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Panel report issued in the WTO dispute on *China - Measures Related to the Exportation of Various Raw Materials*

On 5 July 2011, the WTO panel in the dispute *China - Measures Related to the Exportation of Various Raw Materials*, issued its report. This dispute dates back to 2009 (for more background on export restrictions and this dispute, see Trade Perspectives, Issues No. 21 of 13 November 2009, and No. 8 of 23 April 2010), when the EU, Mexico and the US alleged, *inter alia*, that China's imposition of export duties and export quotas - in the form of 32 measures, and additional unpublished restrictive measures - on certain raw materials (*i.e.,* bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorus and zinc), which can be used for the manufacturing of aluminium, cars, light bulbs, microchips, mobile phones, pesticides, planes, steel, and other products, violated China's WTO obligations under the Accession Protocol of China to the WTO (hereinafter, China's Accession Protocol, or the Protocol).

The Panel found that China's export duties were inconsistent with the commitments that China had made in its WTO Accession Protocol. For each of the commodities identified by the complainants, the Panel found that China's series of export restraint measures operated in concert to impose export duties that were inconsistent with China's obligations under Paragraph 11.3 of China's Accession Protocol. Paragraph 11.3 of the Protocol binds China to eliminate all export taxes and charges, unless they are specifically provided for in Annex 6 of the same Protocol. The Panel assessed the effect on trade of the measures '*acting in concert*'. The Panel did this in order to avoid a situation whereby individual measures, renewed annually, might escape WTO dispute settlement review as a result of their expiration during the Panel proceedings. The Panel further concluded that China violated its obligations under Annex 6 of China's Accession Protocol by not consulting with other affected WTO Members prior to the imposition of the export duties affecting bauxite, coke, fluorspar, magnesium, manganese, silicon metal and zinc.

The Panel also found that the wording and context of Paragraph 11.3 of China's Accession Protocol precluded the possibility of China invoking the general exceptions in Article XX of the GATT to justify the imposition of WTO-inconsistent export duties in violation of Paragraph 11.3 of China's Accession Protocol. The Panel noted that, to '*allow such exceptions to justify a violation when no exception was apparently envisaged or provided for, would change the content and alter the careful balance achieved in the negotiation of China's Accession Protocol*'. The Panel further noted that, even if Article XX(g) of the GATT (*i.e.*, a GATT exception for the conservation of exhaustible natural resources, if such measures are made effective in conjunction with restrictions on domestic production or consumption) were available to justify export duties in violation of China's Accession Protocol, China had not demonstrated that its export duties on bauxite and fluorspar related to the conservation of exhaustible natural resources and were made effective in conjunction with restrictions on domestic production or consumption pursuant to this provision. The Panel also concluded that, even if China was permitted to claim, under GATT Article XX(b)

(*i.e.*, a GATT exception for measures that are necessary to protect human, animal or plant life or health) that certain other export quotas and duties were necessary for the protection of the health of China's citizens, China had been unable to demonstrate that its export duties and quotas were '*necessary*' within the meaning of GATT Article XX(b) and would lead to a long-term or short-term reduction of pollution.

China - Measures Related to the Exportation of Various Raw Materials demonstrates that WTO dispute resolution panels continue to treat WTO accession protocols as sacrosanct contracts between acceding WTO Members and existing WTO Members. WTO dispute resolution panels will likely interpret accession protocols in a way that permits situations in which there is a degree of inequality in the rights enjoyed by WTO Members, with some WTO Members largely prohibited from using export duties (*i.e.*, China), and other WTO Members permitted to conditionally use export duties, either due to the terms of their respective accession protocols, or because of their membership of the WTO at the time of its inception. In addition to China, the WTO Members currently subject to obligations on export duties due to accession protocols include Croatia, Latvia, Mongolia, Saudi Arabia, Ukraine, and Vietnam. The export duty concessions of acceding WTO Members such as China have been placed in their accession protocols, rather than in their GATT schedules of concessions. This has important legal consequences: there is no WTO mechanism for modifying accession protocols, while GATT schedules of concessions may be modified in accordance with the rules of Article XXVIII of the GATT, and as a consequence of the cyclical rounds of multilateral trade negotiations.

Important commercial consequences may flow from this ruling. China may appeal this decision to the WTO Appellate Body within 60 days of the date of circulation of the Panel report. If China does not appeal the report, then it must comply with the Panel's findings, or face the risk of retaliatory trade measures by the complainants in this case. The Panel's findings are of particular importance for manufacturers based in the EU, where raw materials reportedly comprise 10%, or 1.3 billion EUR, of the EU's non-energy imports. For some of the commodities at issue in this case, China's raw material export restrictions have apparently produced a situation in which world prices are approximately 100% higher than those paid by China's domestic manufacturers. This has potentially distorted competition in a wide range of EU manufacturing industries, including aircraft, home appliances, and steel pipes. *China - Measures Related to the Exportation of Various Raw Materials* may also increase pressure on China to remove its export restrictions on rare earth minerals, important inputs in the manufacturing processes of high-tech electronics, military hardware, and of green energy products, including hybrid cars. China appears to produce 97% of the world's supply of rare earth minerals, and has previously imposed export restraints on these commodities (see Trade Perspectives, Issue No. 1 of 14 January 2011). Reports indicate that the US, and other WTO Members, may be waiting for China's appeal decision in *China - Measures Related to the Exportation of Various Raw Materials* before filing a formal WTO complaint over China's export restrictions on rare earth minerals. Given the global pricing effects on commodities caused by China's export restraints, and the wide scope of critical industrial commodities affected, it is crucial for manufacturers and traders of these types of commodities to closely monitor the subsequent steps taken by China, the EU, Mexico and the US in the *China - Measures Related to the Exportation of Various Raw Materials* dispute.

New EU food labelling rules may force operators to amend most food product labels

On 6 July 2011, the EU Parliament voted in favour (606 votes to 46, with 26 abstentions) of new food labelling rules, after having reached a compromise with the EU Council. For a review of the background to the food information regulation (hereinafter, FIR), see Trade

Perspectives Issues No. 6 of 26 March 2010, No. 12 of 18 June 2010, No. 23 of 20 December 2010, and No. 4 of 25 February 2011.

Under FIR, it is mandatory to state the energy content and amounts of fat, saturated fat, carbohydrates, sugars, protein and salt in a legible tabular form on the packaging, together and in the same field of vision. This information must be expressed per 100g or per 100ml (in addition, it may also be expressed per portion). The initial proposal of the EU Commission for nutrition labelling on the front of packages was not endorsed. Also, the so-called '*traffic light colour coding*' was not made mandatory. Alcoholic beverages are exempted from the ingredient and nutrition labelling requirements. As the indication of '*salt*' is now mandatory, operators will no longer have the possibility to provide the sodium content. This appears to create a situation whereby food manufacturers will be obliged to indicate that dairy products, such as milk and yoghurt, contain salt (*i.e.*, sodium chloride), when they may actually contain sodium. However, FIR also provides that, where appropriate, a statement indicating that the salt content is exclusively due to the presence of naturally occurring sodium may appear in close proximity to the nutrition declaration. The *Codex Alimentarius Guidelines on nutrition labelling* (CAC/GL 2-1985) do currently not cover sodium and/or salt. In May 2011, the Codex Committee on food labelling discussed *Recommendations on the declaration of sodium (salt)*, noting that there is consensus that the nutrient sodium and/or salt should be included in the list of nutrients in the *Codex Alimentarius Guidelines on nutrition labelling*; however no agreement could be reached on the preferred terminology, and the matter was postponed for further discussion.

FIR establishes a minimum font size of 1.2mm for all mandatory information. This will have an impact on those companies that use several languages on a single package, as the use of a minimum font size may require more space, and different packaging will have to be introduced for different regions. Currently, all ingredients, including allergenic substances, must be indicated on the labels of pre-packaged foods. Under FIR, it will be easier for consumers to see if a product contains allergenic substances, as these ingredients will have to be highlighted in the ingredient list. Also, information on allergens will have to be provided for non-packaged foods (*e.g.*, on food sold in restaurants or canteens).

In relation to the contentious matter of indicating whether a product or an ingredient has been '*defrosted*' (see Trade Perspectives, Issue No. 4 of 25 February 2011), a compromise was reached between the EU Parliament and the EU Council. For foods that have been frozen before sale and which are then sold defrosted, the name of the food will have to be accompanied by the designation '*defrosted*'. However, the FIR establishes exceptions to this rule for ingredients present in the final product (*e.g.*, butter as an ingredient in cookies); foods for which freezing is a technologically necessary step of the production process (this seems to refer to, *e.g.*, freeze-dried coffee or fruit); and foods for which the defrosting has no negative impact on the safety or quality of the food. As to the third category, the introduction to FIR states explicitly that freezing of butter has no effect on its safety, taste, and physical quality, while the freezing and subsequent defrosting of meat and fishery products has such effects.

In accordance with current EU labelling law, the indication of the country of origin or place of provenance is mandatory where the failure to indicate this might mislead the consumer as to the true country of origin or place of provenance of the food, in particular if the information accompanying the food or the label as a whole would otherwise imply that the food has a different country of origin or place of provenance. In addition to this rule, where the country of origin or the place of provenance of a food is given, and where it is not the same as that of its primary ingredient, the country of origin or place of provenance of the primary ingredient in question has to be given or has to be indicated as being different to that of the food. Furthermore, FIR extends country of origin labelling requirements to fresh meat from pigs, sheep, goat and poultry. The new country of origin labelling requirements extend this

labelling regime beyond beef, where it was already mandatory, and other foods, such as honey, olive oil, fresh fruit, and vegetables. The EU Commission will introduce implementing rules within two years of FIR's entry into force. A possible further extension of country of origin labelling to the following food products will also be evaluated by the EU Commission: other meat than that mentioned above; meat when used as an ingredient; milk; milk used as an ingredient in dairy products; unprocessed foods; single ingredient products; and ingredients that represent more than 50% of a food. In its assessment, the EU Commission will have to take into account the need for consumers to be informed, the feasibility of providing mandatory indication of the country of origin or place of provenance, and an analysis of the costs and benefits of the introduction of such measures, including the legal impact on the internal market, and the impact on international trade.

Once FIR is published in the EU Official Journal (expected in October 2011), food companies will have three years to adapt to most of the rules, but five years to implement the new nutritional declaration. Manufacturers will need to change their labels accordingly. However, phasing-in of the new requirements allows operators to plan packaging changes in advance. The possible future mandatory extension of country of origin labelling to, in particular, meat, milk used as ingredients, and milk, would create additional labelling costs for operators, and the packaging would need to be changed according to the sourcing of the ingredients. This is another example of the trend within the EU of introducing mandatory country of origin requirements for a growing range of food products (in relation to the possible incompatibility of such requirements with international trade rules, see '*The EU Parliament votes on mandatory country-of-origin labelling for certain foodstuffs*' in Trade Perspectives, Issue No. 12 of 18 June 2010). In this context, press reports indicate that a WTO dispute settlement panel has ruled against the US on mandatory country of origin labelling requirements for various agricultural products. The decision is expected to be published this summer and is likely to be appealed.

The EU and Canada reach an agreement on equivalency of organic products

Intensive discussions between the EU Commission and Canadian authorities over the past year have resulted in an agreement on the equivalency of organic products in both jurisdictions. The arrangement allows the import and export of certified organic products between the EU and Canada, without the need for additional certification. Canada confirmed in writing on 23 June 2011 that it now recognises all EU organic products as equivalent to the Canadian Organic Products Regulation (which came into force on 30 June 2009). The Canadian Organic Products Regulation harmonised existing voluntary and mandatory organic certification in different provinces across the country, and requires all Canadian organic products to be endorsed by a certification body accredited by the Canadian Food Inspection Agency (hereinafter, CFIA).

On the EU side, the regulation adding Canada to the list of recognised countries (*Commission Implementing Regulation (EU) No. 590/2011 of 20 June 2011 amending Regulation (EC) No. 1235/2008, laying down detailed rules for implementation of Council Regulation (EC) No. 834/2007 (on organic production) as regards the arrangements for imports of organic products from third countries*) came into effect on 28 June 2011. It provides that certain agricultural products imported from Canada may be currently marketed in the EU pursuant to the transitional rules provided for in *Regulation (EC) No. 1235/2008*. Canada has submitted a request to the EU Commission to be included on the list provided for in Annex III to that Regulation. The examination of the information submitted by Canada, and the consequent discussions with the Canadian authorities, have led to the conclusion that Canada's rules governing production and controls of agricultural products are equivalent to those laid down in *Regulation (EC) No. 834/2007*. In reaching this conclusion, the EU Commission has carried out an on-the-spot check of the rules of production and the control

measures actually applied in Canada, as provided for in Article 33(2) of *Regulation (EC) No. 834/2007*.

The product categories recognised in *Regulation (EU) No. 590/2011* as equivalent are (a) live or unprocessed agricultural products and vegetative propagating material and seeds for cultivation; (b) processed agricultural products for use as food; and (c) feed. It is explicitly provided that the origin of the products in category (a), and organically grown ingredients of products in category (b), must be Canadian. The recognised production standard is the *Canadian Organic Products Regulation* and the competent authority is the CFIA. The regulation also lists 21 control bodies which may certify Canadian products as organic and issue the respective certificates. The inclusion of Canada in the list of recognised countries is limited until 30 June 2014. In international trade terms, Canada and the EU have also accepted the respective organic measures of the other Member as equivalent under Article 4 of the WTO Agreement on Sanitary and Phytosanitary Measures.

According to the Research Institute of Organic Agriculture (an independent entity established in Austria, Germany and Switzerland), the value of global organic trade is estimated at about 54.9 billion USD in 2009, with 96% of this figure being represented by the US (48.1%, *i.e.*, 26.4 billion USD) and EU (48%, *i.e.*, 26.3 billion USD) markets. Canada's organic market has grown from 2 billion USD in 2008 to over 2.6 billion USD in 2010, according to the Canada Organic Trade Association. Canadian companies export almost 400 million USD worth of organic commodities, ingredients and products to the EU, US and other parts of the world. The equivalency reached between the EU and Canada is expected to facilitate and boost trade in agricultural organic products between both markets. Canadian and EU organic producers will have increased opportunities to export their products, and consumers looking for organic food will have more choice. The respective organic logos, the Canada Organic Biologique logo introduced in 2009, and the EU organic logo, are now authorised for use across both markets. While Canada and the US have an equivalency agreement on organic products in place, there is not yet such an agreement between the US and the EU, although the issue was discussed in February 2011 between the US Agriculture Secretary and the EU Agriculture Commissioner.

The WTO releases latest trade policy review of the EU

On 8 July 2011, the WTO issued its latest bi-annual trade policy review (hereinafter, TPR, or the Report) of the EU. WTO TPRs regularly analyse the trade policies of WTO Members in order to determine how well they have complied with their WTO commitments. The most recent review of the EU's trade policy was based on a report presented by the WTO Secretariat, a report submitted by the EU, and more than 800 advance written questions submitted to the EU by other WTO Members.

The TPR assessed, *inter alia*, two trade issues of ongoing concern. First, the TPR noted the '*extraordinary intervention*' undertaken by EU Member States, which provided financial support to domestic firms affected by the 2008-2009 economic crisis. The TPR noted that most of the EU's state aid was targeted towards the financial sector, although the automobile, construction, and tourist sectors also received financial support. According to the TPR, between October 2008 and October 2010, the EU approved state aid totalling approximately 4.59 trillion EUR for the financial sector, with about three-quarters of this amount apparently coming in the form of bank guarantees. The TPR argued that the EU must continue with initiatives to phase out this crisis support in order to ensure that support measures do not block long-term adjustment and restructuring efforts in the targeted sectors. This issue reflects an underdeveloped area of WTO law, as service sector subsidies are not currently covered by the disciplines of the WTO General Agreement on Trade in Services (hereinafter, GATS). Article XV:2 of the GATS simply requires that '*sympathetic*

consideration' be given to a request for consultations by a WTO Member, which claims to be adversely affected by a services subsidy provided by another WTO Member. Pursuant to Article XV:1 of the GATS, multilateral negotiations to develop GATS disciplines for services subsidies began in 1995 under the auspices of the Working Party on GATS Rules, but have thus far made little progress.

The TPR also addressed the EU's subsidies within the agricultural sector. Although it was noted that the EU has made progress in reforming its Common Agricultural Policy subsidy regime, the TPR noted that, during the ten years prior to 2009, taxpayers and consumers in the EU transferred nearly 1 trillion EUR to agricultural producers. This issue flags an ongoing consequence of the stalled Doha Round trade talks. Paragraph 13 of the Doha Ministerial Declaration commits WTO Members to reducing '*all forms of export subsidies*', and achieving '*substantial reductions in trade-distorting domestic support*' within the agricultural sector. With the Doha Round negotiations currently deadlocked, such progress has not been made. Although the TPR noted that the EU has increasingly decoupled its agricultural subsidies from production levels, it also highlighted the fact that, since the marketing year 2000/01, EU '*Green Box*' support has increased nearly three-fold, to 62.6 billion EUR, while '*Amber Box*' and '*Blue Box*' support have both declined by three-quarters, to about 5.2 billion EUR and 12.4 billion EUR, respectively.

Under WTO law, agricultural subsidies are classified according to three colour-coded '*boxes*'. The '*Green Box*' is defined in Annex 2 of the WTO Agreement on Agriculture (hereinafter, AoA). Subsidies qualifying under the '*Green Box*' encompass a wide category of aid, including payments under environmental stewardship and conservation programmes, payments for relief from natural disasters, and income support to farmers which is decoupled from production levels, which do not distort trade, or at most cause minimal trade distortion. The '*Amber Box*', defined in Article 6 of the AoA, contains all domestic support measures considered to distort production and trade (*e.g.*, price supports and production subsidies). The '*Blue Box*', outlined in Article 6(5) of the AoA, refers to any support that would normally be placed in the amber box, if not for the requirement that farmers limit production. Since the last TPR, the EU has shifted agricultural subsidies to the '*Green Box*' by a substantial degree. This has concerned some WTO Members, which claim that some of the subsidies listed in the '*Green Box*' by the EU may, in fact, not meet the criteria of the first paragraph of Annex 2 of the AoA, largely because the trade distortion caused may be more than '*minimal*'. In this view, EU '*Green Box*' allocations may be a case of '*creative accounting*' regarding agricultural subsidies, rather than a significant reduction of trade-distorting agricultural subsidies. The difficulty for WTO Members taking this view is that further reforms to the WTO's agricultural subsidy system (*e.g.*, more restrictive disciplines for '*Green Box*' subsidy allocations) await progress in the Doha Round.

The TPR's analysis of state aid and agricultural subsidies within the EU highlights two ongoing issues of commercial significance to a wide range of parties. Given the ongoing euro zone crisis, there is a possibility that providing substantial state aid to the financial services sector may return to the agenda of EU policy-makers. Agricultural subsidies represent one of the longest-running trade irritants between the EU and third countries, most notably the US, and affect a wide range of parties engaged in the production and transportation chains for agricultural imports and exports. Parties involved in the EU financial sector or agricultural industries should remain informed regarding how these issues may affect their commercial interests.

Recently Adopted EU Legislation

Market Access

- *Commission Implementing Regulation (EU) No. 675/2011 of 13 July 2011 fixing the allocation coefficient to be applied to applications for import licences lodged from 1 July 2011 to 8 July 2011 under subquota III in the context of the tariff quota opened by Regulation (EC) No. 1067/2008 for common wheat of a quality other than high quality*

- *Commission Implementing Regulation (EU) No. 669/2011 of 12 July 2011 amending Regulation (EC) No. 376/2008 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products*

- *Commission Implementing Regulation (EU) No. 643/2011 of 1 July 2011 amending Regulation (EU) No. 642/2010 as regards import duties on sorghum and rye*

Trade Remedies

- *Notice of the expiry of certain anti-dumping measures (potassium chloride from Belarus and Russia)*

- *Council Implementing Regulation (EU) No. 655/2011 of 28 June 2011 terminating the anti-dumping measures applicable to imports of coumarin originating in the People's Republic of China*

- *Notice of initiation of an interim review of the anti-dumping measures applicable to imports of furfuraldehyde originating in the People's Republic of China*

Food and Agricultural Law

- *Commission Implementing Regulation (EU) No. 672/2011 of 13 July 2011 amending Regulation (EC) No. 968/2006 laying down detailed rules for the implementation of Council Regulation (EC) No 320/2006 establishing a temporary scheme for the restructuring of the sugar industry in the Community*

- *Commission Implementing Regulation (EU) No. 676/2011 of 13 July 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 Implementing Regulation (EU) No. 663/2011 of 8 July 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 Implementing Regulation (EU) No. 657/2011 of 7 July 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*

- *Commission Implementing Regulation (EU) No. 659/2011 of 7 July 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*

- *Council Decision of 28 June 2011 laying down simplified rules and procedures on sanitary controls of fishery products, live bivalve molluscs, echinoderms, tunicates, marine gastropods, by-products thereof and products derived from these by-products coming from Greenland*

- *Commission Implementing Regulation (EU) No. 650/2011 of 4 July 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 Implementing Decision of 1 July 2011 repealing Decision 2006/241/EC concerning certain protective measures with regard to certain products of animal origin, excluding fishery products, originating in Madagascar (notified under document C(2011) 4642)*

- *Commission Implementing Regulation (EU) No. 646/2011 of 1 July 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*

Trade-Related Intellectual Property Rights

- *Commission Implementing Regulation (EU) No. 670/2011 of 12 July 2011 amending Regulation (EC) No. 607/2009 laying down certain detailed rules for the implementation of Council Regulation (EC) No. 479/2008 as regards protected designations of origin and geographical indications, traditional terms, labelling and presentation of certain wine sector products*

Other

- *Council Decision of 13 May 2011 on the conclusion of an Agreement between the European Union and the Kingdom of Morocco establishing a dispute settlement mechanism*

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