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Remaining '*retaliatory*' duties in the *EC – Hormones* dispute lifted by the US

The US terminated all remaining '*retaliatory*' duties imposed on imports from the EU in relation to the EU's ban on imports of hormone-treated beef. Under the terms of the EU-US Memorandum of Understanding on High Quality Beef (hereinafter, the 2009 MOU), signed on 13 May 2009, these duties should have ended only in August 2012. However, an October 2010 decision of the US Court of Appeals for the Federal Circuit ruled that the Office of the US Trade Representative no longer had the authority to continue imposing the duties beyond 29 July 2007, as no request for an extension of these US duties had been received within the required timeframe. As a result, these duties have now been lifted by the US in advance of the timeline set out in the 2009 MOU.

The *EC – Hormones* dispute arose from a complaint lodged at the WTO by the US and Canada against EU measures that banned the use of growth-promoting hormones, as well as imports of meat treated with such hormones. In 1998, the WTO Appellate Body found that the EU import prohibition on meat and meat products from cattle treated with any of six specific hormones used for growth promotion purposes was inconsistent with Articles 3.3 and 5.1 of the SPS Agreement. Article 3.3 of the SPS Agreement permits WTO Members to introduce sanitary or phytosanitary measures, which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on relevant international standards, guidelines or recommendations, so long as a scientific justification is provided, or on condition that the WTO Member seeks further scientific information and conducts an appropriate assessment of the risks to animal or plant life or health. Article 5.1 of the SPS Agreement requires WTO Members to ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by relevant international organisations.

The US and Canada claimed that the EU did not comply with the Appellate Body's ruling by the deadline of 13 May 1999, and sought permission from the WTO Dispute Settlement Body to apply '*retaliatory*' trade sanctions against the EU in the form of suspensions of a number of trade concessions. Pursuant to the arbitration procedure under Article 22.6 of the WTO Dispute Settlement Understanding, an arbitrator subsequently authorised the imposition of 100% *ad valorem* import duties on selected EU exports, for a total yearly value of 116.8 million USD and 11.3 million CAD, respectively (see, for more information, Trade Perspectives, Issue No. 1 of 16 January 2009). The US applied '*retaliatory*' duties against a range of EU agricultural exports, including meat, poultry, cheese, vegetables, cereals, spices, juices, chocolate, mineral water, mustard, and against manufactured goods such as artificial staple fibres, hair clippers and motorcycles. The EU and the US eventually signed the 2009 MOU to resolve this dispute. Under the terms of this arrangement, to be implemented in three stages, the EU was to provide the US with greater market access through a tariff-rate quota for US '*high quality beef*' produced without growth-promoting

hormones. In exchange, the US agreed to reduce its '*retaliatory*' duties levied on certain EU exports (for more details on the EU-US agreement, see Trade Perspectives, Issue No. 10 of 22 May 2009).

The removal by the US of its remaining '*retaliatory*' duties should lower costs for exporters of EU products such as certain meats, cheeses, onions, carrots, juices, mustard, and tomatoes. The EU Commission has now pledged to prepare a legislative proposal for the EU Council and the EU Parliament to authorise the beginning of the second phase of the 2009 MOU, scheduled to take effect in August 2012. Under this phase, the EU will increase its tariff-rate quota for imports of US, Canadian and Australian '*high quality beef*' produced without growth-promoting hormones from 20,000 metric tonnes to 45,000 metric tonnes. Parties involved in the export of agricultural products from the EU, or in the importation of US, Canadian or Australian beef into the EU, should closely follow the subsequent events and engage with other stakeholders and relevant EU Institutions in order to maximise the commercial windfall from this significant improvement in EU-US trading relations. Commercial parties should plan ahead in order to ensure that their businesses are prepared to handle important issues such as tariff-rate quota management, certifications, and regulatory and administrative compliance.

Report by EU Parliament foresees important changes to fruit juice proposal

The EU Parliament's Committee on Environment, Public Health and Food Safety has adopted on 26 May 2011 the report of *Rapporteur* Andrés Perelló (hereinafter, the report) on an EU Commission proposal of 21 September 2010 to amend Council Directive 2001/112/EC relating to fruit juices and certain similar products intended for human consumption (hereinafter, the Directive). In line with the EU policy of reducing added sugars in products and promoting a balanced diet, the EU Commission proposal followed requests from the European fruit industry (See Trade Perspectives, Issue No. 18 of 8 October 2010). The proposal provided 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. It is also proposed to adapt the Directive to technological progress, taking into account developments (such as quality factors and labelling requirements) in relevant international standards, notably the Codex Alimentarius Standard 247-2005 for fruit juices and nectars (hereinafter, the Codex Standard) and the Code of Practice of the European Fruit Juice Association.

The report endorses most of the EU Commission's proposal. However, it also suggests some significant changes. In addition, it is worded in a '*buy local'* tone that will inevitably create tensions with EU trading partners. Further to the EU Commission's proposal, which only makes reference to sugar and honey, the report provides that nectars and (other very specific products covered by the Directive) may be sweetened also by the addition of sweeteners. In fact, the Codex Standard foresees that sugars, honey and/or syrups, and/or food additive sweeteners, as listed in the General Codex Standard for Food Additives, may be added to fruit nectars. In this respect, it may be argued that this proposed change permits further harmonisation with international rules. However, the requirement in the EU Commission's proposal that the sales name of nectars shall include the words *'sweetened'* or *'with added sugar'* is eliminated in the report with the justification that other drinks with high sugar content, such as soft drinks, are not required to make such specific statement. It should be noted that the Codex Standard requires statements like *'sugar(s) added'* and *'with sweetener(s)'.*

In relation to fruit juices, the statement *'without added sugar'* for juices should, according to the report, be permitted on a voluntary basis '*in view of the fact that certain consumer groups (diabetics, children and people with weight problems) have special needs and that*

consumers still have difficulty distinguishing between 'fruit juice' and 'fruit nectar' as far as their sugar content is concerned'. In this context, at the heart of the EU Commission's proposal is the removal of sugar from the list of authorised ingredients for juices. Only nectars and similar products listed in an Annex to the Directive may, in the future, be sweetened. Although, in practice, very few juices seem to contain added sugars, and those that do normally clearly indicate so on the label, the fact that the addition of sugar to juices is currently permitted under Article 3(4) of the Directive appears to cause confusion among consumers. A statement *'without added sugar'* on juices, even if voluntary and temporary, as suggested in the report, may not be of help in consideration of the fact that juices cannot (by law) contain sugar. In simpler terms, considering that consumers seem to have difficulties in distinguishing between fruit juice and fruit nectar, the report wants to permit the label *'without added sugar'* on fruit juices (which will not be permitted to contain sugar anyway), but does not want mandatory statements such as *'sweetened'* or *'with added sugar'* on nectars, given that this information should already be provided in the list of ingredients.

Of particular relevance in terms of international trade, is the proposal in the report that juice obtained from *Citrus reticulata* (*i.e.*, mandarins) and/or *Citrus reticulata* hybrids (*i.e.*, tangerines) be allowed for addition to orange juice in a proportion not exceeding 10%, as long as it is mentioned in the list of ingredients. As a justification, the report provides that this possibility is contemplated in the Codex and, furthermore, that it is widely practiced by Brazilian and US producers (*i.e.*, '*(I)f this option were to be denied to European producers, they would be left at an unfair disadvantage compared with their international competitors').* In fact, the Codex Standard states that '*Subject to national legislation of the importing country, the juice from Citrus reticulata and/or hybrids with reticulata may be added to orange juice in an amount not to exceed 10%'.* The question is whether, in practice, the EU is currently importing orange juice with a 10% addition of mandarin and tangerine juice, as permitted by Codex (but s*ubject to national legislation)*, which is currently not permitted by the Directive. This prohibition certainly applies to both EU and third country producers in as much as the product is then sold onto the EU market. In that sense, the proposed recital 2a in the report, which states that '*to avoid distortions in competition, the rules arising from adaptation of the directive to the Codex should be equally applicable to all products marketed within the EU, regardless of whether they are produced in the EU or imported from third countries'* appears redundant. The same applies to the justification given by the *Rapporteur* that, '*from the point of view of the environment and socioeconomic sustainability, it is always better to choose locally-produced products, and that this also encourages producers in third countries to move towards producing higher quality and more sustainable goods'.* The statement implies that third country products are of lower quality and, by definition, environmentally and socio-economically unsustainable.

In conclusion, there seems to be an institutional agreement on prohibiting added sugar in fruit juices. The report introduces two important new matters within the scope of the proposal: permitting 10% mandarin or tangerine juice in orange juice and the addition of sweeteners to fruit nectars. Both matters are in line with the Codex Standard. Operators with an interest in juice trade should follow this procedure closely as the amendments may either open new business opportunities or pose serious regulatory and/or commercial hurdles. As the proposal also involves costly changes in the labelling of products, the establishment of a period of grace should be considered, during which manufacturers may continue using old labels. The next stage in the legislative procedure is the vote in the plenary of the EU Parliament on the report by the Committee for Environment, Public Health and Food Safety, scheduled for 7 July 2011.

Ukraine requests the establishment of a WTO panel regarding Moldova's environmental charges

On 18 February 2011, Ukraine formally requested the establishment of a WTO panel to address Moldova's imposition of environmental charges, which have allegedly had a negative effect on the importation and internal sale of a range of Ukrainian goods, including plastic and '*tetra-pack*' drinking containers. Ukraine originally requested consultations with Moldova on 17 February 2011. On 3 March 2011, the EU requested to join the consultations. Following the failure of the consultations, Moldova blocked Ukraine's request for the establishment of a panel at the 24 May 2011 meeting of the Dispute Settlement Body (hereinafter, DSB). Moldova will not be able to block a second request from Ukraine for the establishment of a panel at the next regular meeting of the DSB on 17 June 2011.

According to Ukraine's request for the establishment of a panel, pursuant to Moldova's 25 February 1998 law '*On Charge for Contamination of Environment*' (hereinafter, the Environmental Contamination Law), Moldova applies a charge for the importation of products whose use is deemed to contaminate the environment. These charges range from 0.5% to 5% of the customs value of the imported products. The list of products to which these charges apply is allegedly quite extensive. Ukraine has also claimed that Moldavian '*like products*' do not appear subject to these charges. Moldova's Environmental Contamination Law also appears to authorise a charge for plastic or '*tetra-pack*' packages containing non-dairy products. Ukraine claims that packages containing domestically-produced '*like products*' are not subject to this charge. Ukraine has argued that these environmental charges have reduced the sales of Ukrainian beer and juice within Moldova. Official Ukrainian figures state that, from January to November 2010, Ukrainian beer exports to Moldova declined 32.6% from 9.2 million USD to 6.2 million USD. Juice exports reportedly fell 34.8% from 3.8 million USD to 2.5 million USD.

A 1996 report of the WTO's Committee on Trade and Environment to the Singapore Ministerial explicitly stated that '*[s]cope exists under WTO provisions for Member governments to apply environmental charges and taxes*'. However, Ukraine's complaint does not pertain to Moldova's environmental charges *per se*, but to the allegedly discriminatory application of these charges against imported products. According to its request for the establishment of a WTO panel, Ukraine claims that, through the imposition of additional import duties and higher internal tax rates on imported products such as '*tetra-packs*', Moldova is violating its WTO national treatment obligations, as provided in Article III of the General Agreement on Tariffs and Trade (hereinafter, GATT).

In particular, Ukraine has challenged these measures on the basis of Articles III:1, III:2 and III:4 of the GATT. Article III:1 of the GATT contains the general principle that internal taxation (Article III:2) and regulation (Article III:4) cannot be applied to imported or domestic products so as to afford protection to domestic products. The first sentence of Article III:2, for instance, provides that products from the territory of one WTO Member imported into the territory of another WTO Member cannot be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to '*like domestic products*'. To support its claim under this provision, Ukraine must show that the imported Ukrainian products subject to the environmental charges, such as plastic and '*tetra-pack*' drinking containers, are '*like products*' to Moldovan goods which are not subject to the same charges. Previous WTO case law indicates that the '*likeness*' of the products will be determined by a number of factors, such as the products' end-uses in a given market, the tariff classification of the product, consumers' tastes and habits, and the product's physical properties, nature and quality. Ukraine must also show that the taxes applied on the imported products are '*in excess of*' those applied by Moldova to the domestic variant. In *Japan – Alcoholic Beverages*, the Appellate Body established that even the smallest

disparity of internal taxes or charges to the detriment of imported products is against WTO law. The second sentence of Article III:2 of the GATT provides that dissimilar taxation imposed on directly competitive or substitutable imports (a category that is broader than '*like products*') cannot be applied in a way that affords protection to domestic production. Based on WTO cases such as *Japan – Alcoholic Beverages II*, this claim requires an analysis of: (i) whether the imported and domestic goods are '*directly competitive or substitutable products*' which are in competition with each other; (ii) whether such products are '*not similarly taxed*'; and (iii) whether the dissimilar taxation of such products is applied '*so as to afford protection to domestic production*'.

Although Ukraine's request for the establishment of a panel does not provide further information on the operation of the measure, arguably a charge on the importation may also be challenged under Article II of the GATT, which, *inter alia*, prevents WTO Members from: (i) according to the imported products of other WTO Members a treatment which is less favourable than that committed to under their Schedules of Concessions; and (ii) applying customs duties, as well as other duties and charges of any kind imposed on (or in connection with) the importation in excess of the bound levels, as indicated in the Schedules of Concessions. The Note to Article III of the GATT clarifies that an internal charge which applies to an imported product and to the like domestic product at the time of importation may be subject to the provisions of Article III. According to the Appellate Body, the application of Article II or III of the GATT to an internal charge is to be determined by identifying among all relevant characteristics those that are more central. Article III should apply when the fiscal obligation is triggered by an internal factor, taking place within the customs territory (*i.e.*, after importation).

Moldova has reportedly acknowledged that its environmental charges have created an obstacle for dialogue with the EU regarding a future FTA, as well as a risk for retaliation by Moldova's major trading partners within the Commonwealth of Independent States (*i.e.*, Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Turkmenistan, and Uzbekistan; hereinafter, CIS) against Moldovan exports of fruits, vegetables and alcoholic beverages. On 30 May 2011, media reports indicated that the Moldovan Government has initiated proceedings to abolish these environmental charges. Parties with commercial trading interests in the EU, Ukraine, Moldova, and other CIS Countries should monitor this dispute closely.

Three issues reportedly remain unresolved in EU – Ukraine FTA talks

Ukrainian Prime Minister Mykola Azarov has reportedly stated that Ukraine and the EU have almost concluded negotiations on a bilateral FTA, and that just three issues remain to be resolved. The Ukrainian Prime Minister has announced the common desire of both parties to complete the FTA negotiations by the end of the year.

The EU-Ukraine FTA talks are occurring within the context of ongoing negotiations for an Association Agreement between the parties. The EU has designated Ukraine as a priority partner within the European Neighbourhood Policy (hereinafter, ENP), a foreign relations programme which aims at improving political and economic ties between the EU and its neighbouring States. The ENP is an extension of existing agreements, such as Partnership and Cooperation Agreements, and Association Agreements, between the EU and partner States. The EU and Ukraine signed a Partnership and Cooperation Agreement in 1998. In March 2007, the EU and Ukraine launched negotiations on a new Association Agreement. The EU and Ukraine are negotiating this FTA as a core element of a possible Association Agreement (see Trade Perspectives, Issue No. 3 of 11 February 2011). Ukraine already enjoys extensive duty-free access to the EU due to the EU's Generalised System of Preferences (hereinafter, GSP). In 2009, Ukraine exported to the EU 1.61 billion EUR worth

of goods under the GSP. Ukrainian goods enjoying preferential access under the GSP include chemicals, plant oils, minerals, base metals, machinery, and mechanical appliances. Ukraine's push to conclude an FTA with the EU may also be viewed within the context of the EU's GSP reform proposals (see Trade Perspectives, Issue No. 9 of 6 May 2011), under which the EU would remove GSP concessions from countries (such as, presumably, Ukraine) that have reached a certain level of development and that should no longer receive unilateral preferential treatment within the GSP system, but rather engage in reciprocal preferential concessions within bilateral FTAs.

The reported announcement from Mr. Azarov suggests that the parties have made progress on issues which were reported to have been contentious. This includes EU requests that Ukraine accomplish the following: bring its legislation on technical regulations, standardisation, and conformity assessments into line with EU regulations; align its sanitary and phytosanitary measures and animal health and welfare legislation with that of the EU; improve its enforcement of intellectual property rights law; improve the transparency of Ukrainian customs valuation procedures; and harmonise its public procurement legislation with that of the EU. The first remaining area of disagreement reportedly concerns EU quota levels for imports of Ukrainian grain. Ukraine initially insisted on the immediate elimination of all EU quotas on Ukrainian grain imports, but has reportedly revised its position to support a multi-year transitional period during which EU grain import quotas will be increased. The second remaining dispute relates to the services market, regarding which Ukraine has alleged that the EU Commission has adopted a discriminatory position by blocking Ukrainian air carriers from operating in the EU market. On this issue, Ukraine has also reportedly proposed a transitional period during which the EU's services restrictions will gradually be removed. The final remaining dispute apparently involves the geographical names of certain Ukrainian commodities. Ukraine has reportedly offered to accept a transitional period during which Ukraine will gradually eliminate Ukrainian product names that conflict with EU geographical indications (*i.e.*, place names, or words associated with a geographical location, used to identify products that have a certain quality or reputation due to their origin from that place). The Ukrainian minister for economic development and trade has reportedly been authorised to offer these concessions at the next round of FTA talks, scheduled to be held in Kiev from 20 to 24 June 2011.

The EU is already Ukraine's most important commercial partner, and accounts for approximately one-third of Ukraine's external trade. For the EU, Ukraine is a fast-growing export market: between 2000 and 2005, EU exports to Ukraine more than doubled in value, rising to 36 billion EUR. If an Association Agreement (including a bilateral FTA) is concluded, it could provide new commercial opportunities in various sectors, including pharmaceuticals, heavy machinery and agriculture. A possible EU-Ukraine FTA would also likely introduce a new generation of deep and comprehensive FTAs that address both trade issues (*e.g.*, services, intellectual property rights, customs, public procurement, energy-related issues, and competition) and certain '*beyond the border*' issues (*e.g.*, internal regulations such as restrictions on establishing a commercial presence and branch offices), by arranging for the approximation of certain Ukrainian regulatory regimes with the EU's relevant trade-related *acquis* (*i.e.*, the accumulated legislation and court decisions which constitute the body of EU law). Given the economic prospects and significant scope of a potential EU-Ukraine FTA, interested business parties should engage with their Governments, negotiators, and other stakeholders in order to ensure that they understand the issues at stake and maximise the benefits from a potential EU-Ukraine FTA.

Recently Adopted EU Legislation

Market Access

- *Commission Implementing Regulation (EU) No. 535/2011 of 31 May 2011 fixing the import duties in the cereals sector applicable from 1 June 2011*

- *Commission Implementing Regulation (EU) No. 521/2011 of 26 May 2011 amending Regulation (EC) No. 620/2009 providing for the administration of an import tariff quota for high-quality beef*

- *Regulation (EU) No. 512/2011 of the European Parliament and of the Council of 11 May 2011 amending Council Regulation (EC) No. 732/2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011*

- *Decision No. 1/2011 of the EU-Morocco Association Council of 30 March 2011 with regard to the amendment of Annex II of Protocol 4 to the Euro-Mediterranean Agreement between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, containing the list of working or processing required to be carried out on non-originating materials in order for the product manufactured to obtain originating status*

Trade Remedies

- *Commission Decision of 23 May 2011 granting certain parties an exemption from the extension to certain bicycle parts of the anti-dumping duty on bicycles originating in the People's Republic of China imposed by Council Regulation (EEC) No. 2474/93, last maintained and amended by Regulation (EC) No. 1095/2005, lifting the suspension and revoking the exemption of the payment of the anti-dumping duty extended to certain bicycle parts originating in the People's Republic of China granted to certain parties pursuant to Commission Regulation (EC) No. 88/97 (notified under document C(2011) 3543)*

Food and Agricultural Law

- *Commission Implementing Regulation (EU) No. 529/2011 of 30 May 2011 amending Commission Regulation (EC) No. 1580/2007 as regards the trigger levels for additional duties on tomatoes, apricots, lemons, plums, peaches, including nectarines, pears and table grapes*

- *Commission Decision of 27 May 2011 authorising the placing on the market of Chromium Picolinate as a novel food ingredient under Regulation (EC) No. 258/97 of the European Parliament and of the Council (notified under document C(2011) 3586)*

- *Commission Regulation (EU) No. 524/2011 of 26 May 2011 amending Annexes II and III to Regulation (EC) No. 396/2005 of the European Parliament and of the Council as regards maximum residue levels for biphenyl, deltamethrin,*

ethofumesate, isopyrazam, propiconazole, pymetrozine, pyrimethanil and tebuconazole in or on certain products

- *Commission Implementing Regulation (EU) No. 523/2011 of 26 May 2011 amending the representative prices and additional import duties for certain products in the sugar sector fixed by Regulation (EU) No. 867/2010 for the 2010/11 marketing year*

- *Commission Regulation (EU) No. 520/2011 of 25 May 2011 amending Annexes II and III to Regulation (EC) No. 396/2005 of the European Parliament and of the Council as regards maximum residue levels for benalaxyl, boscalid, buprofezin, carbofuran, carbosulfan, cypermethrin, fluopicolide, hexythiazox, indoxacarb, metaflumizone, methoxyfenozide, paraquat, prochloraz, spirodiclofen, prothioconazole and zoxamide in or on certain products*

- *Commission Implementing Regulation (EU) No. 515/2011 of 25 May 2011 concerning the authorisation of vitamin B_6 as a feed additive for all animal species*

- *Commission Regulation (EU) No. 508/2011 of 24 May 2011 amending Annexes II and III to Regulation (EC) No. 396/2005 of the European Parliament and of the Council as regards maximum residue levels for abamectin, acetamiprid, cyprodinil, difenoconazole, dimethomorph, fenhexamid, proquinazid, prothioconazole, pyraclostrobin, spirotetramat, thiacloprid, thiamethoxam and trifloxystrobin in or on certain products:*

- *Commission Implementing Decision of 24 May 2011 establishing a specific control and inspection programme for pelagic fisheries in Western Waters of the North East Atlantic (notified under document C(2011) 3415)*

- *Commission Implementing Regulation (EU) No. 506/2011 of 23 May 2011 amending Regulation (EU) No. 297/2011 imposing special conditions governing the import of feed and food originating in or consigned from Japan following the accident at the Fukushima nuclear power station*

Other

- *Regulation (EU) No. 511/2011 of the European Parliament and of the Council of 11 May 2011 implementing the bilateral safeguard clause of the Free Trade Agreement between the European Union and its Member States and the Republic of Korea*

- *Council Decision of 13 May 2011 on the conclusion of an Agreement in the form of a Protocol between the European Union and the Arab Republic of Egypt 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 Arab Republic of Egypt, of the other part*

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