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Brazil may initiate a WTO dispute regarding EU restrictions on poultry marketing regulations

It appears that Brazil is considering launching a WTO dispute settlement proceeding regarding new EU poultrymeat marketing regulations which may impact imports of Brazilian poultry into the EU. Previously, EU rules imposed no time limit for the use of the term '*fresh*' on poultrymeat. Although poultrymeat could not be frozen, then thawed and sold as '*fresh*', poultrymeat producers were not prevented from maintaining weeks-old poultrymeat in a supermarket chiller unit and marketing it as '*fresh*'.

To avoid consumers being misled as to the characteristics of the foodstuff, the EU has now changed its poultrymeat marketing regulations by setting out new definitions of frozen and fresh poultrymeat, and introducing a new definition of '*poultrymeat preparation*' and '*fresh poultrymeat preparation*'. These new provisions are contained in Council Regulation (EC) No. 1047/2009 of 19 October 2009, which is itself an amendment of Annex XIV of Council Regulation (EC) No. 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (hereinafter, the Single CMO Regulation). Article 116 of the Single CMO Regulation provides that products in the poultrymeat sector are to be marketed in accordance with the provisions of Annex XIV of the Single CMO Regulation. The amendments to Annex XIV of the Single CMO Regulation were published on 19 October 2009 and applied as of 1 May 2010.

These new rules have apparently created concern amongst some large Brazilian food processing companies. The amended Part B II.2 of Annex XIV now defines '*fresh poultrymeat*' as poultrymeat which has not been stiffened at any time by the cooling process prior to being kept at a temperature between – 2 °C and + 4 °C. Brazil is now apparently in the process of compiling export data obtained from the private sector in order to determine to what degree the amendments to Annex XIV of the Single CMO Regulation have negatively affected its poultry export sector. Brazil's apparent concern is that EU consumers are less likely to purchase poultrymeat which is not labelled as fresh. One report claims that Brazil's barbecue poultrymeat exports to the EU already fell by 9.6% in 2010.

If Brazil were to decide to initiate a WTO proceeding against the EU, Brazil could claim that the EU's new poultrymeat marketing regulations violate Article III:4 of the General Agreement on Tariffs and Trade (hereinafter, GATT). This provision prohibits internal domestic regulations affecting, *inter alia*, the sale, offer for sale and distribution of imported products in a manner which constitutes treatment less favourable than that accorded to like domestic products. Elaborating on this notion, several WTO panel reports have ruled that Article III:4 of the GATT requires imported products to be given '*competitive opportunities*' no less favourable than those given to domestic products. In addition, Brazil may also invoke Article 2.2 of the WTO's Agreement on Technical Barriers to Trade. This provision requires WTO Members to ensure that technical regulations are not adopted with a view of creating

unnecessary obstacles to international trade. The article also requires that technical regulations be not more trade-restrictive than necessary to fulfil a legitimate objective. Brazil would have to show that the new marketing regulations cause unnecessary obstacles to trade or are, in fact, more trade-restrictive than necessary to meet the EU's objectives of preventing deceptive marketing practices.

Brazil has emerged in recent years as one of the world's leading agricultural producers, reportedly exporting approximately 1.5 billion USD of poultry to the EU each year. However, the EU's amendment of Annex XIV of the Single CMO Regulation has apparently left Brazilian exporters concerned that the new rules will complicate export logistics, increase the cost of insurance, and, most importantly, negatively affect consumers' perception of the quality and freshness of Brazilian produce. Commercial parties with a stake in the growing EU – Brazil trading relationship and/or exporting poultry to the EU from other relevant markets (*i.e.*, Thailand, Argentina, etc.) should monitor any further developments in this potential EU – Brazil poultrymeat dispute.

The EU plans to establish a threshold for GM presence in imported animal feed

On 22 February 2011, the EU Standing Committee on the Food Chain and Animal Health (Genetically Modified Food and Feed and Environmental Risk Section), which represents EU Member States, endorsed a draft EU Commission Regulation laying down the methods of sampling and analysis for the official control of feed as regards the presence of genetically modified material for which an authorisation procedure is pending or the authorisation of which has expired. The legal basis for the measure is Regulation No. (EC) 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules.

The measure addresses the current uncertainty which EU operators encounter when they place feed from third countries on the EU market. By harmonising procedures in EU Member States, the measure is intended to improve the legal certainty for importers of feed from third countries. Considering that 0.1% is the lowest level of genetically modified (hereinafter, GM or GMO) presence where sampling and analysis can be performed in a reproducible and reliable manner, the measure establishes that feed shall only be considered as non-compliant with EU legislation when, taking into account uncertainty, the presence of non-authorised GM material exceeds this limit (the technical zero). The measure is limited to GM feed material authorised for commercialisation in a third country and for which an authorisation procedure is pending in the EU, or for GM feed material for which EU authorisation has expired.

In simple terms, the measure is intended to end import restrictions on animal feed containing traces of GM crops, up to a 0.1% threshold. However, under the new rules, only unauthorised GMO imports already approved in a non-EU country and with an application pending with the European Food Safety Authority for at least three months will be allowed into the EU.

The proposed Regulation faces opposition within the EU because it overrules the EU's zero-tolerance policy towards unauthorised GMOs. The feed industry, exporting states and the EU Commission, however, argue that the measure is necessary to prevent supply disruptions, as in 2009, when several shipments of US soya beans were impounded due to the discovery of traces of unauthorised genetically modified material. It has been argued that the zero-tolerance policy has a big impact on the profitability of the EU livestock sector and leads, in the end, to a rise in food prices. By allowing trace amounts of unauthorised GM products in future animal feed imports, this adverse situation might be corrected. According

to FEFAC, the European Feed Manufacturers' Federation, and other EU feed and food chain organisations, the consequences of the zero-tolerance policy on EU economic operators and consumers are highlighted by independent economic impact assessments which point to a 'bill' of almost 4 billion EUR to partners in the feed chain, livestock industry and EU consumers. The cost could rise even higher in the coming months should the EU no longer be able to import soybean meal from South America.

According to EU Commission figures, in the 2008-09 season, 4 million tons of different maize products and 33 million tons of soya products were imported, mainly from Argentina, Brazil and the US. This constitutes an essential input for the EU's livestock sector. According to industry figures, the EU livestock industry imported around 51 million tonnes of feed last year, of which around 50% were authorised genetically modified soya beans from Brazil and Argentina.

The EU Commission basically wants restrictions by national authorities on GM feed importation removed because of WTO rules. In 2003, GM products became the object of a WTO dispute, *EC – Biotech*, when Argentina, Canada and the US challenged the EU's *de facto* ban on GM food products. The WTO panel in *EC – Biotech* ruled, *inter alia*, that EU Member States had violated Articles 5.1 and 2.2 of the WTO's Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter, SPS Agreement), as the import prohibition on biotech products was not based on an appropriate risk assessment as required by Article 5.1 of the SPS Agreement and defined in Annex A(4) of the SPS Agreement, and the import prohibition on biotech products was maintained without sufficient scientific evidence, in contravention of Article 2.2 of the SPS Agreement. Banning feed imports because of minor traces of GM material, which has not (yet) been authorised in the EU, but has been authorised by another WTO Member, could trigger a new dispute similar to that in *EC - Biotech*.

As the measures envisaged by the EU Commission are in accordance with the opinion of the EU Standing Committee on the Food Chain and Animal Health, the draft measures have now been submitted for scrutiny by the EU Parliament and the Council. The EU Parliament, acting by a majority of its members, or the Council, acting by a qualified majority, may oppose the adoption of the said draft by the EU Commission, justifying their opposition by indicating that the draft measures proposed by the EU Commission exceed the implementing powers provided for in the basic instrument, or that the draft is not compatible with the aim or the content of the basic instrument, or that it does not respect the principles of subsidiarity or proportionality. If, within three months from the date of referral to them, neither the EU Parliament nor the Council has opposed the draft measures, the latter shall be adopted by the EU Commission.

Trade concerns are affecting the possible adoption by the EU of a new novel foods regulation

On 3 March 2011, the EU Commissioner for Trade, Karel De Gucht, briefed the EU Parliament's Committee on International Trade (hereinafter, INTA Committee) on the trade dimensions of the EU Commission's draft regulation on novel foods. According to the proposed text, a food may be considered novel when it has not been used to a significant degree for human consumption within the EU before 15 May 1997 (see Trade Perspectives Issue No. 13 of 2 July 2009), the date on which EC Regulation No. 258/97 on novel foods and novel food ingredients (hereinafter, current novel foods regulation) came into force.

The draft regulation on novel foods was submitted by the EU Commission to the EU Council and EU Parliament on 15 January 2008. If adopted, the draft regulation on novel foods will

replace the EU's current novel foods regulation. The objective of the proposal is to encourage the development and placing on the EU market of safe, innovative foods, as well as to ensure food safety, and the protection of human health. The proposed regulation streamlines the authorisation procedure by switching from a national to a centralised EU level procedure. In addition, it introduces new definitions (*e.g.*, addressing new technologies, such as nanotechnology and cloning, which have been developed in recent years) and an accelerated authorisation procedure for food which has a history of safe use in third countries.

The draft regulation on novel foods has been extensively discussed within the different EU institutions. The EU Parliament delivered its opinion at first reading on 25 March 2009. The EU Council adopted its position at first reading on 15 March 2010. On 7 July 2010, the EU Parliament adopted 103 amendments to the EU Council's position. These amendments included an explicit demand that dairy products and meat from cloned animals and their offspring be excluded from the scope of the draft novel foods regulation and their import be banned from the European Union (see Trade Perspectives Issue No. 16 of 10 September 2010). The EU Commission submitted its opinion on the EU Parliament's amendments to the EU Council on 12 October 2010. Finally, the EU Council decided on 6 December 2010 not to approve all of the EU Parliament's amendments, and consequently to convene the Conciliation Committee in order to resolve the matter. The six-week time limit for convening the Conciliation Committee was extended in view of the complexity of the dossier.

The most contentious issue affecting whether the draft regulation on novel foods will be finally adopted appears to be whether products of the offspring of cloned animals will be considered novel foods. To consider the products of cloned animals to be novel foods under the EU's draft regulation on novel foods could facilitate their authorisation for human consumption within the EU. The EU Commission has proposed a compromise regarding this issue: a 5 year *moratorium* on the authorisation of food from cloned animals. Yet some members of the EU Parliament have urged stronger measures to ensure that no foodstuffs from cloned animals or their descendants may ever be imported into the EU market.

Before the INTA Committee, Mr. De Gucht stated that cloned animals, such as bulls, are not themselves usually exported. It is more commonly the semen of such animals which is exported. Whereas an import ban on cloned animals and their offspring could be justified under the GATT on the basis of both public morality concerns (under Article XX(a) of the GATT) and animal welfare concerns (under Article XX(b) of the GATT), Mr. De Gucht warned that an import ban extending to meat and dairy products derived from the offspring of cloned animals could be hard to defend under WTO rules. Mindful of the EU's experience with WTO cases such as *EC – Hormones* and *EC – Biotech*, the EU Commission's apparently cautious approach to the introduction of an import ban appears to reflect its desire to avoid another lengthy WTO dispute. In fact, such a ban could violate the rules of the SPS Agreement, as scientific studies conducted by the European Food Safety Authority have thus far not identified any health risks associated with the human consumption of products of the offspring of cloned animals.

Some members of the EU Parliament have suggested that the EU could require that WTO Members wishing to export meat to the EU have in place meat labelling and traceability systems which can identify meat derived from cloned animals or their offspring. However, Mr. De Gucht indicated that it could be difficult for the EU to require that its trading partners have in place an elaborate system for meat traceability. As a result, to effectively achieve a ban on the import of meat from the offspring of cloned animals, the EU might be obliged to impose a *de facto* ban against the import of all meat from specific WTO Member countries. This could leave the EU vulnerable to a challenge under WTO law.

The current dispute over the adoption of a new novel foods regulation has important commercial consequences for the EU in light of the EU's Lisbon Agenda. A 2007 report by the economist Graham Brookes warned that the EU's economic competitiveness was being limited by the EU's current novel foods regulation. According to Mr. Brookes, authorisation delays of 30 months or more before a product launch reportedly reduces a company's rate of return by 30%, or an average of 4 million EUR per product. If a deal is not reached between the EU Council and EU Parliament in time for the conciliation meeting scheduled for 16 March 2011, the legislative procedure will start anew and the current draft novel foods regulation will be lost. In this case, both cloning and nanotechnology will remain governed by the current EU regulation and there will be, for the moment, no accelerated authorisation procedure for food which has a history of safe use in third countries.

China may take WTO action against the EU over telecoms subsidies

According to a confidential memo reportedly produced by China's Ministry of Commerce, China is considering launching a formal WTO dispute against the EU regarding the EU's alleged subsidisation of telecommunications infrastructure companies. The EU Commission has itself recently pursued two separate investigations into allegedly WTO non-compliant Chinese government subsidisation schemes for Chinese telecommunications infrastructure companies. One EU Commission investigation started as a result of an anti-dumping complaint lodged on 3 June 2010 by Option NV, a Belgian wireless modem manufacturer, against Huawei and ZTE, two Chinese telecommunications infrastructure companies. On 2 August 2010, Option NV also initiated with the EU Commission an anti-subsidy proceeding against Huawei and ZTE. Option NV withdrew both complaints on 26 October 2010, following the signing of a '*cooperation agreement*' with Huawei. In light of the withdrawal of Option NV's complaints, the EU terminated its anti-dumping and anti-subsidy investigations against Huawei and ZTE on 2 March 2011.

In a document apparently distributed confidentially to EU Member States on 1 February 2011, the EU Commission reportedly presented its preliminary findings of an investigation into the trading practices of Huawei and ZTE. The report apparently suggests that Huawei recently received a 30 billion USD credit line from the China Development Bank, and ZTE received a 15 billion USD credit line from the China Development Bank and 10 billion USD from the China Export-Import Bank. The EU Commission document reportedly argues that these loans constitute WTO-inconsistent export credit financing, which provides Chinese telecommunications infrastructure firms with a major competitive advantage over European rivals.

China has responded by highlighting EU research and development grants to telecom manufacturers, which apparently amounted to 9.1 billion EUR for the 2007-2013 period. China also reportedly claims that approximately 1.5 billion EUR in loans based on non-commercial terms have been granted by the European Investment Bank to three unnamed European telecommunications manufacturers.

Should the EU elect to pursue a WTO dispute against China, it would likely claim that China has provided export subsidies to its telecommunications manufacturers in violation of both WTO law and the guidelines of the Organisation for Economic Co-operation and Development (hereinafter, OECD). The OECD has long been the primary *forum* in which countries have discussed controls on government subsidies granted in connection with the provision of export credits. The 2008 Revision of the OECD Arrangement on Guidelines for Officially Supported Export Credits (hereinafter, 2008 OECD Guidelines) governs the use of export credits. The 2008 OECD Guidelines are not legally binding, and China is not a party to the Guidelines. Nevertheless, certain aspects of the 2008 OECD Guidelines have been incorporated by reference into item (k) of the Illustrative List of Export Subsidies in the

Agreement on Subsidies and Countervailing Measures (hereinafter, SCM Agreement). The SCM Agreement is the key WTO Agreement governing the legal provision of government subsidies in regard to trade in goods. Item (k) of Annex I of the SCM Agreement defines an export subsidy as a grant of export credits by a government at below-market rates. Such a measure is considered by the SCM Agreement to be a prohibited export subsidy, and there is no further need to demonstrate that it falls within the meaning of Article 3.1(a) of the SCM Agreement. Article 3.1 of the SCM Agreement enumerates the types of subsidies that are expressly prohibited by the SCM Agreement.

China may itself claim in a WTO dispute proceeding that the EU's loans and research and development grants provided to European telecommunications manufacturers constitute actionable subsidies within the meaning of Article 5 of the SCM Agreement. In particular, China may argue that its telecommunications industries have suffered serious prejudice within the meaning of Article 5(c) of the SCM Agreement. In order to make this case, China would need to demonstrate that the EU's research and development grants constituted a '*financial contribution*' and conferred a '*benefit*' to the EU's telecommunications industry within the meaning of Article 1.1 (a) and (b) of the SCM Agreement, and constituted a '*specific*' subsidy within the meaning of Article 2 of the SCM Agreement.

Since the early 2000s, Chinese telecommunications manufacturers such as Huawei and ZTE have made striking gains in market share within the EU. Option NV's complaint against Huawei and ZTE concerned wireless modems, which reportedly comprise a small portion of Huawei and ZTE's business. However, the larger commercial stakes apparently concern large network equipment, such as Internet base stations for mobile networks. This is a business area in which Huawei and ZTE directly compete with European companies such as Ericsson, Nokia Siemens and Alcatel Lucent. The WTO's legal rules provide powerful tools by which telecommunications equipment manufacturers can seek a '*fair fight*' in the use of government subsidies in this competition for market share, and interested commercial parties should ensure that they remain well-informed and actively involved.

Recently Adopted EU Legislation

Market Access

- *Commission Regulation (EU) No 230/2011 of 9 March 2011 amending Council Regulation (EC) No 992/95 as regards tariff quotas of the Union for certain agricultural and fishery products originating in Norway*

- *Commission Regulation (EU) No 225/2011 of 7 March 2011 amending Commission Regulation (EC) No 1277/2005 laying down implementing rules for Regulation (EC) No 273/2004 of the European Parliament and of the Council on drug precursors and for Council Regulation (EC) No 111/2005 laying down rules for the monitoring of trade between the Community and third countries in drug precursors*

- *Commission Regulation (EU) No 214/2011 of 3 March 2011 amending Annexes I and V to Regulation (EC) No 689/2008 of the European Parliament and of the Council concerning the export and import of dangerous chemicals*

- *Commission Regulation (EU) No 185/2011 of 25 February 2011 amending Council Regulation (EC) No 499/96 as regards tariff quotas of the Union for certain fish and fishery products and live horses originating in Iceland*

- *Commission Regulation (EU) No 187/2011 of 25 February 2011 amending Annex I to Regulation (EC) No 669/2009 implementing Regulation (EC) No 882/2004 of the European Parliament and of the Council as regards the increased level of official controls on imports of certain feed and food of non-animal origin*

- *Commission Decision of 25 February 2011 amending Annex II to Decision 2006/766/EC as regards the inclusion of Fiji in the list of third countries and territories from which imports of fishery products for human consumption are permitted (notified under document C(2011) 1082)*

- *Corrigendum to Commission Regulation (EU) No 144/2011 of 17 February 2011 amending Regulation (EU) No 206/2010 laying down lists of third countries, territories or parts thereof authorised for the introduction into the European Union of certain animals and fresh meat and the veterinary certification requirements*

Trade Remedies

- *Commission Decision of 9 March 2011 terminating the anti-dumping proceeding concerning imports of certain stainless steel bars originating in India*

- *Council Implementing Regulation (EU) No 205/2011 of 28 February 2011 amending Regulation (EC) No 1292/2007 imposing a definitive anti-dumping duty on imports of polyethylene terephthalate (PET) film originating in India*

- *Council Implementing Regulation (EU) No 206/2011 of 28 February 2011 amending Regulation (EC) No 367/2006 imposing a definitive countervailing duty on imports of polyethylene terephthalate (PET) film originating in India*

- *Commission Regulation (EU) No 209/2011 of 2 March 2011 terminating the anti-dumping and anti-subsidy proceedings concerning imports of wireless wide area networking (WWAN) modems originating in the People's Republic of China and terminating the registration of such imports imposed by Regulations (EU) No 570/2010 and (EU) No 811/2010*

- *2011/C 68/05 Notice of the expiry of certain countervailing measures*

Customs Law

- *Commission Implementing Regulation (EU) No 232/2011 of 9 March 2011 amending the representative prices and additional import duties for certain products in the sugar sector fixed by Regulation (EU) No 867/2010 for the 2010/11 marketing year*

- *Commission Implementing Regulation (EU) No 227/2011 of 7 March 2011 amending the representative prices and additional import duties for certain products in the sugar sector fixed by Regulation (EU) No 867/2010 for the 2010/11 marketing year*

- *Commission Regulation (EU) No 200/2011 of 28 February 2011 fixing the import duties in the cereals sector applicable from 1 March 2011*

Food and Agricultural Law

- *Commission Regulation (EU) No 221/2011 of 4 March 2011 concerning the authorisation of 6-phytase (EC 3.1.3.26) produced by Aspergillus oryzae DSM 14223 as a feed additive for salmonids (holder of authorisation DSM Nutritional Products Ltd represented by DSM Nutritional products Sp. Z o.o)*

- *Commission Regulation (EU) No 212/2011 of 3 March 2011 concerning the authorisation of Pediococcus acidilactici CNCM MA 18/5M as a feed additive for laying hens (holder of authorisation Lallemand SAS)*

- *Commission Regulation (EU) No 222/2011 of 3 March 2011 laying down exceptional measures as regards the release of out-of-quota sugar and isoglucose on the Union market at reduced surplus levy during marketing year 2010/2011*

- *Commission Regulation (EU) No 184/2011 of 25 February 2011 concerning the authorisation of Bacillus subtilis C-3102 (DSM 15544) as a feed additive for chickens reared for laying, turkeys, minor avian species and other ornamental and game birds (holder of authorisation Calpis Co. Ltd Japan, represented by Calpis Co. Ltd Europe Representative Office)*

Other

- *Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers*

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