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Appellate Body rules in China – Publications on the use of GATT Article XX as a defence outside the GATT

On 21 December 2009, the WTO Appellate Body issued its final report on *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (hereinafter, *China – AV Publications*).

The dispute was brought by the US with a request for WTO consultations of 10 April 2007. According to the US, China violated its commitment to fully open the right to trade (*i.e.*, trading rights or the right to import and export) in relation to publications (*i.e.*, books, newspapers, periodicals and electronic publications) and audiovisual home entertainment products, since all imports had to go through certain Chinese wholly or partially state-owned enterprises. In addition, the US argued that restrictions on market access existed in the distribution of such products. The WTO panel found that China was violating its WTO commitments in relation to both claims (see Trade Perspectives, Issue No. 16 of 4 September 2009).

On 22 September 2009, China appealed certain findings of the WTO panel's decision, in particular the finding that: (i) Chinese measures were not justified under Article XX(a) of the GATT concerning public morals; (ii) the panel's conclusion that China's GATS Schedule of Commitments included specific commitments on the electronic distribution of sound recordings in non-physical form; and (iii) that China violated its trading rights commitments. The US also appealed certain findings of the panel in relation to the applicability of Article XX(a) of the GATT.

Of particular interest is the claim relating to the applicability of Article XX(a) of the GATT to the alleged violation of obligations included in China's Accession Protocol to the WTO (hereinafter, the Accession Protocol). Before the panel, China argued that its regulatory scheme could be justified under Article XX(a) of the GATT, which allows WTO Members to adopt (otherwise) GATT-inconsistent measures that are necessary to protect public morals. According to China, Article XX of the GATT could be used to defend a measure falling within its Accession Protocol. China's argument was based on the first sentence of paragraph 5.1 of the Accession Protocol, which clarifies that the commitments on trading rights undertaken by China (as detailed in the same Article) are '*without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement*'. In particular, China claimed that the introductory clause of paragraph 5.1 of its Accession Protocol constituted an exception to China's obligation to grant the right to trade, as it embodied a general right of WTO Members to adopt or maintain certain measures that pursue legitimate policy objectives. The US denied that Article XX of the GATT could be used against violations of commitments envisaged in the Accession Protocol. The panel did not rule on such issue. In its reasoning, it first made the assumption that Article XX of the GATT was applicable, in order to assess whether the defence was justified. As the panel found that China's measures did not fulfil the requirements spelled out in Article XX(a) of the GATT, the panel considered that there was no need to rule on whether Article XX of the GATT could be applied inside the context of paragraph 5.1 of the Accession Protocol.

In its assessment of whether Article XX of the GATT could be used to justify a measure that allegedly violated paragraph 5.1 of the Accession Protocol, the Appellate Body used a two-step approach. First, it examined whether China's measures were covered by paragraph 5.1 of the Accession Protocol. As this was the case, the Appellate Body moved on to the second step and

assessed whether China's defence under Article XX(a) of the GATT was justified. Therefore, the Appellate Body reversed the panel's order of reasoning.

The Appellate Body found that the introductory clause '*without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement*' in paragraph 5.1 of China's Accession Protocol covers China's power to take regulatory action that conform to WTO disciplines (the example was made of a sanitary and phytosanitary measure taken in compliance with the SPS Agreement) and China's power to take regulatory action that derogates from WTO obligations that would otherwise constrain China's exercise of such power (*i.e.*, China's power to adopt relevant exceptions). Noting that China's power to regulate trade in goods is disciplined by the provisions of the WTO agreements regulating trade in goods (*i.e.*, Annex 1A of the WTO Agreement), the Appellate Body found that that the introductory clause of paragraph 5.1 could not be interpreted so to '*allow a complainant to deny China access to a defence merely by asserting a claim under paragraph 5.1 and by refraining from asserting a claim under other provisions of the covered agreements relating to trade in goods that apply to the same or closely linked measures and which set to regulate trade in a manner consistent with the WTO Agreement and, as such, may not be impaired by China's trading rights commitments*'.

On this basis, the Appellate Body found that the introductory clause in paragraph 5.1 of China's Accession Protocol covers two measures. First, it covers those measures that are consistent with (*i.e.*, conform to) the WTO Agreement. In addition, measures that have a '*clearly discernable and objective link*' to the regulation of trade in goods at issue are also covered by paragraph 5.1 of the Accession Protocol. The Appellate Body clarified that the existence of a clearly '*discernable link*' has to be assessed while keeping in mind which particular goods are addressed and who may engage in trade. On the existence of the necessary '*objective link*', the Appellate Body stated that it depends on the nature, design, structure and function of the measure and its regulatory context. Once such links between the measures and the regulation of trade in goods are confirmed, it is possible to assess whether China could apply the GATT exception as a defence to justify its measures under paragraph 5.1 of the Accession Protocol.

The Appellate Body decided that there was a clearly discernable and objective link between the provisions that China tried to justify and China's regulation on trade in the relevant products. In light of this finding, the Appellate Body found that China could rely on paragraph 5.1 of the Accession Protocol for the measures that were found to be in violation of China's WTO commitments and seek to justify them under Article XX of the GATT. However, the Appellate Body upheld the WTO panel's decision that China had not demonstrated that the relevant provisions that were challenged by the US were necessary to protect public morals and were, thereby, justified.

The impact of this decision by the Appellate Body concerns the applicability of Article XX of the GATT to obligations arising from WTO Accession Protocols. In particular, the use of GATT (or GATS) exceptions for measures covered under Accession Protocols will depend on whether the Appellate Body's reasoning will be interpreted as applicable only in presence of conditions similar to those of paragraph 5.1 of China's Accession Protocol or in a broader context. This appears to be of particular relevance to newly acceded WTO Members, particularly in relation to WTO-plus commitments agreed in the context of their accession packages to the WTO and included in Accession Protocols.

The EU initials an agreement which ends the banana dispute

On 15 December 2009, the EU initialled an agreement with Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru and Venezuela (hereinafter, 'the Latin American Countries') regarding the structure and operation of the EU trading regime for fresh bananas, including plantains, classified under HS tariff line 0803.00.19 and the terms and conditions that apply thereto. In addition, the EU and the US came to an agreement concerning the related bananas dispute launched by the US on 5 February 1996.

The Geneva Agreement on Trade in Bananas was decided following a long-standing trade dispute. The EU banana trading regime provided trade preferences to African, Caribbean and Pacific (hereinafter, 'ACP') banana exporting countries. Such preferences were the object of a number of disputes before (the GATT and) the WTO, the outcome of which required the EU to modify its banana trading regime. In 2001, the EU, the US and Ecuador agreed that the EU would change its quota-based import regime for bananas to a tariff-only regime by 2006. For this reason, the EU calculated a duty of 230 EUR/tonne as the tariff-equivalent of the level of protection guaranteed by the previous regime, characterized by an MFN duty of 680 EUR/tonne and a tariff rate quota with a duty of 75 EUR/tonne. However, such proposed duty was deemed too high by Latin American Countries and led to two new arbitrations in 2005.

The parties involved reached a mutually agreed solution through the Geneva Agreement on Trade in Bananas. In particular, it was agreed that the EU would maintain an MFN-only regime for the importation of bananas, with the MFN tariff set at a level not higher than 148 EUR/tonne from 15 December 2009 until 31 December 2010 (as opposed to the tariff of 176 EUR/tonne applied as of 1 January 2006). The maximum tariff rate will decrease from that point to 114 EUR/tonne by 1 January 2017. This commitment is to be added to the EU's WTO Schedule of Concessions by means of certification. As such procedure is completed, the Latin American Countries agreed to settle all pending disputes and all claims filed to date with respect to the EU trading regime for bananas. The Latin American Countries further agreed that this regime would constitute the EU's final market access commitments for bananas in the Doha Round.

The ACP banana producers will continue to enjoy duty-free and quota-free access to the EU under separate trade and development agreements (*i.e.*, the Economic Partnership Agreements). In addition, the so-called 'Banana Accompanying Measures' were drawn-up. Under such measures the EU committed to provide financial aid up to 200 million EUR to the ACP banana supplying Countries between 2010 and 2013 in order to assist with the transition to a more competitive market situation. Still, it is to be expected that exports of bananas from ACP Countries to the EU will drop to the advantage of banana exporters from Latin America.

The deals need the approval of the EU Council and the consent by the EU Parliament, following which the EU will sign the banana agreements with the Latin American Countries and the US. Once the agreements are signed, the EU will add the commitments undertaken as a result of the Geneva Agreement on Trade in Bananas in its WTO Schedule of Concessions by means of certification.

EU Commission, EU Parliament, consumers and food industry divided on changes to EU food labelling rules

In January 2008, the EU Commission submitted to the EU Parliament and the EU Council a proposal for a revision of the EU rules on food labelling. The proposal is intended to meet the requirements of better law-making by consolidating and replacing seven directives and a regulation. Among other provisions, the EU Commission proposal provides for a mandatory nutrition declaration. It extends mandatory allergen labelling to non-pre-packaged foods and proposes a minimum font size of 3 mm for all mandatory labelling particulars and a presentation in a way so as to ensure a significant contrast between the print and background. The current rules on origin labelling would be significantly amended. The Commission proposal allows the EU Member States considerable scope to adopt national labelling rules. Member States would be able to adopt legal provisions governing specific categories of food and, in addition to the mandatory forms of expression, develop national labelling systems.

Currently, nutrition labelling is optional and only mandatory if a specific nutrition claim is made. Now the EU Commission proposes the introduction of a compulsory and comprehensive nutrition declaration. Mandatory particulars relating to the energy value of the food and the nutrients fat,

saturates, carbohydrates, sugar and salt shall be given in the appropriate order in the principal field of vision (this seems to relate to the front of the package), expressed per 100 g or 100 ml or per portion. Details of other particulars (*i.e.*, trans-fats, mono-unsaturates, polyunsaturates, polyols, starch, fibre, protein and any of certain minerals or vitamins) may be given elsewhere on the packaging, if space permits, in table format. Current EU rules relating to the provision of origin labelling on pre-packaged foodstuffs foresee the indication of origin on a voluntary basis unless the exclusion of such provisions would seriously mislead the consumer as to the true origin of the foodstuff. The text proposed by the EU Commission states that '*where the country of origin or the place of provenance of the food is not the same as the one of its primary ingredient(s), the country of origin or place of provenance of those ingredient(s) shall also be given*'.

In December 2008, the EU Parliament's responsible committee (*i.e.*, the Committee on the Environment, Public Health and Food Safety) tabled a large number of amendments to the proposal. On 11 November 2009, the Rapporteur of the Committee, Mr. Renate Sommer, published a draft report on the proposal. Although the Rapporteur welcomed the proposal, in many points of the report he expressed disagreement. In particular, the report suggests deleting the new provision on origin labelling arguing that, while it is important for the consumer to know where the product comes from, it may not always be possible to state one country of origin since the ingredients of the product can come from different countries or even change daily. As to the font size, where current rules simply require legibility, the Rapporteur states that the requirement that information be printed with a font size of at least 3 mm is not workable in practice, particularly, but not exclusively, in the case of products whose packaging carries information in several languages.

In its recently published '*Priorities for the Spanish Presidency of the EU*', the Confederation of Food and Drink Industries of the EU (hereinafter 'CIAA'), which is the leading trade association in the food sector, strongly encouraged public authorities to build on the efforts and achievements made by the industry thus far. As legibility is a complex issue dependant on a number of inter-related factors that extend beyond font size, the CIAA considers industry guidelines for the legibility of labelling as a much more flexible, workable solution than legislation (on the key factors affecting legibility, namely, layout, font, colour and contrast). CIAA fully supports the provision of mandatory nutrition information on the '*Big 8 nutrients*' per 100g/ml (however, on the back-of-pack) to allow comparability between products. As consumers also want simple, 'at-a-glance' information, CIAA supports the GDA icon for Energy on the front-of-pack (*i.e.*, values for energy are expressed in the absolute amount per portion and its percentage of the GDAs), in line with the CIAA '*GDA Style Guide*'. Finally, CIAA supports maintaining the existing framework for origin labelling and calls for a pragmatic approach, which requires no further legal requirements. Both EU Parliament and food industry take the view that national labelling systems would be more likely to confuse consumers, undermine legal certainty and lead to distortions of the internal market.

The proposal is now awaiting the EU Parliament's decision in the first reading (single reading) before the EU Council adopts the regulation. The adoption of the EU Parliament's Committee report is scheduled for 16 March 2010. The indicative date for the EU Parliament's plenary sitting is 14 June 2010. As opinions on the new rules are divided between all stakeholders, intense lobbying activities are expected over the next few weeks.

China and the US reach an agreement in relation to the '*famous brands subsidies*' dispute

On 18 December 2009, the US and China reached an agreement concerning the dispute '*China – Grants, loans and other incentives*', better known as the '*famous brand subsidies*' case.

The dispute was initiated by the US through a request for consultations circulated on 19 December 2008 in relation to a number of Chinese measures (*i.e.*, the China World Top Brand Program, the Chinese Famous Export Brand Program, and the China Name Brand Products initiatives and other measures) allegedly granting subsidies to producers of, *inter alia*, household electronic appliances, textiles and apparel, agricultural products and chemicals (see Trade Perspectives, Issue No. 2 of

30 January 2009). According to the US, such measures were providing grants, loans and other incentives to Chinese enterprises meeting certain export performance thresholds, in violation of the WTO Agreement on Subsidies and Countervailing Measures (hereinafter, SCM Agreement), the WTO Agreement on Agriculture, China's Accession Protocol to the WTO and the GATT.

In particular, the US alleged that such measures constituted export subsidies, which are prohibited subsidies according to Article 3 of the SCM Agreement, as they were granted upon the condition that the recipients met certain export performance criteria. It is not the first time that China and the US held WTO consultations concerning alleged violations of Article 3 of the SCM Agreement. In *China – Certain measures granting refunds, reductions or exemptions from taxes and other payments*, the US claimed that the two categories of prohibited subsidies, (*i.e.*, subsidies contingent upon export performances and subsidies contingent upon the use of domestic over imported goods), were found to exist in relation to various measures. As in the '*famous brands subsidies*' case, the latter case was resolved through consultations.

This dispute stands to affect a large number of industries given that Chinese measures in principle appeared to benefit a great range of products. Industries and governments should monitor closely the development of the dispute, including the steps, if any, that China has undertaken as a result of the solution reached during consultations. It is worth mentioning that this is the fourth dispute out of eight challenges that the US brought against China that has been resolved through consultations, rather than resorting to long and costly WTO dispute settlement procedures.

Recently Adopted EU Legislation

- *Commission Regulation (EU) No. 24/2010 of 13 January 2010 entering a name in the register of protected designations of origin and protected geographical indications [Jihočeská Niva (PGI)]*

- *Commission Directive 2010/1/EU of 8 January 2010 amending Annexes II, III and IV to Council Directive 2000/29/EC on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community*

- *Commission Decision of 7 January 2010 on the safety requirements to be met by European standards for consumer-mounted childproof locking devices for windows and balcony doors pursuant to Directive 2001/95/EC of the European Parliament and of the Council (notified under document C(2009) 10298)*

- *Commission Decision of 6 January 2010 on the safety requirements to be met by European standards for bath rings, bathing aids and bath tubs and stands for infants and young children pursuant to Directive 2001/95/EC of the European Parliament and of the Council (notified under document C(2009) 10290)*

- *Commission Regulation (EU) No. 6/2010 of 5 January 2010 initiating a review of Council Regulations (EC) No. 1292/2007 and (EC) No. 367/2006 (imposing definitive anti-dumping and countervailing duties on imports of polyethylene terephthalate (PET) film originating in India, and extending those duties to imports of that product consigned from, inter alia, Israel) for the purposes of determining the possibility of granting an exemption from those measures to one Israeli exporter, repealing the anti-dumping duty with regard to imports from that exporter and making imports from that exporter subject to registration*

- *Commission Decision of 26 November 2009 on establishing the ecological criteria for the award of the Community Ecolabel for wooden floor coverings (notified under document C(2009) 9427)*

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