimming foods*' in the framework for PARNUTS (according to the EU Commission, Member States have reported that the PARNUTS legislation is being used by some operators to circumvent the rules of the Health Claims Regulation), the question of a '*tailor-made*' precautionary principle for PARNUTS will add to the discussions.

The US requests consultations with India on SPS poultry restrictions

On 6 March 2012, the US formally requested consultations with India concerning the latter's import restrictions on agricultural products. Since 2007, India maintains a full import ban on US poultry products based on Avian Influenza (hereinafter, AI) concerns. In the US view, the restrictions being imposed are illegal and violate the rules of the WTO and other relevant international organisations. Under Article 4 of the WTO Dispute Settlement Understanding, if the dispute does not get resolved through consultations within 60 days, a complaining party is entitled to request the establishment of a panel for the further resolution of the controversy.

In February 2007, India prohibited imports of live poultry, poultry meat, eggs and egg products and a number of other products of animal origin from countries reporting both Highly Pathogenic Avian Influenza (hereinafter, HPAI) and Low Pathogenic Avian Influenza (hereinafter, LPAI). This measure was imposed in response to the spread of highly pathogenic strains of the AI virus in 2003 – 2006 across the world. The US was included in the list of such countries, though, according to the US Trade Representative Office, there have been no instances of AI within the US territory through the entire period of application of India's restriction, with the last occasion of LPAI registered in the US in 2004. In the view of the US, India bears no valid, scientifically-based justification for the import restrictions. Moreover, the US believes that relevant international standards do not support the imposition of import bans due to detections of LPAI. Although India's measures were not raised as a specific trade concern before the WTO SPS Committee, the US repeatedly asked India to justify the necessity of the ban, failing to receive a satisfactory response. If the formal WTO consultations do not resolve the dispute, the US looks poised to request the establishment of a WTO panel.

The major international instrument regulating the application of import restrictions due to sanitary concerns is the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter, the SPS Agreement). The complaints voiced by the US are rooted in the text of this agreement, as it covers both the scientific underpinning of measures and the perception of international sanitary standards by the domestic competent authorities. Article 3 of the SPS Agreement generally aims at the harmonisation of sanitary measures across WTO Members on the basis of the relevant international guidelines. Avian Influenza concerns have been addressed in a number of standards of the World Organisation of Animal Health (International Office of Epizootics, hereinafter the OIE). According to OIE standards, unlike HPAI, LPAI is not listed as a reportable disease since it does not pose any known serious threat to human health. Article 10.4.4 of the Terrestrial Animal Health Code promulgated by the OIE maintains that a country may be considered free from *highly pathogenic* AI when it has been shown that no HPAI in poultry has been present in the country for the past 12 months, although its LPAI status may be unknown. Article 3.4 of the SPS Agreement explicitly recognises the relevance of standards and guidelines developed by the OIE. Given that OIE standards do not support a quarantine measure for such circumstances, India's measures appear to impose a higher level of sanitary protection than would be achieved by measures based on the relevant OIE international standards.

The SPS Agreement does not prohibit WTO Members to maintain measures which result in a higher level of protection as compared to an international standard. As stated by the Appellate Body in *EC – Hormones*, the right of a Member '*to establish its own level of sanitary protection is an autonomous right*' and not an '*exception*' from a general obligation to base sanitary measures on international standards. Nonetheless, Article 3.3 of the SPS Agreement requires that measures with a higher level of protection be introduced only in cases of *a valid scientific justification* or *risk assessment*. According to the Appellate Body in *EC – Hormones*, the distinction between the two grounds '*may have very limited effects and may, to that extent, be more apparent than real*', as all measures resulting in a higher level

of protection shall ultimately comply with risk assessment requirements in Article 5 of the SPS Agreement. In *Japan – Agricultural products II*, the Appellate Body also found that for a scientific justification to be valid, a rational relationship between the SPS measure at issue and the available scientific information should be demonstrated. Thus, if the consultations between India and the US were to result in a WTO dispute, India would bear the burden of proving that available scientific information on LPAI rationally justifies the imposition of an import ban. Furthermore, India would have to convince the WTO adjudicators that the import ban is based on appropriate risk assessment, taking into account different risk assessment techniques. As held by the Appellate Body in *Australia – Salmon*, '*some*' evaluation of risk would not suffice, and a Member maintaining the measure must provide expert opinions that evaluate the likelihood or probability, either quantitative or qualitative, of the risks combated by the sanitary measure.

Largely agricultural economies, like India, tend to maintain relatively high tariffs to protect their agricultural production, especially in such sensitive sectors as poultry meat or pork. The imposition of additional trade barriers due to sanitary reasons has the effect of according additional protection to domestic producers and further excluding foreign participants from the domestic market. Conservative estimates claim that the losses by US exporters because of India's sanitary restrictions on poultry products surpass 300 million USD annually. In order to preserve the restriction in the case at hand, India will be called to provide ample evidence of health risks associated with LPAI, which has so far not been supported within the auspices of the OIE. However, should such scientific evidence be established, India could not be requested to withdraw the measures, as it remains absolutely free to determine its own appropriate level of sanitary protection. The evolution of the case should therefore be carefully monitored by all businesses facing SPS-related restrictions across the world, as well as by the domestic competent authorities of all WTO Members dealing with the scientific justification of domestic sanitary measures.

The EU vote on polluting values for fuels obtained from oil sands ends in deadlock

The dispute between the EU and Canada over the carbon intensity of greenhouse gas emissions from Canadian oil sands production (see a description of the oil sands and updates on the dispute in Trade Perspectives, Issue No. 9 of 7 May 2010 and Issue No. 7 of 8 April 2011) has taken a new level with the EU expert committee's vote on a draft measure, which attempts to label fuel originating from oil sands deposits as '*highly polluting*', ending in deadlock. The draft measure, which is an implementing measure based on Article 7(a)(1) of *Directive 1998/70/EC of the European Parliament and of the Council of 13 October 1998 relating to the quality of petrol and diesel fuels* (as amended by *Directive 2009/30/EC of the European Parliament and of the Council of 23 April 2009 as regards the specifications of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions)* (hereinafter, the EU Fuel Quality Directive) proposed the addition of a new category of fuel obtained from oil sands. This draft measure failed to receive a qualified majority (255 votes of 345) of EU committee voters to either outright pass or defeat it. As a result, the proposed revision is now sent to the EU Parliament and the Council to be presented for vote before environmental ministers of the EU's 27 Member States.

Canadian officials have questioned the scientific basis of this proposed ranking and the implications that a '*dirty fuel*' label will have on global sales. If the draft revision had obtained qualified majority, fuel from oil sands deposits would be ascribed a default greenhouse gas value of 107 grams per megajoule, 22% more polluting as compared to fuels obtained from conventional sources, attributed a value of 87.5 grams. The Canadian province of Alberta ranks third in the world for its size of oil reserves. While little of this crude oil is actually shipped to Europe, the Canadian oil industry fears that this label on oil exports could encourage similar regulations in several US states if it passes in the EU (see Trade

Perspectives, Issues No. 22 of 27 November 2009, No. 9 of 7 May 2010 and Issue No. 7 of 8 April 2011), which could have significant industry ramifications.

The Canadian ambassador to the EU has already warned the EU that if the final measure singles out fuels obtained from oil sands '*in a discriminatory, arbitrary or unscientific way, or are otherwise inconsistent with the EU's international trade obligations*', Canada would explore every available avenue to defend its interests, including WTO action. EU legislation targeting fuel produced from oil sands as high-carbon fuel appears to affect the EU's obligations under Articles I and III of the GATT, which prevent WTO Members from applying discriminatory treatment to third countries' imported products *vis-à-vis* like foreign and domestic products in respect to internal regulations, and likely constitutes a technical barrier to trade within the meaning of Annex 1:1 of the WTO's Agreement on Technical Barriers to Trade (hereinafter, TBT Agreement). While WTO Members are authorised to draw up technical regulations in order to protect the environment, Article 2.1 of the TBT Agreement provides that such technical regulations cannot result in discriminatory treatment *vis-à-vis* like products of national origin or those originating in other countries. In addition, Article 2.2 of the TBT Agreement requires that technical regulations not result in unnecessary barriers to trade. By creating a trade barrier for oil generated from oil sands and other unconventional sources on the basis of their (comparatively-speaking) greater polluting production process, such standards may lead to a *de facto* EU ban on fuel originating from oil sands deposits, which would also be contrary to Article XI of the GATT.

A decision on the revised EU Fuel Quality Directive by EU environmental ministers is expected by June 2012. This decision should be followed very closely by parties involved in the oil industry, those that depend upon the oil industry for a significant outlay of business and parties with direct ties to EU-Canada commercial relations as a vote in favour of the revised measures adding a new rank for fuels obtained from oil sands will have sweeping ramifications for all these parties.

Recently Adopted EU Legislation

Market Access

- *Commission Decision of 20 September 2011 on the measure C 35/10 (ex N 302/10) which Denmark is planning to implement in the form of duties for online gambling in the Danish Gaming Duties Act.*

- *Agreement in the form of an Exchange of Letters between the European Union and the Russian Federation relating to the administration of tariff-rate quotas applying to exports of wood from the Russian Federation to the European Union.*

- *Protocol between the European Union and the Government of the Russian Federation on technical modalities pursuant to the Agreement in the form of an Exchange of Letters between the European Union and the Russian Federation relating to the administration of tariff-rate quotas applying to exports of wood from the Russian Federation to the European Union.*

- *Council Decision of 14 December 2011 on the signing, on behalf of the Union, and provisional application of the Agreement between the European Union and the Government of the Russian Federation on trade in parts and components of motor vehicles between the European Union and the Russian Federation.*

- *Agreement between the European Union and the Government of the Russian Federation on trade in parts and components of motor vehicles between the European Union and the Russian Federation.*

- *Council Decision of 14 December 2011 on the signing, on behalf of the Union, and provisional application of the Agreement in the form of an Exchange of Letters between the European Union and the Government of the Russian Federation relating to the preservation of commitments on trade in services contained in the current EU-Russia Partnership and Cooperation Agreement.*

- *Agreement in the form of an Exchange of Letters between the European Union and the Government of the Russian Federation relating to the preservation of commitments on trade in services contained in the current EU-Russia Partnership and Cooperation Agreement.*

- *Council Decision of 14 December 2011 on the signing, on behalf of the Union, and provisional application of the Agreement in the form of an Exchange of Letters between the European Union and the Russian Federation relating to the introduction or increase of export duties on raw materials.*

- *Agreement in the form of an Exchange of Letters between the European Union and the Russian Federation relating to the introduction or increase of export duties on raw materials.*

- *Council Decision of 14 February 2012 on the position to be taken by the European Union within the General Council of the World Trade Organization on the request for a WTO waiver on additional autonomous trade preferences granted by the European Union to Pakistan.*

Trade Remedies

- *Notice regarding the anti-dumping measures in force on imports of certain iron or steel fasteners originating in the People's Republic of China, following the recommendations and rulings adopted by the Dispute Settlement Body of the World Trade Organisation on 28 July 2011 in the EC — Fasteners dispute (DS397).*

- *Notice of initiation of an expiry review of the anti-dumping measures applicable to imports of certain polyethylene terephthalate originating in India, Indonesia, Malaysia, Taiwan and Thailand.*

- *Notice of initiation of an expiry review of the countervailing measures applicable to imports of certain polyethylene terephthalate originating in India.*

Customs Law

- *Corrigendum to Commission Implementing Regulation (EU) No. 1006/2011 of 27 September 2011 amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ L 282, 28.10.2011).*

Food and Agricultural Law

- *Commission Directive 2012/9/EU of 7 March 2012 amending Annex I to Directive 2001/37/EC of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products.*

Other

- *Commission Implementing Decision of 28 February 2012 establishing the best available techniques (BAT) conclusions under Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions for the manufacture of glass (notified under document C(2012) 865).*

- *Commission Implementing Decision of 28 February 2012 establishing the best available techniques (BAT) conclusions under Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions for iron and steel production (notified under document C(2012) 903).*

- *Amendment to the Customs Convention on the International Transport of Goods Under Cover of TIR Carnets (TIR Convention, 1975) — According to the UN Depositary Notification C.N.659.2011.TREATIES — 3 the following amendments to the TIR Convention enter into force on 1 January 2012 for all Contracting Parties.*

- *Council Decision of 3 October 2011 on the approval, on behalf of the European Union, of the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean.*

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