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The EC calls for measures against 'inhumane killing of seals'

'Inhumane killing of seals' appears to be a new environment-related controversy put on the international trade agenda, following the famous 'trade and environment' cases in the GATT/WTO, such as *Tuna / Dolphin* and *US - Shrimp*. Currently, the EC is considering a proposal to impose a ban on the placing on the market and the import in, transit through, or export from, the Community of seal products obtained by killing and skinning seals in ways that cause pain, distress and suffering. The proposal was adopted by the Commission in July 2008 and is currently being discussed within the European Parliament. According to the draft proposal, the ban would not apply to products resulting from hunts traditionally conducted by Inuit communities and to countries where adequate legislative provisions and enforcement mechanisms apply, effectively ensuring that seals are killed and skinned without causing avoidable pain, distress and any other form of suffering.

The proposal is based, to a large extent, on a 2007 report of the European Food Safety Authority (hereinafter the EFSA), presenting scientific evidence of inhumane killing and skinning of seals in Canada for commercial purposes. Considering that, in light of the EFSA report, Canadian traders of seals products will, most likely, not fall under the proposal's exceptions, the proposed ban has caused serious concerns in Canada. Canada, a large exporter of seals fur, has attempted to persuade EC representatives to abandon the proposed measure. As Canada claims, the exports of seals fur to the EC comprise a vital element of livelihood for over 6,000 sealers in rural communities across Northern and Atlantic Canada and Quebec. Moreover, Canada assures, the EC concerns regarding the inhumane killing and skinning of seals were already taken into account in Canada's new rules governing the way in which hunters determine whether seals are dead before skinning them. Notably, the proposed measure is not the first ban in the EC territory on imports of seals products. In 2007, Belgium and the Netherlands independently imposed bans on the importation and trade of seals products. In response to such measures, on 25 September 2007 Canada lodged a request for WTO consultations. However, no panel was established and no settlement was notified. After the proposal for the EC trade restriction was formulated, Canada stated that the EC ban is in violation of WTO law and that such measure would be challenged at the WTO.

The possible EC trade ban on the importation of seals brings into focus a long-standing clash between the protection of the environment and free trade. As the experience of previous GATT/WTO cases on this issue shows, the assessment of the compatibility of a pro-environment trade ban with WTO rules includes both the analysis of the compliance of this measure with WTO principles such as non-discrimination or elimination of quantitative restrictions, and compliance with specific requirements provided under the so-called 'general exceptions' provisions within certain WTO agreements. In the specific case at stake, this assessment would be conducted within the framework of the GATT and/or the Agreement on Technical Barriers to Trade (hereinafter, the TBT Agreement). In particular, both the GATT and the TBT Agreement allow WTO Members to deviate from trade commitments if their measures relate to the conservation of exhaustible natural resources or are necessary to protect animal life or health, subject to certain conditions and a requirement that such

measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination, or a disguised restriction on international trade. For example, as the *US – Shrimp* case indicates, in order to prove that a pro-environment ban does not constitute an arbitrary or unjustifiable discrimination the respondent has to prove that it pursued international negotiations and cooperation in protecting and conserving banned species. Compliance of the EC with such requirements appears to be a key issue in a possible seals products dispute.

A vote of the European Parliament Committee on Internal Market and Consumer Protection on the proposal is scheduled for 17 February 2009. Following this vote, the Parliament is expected to vote again on the issue in its plenary session scheduled for April 2009. Traders and end-users of seals fur and seals products should monitor such process.

Trade reactions on the 'Buy American' provision of the US 'Stimulus Bill'

The US is currently evaluating a proposed 'stimulus bill' of approximately US$ 900 billion, intended to revive the US economy. The so-called 'Buy American' provision included in the proposal caused political turmoil not only inside the US, but throughout the international trade community. It appears that the controversial provision, if passed, would require contractors involved in stimulus-funded public work projects, including infrastructural rebuilding, to purchase US-made materials and equipment. In exchange, the contractors would benefit, *inter alia*, from tax cuts. The provision includes three exceptions, under which the requirement to buy US-made products can be waived. These exceptions deal with issues of quality and quantity of products needed, cost of projects, and 'consistency with the public interest'. The latter exception has been interpreted by the proponents of the measure as a leeway for US authorities to except from the requirement materials and equipment coming from NAFTA Members or countries which signed with the US bilateral trade deals. In addition, this exception could potentially cover the WTO Members that signed the plurilateral WTO Agreement on Government Procurement (hereinafter, the GPA). Such interpretations, however, have so far not been confirmed by explicit legal provisions.

Even assuming that the exception relating to the 'consistency with the public interest' covers WTO Members which are Parties to the GPA, such as Canada, the EC, and Japan, and the US Free Trade Agreements' partners, the 'Buy American' provision is still likely to cause a serious prejudice to the exporters' interests from WTO Members that are non-Parties to the GPA, such as Brazil, China and India. These countries would be in a position to challenge this measure at the WTO as a violation, *inter alia*, of the WTO Agreement on Subsidies and Countervailing Measures. In fact, the current shape of the 'Buy American' provision may have two controversial effects. First, it provides the contractors involved in stimulus-funded public work projects with a prohibited subsidy in the form of tax cuts, which is contingent upon the use of domestic over imported goods. Second, it may constitute an actionable subsidy, causing a serious prejudice to the interests of the industries of other WTO Members, by altering the competition between US-made products and the foreign-produced like products within the US market. In order to prove the latter type of violation, the key element would be finding that the price paid for US-made products is higher than the market price.

In the US, positions concerning the 'Buy American' provision vary greatly. The measure is opposed, for example, by major US corporations such as General Electric, Boeing and FedEx, which expressed their concern over other countries' possible retaliation targeting their exports. On the international front, a significant number of WTO Members, including Australia, Canada, the EC and Japan, have already expressed their concerns in relation to the proposal being considered by US legislators. To address the political heat generated by the Bill, the US Senate approved language clarifying that the provisions in the 'stimulus bill' should be applied in a manner consistent with US obligations under international agreements. However, more

specific actions to reconcile the 'Buy American' provision with international trade rules have not been taken so far. The 'stimulus bill' with the controversial 'Buy American' requirements was approved by the US Senate on 10 February 2009. The policymakers from the Senate, House, and the White House are now expected to reconcile differences between the House and Senate versions of the bill and ensure that their proposal will receive the signature of the US President. The ongoing discussions on the 'Buy American' measure are closely followed by the international trade community. It has to be recalled that, in November 2008, the leaders of the world's largest economies signed a declaration outlining their commitment to abstain from measures restricting trade, despite the economic recession. The adoption by the US of a measure inconsistent with international trade rules could trigger further protectionism by other WTO Members.

The new EC Regulation on the classification, labelling and packaging of chemicals based on the UN GHS is in force

On 16 December 2008, the European Parliament and the European Council adopted a new Regulation on classification, labelling and packaging of substances and mixtures (CLP) which aligns existing EC legislation to the Globally Harmonised System of Classification and Labelling of Chemicals (GHS). Regulation No. 1272/2008 (1,355 pages with all annexes) was published in the Official Journal on 31 December 2008 (OJ L 353).

The GHS (also known as the 'Purple Book') is a United Nations' system used to identify hazardous chemicals and to inform users about these hazards through standard symbols and phrases on the packaging labels and through safety data sheets. Over the past decades, a number of different classification and labelling (C&L) systems for chemicals (substances and preparations/mixtures) have emerged in various jurisdictions such as, Australia, Canada, China, Japan, Korea, the EC, the US, etc. This has led to divergent C&L systems providing different health and safety information for the same goods that originate in different countries, but that are often internationally traded. In 1992, the UN Conference on the Environment and Development held in Rio de Janeiro identified the harmonisation of classification and labelling systems for chemicals as one of its action programmes. The 2002 UN World Summit on Sustainable Development in Johannesburg agreed that the GHS should be implemented worldwide and set the target date of 2008.

The new EC system will ensure that the same hazards are described and labelled in the same way as under GHS. For example, currently there are differences between the definitions for 'acute toxicity - oral' under the existing system compared to the new GHS criteria. By using internationally agreed classification criteria and labelling elements, it is expected that trade in these products will be facilitated and the global efforts to protect humans and the environment from the hazardous effects of chemicals will be enhanced. The new regulation will also complement the EC REACH Regulation on the registration, evaluation, authorisation and restriction of chemicals.

C&L involves an evaluation of the intrinsic hazard of a substance or mixture/preparation and a communication of that hazard via the label. This evaluation must be made for any substance or mixture/preparation manufactured within or imported into the EC and placed on the EC market. C&L is, therefore, a useful tool for risk management of chemicals. All marketed substances and mixtures/preparations must be classified and labelled, irrespective of the quantity placed on the market. The labelling is the first and often the only information on the hazards of a chemical that reaches the user, which could be a consumer or a worker. In addition, the classification has a large number of downstream consequences within the EC legislation. For example, under Council Directive No. 91/414 concerning the placing of plant protection products on the market, active substances of plant protection products and the products themselves are classified and labelled in accordance with Council Directive No.

67/548 and Directive No. 1999/45. The classification and labelling is reported in the dossier made by the manufacturer and is a part of the monograph prepared by an EC Member State. The C&L is considered under the authorisation process. New harmonised warning and precautionary statements for labels, which will replace the existing risk and safety phrases, have also been established. Two new harmonised hazard warning symbols for labels (known as 'pictograms') and a new design for the existing symbols have been introduced. New hazard statements for labels (for example: H240 - Heating may cause an explosion; H320 - Causes eye irritation; H401 - Toxic to aquatic life) and new precautionary statements for labels (for example: P102 - Keep out of reach of children; P271 - Use only outdoors or in well-ventilated area; P410 - Protect from sunlight) have been established.

Under the previous system, only EC Member States' competent authorities could make proposals for harmonised C&L for substances to be included in Annex I to Directive No. 67/548. Now, also manufacturers, importers or downstream users can make a proposal for the harmonised C&L of a substance to be included in Annex VI to CLP. The proposal should be submitted to the European Chemicals Agency in accordance with the procedure laid down in CLP. As with the old legislation, the new CLP Regulation is intended to be primarily a self-classification system for enterprises. It entered into force on 20 January 2009 and establishes deadlines for substance reclassification (30 November 2010) and for mixtures (31 May 2015). The old Directives on classification, labelling and packaging (*i.e.*, Council Directive No. 67/548 and Directive No. 1999/45), will be repealed on 1 June 2015. For traders, this means that there are transitional periods during which the new and the current legislation will co-exist (until the deadlines mentioned above). During the transitional period, enterprises may use either system as provided in the current EC legislation or the new regulation.

The EC has re-introduced 'export refunds' for certain agricultural products

Facing a sharp fall in prices of agricultural products, the EC, for the first time since 2007, has re-introduced export subsidies in the form of export refunds. The measure will cover mainly dairy products, such as butter, milk powder and cheese, but it will also apply to several other products, including frozen poultry and eggs. The refunds are going to fill the gap between domestic 'floor' prices and international prices. The EC officials assure that the measure will fully comply with the EC reduction commitments on subsidised exports under the WTO Agreement on Agriculture (hereinafter, the AoA). According to this agreement, WTO Members are allowed to keep subsidies on agricultural products, subject to the level of annual or final bound reduction commitments in their Schedules. The EC stated that the measure will be in force for as long as market conditions so dictate. The European Commission will continue to monitor market developments and will adjust subsidies accordingly.

In the WTO, the EC measure caused strong reactions and opposition by the so-called Cairns Group, a coalition of 19 agricultural exporting countries, including developed and developing countries from Latin America, Africa and the Asia-Pacific region. Having a significant interest in agricultural markets, the Cairns Group has advocated for a long time the elimination of export subsidies. If the EC measure stays within the limits established by the AoA, the only hope for the opponents of exports subsidies remains the ongoing WTO Doha Round of negotiations. Under the latest draft 'modalities' text on agricultural negotiations agreed in the Doha Round, the EC committed to eliminate export subsidies by the end of 2013.

New ruling on *US – Zeroing*

On 4 February 2009, the WTO Appellate Body issued its report on the '*United States - Continued Existence and Application of Zeroing Methodology*' dispute. The term 'zeroing' refers to the practice, applied in the calculation of dumping margins, of assigning a zero value

to those transactions where negative dumping margins were reported (*i.e.,* where the export price was higher than the normal value). The consequence of the use of such practice is to avoid that negative dumping margins for certain transactions could offset positive dumping margins. Therefore, this practice has the effect of inflating the overall dumping margin. In its report, the Appellate Body found continued use of 'zeroing' by the US, confirmed that 'zeroing' is in breach of the obligations provided by the GATT and the WTO Agreement on Anti-dumping, and required the US to bring its measures into conformity with its obligations under those Agreements.

According to the WTO Dispute Settlement rules, the Appellate Body report shall be adopted by the Dispute Settlement Body and unconditionally accepted by the parties to the dispute within 30 days following its circulation to the WTO Members, unless the WTO Members decide by consensus not to adopt the report. Compliance with the Appellate Body report and recommendations will result in reduction or abolishment of anti-dumping duties on a wide range of EC exports, including steel products, which were artificially inflated by 'zeroing'.

The WTO surveillance mechanism of the implementation of ruling or recommendations will ensure that the US promptly complies with the ruling. In case of non-compliance, the EC may eventually be entitled to apply 'retaliatory' measures. 'Zeroing' was the subject of a range of WTO disputes and has been constantly condemned by WTO panels and by the Appellate Body. Whether the ruling in the current dispute constitutes a final decision on this issue, it remains uncertain.

Recently adopted EC legal instruments:

Commission Regulation (EC) No. 112/2009 of 6 February 2009 imposing a provisional anti-dumping duty on imports of wire rod originating in the People's Republic of China and the Republic of Moldova:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:038:0003:0024:EN:PDF

Commission Decision of 21 November 2008 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Community and the Republic of Chile concerning amendments to Appendix V of the Agreement on Trade in Wines annexed to the Association Agreement between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:037:0008:0008:EN:PDF

Agreement in the form of an Exchange of Letters between the European Community and the Republic of Chile concerning amendment of Appendix V to the Agreement on Trade in Wines of the Association Agreement between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:037:0009:0013:EN:PDF

Council Regulation (EC) No. 91/2009 of 26 January 2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China:
http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2009:029:SOM:EN:HTML