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China's measures affecting natural rubber create concerns among its trading partners

Informed sources reported that, at the meeting of the WTO Committee on Technical Barriers to Trade (hereinafter, TBT Committee) of 17-18 June 2015, Indonesia and Malaysia raised concerns in relation to certain measures in place in China that negatively affect exports of natural rubber from these two countries.

In particular, Indonesia reportedly indicated that, since January 2015, its exporters of natural rubber are required to engage in lengthy and costly processes when submitting the necessary documents for purposes of customs clearance at the Chinese border. Indonesia noted that China's requirements are not public and requested China to publish the relevant measure and to notify it to the TBT Committee, as well as to postpone its application accordingly. It appears that Malaysia delivered a statement along the same lines. Responding to its trading partners, China did not acknowledge the existence of any such measure, but requested these countries to continue working in order to help China identify the issues at stake.

Natural rubber is an elastic material obtained from the latex sap of certain trees that can be processed into more durable materials and used in the manufacture of a variety of products. During processing, rubber is first mixed with additives and chemicals like sulphur and carbon black and then converted into a dough-like mixture called '*compound*'. Thanks to its specific properties (in particular, elasticity, resilience and toughness), rubber is the basic constituent of vehicle, aircraft and bicycle tires. Other products manufactured from rubber include mechanical parts such as mountings, gaskets, belts and hoses, as well as consumer products such as shoes, clothing, furniture and toys. Thailand, Indonesia and Malaysia are the largest producers of natural rubber (accounting for around 72% of global production), while China is the world's major consumer.

As relevant as the customs clearance and documentary-related concerns raised at the TBT Committee are, it appears that they may not be the only source of trade concerns for exporters of natural rubber to China. On 31 December 2014, for purposes of a public consultation, China published the standard *Compounded rubber - General technical specification*. The aim of this measure, which is reportedly set to enter into force on 1 July 2015, is to limit the content of natural rubber in compound rubber at 88%, thereby substantially lowering it from the current threshold (set at 95% to 99.5%). It appears that the remaining part

of compound rubber must be made of carbon black, a petroleum-derived product, which confers the rubber physical strength and a black colour.

China grants tariff-free market access to imports of compound rubber, but it subjects natural rubber to the payment of a tariff as high as RMB 1,500/tonne (*i.e.*, around EUR 211/tonne). Incidentally, this tariff was recently raised from RMB 1,200/tonne (*i.e.*, EUR 169/tonne). Under China's new measure, rubber with a natural rubber content higher than 88% will no longer be considered '*compound*', thereby losing its tariff-free market access and, instead, being subject to the payment of a tariff. Alternatively, in order to ensure that such products continue to be tariff-free, the measure will require exporters to adjust their production methods when exporting to the Chinese market (*i.e.*, by ensuring that rubber contains no more than 88% of natural rubber). However, this avenue may prove rather burdensome, inasmuch as the manipulation of the higher amount of carbon black in rubber apparently requires special equipment that rubber processors in producing countries may not currently possess. The measure also looks poised to negatively affect Chinese manufacturers importing and using compound rubber as an intermediate product, which will be subject to the payment of a tariff or, in the alternative, will be *de facto* constrained to use a product of a (reportedly) lower quality. On the other hand, it may benefit Chinese compound rubber manufacturers, which will need to source lower amounts of natural rubber from foreign markets.

From a WTO perspective, it appears that China's measure may constitute an obstacle to trade in contravention of the WTO Agreement on Technical Barriers to Trade (hereinafter, TBT Agreement), which applies to technical regulations, standards and conformity assessment procedures. In particular, the measure appears to fulfil all the requirements to qualify as a technical regulation, inasmuch as it applies to an identifiable group of products (*i.e.*, compound rubber), it lays down product characteristics (*i.e.*, a maximum natural rubber content) and its compliance is mandatory (in order to access the Chinese market).

In relevant part, the TBT Agreement requires, in Article 2.2, that measures not be more trade-restrictive than necessary to fulfil a legitimate objective, such as, *inter alia*, national security requirements, the protection of human health or safety and the protection of the environment. In this context, the assessment of the necessity of any given measure must take into account available scientific and technical information. However, it appears that no scientific report was issued to support the standard. In fact, in the absence of a notification to the WTO (in possible violation of Article 2.9 of the TBT Agreement), it is not clear on which scientific bases and purposes China's measure is grounded. Moreover, despite the requirement in Article 2.4 of the TBT Agreement that technical regulations be based on relevant international standards, the version that was made available in China does not appear to refer to any such basis.

Should the TBT Agreement not be applicable to China's measure, it would still need to comply with the WTO General Agreement on Tariffs and Trade (hereinafter, GATT), which prohibits, *inter alia*, that WTO Members impose import restrictions (under Article XI). With respect to the customs clearance and documentary requirements highlighted in the context of the TBT Committee, it is noted that Article VIII of the GATT requires that all fees and charges on imports be limited to the approximate cost of the services rendered, and that they do not constitute a means of disguised protectionism. In addition, as a WTO Member, China is required to publish and administer its trade regulations in accordance with Article X of the GATT.

At the said meeting of the TBT Committee, China asked Indonesia and Malaysia to work closely so that China can identify the relevant issues. This was the first time that China's framework on compound rubber was discussed at the TBT Committee, although WTO Members are free to continue to raise this issue at forthcoming meetings, both as a means to renew their trade concerns and to seek support from other WTO Members. Eventually, should these discussions not bear fruits, concerned WTO Members may deem it appropriate to move

this issue to more assertive *fora* within the WTO (*e.g.*, by formally requesting consultations with China and thereby triggering dispute settlement proceedings). In any event, interested operators should use the little, but valuable, time in their hands to effectively engage with their relevant authorities, in order to ensure that the diplomatic avenues (including the TBT Committee) are exhausted before any more contentious remedies are explored.

Russia requests the establishment of a WTO panel in *EU – Certain Measures Relating to the Energy Sector*

On 28 May 2015, the WTO Dispute Settlement Body (hereinafter, DSB) circulated a request for the establishment of a WTO panel by Russia in *EU – Certain Measures Relating to the Energy Sector*. In its request, dated 11 May 2015, Russia claims that the EU's *Third Energy Package* unjustifiably restricts imports of natural gas originating in Russia and discriminates against Russian natural gas pipeline transport services and service suppliers. On 19 June 2015, at a meeting of the WTO DSB, the EU rejected Russia's request, and thus the WTO DSB deferred the establishment of a panel. Nonetheless, the WTO DSB will likely establish a panel at its meeting on 20 July 2015, unless the EU and Russia are able to come to an agreement before that time, as per the rules of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter, DSU).

The EU's *Third Energy Package* was adopted in July 2009, and consists of various Directives and Regulations, implementing legislation and decisions of the EU and its Member States. With respect to gas, *Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC* (hereinafter, Directive 2009/73/EC) establishes common rules for the transmission, distribution, supply and storage of natural gas (including liquefied natural gas, or LNG) in the EU. Directive 2009/73/EC envisages that companies '*unbundle*' their production and supply activities through one of three schemes: (1) the '*ownership unbundling*' (where ownership of energy production is separated from ownership of transmission activities); (2) an '*Independent System Operator*' (where both activities may be carried out by a vertically-integrated company, provided that the management of the transmission network's technical and commercial operations is entrusted to a company under distinct ownership); or (3) an '*Independent Transmission Operator*' (where both activities may be carried out by a vertically-integrated company, provided that specific independency requirements apply to the transmission subsidiary and it is subject to additional controls) (see Trade Perspectives, Issue No. 18 of 5 October 2012).

The issues surrounding trade in energy between the EU and Russia are not novel. In September 2012, the EU Commission confirmed that it had initiated proceedings to establish whether *Gazprom*, Russia's State-owned gas company, restricted competition in breach of the EU's antitrust rules (see Trade Perspectives, Issue No. 10 of 16 May 2014). In particular, the EU Commission investigated whether *Gazprom* divided gas markets by hindering the free flow of gas across EU Member States, prevented the diversification of gas supply and imposed unfair prices on its customers by linking oil and gas prices. In December 2013, the EU Commission also indicated that the inter-governmental agreements concluded between Russia and a number of EU Member States (*i.e.*, Austria, Bulgaria, Croatia, Greece, Hungary and Slovenia) and Serbia, underpinning the construction a *Gazprom*-favoured pipeline, were in breach of EU law and, therefore, had to be renegotiated. According to the EU Commission, the seven agreements would render the pipeline contrary to the EU's *Third Energy Package*. The EU Commission appeared to have put the antitrust proceedings on hold until 22 April 2015, when it sent a '*Statement of Objections*' to *Gazprom* indicating that, in its preliminary view, *Gazprom* was breaking EU competition rules by pursuing an overall strategy to partition Central and Eastern European gas markets.

Prior to its WTO accession in August 2012, Russia had maintained that the application of the EU's *Third Energy Package* represented a confiscation of property in terms of the loss of control that *Gazprom* could exert over its European pipeline assets. Nonetheless, Russia did not file its request for WTO consultations in this dispute until 30 April 2014. The EU and Russia held consultations on 23-24 June 2014 and 10 July 2014, but were unable to come to a satisfactory resolution. At issue, according to Russia's request for WTO consultations, was whether EU's *Third Energy Package* is inconsistent with Articles II, VI, XVI and XVII of the General Agreement on Trade in Services (hereinafter, GATS), Articles I, III, X and XI of the GATT, Article 3 of the Agreement on Subsidies and Countervailing Measures (hereinafter, SCM Agreement) and the Article 2 of the Agreement on Trade-Related Investment Measures (hereinafter, TRIMs Agreement). Reports indicate that, at the meeting of the WTO DSB on 19 June 2015, the EU argued that Russia's request for the establishment of a WTO panel exceeds the scope of its original request for WTO consultations. Interestingly, the WTO provisions cited in Russia's request for the establishment of a WTO panel are different than those cited in its request for WTO consultations, but only insomuch as Russia appears to have dropped its claims under the SCM Agreement and the TRIMs Agreement.

Under WTO rules, goods and services are regulated differently and thus the definition of energy in terms of a service (*i.e.*, energy-related services, such as transmission and distribution) or a product (*i.e.*, a '*gas product*') is important in determining what treatment must be accorded to energy. Russia's claims rely on both the GATS and the GATT. Under Article II:1 of the GATS, WTO Members have a general obligation to accord services and service suppliers of other WTO Members treatment no less favourable than that they accord to like services and service suppliers of any other country, known as Most-Favoured Nation (hereinafter, MFN) Treatment. In addition, WTO Members may make specific commitments (*i.e.*, those listed in its GATS Schedule of Specifics Commitments on Services, or GATS Schedule), whereby they are then obligated to, *inter alia*, under Article VI:1 of the GATS, ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner, and, under Article VI:5(a) of the GATS, not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner that does not constitute unnecessary barriers to trade in services and could not reasonably have been expected at the time the specific commitments in those sectors were made. In particular, obligations with respect to market access in services, under Article XVI of the GATS, and National Treatment in services (*i.e.*, treatment no less favourable than that it accords to its own like services and service suppliers), under Article XVII of the GATS, are only applicable if the WTO Member concerned has included the relevant services (*e.g.*, pipeline transport services) in its GATS Schedule.

Conversely, obligations under the GATT are not dependent on whether a WTO Member has made specific commitments with respect to a particular good (*e.g.*, a gas product). According to Article I:1 of the GATT, WTO Members must accord MFN Treatment to any product originating in or destined for any other country. In addition, under Article III:4, WTO Members must also accord National Treatment to products of the territory of any WTO Member imported into its territory, unless differential internal transportation charges are based exclusively on the economic operation of the means of transport and not on the nationality of the product. WTO Members also have certain publication requirements under Article X:3(a) of the GATT, whereby each WTO Member must administer in a uniform, impartial and reasonable manner all of its laws, regulations, decisions and rulings. Lastly, Article XI:1 of the GATT requires WTO Members to eliminate quantitative restrictions from their territories, which means that no prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained on the importation or exportation of any product coming from or going to any other WTO Member.

In its request for the establishment of a WTO panel, Russia first points to the specific GATS commitments of Croatia, Hungary and Lithuania, which have implemented unbundling models under Directive 2009/73/EC and that undertook commitments under Article XVI and Article XVII of the GATS with respect to pipeline transport services. In addition, Russia maintains that Croatia, Hungary and Lithuania have implemented measures that allow their governments to own and control both the transmission system operator and the production or supply portion of vertical integrated natural gas undertakings, but which do not accord Russia similar treatment. Accordingly, Russia asserts that said EU Member States are in violation of their GATS market access and National Treatment obligations. In general, many of Russia's claims indicate that it believes it has been singled out, in violation of the EU's MFN Treatment obligations under Article II of the GATS and Article 1 of the GATT. In this regard, Russia describes instances where EU administrative bodies have granted gas products and/or services or service suppliers from other WTO Members a standard of treatment different than that applied to Russia (*e.g.*, being required to cede control of transmission system operators, being subject to higher certification requirements, having different interpretations of the term "*inter-connector*" applied by a German authority, being forced to charge regulated prices when other WTO Members are allowed to charge market prices and having its LNG corridors excluded from a special priority status in the EU), even though similar factual situations were present. Russia also argues that a '*gas release*' programme applicable to the Ostseepipeline-Anbindungsleitung (*i.e.*, OPAL pipeline), which a Russian supplier controls, acts as a *de facto* quantitative restriction on importation, contrary to Article XI of the GATT, which was not administered in a uniform, impartial and reasonable manner as required by Article X of the GATT.

The expansion of the EU during the past 15 years adds an interesting characteristic to this dispute as well. WTO Members submitted their GATS Schedules to the WTO in 1994, at which time the EU (formerly, the European Communities) submitted a schedule, on behalf of itself and its (then) 12 Member States, which included no commitments with respect to pipeline transport services. Croatia, Hungary and Lithuania did not join the EU until 2013, 2004 and 2004, respectively, and thus submitted separate GATS Schedules to the WTO upon accession, which do include specific commitments for pipeline transport services. On 11 June 2004, following the expansion of the EU from 12 to 25 Member States, the EU notified other WTO Members of its intention to modify or withdraw specific commitments, as allowed under Article V:5 of the GATS, and in accordance with Article XXI of the GATS. Under Article XXI of the GATS, in order to withdraw or modify commitments made under its GATS Schedule, the concerned WTO Member must negotiate compensatory adjustments with any affected WTO Members. With respect to pipeline transport services, the eventual consolidated GATS Schedule of the EU only included specific commitments for Hungary and Lithuania. The EU now includes 28 Member States, and it appears as though the EU has initiated notification procedures to modify or withdraw specific commitments, at least with respect to Bulgaria and Romania, but there is no evidence that an updated consolidated GATS Schedule of the EU has been certified by the WTO. Therefore, it appears as though Croatia's original GATS Schedule is still applicable. Accordingly, the dispute may in some ways serve as a reminder for groups for regional trade groups, or customs unions such as the EU, that are represented collectively to review individual commitments to ensure that they are consistent. Businesses with operations in such unions or associations may be better served if they are confident that international regulations will apply consistently throughout regional trading partners, where possible.

With respect to the dispute at hand, it is likely that the WTO DSB will establish a panel at its next regular meeting on 20 July 2015. It is unlikely that the EU will succeed in its argument that Russia changed the '*essence*' of its claims in its request for the establishment of a WTO panel, given that Russia appears to have narrowed the scope of its legal claims, and that, nonetheless, its request for WTO consultations reserved the right to address additional measures and claims. The dispute is most interesting because it will provide the WTO DSB an

opportunity to address trade in energy, an area with minimal discussion in WTO jurisprudence, and because the measures at issue deal in large part with antitrust protections, such as '*unbundling*', which are not an area in which the WTO has express '*jurisdiction*'. Businesses and governments alike should actively monitor the dispute. If it progresses to the panel and Appellate Body stages, the result could have major impact on the applicability of WTO law.

EU Parliament's JURI committee rejects amending the NHCR on nutrient profiles

On 16 June 2015, the EU Parliament's Legal Affairs Committee (hereinafter, JURI Committee) rejected an amendment that would have deleted nutrient profiles from *Regulation (EC) No. 1924/2006 on nutrition and health claims made on foods* (hereinafter, the Nutrition and Health Claims Regulation or NHCR). The JURI Committee voted on the EU Commission's Regulatory Fitness and Performance programme (hereinafter, REFIT), which seeks to simplify and rationalise the EU regulatory framework. The changes to the NHCR had been proposed by the EU Parliament's Committee on the Environment, Public Health and Food Safety (hereinafter, ENVI Committee) in March 2015. In its proposal to the JURI Committee, the ENVI Committee called for the EU Commission to review the scientific basis of the NHCR and to eliminate the concept of nutrient profiles. The ENVI Committee argued that there are serious and persistent problems with the implementation of the NHCR and, in particular, with the establishment of nutrient profiles.

In simple terms, the so-called nutrient profiles will determine whether foods are, in general, eligible or not to bear claims, based on their nutrient composition. Nutrient profiles shall ensure that foods that are, *e.g.,* high in sugar, fat or salt and, therefore, considered '*unhealthy*', cannot carry a nutrition or health claim. According to the European Consumer Organisation (hereinafter, BEUC), the purpose of establishing nutrient profiles is to prevent the use of claims masking the true nature of food products (*e.g.*, a lollipop that is claimed to be '*low in fat*', a milk bottle that is claimed to '*boost the immune system*').

Food business operators are not free to make any nutrition or health claim for marketing their food products. Only nutrition and health claims contained in the lists adopted by the EU Commission, which are based on generally accepted scientific evidence, are permitted. If a food business operator desires to use an unlisted health claim, it may apply for the inclusion of the claim on the approved list. The application of nutrient profiles as an additional criterion aims at avoiding a situation where nutrition or health claims mask the overall nutritional status of a food product, which could mislead consumers when trying to make healthy choices in the context of a balanced diet. Article 4 of the NHCR foresees the setting of such nutrient profiles by the EU Commission. Said measure, designed to amend non-essential elements of the NHCR by supplementing it, must be adopted in accordance with the regulatory procedure with scrutiny. The development of nutrient profiles, originally scheduled for January 2009, has not yet been finalised. When first draft proposals for a system were presented for discussion in 2008 and 2009, EU Member States' experts, the EU Parliament, and some quarters of the EU Commission, expressed serious concerns. A primary criticism was the draft proposal's restrictive approach (*e.g.*, very strict thresholds), which some believed would dissuade innovation and jeopardise the sustainability and development of a range of food categories in Europe.

Moreover, some said that the system proposed and agreed on could ultimately be used as a reference by regulators to apply restrictions on what are determined to be '*bad foods*' in a number of other areas, such as advertising and taxation. The EU Commission's services have been working on an implementing measure on nutrient profiles based on an opinion of the European Food Safety Authority (EFSA) and taking into account of criteria included in the

NHCR and consultations with the interested stakeholders and the EU Member States, but a timeline is currently not available.

It has been argued that there is no scientific justification for nutrient profiles in the context of the NHCR and, therefore, it has been proposed to delete Article 4 of the NHCR in the next review of the regulation. Arguably, with nutrient profiles as prerequisites for the use of nutrition and health claims, the EU legislature has written a new chapter in EU food law. So far, its priorities were food safety, consumer information and protection against misleading advertising. Through nutrient profiles, the nutritional behaviour of consumers will also be positively influenced in the future. The NHCR states, in recitals 1 and 10 thereof, that a varied and balanced diet is a prerequisite for good health and that single products have relative importance in the context of the total diet. Foods promoted with nutrition and health claims may encourage consumers to make choices, which directly influence their total intake of individual nutrients or other substances in a way that would run counter to scientific advice. These appear to be nutrition policy objectives that pursue the aim of protection of health, for which there is arguably no legal base. The NHCR was based on Article 95 of the Treaty establishing the European Community (now Article 114 of the Treaty on the Functioning of the EU or TFEU) for the achievement of the objectives set out in its Article 14 (*i.e.*, measures with the aim of establishing or ensuring the functioning of the internal market and the free movement of goods, now Article 26 of the TFEU).

BEUC had been campaigning against the changes proposed by the ENVI Committee, and reportedly said that the clear decision of the JURI Committee meant that the NHCR had been safeguarded and that nutrient profiles are key to ensuring that consumers are not misled by unhealthy foods making spurious claims. BEUC is urging the EU Commission to develop the long awaited nutrient profiles.

It must be noted that, in February 2015, the World Health Organisation's Regional Office for Europe presented its nutrient profiling tool to restrict the marketing of '*unhealthy*' foods and drinks to children. The nutrient profile model is intended to help national authorities identify '*unhealthy*' foods and restrict their marketing to children.

The EU Parliament will vote a motion for a resolution on the REFIT report (including the nutrient profiles matter) in its July plenary session in Strasbourg, France. The report is not legally binding because it is an own initiative procedure, although the EU Commission is still required to take a position. The next steps taken in the EU on nutrient profiles should be closely monitored and operators should be prepared to participate in shaping potentially upcoming EU legislation by interacting with EU Institutions, third country Governments, relevant trade associations and affected stakeholders.

Recently Adopted EU Legislation

Market Access

- *Regulation (EU) 2015/936 of the European Parliament and of the Council of 9 June 2015 on common rules for imports of textile products from certain third countries not covered by bilateral agreements, protocols or other arrangements, or by other specific Union import rules*

- *Regulation (EU) 2015/940 of the European Parliament and of the Council of 9 June 2015 on certain procedures for applying the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part, and for applying the Interim Agreement on trade and trade-related matters between the*

European Community, of the one part, and Bosnia and Herzegovina, of the other part

- *Council Decision (EU) 2015/926 of 16 March 2015 on the position to be taken on behalf of the European Union within the Association Council set up by the Euro-Mediterranean Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Tunisia, of the other part, with regard to the adoption of a recommendation on the implementation of the EU-Tunisia Action Plan (2013-2017) implementing the privileged partnership*

- *Council Decision (EU) 2015/904 of 17 December 2014 on the signing and provisional application, on behalf of the European Union, of the Protocol to the Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part, on a Framework Agreement between the European Union and the People's Democratic Republic of Algeria on the general principles for the participation of the People's Democratic Republic of Algeria in Union programmes*

Customs Law

- *Council Regulation (EU) 2015/981 of 23 June 2015 amending Regulation (EU) No. 1388/2013 opening and providing for the management of autonomous tariff quotas of the Union for certain agricultural and industrial products*

- *Council Regulation (EU) 2015/982 of 23 June 2015 amending Regulation (EU) No. 1387/2013 suspending the autonomous Common Customs Tariff duties on certain agricultural and industrial products*

Food and Agricultural Law

- *Commission Implementing Regulation (EU) 2015/949 of 19 June 2015 approving the pre-export checks carried out on certain food by certain third countries as regards the presence of certain mycotoxins*

- *Commission Implementing Regulation (EU) 2015/931 of 17 June 2015 amending and correcting Regulation (EC) No. 1235/2008 laying down detailed rules for implementation of Council Regulation (EC) No 834/2007 as regards the arrangements for imports of organic products from third countries*

- *Commission Implementing Regulation (EU) 2015/917 of 15 June 2015 amending Annex I to Regulation (EU) No. 206/2010 laying down lists of third countries, territories or parts thereof authorised for the introduction into the European Union of certain animals and fresh meat and the veterinary certification requirements as regards Bangladesh*

Other

- *Council Regulation (EU) 2015/960 of 19 June 2015 amending Regulation (EU) 2015/104 as regards certain fishing opportunities*

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