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US House of Representatives passes a bill imposing taxes on products from countries failing to cap greenhouse gas emissions

On 26 June 2009, the US House of Representatives passed the US Clean Energy and Security Act (hereinafter, the Act), which includes provisions imposing Border Tax Adjustments (hereinafter, BTAs) on certain imports originating from countries without carbon emission controls equivalent to those of the US.

The BTAs will mainly concern chemicals, iron and steel, glass, cement, some pulp and paper products, lime, and non-ferrous metals such as aluminium and copper. Under the current version of the Act, BTAs will consist in a charge on importers of such heavily-traded energy-intensive products, in the form of emission allowances purchases (conferring the right to emit a specific amount of the polluting substance). The scheme also provides for few exceptions. The BTAs will not apply to imports from least-developed countries as well as to imports from countries accounting for below the *de minimis* threshold of 0.5% of global emissions (provided that such imports account for less than 5% of US imports in the sector in question). In addition, it appears that under the current language of the Act, the US President may issue a BTAs waiver, subject to the Congress' approval, if the administration considers it in the national interest. Moreover, BTAs will not be levied against imports from countries where the greenhouse gas or energy intensity of the sector is equal to or lower than that of its US competitors, or against products the 85% (at least) of which are being imported by the US from countries with binding emissions reduction targets. Lastly, it appears that the Act would provide rebates in the form of emission allowances for trade-exposed energy-intensive industries complying with the US climate change legislation.

In the WTO, the relationship between trade and environment is controversial. Despite a range of WTO disputes addressing this relationship, there is still a lack of clear-cut answers and interpretations on numerous questions, including the consistency of BTAs with WTO law. The WTO General Agreement on Tariffs and Trade (hereinafter, the GATT) prohibits WTO Members from imposing tariffs and charges in excess of the level committed in the Schedules of Concessions. In addition, the GATT prohibits levying internal taxes or charges in excess of those applied to like domestic products. However, it allows WTO Members to impose charges and internal taxes that are not in excess of taxes applied to the like domestic product. Therefore, to comply with this WTO requirement, the BTAs envisaged in the US Act must not contemplate any discrimination between domestic and imported like products, and should preferably be aimed at offsetting the taxes or charges applied to domestic producers. Currently, it remains unclear how the BTAs in the US Act would offset the quantity of carbon emissions resulting from the production of a particular good, and whether this mechanism could potentially lead to discrimination between 'like' foreign and domestic products. Article III.2 of the GATT also prohibits the application of internal taxes or charges so as to afford protection to domestic production when competition is involved between domestic and imported products.

On the other hand, the GATT provides general exceptions for WTO-inconsistent measures, which are necessary to protect human, animal or plant life or health, or which relate to the conservation of exhaustible natural resources (Article XX (b) and (g) of the GATT). Both exceptions are subject to strict requirements. So far, in the majority of WTO cases, WTO Members have failed to justify their environment-related measures under such exceptions. At present, trade policies addressing climate change have never been the object of a trade dispute at the WTO.

The future of the Act remains uncertain. The Act has faced criticism both domestically and abroad. The US Senate is currently devising its own version of the Act, seeking to ensure that the BTAs provisions are consistent with WTO law, and to avoid possible retaliations from US trading partners. The representatives of a range of developing countries, including China and India, also expressed their strong opposition to the BTAs provisions contained in the Act. China and India have regarded the US BTAs as a means to pressure developing countries to cut more greenhouse gas emissions, whereas, according to the Kyoto Protocol, rich countries should bear a heavier burden than poor countries in mitigating climate change. Businesses involved in trade in energy-intensive products with the US should closely follow the legislative process and discuss with their governments possible ways to get involved in the ongoing international discussion of the US Act.

The Codex Alimentarius Commission adopts new provisions for food supplements

The *Codex Alimentarius* Commission adopted new provisions on food supplements, which will become official *Codex* Standards and Guidelines.

The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter, the SPS Agreement) explicitly recognises the standards, guidelines and recommendations established by the *Codex Alimentarius* Commission for food safety. With the purpose of harmonising the SPS measures on as wide a basis as possible, the SPS Agreement establishes the obligation for WTO Members to base their SPS measures on international standards, guidelines or recommendations, including those provided by the *Codex Alimentarius* Commission.

The new *Codex Alimentarius* provisions include the following items: Recommendations on the Scientific Substantiation of Health Claims; Nutritional Risk Analysis Principles; Provisions on the carrier Gum Arabic; the definition of the term ‘dietary fibre’ and conditions for the use of the term; and the use of eight food colours in food supplements.

In particular, the Recommendations on the Scientific Substantiation of Health Claims suggest that, for substantiating a health claim, instead of placing primary importance on human intervention trials, one should consider the entirety of the available relevant scientific data and weigh the evidence. The new Nutritional Risk Analysis Principles establish a framework for the future application of the risk assessment method by *Codex* for the use of a range of substances in food supplements, including vitamins and minerals. The *Codex Alimentarius* Commission further adopted the use of the following eight food colours in food supplements, meaning that the safety of these colours was scientifically substantiated: Allura Red AC; Caramel Colour-Class IV; Carotenoids; Chlorophylls-Copper Complexes; Fast Green FCF; Grape Skin Extracts; Indigotine; and Iron Oxides.

Finally, the *Codex Alimentarius* Commission adopted a provision providing a definition of the term ‘dietary fibre’ and conditions for its use. The food industry had long awaited the dietary fibre definition. Companies have to apply different definitions and interpretations of the terms ‘fibre’ or ‘dietary fibre’ in the EC Member States and worldwide. Article 1(4)(j) of the EC Nutrition labelling Directive 90/496/EEC currently states that ‘fibre means a material to be defined by the Commission and measured by a method of analysis to be determined by the Commission’, while those measures still need to be adopted. A harmonised definition will make the nutrition labelling of different products better comparable for industry and also for consumers.

The *Codex* Recommendations on the Scientific Substantiation of Health Claims are of particular interest in view of the ongoing debates and disagreements on the assessment and approval of health claims, in particular in the EC where the situation is unclear to many companies. The *Codex Alimentarius* Commission now suggests that, for substantiating a health claim, instead of placing primary importance on human intervention trials, one should consider the entirety of the available relevant scientific data and weigh the evidence.

India bans dairy products, cell phones and toys from China

Despite trade between India and China having grown rapidly over the course of recent times and accounting for approximately 34 billion US dollars in 2007, trade flows have been impeded by a number of tensions between the world's two most populous countries. In particular, trade tensions between India and China concern recent Indian import bans on Chinese dairy products, cell phones, and toys.

On 17 June 2009, India announced that it would extend its ban on Chinese dairy imports for six more months. The ban was introduced in the fall of 2008 by more than 20 countries, including India, after chemical melamine was found in milk, infant formula, and other Chinese dairy products. Melamine is a substance used for making high-resistance concrete, fertiliser and plastics and is considered to be toxic and known to cause kidney malfunction and organ failure when ingested. In 2008, worldwide reports revealed that thousands of people in China, mostly children, had turned sick after consuming dairy products adulterated with melamine. The World Health Organization referred to the 2008 Chinese milk scandal as one of the largest food safety incidents it had ever dealt with. In addition to dairy products, India banned imports of Chinese cell phones and toys on the basis of product safety and health grounds. The cell phone ban concerns specifically phones without an International Mobile Equipment Identity number. According to Indian officials, since the sale and the use of these phones are difficult to track, they could potentially be used by terrorists to communicate with each other or to set off explosive devices. Concerning toys, the ban applies to those Chinese toys that have not been certified by the International Laboratory Accreditation Cooperation (hereinafter, the ILAC). The ILAC is an international *forum* of cooperation between laboratories and inspection accreditation bodies around the world, which have been evaluated by peers as competent to perform their respective practices. The toys' ban appears to be based on the danger resulting from high lead content in Chinese products.

WTO rules would appear to apply to measures imposed by India. In particular, GATT rules prohibit import bans, with few exceptions. Therefore, Indian measures imposed on cell phones would fall within the scope of the GATT's prohibition, although they could arguably be justified under the Security Exceptions provided in Article XXI of the GATT. In addition, the provisions of the WTO Agreement on Technical Barriers to Trade would appear relevant to Indian measures on Chinese toys. Such agreement, *inter alia*, prevents WTO Members from applying technical regulations with a view or with effect of creating unnecessary obstacles to international trade. Finally, the ban on dairy products is subject to the requirements of the WTO SPS Agreement. The SPS Agreement requires WTO Members to ensure that any SPS measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles, and is not maintained without sufficient scientific evidence. In this regard, China has already invoked the SPS Agreement, requiring India to provide the basis for its ban on dairy products.

If the tensions between India and China are not resolved positively, China may refer the disputes to the WTO Dispute Settlement Body. Businesses involved in trade in such products with India, regardless of whether they were affected by Indian measures or not, should closely follow the consultations between India and China and ensure that their interests are not adversely affected by possible compromises between these countries.

EC Member States clash over the use of GM crops

On 15 June 2009, the European Food Safety Authority (hereinafter, EFSA) issued its positive opinion on the safety of Monsanto's MON 810 maize. This product belongs to the group of the so-called 'biotech products', also known as GMOs or GM crops, which are pest-resistant due to specific genes inserted into their structure.

In its conclusion, published on 30 June 2009, the EFSA Panel on GMO considered that the MON810 maize is as safe as its conventional counterpart with respect to potential effects on human and animal health. The EFSA Panel on GMO also concluded that the MON810 maize is unlikely to have any adverse effect on the environment in the context of its intended uses, especially if appropriate management measures are put in place. Moreover, the EFSA Panel on GMO recommended that pest-resistance management strategies continue to be employed.

The use of GM crops in the EC has caused a clash between EC Member States. Whereas the supporters of GM crops believe that, due to their physical characteristics, they can boost the agricultural sector in the EC, the opponents consider them unsafe not only for human beings, but also for the environment. In 2008, the MON 810 maize, marketed as YieldGuard, was planted on about 107,000 hectares in seven EC Member States. Outside the EC, various GM crops are planted in North America, South America and China. However, France, Germany, Hungary, Austria, Greece and Luxembourg have banned GM crops, invoking safeguard clauses on the grounds of potential environmental hazards (for more details on MON810 ban by the EC individual Member States see Trade Perspectives, Issue No. 8 of 24 April 2009). In addition, France has already rejected the EFSA report on GM crops, arguing that it had failed to take into account EC Member States' requests to change the way it evaluated the risk. In particular, the EFSA did not ensure that the safety assessment would also cover any impact on other forms of wildlife and whether pests could develop resistance.

The producers and traders of GM crops have struggled to achieve the authorisation for marketing their products in the EC, including MON 810 maize, for more than a decade. So far, the EC has effectively blocked these efforts, which even resulted in a WTO case. On 21 November 2006, the WTO Dispute Settlement Body adopted a Panel report, which, *inter alia*, found that between June 1999 and August 2003 the EC had maintained a *de facto moratorium* on approvals of GM products. On this basis, the WTO Panel concluded that the EC had failed to observe its obligation under the WTO SPS Agreement to ensure that its approval procedures are undertaken and completed without undue delay. In addition, the WTO Panel found that individual EC Member States' safeguard measures, which provisionally prohibited the use and/or sale of GM products in their territory, were inconsistent with the relevant provisions of the SPS Agreement, since they were not based on a risk assessment, as the SPS Agreement requires. On these bases, the Panel recommended that the EC bring its measures into conformity with the applicable WTO rules.

It appears that the ongoing reassessment of the risks posed by GM crops in the EC is part of the plan to implement the above-mentioned WTO Panel's recommendations. The EFSA is the EC's independent risk assessor. While the European institutions are not bound to consider its opinions, the EC Commission may propose, on the basis of the EFSA's assessment, the renewal of the GM products' approval for cultivation and other uses in the EC.

Recently adopted EC legislation:

Council Regulation (EC) No 598/2009 of 7 July 2009 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in the United States of America

Council Regulation (EC) No 599/2009 of 7 July 2009 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in the United States of America

Commission Regulation (EC) No 604/2009 of 9 July 2009 fixing the maximum export refund for butter in the framework of the standing invitation to tender provided for in Regulation (EC) No 619/2008

Commission Regulation (EC) No 605/2009 of 9 July 2009 fixing the maximum export refund for skimmed milk powder in the framework of the standing invitation to tender provided for in Regulation (EC) No 619/2008

Commission Regulation (EC) No 592/2009 of 8 July 2009 amending the representative prices and additional import duties for certain products in the sugar sector fixed by Regulation (EC) No 945/2008 for the 2008/2009 marketing year

Commission Regulation (EC) No 579/2009 of 2 July 2009 fixing the complementary quantity of raw cane sugar originating in the ACP States and India for supply to refineries in the period from 1 October 2008 to 30 September 2009

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