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The EC and the US reach a deal to end the *EC - Hormones* dispute

The EC and the US reached a deal on the long-standing trade dispute over imports of US beef produced with growth-promoting hormones into the EC. Under the terms of the deal, the EC would be allowed to maintain its trade ban on US imports of beef treated with growth-promoting hormones. In exchange, it will have to grant greater market access to US high quality beef produced without growth-promoting hormones. The deal will prevent the application of the so-called 'carousel sanctions' that the US had recently announced it would apply on EC products.

The deal, which was signed on 13 May 2009, is to be implemented in three phases. In the first three year long phase, the EC will open an annual tariff-rate quota (TRQ) of 20,000 tonnes for US beef produced without growth-promoting hormones. In this phase, the US may still maintain the additional (retaliatory) import duties that it currently applies on EC products (such as Roquefort cheese), but it will not impose the 'carousel sanctions' that it had threatened to impose and which were due to come into effect on 9 May 2009. Under these proposed sanctions, the list of EC products subject to additional duties would have changed every six months, thus causing serious prejudice to EC exporters due to the uncertainty in relation to the products that would be targeted next. In the second phase of the deal, intended to last one year, the EC will increase the TRQ to 45,000 tonnes. The US, in turn, will suspend the application of all additional duties on EC products. The implementation of the second phase, however, will not be automatic and a decision to implement this part of the deal will depend on whether, at the end of the first phase, the US beef industry will be able to effectively fill the 45,000 tonnes TRQ. Finally, in the third phase of the deal, the EC will maintain the 45,000 tonnes TRQ and the US would refrain for imposing any additional duties on EC products.

The deal is also supposed to suspend WTO litigation in relation to the EC compliance with the *EC - Hormones* decisions. It is recalled that the EC recently initiated a compliance dispute (for more details, see Trade Perspectives, Issue No. 1 of 16 January 2009). Under the deal, this related WTO litigation is suspended for the first 18 months, at the end of which either or both parties would be free to request a WTO panel. If such request is made, the procedure will be carried forward until the panel is ready to release its interim report. The release of such report to the parties will be suspended until the end of the second phase of the EC-US deal, and any further steps of the procedure will be subject to negotiations between the parties.

In implementing the deal, the EC is required to abide by WTO principles and not to prejudice the rights of its trading partners. In particular, the additional TRQ opened by the EC for beef imports will have to be designed in a non-discriminatory fashion and, in principle, be opened to the benefit of all supplying countries on the basis of Article XIII of the GATT. If the quota is to be allocated, the EC must either reach an agreement with all supplying countries or allocate shares among them on the basis of past performance. WTO rules appear to prevent the EC from attributing the TRQ entirely to the US, but depending on how the deal is structured, the EC may achieve such ultimate objective by opening the TRQ in a way that would effectively benefit only (or mainly) US exports. This appears to be the intention of the parties. It is clear,

however, that many other beef exporting countries will be closely monitoring events and developments since the size of the proposed increased market access (*i.e.*, 45,000 tonnes at the end of the implementation period) looks posed to create attractive quota rents and lucrative commercial opportunities. The history of TRQ administration for access to the EC market has been marred by controversy both at EC Courts and the WTO (two well-known examples are bananas and poultry meat). Traders and exporting countries should therefore keep a watchful eye on the implementation of this deal and consider all possible legal avenues.

Canada and Mexico request supplementary WTO consultations on US country-of-origin (COOL) measures

On 13 January 2008, Canada announced that it suspended its complaint at the WTO regarding US regulations that require meat to be labelled with its country of origin (see Trade Perspectives, Issue No. 2 of 30 January 2009), after negotiations resulted in 'relaxed' country-of-origin labelling (COOL) rules. Technically, the Canadian complaint at the WTO was not withdrawn and it may be resumes if need be.

Since these consultations were held, the US replaced its '*Interim Final Rule'* with the '*Final Rule on Mandatory Country of Origin Labelling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts'* (published on 15 January 2009 as 74 Fed. Reg. 2658, Parts 60 and 65) and the US Secretary of Agriculture issued a public letter, dated 20 February 2009, regarding the implementation of the Final Rule.

However, on 7 May 2009, the Canadian authorities have requested supplementary consultations with regard to the US COOL measure, including the Final Rule. In this request for supplementary consultation, Canada alleges that the US COOL measure is inconsistent, *inter alia*, with the US obligation to provide national treatment obligation in respect of technical regulations required under the TBT Agreement or, in the alternative, with the principles of risk assessment and scientific justification and proportionality under the SPS Agreement. In addition, Canada claims that such requirements are inconsistent with the WTO principles governing (non preferential) rules of origin.

On the same date, and with almost identical reasoning (and an alleged further violation of Article 12 of the TBT Agreement on Special and Differential Treatment of Developing Country Members), Mexico has requested consultations with the US concerning the same COOL provisions. This request supplements Mexico's prior request for consultations of 17 December 2008 concerning the COOL measures, as a result of which consultations were held on 27 February 2009.

EC Parliament votes in favour of a ban on imports of seal products

The EC Parliament in plenary session voted in favour of the imposition of a ban on seal products in the European Community. The (Parliament) Committee on Internal Market and Consumer Protection had already approved such ban on 2 March 2009 (for more details, see Trade Perspectives, Issue No. 6 of 27 March 2009). Now the proposed measure achieved the support of the whole European Parliament and will be transmitted to the EC Council of Ministers for it to decide by qualified majority.

The EC Parliament adopted the European Commission's proposal with amendments. According to the consolidated text, the placing on the EC market of seal products is to be allowed by way of exception only where the seal products result from hunts traditionally

conducted by Inuit and other indigenous communities and which contribute to their subsistence. As these measures are intended to apply both to products originating in the EC and to those introduced into the EC from third countries, Article 3 of the consolidated text appears intended to clarify that, in relation to imported seal products, the conditions for placing on the market apply at the time or point of importation. Therefore, the measure results into an import ban. The proposed text would still allow: importation of seal products where it is of an occasional nature and consists exclusively of goods for the personal use of the travellers or their families; and the placing on the market of seal products that result from by-products of hunting regulated under national law and conducted for the sole purpose of sustainable management of marine resources, provided that it is on a non-profit basis.

Canada has long claimed that the EC measures, if adopted, would be WTO inconsistent. Following the imposition of bans on seal products by individual EC Member States, Canada had lodged a request for WTO consultations already on 25 September 2007. So far no WTO panel has been established and no negotiated settlement has been notified in relation to that dispute (for more details, see Trade Perspectives, Issue No. 3 of 13 February 2009). Now Canada threatens to bring a WTO challenge against the EC measure. At the same time, the seal ban could undermine FTA negotiations recently launched between Canada and the EC, although it appears that, for the moment, Canadian negotiators intend to keep the two issues separated. Canada is not the only WTO Member threatening dispute settlement action. Norway has also recently declared that it would initiate WTO consultations should a ban on trade in seal products be adopted by the EC.

Italy referred to the Court of Justice over its failure to notify implementing measures concerning the labelling of certain ingredients which are susceptible to cause allergenic reactions

On 14 May 2009, the European Commission referred Italy to the EC Court of Justice (ECJ) over its failure to notify national implementing measures as required by Commission Directive 2007/68/EC of 27 November 2007 amending Annex IIIa to Directive 2000/13/EC of the European Parliament and of the Council as regards certain food ingredients. This Directive establishes a list of food ingredients which must be indicated on the label of foodstuffs as they are likely to cause adverse reactions in certain individuals. EC Member States were obliged to implement the Directive by 31 May 2008. In February 2009, the EC Commission sent a 'Reasoned Opinion' to Italy over its failure to notify the measures taken under its national law to implement the Directive. An ECJ judgement in an infringement proceeding under Article 226 of the EC Treaty against Italy will oblige it to take action or risk financial penalties.

The implementation of Directive 2007/68/EC in Italy is foreseen by the Law on the 'Arrangements for the fulfilment of obligations of the European Communities', the so-called 'Community Law 2008' (*Legge comunitaria* 2008), which was adopted by the Italian Senate on 17 March 2009, but still needs to be adopted by the Italian Parliament. The vote in the plenary was scheduled for the 19 May 2009. According to informed sources, it appears that the text has been adopted by the Italian Parliament the following day, with amendments. Article 24 of the draft 'Community Law 2008' provides for the modification of Section III, Annex 2 of the Legislative Decree 27 January 1992, No. 109 (L.D. 109/1992), implementing Directive 2000/13/EC. Section III, Annex 2 to the draft 'Community Law 2008' is identical to the Annex to the Directive. However, as the final version of the 'Community Law 2008' is not yet available, it remains uncertain whether Directive 2007/68/EC has been correctly transposed.

Why is the exact transposition so important? One could think that all ingredients need to be indicated on foodstuffs. Although this is the basic rule, under EC food labelling law this is not always the case. Directive 2000/13/EC on food labelling provides for certain exceptions. However, because some ingredients covered by these exceptions may cause allergic

reactions, there is an 'exception to the exception'. Annex IIIa to Directive 2000/13/EC establishes a list of food ingredients which must always be indicated on the label of foodstuffs as they are likely to cause adverse reactions in susceptible individuals. Directive 2007/68/EC (whose implementation has not been notified by Italy) provides that Annex IIIa to Directive 2000/13/EC is replaced by a new Annex. The Annex, which has not yet been implemented and/or notified by Italy, lists the ingredients that always need to be indicated, without exception. In particular, the Annex lists the following: Cereals containing gluten and products thereof, with exceptions; Crustaceans and products thereof; Eggs and products thereof; Fish and products thereof, with exceptions; Peanuts and products thereof; Soybeans and products thereof, with exceptions; Milk and products thereof with exceptions; Nuts, (*i.e.* almonds); Celery and products thereof; Mustard and products thereof; Sesame seeds and products thereof; Sulphur dioxide and sulphites at concentrations of more than 10 mg/kg or 10 mg/litre expressed as SO2; Lupin and products thereof; Molluscs and products thereof. Some of the exceptions to the listed products were introduced by Directive 2007/68/EC after a scientific assessment by the European Food Safety Authority that they are not likely, under specific circumstances, to cause adverse reactions in susceptible individuals

Wine, for example, is exempted from the obligation to label its ingredients. However, if one of the ingredients is an allergenic (like sulphur dioxide in certain concentrations), it has to be indicated. This concerns the ingredients listed above. The wine industry fought this rule, as it would have meant that wine containing the fining agent 'Isinglass', which is produced from fish gelatine, would have needed to bear the label 'contains fish'. As a compromise, scientific dossiers were submitted to the European Food Safety Authority, which finally decided that Isinglass is not susceptible to cause allergic reactions. The result is that the new Annex IIIa to Directive 2000/13/EC now lists 'exceptions to the exceptions' like '*Fish and products thereof, except fish gelatine or Isinglass used as fining agent in beer and wine*'.

It is worth noting that, on 20 May 2009, the European Commission adopted Regulation (EC) No. 415/2009 of 20 May 2009 amending Directive 2007/68/EC amending Annex IIIa to Directive 2000/13/EC of the European Parliament and of the Council as regards certain food ingredients. Fortunately, EC regulations need not to be transposed into national law by EC Member States as they are directly applicable.

Recently adopted EC legislation:

Council Regulation (EC) No. 412/2009 of 18 May 2009 amending Regulation (EC) No. 428/2005 imposing a definitive anti-dumping duty on imports of polyester staple fibres originating in the People's Republic of China and Saudi Arabia, amending Regulation (EC) No. 2852/2000 imposing a definitive anti-dumping duty on imports of polyester staple fibres originating in the Republic of Korea and terminating the anti-dumping proceeding in respect of such imports originating in Taiwan

Commission Decision of 14 May 2009 suspending the definitive anti-dumping duties imposed by Council Regulation (EC) No 1683/2004 on imports of glyphosate originating in the People's Republic of China

Commission Regulation (EC) No 386/2009 of 12 May 2009 amending Regulation (EC) No 1831/2003 of the European Parliament and of the Council as regards the establishment of a new functional group of feed additives

Commission Regulation (EC) No 388/2009 of 12 May 2009 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 as regards the import and export system for products processed from cereals and rice (Codified version)

Commission Regulation (EC) No 389/2009 of 12 May 2009 amending Council Regulation (EC) No 329/2007 concerning restrictive measures against the Democratic People's Republic of Korea

Commission Decision of 8 May 2009 providing for the temporary marketing of certain seed potatoes not satisfying the requirements of Council Directive 2002/56/EC (notified under document number C(2009) 3392)

Commission Decision of 8 May 2009 amending Appendix B of Annex VII to the Act of Accession of Bulgaria and Romania as regards certain establishments in the meat, poultrymeat, fish and milk and milk products sectors in Romania (notified under document number C(2009) 3390)

Commission Regulation (EC) No. 379/2009 of 8 May 2009 concerning the authorisation of a new use of 6-phytase EC 3.1.3.26 as a feed additive for chickens for fattening, turkeys for fattening, laying hens, ducks for fattening, piglets (weaned), pigs for fattening and sows (holder of the authorisation Danisco Animal Nutrition, legal entity Danisco (UK) Limited)

Directive 2009/41/EC of the European Parliament and of the Council of 6 May 2009 on the contained use of genetically modified micro-organisms (Recast) (text with EEA relevance)