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WTO avoids breakthrough on applicability of Article XX GATT in China Publications - Audiovisual Products

On 12 August 2009, a WTO Panel issued its findings on China's measures affecting imports of certain audiovisual products and publications. The case was brought by the US with a request for WTO consultations circulated on 16 April 2007.

According to the US, China restricted the importation of reading materials, audiovisual home entertainment products, sound recordings and films for theatrical release by requiring that any such import be conducted through an intermediary, which is a state-owned enterprise. The US also claimed that the distribution services of said products is limited. Foreign-invested enterprises allegedly cannot engage in the master distribution of reading materials, the master wholesale and the wholesale of electronic publications and the distribution of the imported reading materials. Foreign-invested enterprises would also have to fulfil conditions for sub-distribution of reading materials that are more burdensome than the conditions that apply to the Chinese-owned enterprises. Regarding the distribution of audiovisual home entertainment products, the commercial presence is allegedly reserved for Chinese-foreign contractual ventures with majority Chinese ownership. For sub-distribution of the same product, the US claimed that also here the foreign-invested enterprises are subjected to more burdensome conditions than the Chinese-owned enterprises. The US also insisted on the fact that foreign-invested enterprises were prohibited to engage in the electronic distribution of sound recordings. Finally, the US alleged that the Chinese measures discriminated against the foreign goods as the distribution channels for the publications and audiovisual products are restricted. Therefore, according to the US, China was violating its commitments on trading rights under its WTO Accession Protocol, its market access and national treatment obligations on distribution services under its GATS Schedule of Commitments, and its national treatment obligations under Art. III:4 of the GATT.

Under its Accession Protocol, China committed to allow businesses to engage in the exportation from, and importation to, China of all products. China maintained certain exceptions, which however do not include cultural products, such as those that are the object of the dispute. The Panel found that China was in violation of its WTO Accession commitments by preventing certain trading activities. China claimed that Article XX(a) of the GATT allowed it to breach its commitments to protect public morals. Upon the invitation of the US, the Panel first analysed whether Article XX(a) would constitute a legitimate defence for the imposition of limitations to importation and distribution before entering into whether Article XX is at all applicable to obligations contained in the Accession Protocol. The Panel expanded the 'necessity' jurisprudence in doing so. Before this Panel report, the necessity test included an evaluation of the importance of the policy objective, the restriction on trade, and the contribution of the measure to that policy objective that had to be addressed under Article XX. Now, on the basis of the reasoning of the Panel, the restrictive impact of the measures to the right to import is to be added to this list. Whether the Panel was correct in adding this further condition, it depends on whether this will solely be related

to the nature of the trading rights obligations or not. It raises an interesting question, which has so far not been answered. The Panel came to the conclusion that Article XX(a) could not be used as a legitimate defence to justify the limitations a WTO Member had imposed on the importation and distribution of the cultural goods. Therefore, China was found to be violating its obligations. The Panel avoided going deeper into the applicability of the general exception provision of GATT to other Agreements signed under the WTO.

The Panel also found China to be in violation of its obligations under the GATS in relation to the distribution sector in the audiovisual services sector. In its Schedule of commitments regarding 'videos, including entertainment software and distribution services', for market access under mode 3, joint ventures can be opened with Chinese partners, with the right for China to examine the content of the products. Regarding national treatment, no limitations are scheduled. However, a limitation on equity participation under the form of foreign shareholding maximum percentage was established and, therefore, Article XVI of the GATS was being violated. Furthermore, the Panel concluded that treatment less favourable was accorded to the foreign investors, therefore violating GATS Article XVII.

Regarding the distribution of reading materials, China was found to be in violation of its WTO obligations. Article XVII of the GATS, in particular, is violated as foreign-invested enterprises cannot engage in the wholesale of reading materials subject to subscription, neither wholesale through the market. Master distribution and wholesale, as well as the retail services that are provided, were found to be prohibited, thereby excluding all competition possibilities for foreign-invested enterprises. Also, the registered capital requirement for foreign-invested enterprises is a violation of Article XVII of the GATS.

Regarding the distribution of sound recordings in electronic form, China was found to violate GATS Article XVII. The Panel first stated that these services can be placed under the heading of sound-recording distribution services in its schedule of commitments under sector Audiovisual Services, although China claimed that 'the sound recording distribution services' only referred to distribution of sound recordings embedded in physical media. The panel resorted to Articles 31 and 32 of the Vienna Convention on the Law of Treaties and found that 'sound recordings' cannot be limited to those embedded in a physical medium. 'Distribution' can be understood as a transaction whereby anything of value, tangible or intangible, is delivered to consumers, with or without intermediaries. Therefore, the Panel found China to have made commitments. Then, it established that the services related to this sector could not be provided by foreign-invested enterprises, therefore violating Article XVII of the GATS.

The real impact of the Panel report remains to be seen. It appears certain that the WTO Dispute Settlement mechanism will now be approached more often to resolve issues surrounding the obligations that can be found in WTO Accession Protocols. The Panel here, however, seems to have lost an opportunity to decide whether the general exception of GATT and GATS can be applied outside the respective Agreements. China is also still able to allow the importation of foreign motion pictures for theatrical release on a revenue-sharing basis, installing a cap of 20 movies on an annual basis, as is stated in the services Schedule of China's commitments. China has already expressed its intent of appealing the decision of the Panel.

The EC requests WTO consultations against Philippines' tax on imported liquor

On 29 July 2009, the EC requested WTO consultations against the Philippines' excise tax regime on distilled spirits. According to the EC, such regime provides for a price band system that 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 times higher than those applying to its domestic competitors. The imposition of excise duties on imported liquors has allegedly raised barriers to trade. As a consequence, the export of wines and spirits from the EC is said to have declined from €37 million in 2004 to €18 million in 2007.

The WTO Dispute Settlement mechanism has been resorted to on several occasions 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 of having imposed a different tax regime on imported products than on the domestic like product. In a previous case, which the EC brought against India, the two parties reached a mutually agreed solution during the consultation rounds, according to which India undertook to eliminate the extra duties imposed on the importations of European spirits. However, in September 2008, the EC filed a new complaint, stating that market access for Europe's spirits is still limited.

The EC alleges that Section 141 of the Philippine's Republican Act No. 8242, the Act amending the National Internal Revenue Code as amended by Republic Act No. 9334, subjects imported spirits to a system of price bands at substantially higher taxes than domestic spirits. The EC claims that these measures violate Philippines' obligations under Article III:2 of the GATT. According to the previous case law of the Appellate Body, the Panel will, therefore, have to analyse whether the imported products and the comparable domestic products are 'like' in the sense of Article III:2 GATT first sentence. The Appellate Body in Korea - Alcoholic Beverages held that 'like' products are a subset of directly competitive or substitutable products: all like products are, by definition, directly competitive or substitutable products, whereas not all 'directly competitive or substitutable' products are 'like'. The notion of like products must be construed narrowly, but the category of directly competitive or substitutable products is broader. The Philippines' Government reiterated that imported spirits fall under another category of taxes to protect the indigenous Filipino population that produces alcoholic beverages by using raw materials like coconut and sugarcane. Then, in a second phase, if the first question is answered positively, the Panel will have to analyse whether the taxes applied on the imported products are 'in excess of' the ones applied to the domestic variant.

The interest in this dispute for traders in alcoholic beverages cannot be underestimated. The Philippines' spirit market is one of the largest in the Asian-Pacific region. The consumption is high and there is still room for growth. It is no wonder that European and American spirit producers want to raise exports to that market. Producers and exporters of alcoholic beverages and spirits with an interest in the Philippines or in other markets, where similar trade policies are being enforced and result in alleged discrimination *vis-à-vis* imported products, should closely monitor the development of the case and its aftermath, cooperating with their respective governments in order to fully understand their rights and activate all available mechanisms to protect their commercial interests.

Japan – Switzerland FTA takes effect

Switzerland and Japan concluded a comprehensive and substantive Free Trade Agreement (hereinafter 'FTA') that not only contains provisions on the reduction and elimination of tariffs of trade in goods, but offers a wide coverage as also intellectual property rights (*inter alia*, geographical indications), investment, electronic commerce, competition and services are addressed. On 17 February 2009, the parties signed an agreement on free trade and economic partnership. On 1 September 2009, the agreement took effect.

Japan is the number one trading partner of Switzerland on the Asian continent. Japan, on the other hand, is the fourth Swiss trading partner in terms of imports. Already in 2003, feasibility studies for a possible FTA were conducted between the two trading partners. On 14 May 2007, official talks for an FTA were launched.

The FTA establishes that 99% of all the tariffs on goods will be eliminated on both sides over a period of 10 years. There will also be an improved system of origin declaration, which, although common in Europe, will be an entirely new system for Japan and will function as the basis for further expansion and facilitation of cross-border investments and for services trade. For this system, the customs authorities will designate an exporter (which fulfills certain criteria) as being able to declare that a certain product originates from that party to the agreement. This system can replace the 'certificate of origin', which is more costly and time-consuming. The status of 'approved exporter' can be withdrawn by the customs authorities when misuses and abuses are discovered.

This is the first FTA of Japan with an European country. With this agreement, *inter alia*, Japanese sake and bonsai trees will have easier access to the Swiss market, as will machinery and cars. Swiss companies will also benefit from the trade agreement, especially the chemical, pharmaceutical and watch industries, but also the food industry as its cheese, chocolate and meat trade may be improved. The FTA also tries to ensure a safer trading environment over the web as it recognizes the importance of electronic commerce and the confidence that should be fostered among consumers to encourage the use and the efficiency of this medium to provide goods and services. This is intended to make trade between the two countries a lot easier and more cost-effective.

EC signs Interim EPAs with Papua New Guinea and four ESA countries

The EC has recently signed two new Interim Economic Partnership Agreements (hereinafter, EPAs) with Papua New Guinea and four countries part of the Eastern and Southern Africa regional group.

As required by the Cotonou Agreement signed in 2000 between the EC and ACP countries, EPAs are intended to provide the legal basis for a new trading regime between the two trading blocks. According to the Cotonou Agreement, EPAs were to be concluded before the end of 2007. However, so far only one comprehensive EPA has been reached (*i.e.*, between the EC and CARIFORUM) whereas interim EPAs, providing for goods-only commitments are currently being negotiated with smaller groups of countries and will be used as a basis to conclude full regional EPAs.

The goods-only Interim EPA with Papua New Guinea was initialled in 2007 by the EC, Papua New Guinea and Fiji and started to be provisionally implemented on 1 January 2008. The agreement is now formalised between the EC and Papua New Guinea, whereas Fiji declared that it will formally join the agreement at a later stage. Under the terms of the Interim EPA, Papua New Guinea and Fiji enjoy quota free and duty free access to the EC market, although there is a short transition period for rice and sugar to achieve this. Papua New Guinea committed to eliminate the customs duties on 88% of the imports from the EC over 15 years. Once it formally joins the agreement, Fiji will remove customs duties on 87% of its imports from the EC, over the same period of time. In addition, it appears that the Interim EPA will provide for a relaxation of the rules of origin on a number of agricultural and fish products, allowing processed fish products produced in the two countries duty-free market access to the EC, independently of where the fish originates from. Papua New Guinea and Fiji's trade with the EC amounts to 83% of the total trade between the EC and the Pacific region (comprising Papua New Guinea, Fiji, Cook Islands, Tonga, Samoa, Timor-Leste, Kiribati, Marshall Islands, Fed. Micronesia, Nauru, Niue, Palau, Solomon Islands, Tuvalu and Vanuatu).

The EC also concluded an Interim EPA with Zimbabwe, Mauritius, Madagascar and Seychelles of the ESA regional grouping. Zambia and Comoros indicated that they will join the deal at a later date. The other countries from the ESA region that decided not to join the Interim EPA (*i.e.*, Burundi, Democratic Republic of Congo, Djibouti, Eritrea, Ethiopia, Kenya, Malawi, Rwanda, Sudan and Uganda) already enjoy preferential access to the EC market under the 'Everything But Arms' regulation. Similarly to the agreement with Papua New Guinea, it appears that the Interim EPA with the above ESA countries also provides, in relevant part, for a relaxation of the rules of origin for fisheries.

ACP Countries gain the most with the interim EPAs in the trade of sugar, rice and bananas. As stated above, for rice and sugar, the beneficiary countries will have to wait until 2010 to enjoy full and free market access. In relation to bananas, however, while in 2006 there was still a quota for duty-free market access placed at 755,000 tonnes, this quota is removed with the provisional application of the interim EPAs starting from 10 January 2008 onwards.

EFSA publishes data requirements for food additive applications and, in a second opinion, specifies requirements for the safety assessment of GM plants

The European Food Safety Authority (hereinafter 'EFSA') published a scientific opinion on data requirements for the evaluation of food additive applications. Furthermore, EFSA published safety requirements for GM plants used for non-food and non-feed purposes. On 9 July 2009, the data requirements for food additive applications were defined by EFSA's Panel on Food Additives and Nutrient Sources Added to Food (ANS), which deals *inter alia* with questions of safety in the use of food additives. In accordance with Article 31 of Regulation (EC) No. 178/2002, laying down the general principles and requirements of food law and establishing EFSA, and with the requirement in Regulation (EC) No. 1331/2008 of the European Parliament and Council establishing a common authorisation procedure for food additives, food enzymes and food flavourings, the European Commission had asked EFSA to provide the Commission with a proposal concerning the data required for the risk assessment of food additives. As to the legislative background, four Regulations were adopted by the European Parliament and Council on 16 December 2008. The package consisted of Regulation (EC) No. 1333/2008 on food additives, Regulation (EC) No. 1332/2008 on food enzymes, Regulation (EC) No. 1334/2008 on flavourings and a separate

Regulation (EC) No. 1331/2008 on a common procedure for evaluation and authorisation of these substances. In short, food additives are subject to safety evaluation by EFSA and approval via a Community list (the list of additives permitted in the EC) adopted by the Commission. The inclusion of a food additive in the Community list will be considered by the Commission on the basis of the opinion on its safety from EFSA.

The scientific opinion on data requirements for food additive applications expresses the type of data that the industry should provide for the safety assessment of food additives. The importance of the scientific opinion lays in the fact that the Commission will take it into account when it will draft legislative measures providing, *inter alia*, for the content, the drafting and presentation of the application for evaluation, and the authorisation of food additives. These implementing measures are due by the end of 2010. The goal is to ensure that the internal market has an effective regulation on this matter and that human health is protected. The actual data required are those files that facilitate making a thorough risk assessment of a given food additive. All documents that can help reach this objective and that contain relevant information (as known up to that moment) should be included in the dossier. This includes all the documents necessary for the safety evaluation, the documents that indicate how they have been gathered, a proper safety assessment strategy, raw data in published studies, and certain toxicological data.

The specific requirements for a safety assessment for GM plants used for non-food and non-feed purposes can be found in the second opinion published on 7 August 2009 by EFSA's Panel on Genetically Modified Organisms. This opinion, a self-tasked activity by EFSA without a specific mandate by the Commission, finds its legal basis in Directive (EC) No. 2001/18 on the Deliberate Release of GMOs, Regulation (EC) No. 1829/2003 on GM food and feed and Regulation (EC) No. 726/2004 on Medicinal products for human and veterinary use. As a basis, EFSA used the existing Guidance Document regarding Risk Assessment and Molecular Farming, other international guidelines, the communication between EFSA and the European Medicines Agency (EMEA), taking into account the comments by stakeholders. The purpose is to make the entire risk assessment much more efficient, indicating the required documents that applicants have to include in a comprehensive technical dossier and providing extra guidance for applicants on the risk assessment. EFSA advises applicants and regulators to read this Opinion in parallel with the Guidance Document. A regulatory flowchart is provided showing the interplay between the intended uses of a GM plant and the respective EC legislation applicable.

The role of EFSA is to evaluate the risk that is involved for human and animal life and the environment in general. As GM plants can be used for a lot of purposes, like the production of industrial enzymes, raw materials for bio-fuels, paper, starch, medicinal products, energy, etc., their production is really attractive. However, there are consequences that have to be kept in mind regarding gene-transfer and the exposure to and accidental intake by humans and animal. The kind of risk assessment that will be done is a quantitative one that works in two stages. First the effects on humans, animal life and the environment to the GMO will be tested with no confinement measures in place. In simple terms, confinement measures are intended to keep the GM plant material separate from non-GM plant material for safety reasons. Then, in a second stage, this will be compared to a situation where confinement measures, as proposed by the applicant, are applied. Therefore, the applicant should provide data that allow the assessment of confinement measures under all environmental conditions envisaged, taking worst-case scenarios into account. In this regard it may be necessary and useful for the applicant to narrow the geographical area in which he seeks permission for the product.

It appears that the affected industries welcome the publication of the opinions. However, there was some caution in their approach to do so. They stress that it is crucial to have clear guidelines, but also that these guidelines should not be too burdensome to follow.

Recently adopted EC legislation

- *Commission Regulation (EC) No.745/2009 of 14 August 2009 fixing the import duties in the cereals sector applicable from 16 August 2009*
- *Commission Regulation (EC) No.740/2009 of 12 August 2009 amending Regulation (EC) No 1282/2006 as regards export refunds for milk and milk products*
- *Commission Regulation (EC) No.733/2009 of 11 August 2009 adopting emergency measures for the market of milk and milk products in the form of opening the buying-in of butter and skimmed milk powder by a tendering procedure for the period from 1 September 2009 until 30 November 2009*
- *Commission Regulation (EC) No.734/2009 of 11 August 2009 initiating an investigation concerning the possible circumvention of anti-dumping measures imposed by Council Regulation (EC) No 1858/2005 on imports of steel ropes and cables originating in the People's Republic of China by imports of steel ropes and cables consigned from the Republic of Korea and Malaysia, whether declared as originating in the Republic of Korea and Malaysia or not, and making such imports subject to registration*
- *Council Regulation (EC) No.703/2009 of 27 July 2009 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of wire rod originating in the People's Republic of China and terminating the proceeding concerning imports of wire rod originating in the Republic of Moldova and Turkey*
- *Council Regulation (EC) No.768/2009 of 17 August 2009 amending Regulation (EC) No.1890/2005 imposing a definitive anti-dumping duty on imports of certain stainless steel fasteners and parts thereof originating, inter alia, in Vietnam*
- *Commission Regulation (EC) No.772/2009 of 25 August 2009 amending Regulation (EC) No.1580/2007 as regards the trigger levels for additional duties on tomatoes*
- *Commission Regulation (EC) No.778/2009 of 26 August 2009 setting the allocation coefficient for the issuing of import licenses applied for from 17 to 21 August 2009 for sugar products under tariff quotas and preferential agreements*
- *Commission Regulation (EC) No.798/2009 of 1 September 2009 amending the representative prices and additional import duties for certain products in the sugar sector fixed by Regulation (EC) No.945/2008 for the 2008/2009 marketing year*