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Progress in the Canada-EU free trade agreement negotiations

Progress continues in the negotiations for a free trade agreement – the Comprehensive Economic and Trade Agreement (hereinafter, CETA) – between the EU and Canada. The latest round of talks was conducted in Brussels from 17 to 21 January 2011. Representatives from both parties now predict that an agreement will likely be signed in 2011, with implementation in 2012.

The parties have yet to exchange formal offers, as the offer package will cover all issue areas (*e.g.*, goods, intellectual property, investor protection, services, and government procurement). An exchange of formal offers is scheduled for late March/early April, in advance of the next round of negotiations to be held in Ottawa from 11 to 15 April 2011.

Among the EU's top negotiating demands is the right for its multinational companies to bid on lucrative Canadian provincial and municipal government procurement contracts for goods, services and infrastructure. The value of these contracts may exceed 30 billion EUR annually. A preliminary agreement regarding government procurement has apparently been reached by both sides. The EU has reportedly agreed that there will be no open bidding for contracts below 8.5 million CAD for construction projects, 300,000-400,000 CAD for government goods and services contracts, and 600,000-700,000 CAD for contracts tendered by Crown (*i.e.*, government-controlled) Canadian corporations, utilities and other government entities. Reflecting the importance of this issue area for the EU, Canada's federal government has reportedly promised EU negotiators that Canada will achieve unanimous agreement among the provinces in favour of substantial liberalisation of government procurement.

Canada and the EU have also agreed to eliminate tariffs on 90 per cent of goods. The remaining 10 per cent are primarily in the agricultural sector, where Canada maintains a number of tariff rate-quotas and imposes high over-the-quota tariff duties on imports of dairy, poultry eggs, beef, wheat and margarine products. Canada also maintains high import tariffs on wine. Similar to Canada, the EU imposes tariff rate-quotas with high over-the-quota tariffs for agricultural goods, but also applies tariffs on processed foodstuffs. Although no specific offers have yet been tabled, both parties expect that these tariffs will be reduced. As a result of a November 2010 agreement allegedly terminating the longstanding EU – Canada dispute over beef treated with growth-promoting hormones, Canada has already secured duty-free access to the EU within a 20,000-tonne quota for beef exports. This concession is worth an estimated 10 million CAD per year. In addition, in order to avoid future market access disputes affecting agricultural products, Canada seeks guarantees from the EU regarding its use of sanitary and phytosanitary measures (hereinafter, SPS measures) that could translate into 'WTO-plus' types of commitments, such as enhanced consultative obligations.

Beyond agricultural products, Canada is aiming to reduce or eliminate EU tariffs for Canadian textiles, apparel, footwear, and automobiles. Canadian goods currently face significant tariff spikes on these products: the EU imposes tariffs of 9.4-10 per cent on Canadian footwear and automobiles. Rules of origin on certain goods, such as automobiles, stand to be a crucial issue in the industrial goods chapter of the CETA. In particular, it appears that the value addition by Canadian manufacturers of automobiles amounts to 20 per cent, the rest being sourced primarily from the US. This figure is far below the current EU threshold to confer origin. Certain automotive manufacturers, including some from the EU, are hoping to close the gap between these figures, whereas others may have a more defensive stand.

There has also been progress in services trade liberalisation. The EU represents a particularly large market for architectural and engineering services, and Canada has sought liberalisation from EU Members which currently have no Mode I and IV commitments under the WTO's General Agreement on Trade in Services (hereinafter, GATS). Mode I disciplines cross-border services supply, delivered within the territory of one WTO Member, from the territory of another WTO Member. Mode IV regulates the presence of natural persons, in which a service supplier from one WTO Member delivers a service within the territory of a second WTO Member. The EU's Trade Policy Committee has authorised the EU Commission to use a negative list approach for the liberalisation of services under Mode I, and is currently debating whether to also permit a negative list approach for Modes II and III. Under a negative list approach, all service sectors are liberalised with the exception of certain sensitive sectors, which are placed on a list and remain exempted. EU Member States had previously advocated in favour of a positive list approach, whereby only listed services would be liberalised. The European Commission believes that full agreement on a negative list approach will be achieved by the spring of 2011.

It has further emerged from the 17-21 January 2011 talks that Canada is actively seeking more access for skilled EU workers to its market, while the EU has trepidations about allowing more access to skilled Canadian workers. The EU is reportedly concerned about the precedent this could set for labour mobility in future FTAs.

The commercial stakes in the CETA negotiations are high. According to EU figures, Canada is currently the EU's 11th most important trading partner, and the EU is Canada's 2nd largest trading partner, with a 10 per cent share of its total external trade. The value of bilateral trade in goods rose to 49.9 billion EUR in 2008.

For Canadian exporters, the CETA negotiations offer the best opportunity in Canada's history to diversify beyond the American and Asian markets. Two previous attempts by the federal government to improve trade links to the European Union – the 1972 Third Option plan and a 2005 free trade initiative – failed to advance as far as the current CETA negotiations. For European exporters, the CETA offers an excellent opportunity to gain access to the NAFTA market through Canada. Business parties with an interest in exporting to either the European or Canadian markets should accordingly monitor the CETA talks closely and take the necessary steps to have their commercial interests and agendas reflected in the negotiations. It is not too late, and now is the time to be ambitious and proactive in order to help open new markets across the Atlantic.

EU anti-dumping duties on footwear are set to expire by April 2011

Another chapter of the long-running dispute over the EU's anti-dumping duties against Chinese and Vietnamese footwear appears likely to be written this spring, with the expiry of current anti-dumping duties on 31 March 2011.

On 18 December 2010, the EU Commission published in the Official Journal of the European Union a notice of the impending expiry of the anti-dumping measures on footwear. In order to prevent the expiry of these duties, the EU manufacturers supporting the duties were required to submit a written request for an expiry review to the EU Commission no later than 30 December 2010. The Commission is then to evaluate whether the request contains sufficient evidence that the expiry of the measures would be likely to result in a continuation of injurious dumping. Reports indicate that, following a meeting with the EU Commission, the European Confederation of the Footwear Industry, the association representing EU manufacturers that triggered the anti-dumping proceedings, indicated that it will not pursue a further extension of the duties.

The proceedings started on 7 July 2005, when the EU Commission launched an anti-dumping investigation into Chinese and Vietnamese footwear (see Trade Perspectives, Issue No. 20 of 30 October 2009). On 7 April 2006, provisional anti-dumping duties were imposed by the EU Commission on imports of certain footwear with uppers of leather originating in China and Vietnam. On 5 October 2006, Council Regulation (EC) No. 1472/2006 confirmed this action. These anti-dumping duties were fixed for an initial period of two years. An expiry review was initiated on 7 October 2008 in response to a request by the European Confederation of the Footwear Industry (see Trade Perspectives, Issue No. 20 of 30 October 2009). The review concluded that it was likely that injurious dumping would continue after the expiry of the anti-dumping footwear duties. Accordingly, on 30 November 2009, the EU Commission submitted a proposal to the EU Council for an extension of the imposition of duties on footwear products from China and Vietnam (see Trade Perspectives, Issue No. 23 of 11 December 2009). The EU Council accepted the EU Commission's proposal and extended the anti-dumping duties for an additional period of 15 months (see Regulation (EU) No. 1294/2009 of 22 December 2009).

The extension of the anti-dumping duties prompted China to trigger WTO dispute settlement proceedings against the EU's measures on footwear through a request for WTO consultations on 4 February 2010 (see Trade Perspectives, Issue No. 3 of 12 February 2010). As consultations between China and the EU were unsuccessful, on 5 July 2010 a WTO panel was composed. The panel report is expected to be released by mid-2011. China may choose to withdraw from this WTO dispute if the EU's anti-dumping duties are indeed lifted as of April 2011.

These proceedings have been highly contentious within the EU, with part of the EU footwear industry, importers, and some EU Member States strongly opposing the duties. This was reflected in the length of the duties, which were initially in place for just 2 years and then renewed for a mere 15 month period. This contrasted to the usual 5 year period of EU anti-dumping duties. The WTO case may have put additional pressure on the EU Commission and EU Member States to remove the duties. Reports suggest that, in exchange for dropping the request for the extension of the duties, the European Confederation of the Footwear Industry obtained the EU Commission's endorsement to establish a detailed and permanent monitoring regime on Chinese and Vietnamese shoe prices and import data, aimed at allowing a swift re-introduction of the duties should Chinese and Vietnamese footwear producers be found to be dumping again. Although the EU basic anti-dumping Regulation does not appear to envisage such a possibility, the EU Commission could consider resorting to specific surveillance measures for imports of footwear. The procedures for surveillance under Council Regulation (EC) N. 260/2009 could be a useful tool in this regard.

Reinforced EU legislation in response to the serious incident of dioxin contamination of animal feed?

The EU Commission has announced new legislation in response to a serious incident of dioxin contamination of animal feed in Germany between the end of 2010 and the first weeks of the New Year. It appears that a biodiesel manufacturer delivered dioxin-contaminated consignments of fatty acids intended for technical purposes to a registered feed fat manufacturer that also produces fats for technical use. It seems that feed-grade fat and technical fat were blended. A German compound feed manufacturer detected the feed fat contamination in his own auto-control programme; however, prior to measures taken by the authorities (*i.e.*, destruction of products, closures of farms, *etc.*), a large amount of dioxin-tainted animal feed was put into circulation and sold to farms in Germany, France and Denmark. Furthermore, it was reported that a German feed manufacturer provided the authorities with an incomplete list of potentially affected farms (as well as incorrect information concerning the use of contaminated feed fats in compound feed) and additional farms had to be closed.

The European Commission noted, however, that where EU limits of dioxins in food were exceeded, the observed levels have not been very high. Therefore, no immediate health risk for the consumer is expected as a result of the consumption of contaminated products during a short period of time. Directive 2002/32/EC of the European Parliament and of the Council on undesirable substances in animal feed, as amended by Commission Directive 2006/13/EC of 3 February 2006 (concerning dioxins and dioxin-like PCBs), establishes maximum levels for undesirable substances in animal feed.

At the Agriculture and Fisheries Council meeting held in Brussels on 24 January 2011, the European Commission announced that it will propose four specific actions: 1) a better registration system for the establishments treating fats for animal feed; 2) an improved separation between areas treating fat for animal feed and other fats; 3) a better monitoring system; and 4) a stronger reporting obligation for the private laboratories performing dioxin analyses.

In fact, the primary problem seems to be that current EU law does not prevent companies from manufacturing fats for industrial and food purposes in the same plant. A further regulatory loophole is that, under current EU law, not all feed business operators need to be authorised. Regulation (EC) No. 178/2002 of the European Parliament and of the Council of 28 January 2002 lays down the general principles and requirements of food law, defining 'feed business' as any undertaking carrying out any operation of production, manufacture, processing, storage, transport or distribution of feed (any substance or product, including additives, whether processed, partially processed or unprocessed, intended to be used for oral feeding to animals). Article 10(1) of Regulation (EC) No. 183/2005 of the European Parliament and of the Council of 12 January 2005 sets out requirements for feed hygiene, requiring that only establishments manufacturing and/or placing on the market certain feed additives, premixtures and compound feedingstuffs must be approved by the competent authority of each Member State. Under Article 13(1), the competent authority shall approve establishments only where an on-site visit, prior to start-up of any activity, has demonstrated that they meet the relevant requirements of the Regulation. However, for feed business operators other than the ones manufacturing and/or placing on the market certain feed additives, premixtures and compound feedingstuffs, a mere notification under Article 9(2) of Regulation (EC) No. 183/2005 to the appropriate competent authority of any establishments under their control, active in any of the stages of production, processing, storage, transport or distribution of feed, with a view to registration, is sufficient. Fat blenders, like the one which seems to be responsible in the German dioxin case, do not need an approval and are not subject to on-site visits.

Already in 2008, after the Irish pork crisis, where dioxin-tainted oil was used in the production of animal feed, the compound feed industry body, FEFAC (according to which farm animals in the EU consume an estimated 465 million tonnes of feed a year, of which about 30 per cent are produced by the compound feed manufacturers, whose turnover in 2010 is estimated to have reached 45 billion EURO), raised the question of imposing a legal requirement for separate product flows. FEFAC has now announced the development of a testing protocol for a structured dioxin monitoring plan of the feed fat supply chain at the EU level. FEFAC has also called for a review of the registration (*i.e.*, approval requirements for fat blending businesses under Regulation (EC) No. 183/2005). According to Article 10(3) of Regulation (EC) No. 183/2005, a Regulation adopted by the Commission may extend the approval requirement to other feed business operators which currently must only register with the authorities.

As to the impact on trade, Japan and Hong Kong have tightened checks over food imports from Germany, while Russia, China, South Korea and the Philippines appear to have banned certain animal products from Germany. In the meantime, Germany has announced a new licensing system for producers of oils and fats for animal feed use, plus a compulsory separation of oils and fats output for use in industrial and feed production. However, action at the EU level would be preferable. As the experience of the current dioxin incident shows, feed and feed ingredients are traded EU-wide, and separate legal requirements may only open new loopholes or establish new trade barriers between EU Member States. Companies involved in the feed sector should closely follow the legislative developments.

Breakthrough in the WTO negotiations for a wine/spirit GIs register

WTO Members have announced that work has commenced on a draft proposal for a register to protect the geographical names of wines and spirits. At a meeting of the WTO on 13 January 2011, Mr. Darlington Mwape, chair of a special session of the WTO's Trade-Related Aspects of Intellectual Property Rights Council, circulated among WTO Members a draft proposal regarding notification of products, one of six aspects of the register negotiations. This draft circulation is a breakthrough: it marked the first time in 13 years of negotiations for a geographical register that all WTO Members have discussed a single draft text.

Geographical indications (hereinafter, GIs) are place names, or words associated with a geographical location, used to identify products which have a certain quality or reputation due to their origin from that place. Examples of GIs include 'Prosciutto di Parma', 'Roquefort' and 'Tequila'. Negotiations on the proposed multilateral register for wine and spirits GI registrations began in 1997, pursuant to Article 23.4 of the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter, the TRIPs Agreement). This article commits WTO Members to facilitate stronger protection for wine GIs by undertaking negotiations on a multilateral system of notification and registration of GIs. These ongoing negotiations were incorporated into the Doha Round negotiations when the Round was launched in 2001.

The multilateral GI negotiations cover six issue areas: 1) notification – how a name would be notified and which WTO Members would be entitled to submit notifications; 2) registration – how the GI system would be operated and what role the WTO Secretariat would play; 3) the legal consequences of registration – what legal commitments or other obligations would arise as a result of a term's registration; 4) fees and costs – determining which WTO Members would bear the cost of GI registration; 5) special and differential treatment for developing countries; and 6) participation – whether partaking in the GI system will be entirely voluntary, or whether the registration of a term will have mandatory implications for all WTO Members.

Throughout the GI wine and spirits register negotiations, key differences have emerged between WTO Members regarding the third issue area – the extent of the legal obligations that WTO Members would be required to assume as a result of a term's listing in the GI register. WTO Members are also at odds regarding the sixth issue area – whether the GI system will be strictly voluntary or have mandatory effects for all WTO Members. Stronger protection for GIs is a key Doha Round goal for the European Union. However, other WTO Members, most notably Australia and the US, where European names are often used generically, have stated that existing legal protections for copyright and trademarks make plans for a GI register redundant.

The draft GI register proposal thus emerged as a result of consultations among representatives of three separate groups that have submitted GI register proposals. A 'joint proposal' group, which includes a mixed group of developing and developed countries, including the US, Canada, Mexico and Nicaragua, seeks to implement a GI register as a database. WTO Members would choose whether or not to participate in the register. The intellectual property authorities of participating WTO Members would consult the database when considering the extent of protection for individual trademarks or GIs within their countries.

A second proposal, dubbed the W/52 proposal, and including over 100 WTO Members, including the EU and Switzerland, envisages a GI system that would apply to all WTO Members. WTO Members could, however, choose whether or not to register their own GIs. The legal authorities in all WTO Members would have to take a GI term's registration 'into account' and treat it as *prima facie* evidence that the term meets the proper definition of a GI. The legal authorities within each WTO Member would nevertheless be permitted to consider whether the GI is subject to exceptions because, *inter alia*, the term is generic.

A third proposal, suggested by negotiators from Hong Kong, China, attempts to bridge the gap between the first and second proposals. The Hong Kong proposal suggests that, if a GI term is registered, this would be *prima facie* evidence regarding who owns the rights to a term, but only within WTO Members which choose to participate in the GI registration system. The Hong Kong plan also proposes a test period of four years for this system, followed by a review.

As a result of these competing proposals, the draft proposal for a wine and spirit GI register reportedly makes extensive use of square brackets around areas of the proposed text for which the wording has not yet been agreed, or for which multiple options have been suggested, as per the three different proposals.

The inclusion of GIs in the TRIPs Agreement, which came into effect on 1 January 1995, was a significant step, given that pre-existing international agreements on GIs – such as the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, Stockholm Revision, 1967 – have generally been viewed as ineffective tools of GI protection. By contrast, the TRIPs Agreement incorporates a significant degree of GI protection. Article 22(2) of the TRIPs Agreement mandates that WTO Members must allow interested parties a means to prevent the use of a product name or designation which misleads the public as to the geographical origin of a good, and must prevent any use of GIs which constitutes an '*act of unfair competition contrary to honest practices in industrial or commercial matters*.'

In addition, Article 23(1) of the TRIPs Agreement grants a particularly high standard of protection to the geographical names of wines and spirits. Here, any use of misleading indications is prohibited even if the true origin of the goods is stated, or the GI is used in translation or accompanied by expressions such as 'kind', 'style' or 'type'. It should also be

noted that Article 24(4) of the TRIPs Agreement constitutes a grandfathering clause, which protects GIs used by any WTO Member's nationals or domiciled residents in a continuous manner for at least 10 years before 15 April 1994, or in good faith prior to that date.

Should the WTO negotiations on a new multilateral GI register for wines and spirits succeed, this may provide a powerful mechanism for giving full effect to the relevant articles in the TRIPs Agreement. The status of the negotiations have, however, been described by Mr. Mwape as '*extremely fragile and delicate*'. Mr. Mwape aims at producing a GI register proposal by the end of March 2011. This tight deadline is based on a request from the Trade Negotiations Committee for negotiating texts to be developed in all issue areas by the end of the first quarter of 2011. Business parties with an interest in intellectual property rights concerning wine and spirits should accordingly monitor these talks closely.

Recently Adopted EU Legislation

Market Access

- *Corrigendum to procès–verbal of rectification to the Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, signed at Bridgetown, Barbados on 15 October 2008 and at Haiti on 10 December 2009*

- *Commission Regulation (EU) No 59/2011 of 25 January 2011 opening and providing for the administration of Union tariff quotas for wines originating in the Republic of Serbia*

- *Commission Regulation (EU) No 56/2011 of 21 January 2011 fixing the allocation coefficient to be applied to applications for import licences for olive oil lodged from 17 to 18 January 2011 under the Tunisian tariff quota and suspending the issue of import licences for the month of January 2011*

- *Commission Decision of 20 January 2011 on a derogation from the rules of origin set out in Council Decision 2001/822/EC as regards sugar from the Netherlands Antilles (notified under document C(2011) 140)*

- *Information on the date of signature of the Protocol setting out the fishing opportunities and financial contribution provided for in the Partnership Agreement in the fisheries sector between the European Community and the Union of the Comoros*

- *Commission Regulation (EU) No 42/2011 of 19 January 2011 suspending submission of applications for import licences for sugar products under certain tariff quotas*

- *Commission Regulation (EU) No 41/2011 of 19 January 2011 on the issue of import licences for applications lodged during the first seven days of January 2011 under tariff quotas opened by Regulation (EC) No 616/2007 for poultry meat*

- *Commission Regulation (EU) No 40/2011 of 19 January 2011 on the issue of import licences for applications submitted in the first seven days of January 2011 under the tariff quota for high-quality beef administered by Regulation (EC) No 620/2009*

Trade Remedies

- *Commission Decision of 19 January 2011 terminating the anti-dumping proceeding concerning imports of purified terephthalic acid and its salts originating in Thailand (2011/32/EU)*

- *Commission Decision of 19 January 2011 terminating the anti-subsidy proceeding concerning imports of purified terephthalic acid and its salts originating in Thailand (2011/31/EU)*

- *Council Implementing Regulation (EU) No 38/2011 of 18 January 2011 amending Regulation (EC) No 1292/2007 imposing a definitive anti-dumping duty on imports of polyethylene terephthalate (PET) film originating in India*

- *Corrigendum to Commission Regulation (EU) No 1261/2010 of 22 December 2010 imposing a provisional countervailing duty on imports of certain stainless steel bars originating in India (OJ L 343, 29.12.2010)*

- *Notice of initiation of an anti-dumping proceeding concerning imports of oxalic acid originating in India and the People's Republic of China*

- *Notice of initiation of an expiry review and a review of the anti-dumping measures applicable to imports of tartaric acid originating in the People's Republic of China*

- *Notice of termination of the safeguard investigation initiated under Council Regulations (EC) No 260/2009 and (EC) No 625/2009, concerning imports of wireless wide area networking (WWAN) modems*

- *Notice of the impending expiry of anti-dumping measures regarding Chinese plastic sacks and bags*

- *Notice of the impending expiry of anti-dumping measures against Chinese silicon carbide*

- *Notice of the impending expiry of anti-dumping measures against Chinese Chamois leather*

Customs Law

- *Council Decision of 18 January 2011 on the position to be taken by the European Union within the Joint Committee on Agriculture set up by the Agreement between the European Community and the Swiss Confederation on trade in agricultural products, as regards the adaptation of Annex 3 to the Agreement*

Food Law

- *Commission Regulation (EU) No 61/2011 of 24 January 2011 amending Regulation (EEC) No 2568/91 on the characteristics of olive oil and olive-residue oil and on the relevant methods of analysis*

- *Commission Regulation (EU) No 53/2011 of 21 January 2011 amending Regulation (EC) No 606/2009 laying down certain detailed rules for implementing Council Regulation (EC) No 479/2008 as regards the categories of grapevine products, oenological practices and the applicable restrictions*

- *Commission Decision of 21 January 2011 amending Decision 2010/468/EU providing for the temporary marketing of varieties of Avena strigosa Schreb. not included in the common catalogue of varieties of agricultural plant species or in the national catalogues of varieties of the Member States (notified under document C(2011) 156)*

- *Commission Directive 2011/4/EU of 20 January 2011 amending Council Directive 91/414/EEC to include cycloxydim as active substance and amending Decision 2008/934/EC*

- *Commission Directive 2011/5/EU of 20 January 2011 amending Council Directive 91/414/EEC to include hymexazol as active substance and amending Decision 2008/934/EC*

- *Commission Directive 2011/6/EU of 20 January 2011 amending Council Directive 91/414/EEC to include buprofezin as active substance*

- *Commission Decision of 20 January 2011 concerning the non-inclusion of 1,3-dichloropropene in Annex I to Council Directive 91/414/EEC (notified under document C(2011) 119)*

- *Commission Directive 2011/3/EU of 17 January 2011 amending Directive 2008/128/EC laying down specific purity criteria on colours for use in foodstuffs*

- *Commission Regulation (EU) No 26/2011 of 14 January 2011 concerning the authorisation of vitamin E as a feed additive for all animal species*

- *Commission Regulation (EU) No 10/2011 of 14 January 2011 on plastic materials and articles intended to come into contact with food*

Trade-Related Intellectual Property Rights

- *Council Decision of 18 January 2011 on the signing of the Agreement between the European Union and the Swiss Confederation on the protection of designations of origin and geographical indications for agricultural products and foodstuffs, amending the Agreement between the European Community and the Swiss Confederation on trade in agricultural products*

- *Council Decision of 18 January 2011 on the signing, on behalf of the European Union, of the Agreement between the European Union, the Swiss Confederation and the Principality of Liechtenstein amending the Additional Agreement between*

the European Community, the Swiss Confederation and the Principality of Liechtenstein extending to the Principality of Liechtenstein the Agreement between the European Community and the Swiss Confederation on trade in agricultural products

- *Publication of an application pursuant to Article 6(2) of Council Regulation (EC) No 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs*

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