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WTO Appellate Body upholds the Panel's ruling in *US – Certain Country of Origin Labelling Requirements (COOL)*

On 29 June 2012, the WTO Appellate Body issued its final report upholding, for the most part, the Panel's finding that a series of US statutory provisions pertaining to certain mandatory country of origin labelling (hereinafter, COOL) measures, which require consumers to be informed at the retail level of the country of origin of certain covered agricultural commodities, including beef and pork, was in contravention of Article 2.1 of the WTO Agreement on Technical Barriers to Trade (hereinafter, the TBT Agreement). The Panel found, as alleged by Canada and Mexico, that the US COOL measures violated, *inter alia*, Articles 2.1 and 2.2 of the TBT Agreement (for additional background on the Panel decision, see Trade Perspectives, Issue No. 22 of 2 December 2011).

The US COOL measure sought to define the '*origin*' of meat as a function of the country or countries in which the livestock from where the meat is derived was born, raised and slaughtered. In order to comply with the COOL measure, meat producers are required to monitor and segregate the origins of different cattle and hogs for purposes of classifying the meat into 5 specific categories. The Appellate Body in *US – Clove Cigarettes* determined that a technical regulation violates the national treatment obligation of Article 2.1 of the TBT Agreement if it accords less favourable treatment to imported products than what is accorded to '*like'* domestic products, by modifying the conditions of competition in the relevant market to the detriment of imported products. In upholding the Panel's findings, the Appellate Body confirmed that the COOL measure, particularly regarding muscle cut meat labels, afforded less favourable treatment to imported Canadian and Mexican cattle and hogs as compared to '*like'* domestic cattle and hogs. The Appellate Body reasoned that, if a specified technical regulation (*i.e.*, the COOL measure) gives rise to adverse market effects, which disparately impact imported products, such effects will be attributable to the technical regulation for examining whether less favourable treatment can be found under Article 2.1 of the TBT Agreement.

As a result of the COOL measure, the Panel expressly found that market participants faced, with the choice between a scenario involving exclusively domestic livestock and one involving both domestic and imported livestock, opted predominantly for domestic only livestock. In agreeing with the Panel, the Appellate Body determined that a '*genuine relationship*' existed between the COOL measure and the detrimental impact on imported livestock because its recordkeeping and verification requirements modify the conditions of competition thereby creating an incentive for meat processors to use exclusively domestic livestock, while simultaneously creating a disincentive for using '*like'* imported livestock. The Appellate Body, however, found the Panel's Article 2.1 analysis incomplete, in that it had failed to consider whether the *de facto* detrimental impact from the COOL measure stems exclusively from a '*legitimate regulatory distinction*' (*e.g.*, applied in an even-handed manner), which would make it compliant with Article 2.1. The Appellate Body then reasoned that the informational requirements of the COOL measure imposed a disproportionate

burden on upstream producers and processors of livestock, as only a small amount of the information generated is actually conveyed to consumers through the mandatory labelling requirements, especially when considering that a considerable amount of meat sold is not subject to COOL requirements. As a result, the detrimental impact on imported livestock cannot be said to stem exclusively from a legitimate regulatory distinction, thereby reflecting a violation of Article 2.1 of the TBT Agreement.

In a minor victory for the US COOL measure, the Appellate Body reversed the Panel's initial determination that the measure violates Article 2.2 of the TBT Agreement because it does not fulfil the objective of providing meaningful consumer information on origin with respect to meat products. To be compliant with Article 2.2, WTO Members must ensure that a technical regulation: 1) is not applied with a view to or with the effect of creating unnecessary obstacles to trade; and 2) is not more trade restrictive than necessary to fulfil a legitimate objective. The Appellate Body in *US – Tuna II (Mexico)* provided that the second part of this test informs the scope and meaning of the obligation contained in the first part. In completing its analysis, the Appellate Body confirmed that the Panel had properly identified the COOL measure's '*legitimate objective*', but had erred in its interpretation and application of Article 2.2 on whether the measure is '*more trade-restrictive than necessary*' to fulfil the objective of providing consumer information on origin. Specifically, the Panel incorrectly reasoned that a measure could only be consistent with Article 2.2 if it completely fulfilled its objective or exceeded some minimum level of fulfilment. In doing so, the Appellate Body reasoned that the Panel ignored its own findings that the COOL measure does contribute to achieving its objective, at least to some extent, and that more information was available on origin than prior to its enactment. Consequently, the Appellate Body reversed the Panel's findings that the COOL measure violated Article 2.2 of the TBT Agreement, and clarified that a panel should focus on ascertaining the degree of contribution achieved by the measure, rather than answering whether it fulfils the objective completely or satisfies some minimal level of fulfilment. Finally, due to the absence of relevant factual findings and sufficient undisputed facts by the Panel after its determination that the measure did not fulfil the identified objective, the Appellate Body was unable to complete the Article 2.2 legal analysis and determining whether the COOL measure is more trade restrictive than necessary to fulfil its legitimate objective.

US – COOL was the third decision this year (following *US – Clove Cigarettes* and *US – Tuna II (Mexico)*) where the Appellate Body determined that US consumer and environmental protection measures were not justified as stemming from legitimate regulatory distinctions under Article 2.1 of the TBT Agreement (for information on the Appellate Body rulings in *US – Clove Cigarettes* and *US – Tuna II (Mexico)*, see Trade Perspectives Issue No. 8 of 20 April 2012 and Issue No. 10 of 18 May 2012, respectively). While the US has stated that the ruling confirms its right to adopt labelling requirements that provide information to American consumers about the meat they are buying, it remains to be seen what is necessary for such a measure to be WTO compliant and have a legitimate regulatory distinction. This is especially important as nearly 70 WTO Members have country of origin labelling requirements which may, or ultimately may not, be compliant with the TBT Agreement. Consequently, this determination is of great importance to both businesses and countries, as highlighted by the commercial significance of this ruling and by the fact that it has been estimated that COOL measures have cost Canadian beef and pork producers approximately CAD150 million a year since its implementation in 2008. Therefore, businesses operating in fields where technical regulations are present should carefully follow the expanding WTO jurisprudence relating to technical regulations, as well as any future proposed technical regulations implemented by countries that may affect their business interests.

Bilateral trade agreements between the EU and Russia result in increased opportunities for EU businesses upon Russia's accession to WTO

On 4 July 2012, the EU Parliament endorsed 3 bilateral trade agreements with Russia, which are intended to result in EU's firms receiving better conditions for conducting business in Russia. The agreements, negotiated as part of Russia's accession to the WTO (hereinafter, accession), were signed by the EU in order to protect EU businesses from exemptions granted to Russia during the accession negotiations, as well as for ensuring that existing favourable agreements between the countries remain intact after accession, resulting in superior terms for EU businesses than what is required by WTO rules. The agreements encompass: (1) safeguards on trade in the automotive parts and components industry; (2) notifications relating to the introduction or increase of export duties on raw materials important to the EU industry; and (3) preservation of commitments on trade in services for increased maritime transport market access and easier access for work permits for staff of EU businesses operating in Russia. Importantly, the EU is not required to undertake any commitments under the agreements, which will be applied provisionally from the date of Russia's accession.

For years, Russia sought to attract the relocation of foreign producers of autos and related components to compensate for the decline of its own car industry. In 2005, Russia initiated an auto investment programme that was extended in 2006 to car components and made more stringent in 2010 by Russian Government Decree No. 1289. It prescribes the localisation of auto manufacturers in Russia in return for investment related special privileges (*i.e.*, reduced or abolished import duties) upon meeting local content and other localisation requirements. The law results in the discriminatory treatment of imported auto parts and components for businesses not locally established, which would violate the WTO Agreement on Trade-Related Investment Measures (TRIMs). During accession negotiations, Russia's auto investment programme was exempted from compliance with all WTO agreements allowing continued discrimination against EU auto parts and components manufacturers until 1 July 2018. To counter this exemption, a compensation mechanism was established by means of an import licensing system whereby, if EU exports of car parts and components to Russia fall by at least 3% a year, Russia must allow the import of parts and components of EU origin at reduced import customs duties in quantities equal to the decrease of EU exports for a minimum of 12 months. Consequently, this agreement eases EU auto industry concerns that the continued WTO-inconsistent Russian measures could significantly harm EU exporters, while also reducing the risk of EU auto manufacturers electing to relocate to Russia.

When negotiating its accession, Russia also agreed to bound export tariffs for 80% of its raw materials exports, incorporating them in its Schedule of Concessions and Commitments on Goods. The remaining 20% of its raw materials exports, many which are of strategic importance to EU industries (*i.e.*, a large number of earths and minerals, chemical products, energy products, wheat, sunflower seeds, tobacco, animal skins, wool and cotton), are not subject to export duty restrictions. In order to minimise the risk of new export duties being applied to the '*unbound'* raw materials, the EU negotiated a bilateral agreement requiring Russia to '*make its best efforts*' not to introduce or increase export duties for an Annex list of raw materials where: (1) Russia has more than 10% of global production or exports; (2) the EU has a major import interest (existing or potential); and (3) a risk of tension in global supplies exists. If Russia elects to apply export duties on these raw materials, it is required to '*consult*' with the EU Commission at least 2 months prior to implementation with a view to reaching a solution taking into account the interests of both sides. While described as the best possible temporary solution, obligating Russia only to '*make its best efforts*' and to '*consult*' when enacting export duties on the specified unbound raw materials, this

mechanism is unlikely to ease the concerns of EU manufacturers from potential increases in export duties on materials that may significantly affect inventories and profits.

Finally, the bilateral agreement regarding the preservation of commitments on trade in services ensures that certain commitments made by Russia (*i.e.*, international maritime transport services and temporary movement of natural persons for business proposes), which are more substantial under the existing EU-Russia Partnership and Cooperation Agreement as compared to the multilateral commitments made by Russia for its accession, will remain in force. As a result, Russia agreed to take the appropriate most favoured nation exemptions under its WTO General Agreement on Trade in Services (GATS) Schedule of Commitments to exclusively preserve these commitments with the EU. Consequently, EU businesses operating in the maritime transport services sector will enjoy greater access to road and inland waterway services for freight and passengers, while businesses operating in Russia may benefit from a potential minimum quota of 16,000 work permits per year for EU qualified citizens.

Considering that the EU is Russia's main trading partner accounting for over 47.1% of Russia's overall trade turnover in 2010, ratification of the 3 bilateral agreements will likely result in: improved business opportunities for EU auto parts and components manufacturers; EU manufacturers dependent upon raw materials imported from Russia; and EU service providers operating in Russia, including those in the maritime transport sector. Furthermore, with an estimated 75% of foreign investment stock in Russia coming from EU investors, these agreements, along with Russia's accession and greater protection mechanisms, should result in increased business and investment opportunities for EU businesses in Russia's vast market. EU businesses interested in securing greater access to Russian markets, especially in these 3 fields, should closely monitor the implementation of these bilateral agreements, as well as of Russia's Protocol of Accession to ascertain how their business can benefit with increased opportunities resulting from the changes in trade relations between Russia, the EU and all other WTO Members.

The European Parliament blocks the adoption of the ACTA

The European Parliament (hereinafter, EP) voted on 4 July 2012 against the adoption of the '*Anti-Counterfeiting Trade Agreement*' (hereinafter, the ACTA). The vote comes after the EP's Committee on International Trade adopted in June 2012 a Recommendation drafted by its '*rapporteur*', concluding that the EP should decline to give its consent to the ACTA.

ACTA is a plurilateral trade agreement intended to address the protection and enforcement of intellectual property rights (hereinafter, IPRs), mainly, patents, copyrights, trademarks, designs and geographical indications, at the supranational level, in order to combat large-scale counterfeiting and piracy. Far from creating any new rights, the ACTA aims at improving the enforcement of existing ones, namely by providing for new and common ways for IPRs' holders to access justice, customs and police (see Trade Perspectives Issue No. 9 of 7 May 2010).

The main reasons for the Recommendation not to conclude in favour of the ACTA appear to arise from: 1) the treatment afforded to individual criminalisation; 2) the definition of '*commercial-scale*'; 3) the role of internet service providers; and 4) the treatment granted to generic medicines. According to the EP's '*rapporteur*', the vague language used in regard of the aforementioned areas leads to a considerable degree of uncertainty, which in turn makes the provisions of the ACTA likely to give rise to unintended consequences. The rights and obligations of online service providers *vis-à-vis* IPR holders have been, together with the extremely sensitive issue of access to medicines, a source of heated debate. In respect of the former, the EU Commission has ensured that the provisions of the ACTA are in line with

EU law, in particular with those of the E-Commerce Directive (*i.e., Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market*).

However, according to the Recommendation, the language in the ACTA would appear to require service providers to disclose, under certain circumstances, information on the identification of their subscribers to IPR holders. When it comes to the treatment afforded to generic medicines, controversy arises mainly from the alleged unfair advantage that the ACTA appears to grant to patented over generic medicines. Article 5 of the ACTA defines counterfeit goods in an allegedly overbroad manner, and hence renders it susceptible of severely hampering access to generic medicines, especially when the definition is read in conjunction with the stringent provisions on IPR enforcement. Acknowledging the extremely sensitive nature of the issues at stake, the text of the ACTA expressly endorses the principles laid down by the 2001 '*Doha Declaration on the TRIPs Agreement and Public Health'*, adopted at the Fourth WTO Ministerial Conference with the aim of safeguarding access to health in the context of IPR protection. Indeed, the level of protection envisaged by the ACTA goes beyond that put forward by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter, TRIPs Agreement). In fact, Article 1 of the ACTA states that no provision is to derogate from any obligation of the Parties under other Agreements, '*including the TRIPS Agreement'*. In light of the aforementioned considerations, the EP's '*rapporteur'* concluded in its Recommendation that '*the European Parliament cannot guarantee adequate protection for citizens' rights in the future under ACTA*'.

ACTA negotiations were launched in June 2008, and, after eleven rounds, concluded in November 2010. The entry into force of the Treaty of Lisbon in 2010 determined the procedural development of the text. Inasmuch as it falls within the scope of the EU's Common Commercial Policy, the Treaty on the Functioning of the EU (hereinafter, TFEU) requires consent of the EU Parliament before it can enter into force. After the preparatory work, carried-out at committee level (five committees were involved, under the supervision of the Committee on International Trade), and the adoption of the Recommendation of the '*rapporteur'*, the EU Parliament was presented with the choice of either approving or rejecting the proposed text; but in no case was it entitled to make amendments thereto. In parallel, the EU Commission submitted to the EU Court of Justice a request for an opinion on whether the ACTA was, in any way, incompatible with EU law, especially with the EU's fundamental rights and freedoms, but such an opinion has not yet been issued. Regardless of the outcome, the rejection by the EU Parliament means that, as far as the EU is concerned, the ACTA has fallen and the only option still available is to re-open negotiations with the EU's trading partners. This is the first time that the EU Parliament exercises its right, conferred by the TFEU, to block the adoption of an international trade agreement. The ACTA was concluded by the EU, Australia, Canada, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the US.

Companies operating in the field of IPRs are strongly advised to follow coming developments closely, especially now that the EU is expected to promote the adoption of new rules for the protection of IPRs in the digital environment. In addition, it must not be forgotten that the private sector and civil society have, through different channels, played major roles in the rejection of the ACTA by the EU Parliament. Indeed, it is worth noting that, although it is in the best interest of trade to regulate IPRs' enforcement in a manner that prevents fraud, it is also in the interest of trade to do so in a manner that safeguards other important values.

Recently Adopted EU Legislation

Market Access

- *Commission Implementing Regulation (EU) No. 631/2012 of 12 July 2012 amending Regulation (EC) No. 1295/2008 on the importation of hops from third countries*

- *Commission Regulation (EU) No. 630/2012 of 12 July 2012 amending Regulation (EC) No. 692/2008, as regards type-approval requirements for motor vehicles fuelled by hydrogen and mixtures of hydrogen and natural gas with respect to emissions, and the inclusion of specific information regarding vehicles fitted with an electric power train in the information document for the purpose of EC type-approval*

- *Commission Regulation (EU) No. 622/2012 of 11 July 2012 amending Regulation (EC) No. 641/2009 with regard to ecodesign requirements for glandless standalone circulators and glandless circulators integrated in products*

- *Commission Regulation (EU) No. 618/2012 of 10 July 2012 amending, for the purposes of its adaptation to technical and scientific progress, Regulation (EC) No. 1272/2008 of the European Parliament and of the Council on classification, labelling and packaging of substances and mixtures*

- *Commission Implementing Regulation (EU) No. 607/2012 of 6 July 2012 on the detailed rules concerning the due diligence system and the frequency and nature of the checks on monitoring organisations as provided for in Regulation (EU) No. 995/2010 of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market*

- *Commission Implementing Decision of 28 June 2012 authorising the placing on the market of products containing, consisting of, or produced from genetically modified soybean MON 87701 × MON 89788 (MON-877Ø1-2 × MON-89788-1) pursuant to Regulation (EC) No. 1829/2003 of the European Parliament and of the Council (notified under document C(2012) 4312)*

- *Council Decision of 25 June 2012 on the position to be taken by the European Union in the EEA Joint Committee concerning an amendment to Annex II (Technical regulations, standards, testing and certification) to the EEA Agreement*

- *Regulation (EU) No. 529/2012 of the European Parliament and of the Council of 13 June 2012 repealing Council Regulation (EC) No. 1342/2007 on administering certain restrictions on imports of certain steel products from the Russian Federation*

Trade Remedies

- *Council Implementing Regulation (EU) No. 627/2012 of 10 July 2012 terminating the partial interim review and the expiry review concerning the anti-dumping measures applicable on imports of certain plastic sacks and*

bags originating in the People's Republic of China and Thailand imposed by Regulation (EC) No. 1425/2006

- *Commission Regulation (EU) No. 596/2012 of 5 July 2012 initiating an investigation concerning the possible circumvention of anti-dumping measures imposed by Council Implementing Regulation (EU) No. 467/2010 on imports of silicon originating in the People's Republic of China by imports of silicon consigned from Taiwan whether declared as originating in Taiwan or not, and making such imports subject to registration*

- *Council Implementing Regulation (EU) No. 585/2012 of 26 June 2012 imposing a definitive anti-dumping duty on imports of certain seamless pipes and tubes, of iron or steel, originating in Russia and Ukraine, following an expiry review pursuant to Article 11(2) of Regulation (EC) No. 1225/2009, and terminating the expiry review proceeding concerning imports of certain seamless pipes and tubes, of iron or steel, originating in Croatia*

- *Council Implementing Regulation (EU) No. 626/2012 of 26 June 2012 amending Implementing Regulation (EU) No. 349/2012 imposing a definitive anti-dumping duty on imports of tartaric acid originating in the People's Republic of China*

- *Notice of the impending expiry of certain anti-dumping measures*

Customs Law

- *Decision No. 3/2012 of the EU-EFTA Joint Committee on common transit of 26 June 2012 amending the Convention of 20 May 1987 on a common transit procedure*

Food and Agricultural Law

- *Commission Regulation (EU) No. 610/2012 of 9 July 2012 amending Regulation (EC) No. 124/2009 of 10 February 2009 setting maximum levels for the presence of coccidiostats or histomonostats in food resulting from the unavoidable carry-over of these substances in non-target feed*

- *Commission Regulation (EU) No. 592/2012 of 4 July 2012 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 bifenazate, captan, cyprodinil, fluopicolide, hexythiazox, isoprothiolane, metaldehyde, oxadixyl and phosmet in or on certain products*

- *Commission Regulation (EU) No. 594/2012 of 5 July 2012 amending Regulation (EC) 1881/2006 as regards the maximum levels of the contaminants ochratoxin A, non dioxin-like PCBs and melamine in foodstuffs*

Trade-Related Intellectual Property Rights

- *Commission Implementing Regulation (EU) No. 579/2012 of 29 June 2012 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

- *Commission Regulation (EU) No. 623/2012 of 11 July 2012 amending Annex II to Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications*

- *Commission Regulation (EU) No. 600/2012 of 21 June 2012 on the verification of greenhouse gas emission reports and tonne-kilometre reports and the accreditation of verifiers pursuant to Directive 2003/87/EC of the European Parliament and of the Council*

- *Commission Regulation (EU) No. 601/2012 of 21 June 2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council*

- *Decision of the European Central Bank of 19 June 2012 amending Decision ECB/2007/5 laying down the Rules on Procurement (ECB/2012/10)*

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