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Canadian Act on tobacco aimed at youth might constitute a technical barrier to trade

During the last meeting of the WTO Committee on Technical Barriers to Trade (hereinafter, TBT), which took place on 24 and 25 March 2010, fourteen WTO Members, including Argentina, Brazil, Colombia, the EU, Japan, Malawi, Turkey and the US, raised concerns on Canada's '*Cracking Down on Tobacco Marketing Aimed at Youth Act*'(hereinafter, the Act).

The Act was adopted by the Canadian Parliament in 2009, as an amendment to the 'Tobacco Act' of 1997. Its provisions include restrictions on advertising and packaging, but its most controversial feature is the prohibition to use certain additives, having flavouring properties or enhancing flavour, in little cigars, cigarettes and blunt wraps; exceptions being explicitly provided for twelve additives, including menthol. The Act seeks to accommodate public health concerns within Canada and, therefore, does not apply to those tobacco products which, albeit being manufactured in Canada, are solely intended for exports. The main reason behind the opposition, expressed by several WTO Members against the Canadian legislative amendments, lies in the fact that a number of the prohibited additives are used in the manufacture of blended cigarettes, not in order to give to the tobacco a more fruity or candy-like flavour, which might appeal to youngsters, but, instead, in order to aid in the actual blending of the different sorts of tobacco used in these cigarettes and in order to confer on each brand its unique tobacco flavour. An outright prohibition of the respective additives might, therefore, lead to a *de facto* prohibition of blended cigarettes on the Canadian market.

The WTO-consistency of the Act could be questioned under Articles 2.2 and 2.8 of the TBT Agreement. The argument could be made that the proposed Canadian legislation is more trade-restrictive than necessary to attain the legitimate objective of protection of the health of youth, given that less restrictive measures appear to be reasonably available in order to achieve the desired level of protection. For example, instead of banning additives as such, Canada could resort to a ban of only those final tobacco products, which have acquired a commercial appeal to youngsters, by means of a fruity or candy-like flavour achieved through the use of certain additives. Such an approach would likely be in compliance with the TBT Agreement, which explicitly prescribes WTO Members to specify their technical regulations '*based on product requirements in terms of performance, rather than design or descriptive characteristics*'. In addition, Developing Countries, in particular, could ground arguments supporting the adoption of a less trade-restrictive measure by Canada on the basis of Article 12.3 of the TBT, which maintains that their special development, financial and trade needs should be taken into account during the preparation and application of technical regulations, with a view to ensure that the latter do not create unnecessary obstacles to their exports.

While the parts of the Act relating to the advertising and packaging of tobacco products are already in force, the part relating to the prohibition of use of certain additives is to be implemented from 5 July 2010 onwards (*i.e.*, after that date, the manufacture and sale of specific tobacco products using one of the prohibited additives will be banned). However, that date could be postponed, as opposing WTO Members, in particular, the EU, are asking for the delay of the measure's implementation, due to the fact that Canada did not comply with its obligation to notify its technical regulation to the WTO, in accordance with Article 2.9 of the TBT Agreement. The EU claims that, as a result of Canada's omission, neither a proper discussion has taken place within the WTO TBT Committee, nor interested parties have had the chance to submit their comments on the Act.

In blunt contrast to the aforementioned stance, the US seems to have adopted a much less aggressive attitude towards Canada, probably due to the fact that it maintains a similar ban on clove cigarettes. Such ban, according to reports, is soon to be challenged by Indonesia in the WTO. In addition, the fragility of the US position is further aggravated by the fact that the 1998 'Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act' states that none of the funds provided to some of the US federal agencies, including the Department of Commerce and the Office of the US Trade Representative, *'[…] shall be available to […] seek the reduction or removal by any foreign country of restrictions on the marketing of tobacco or tobacco products, except for restrictions which are not applied equally to all tobacco or tobacco products of the same type'*. Therefore, it appears that the US is inhibited by its internal legislation to go against measures adopted by other countries, restricting the marketing of tobacco, unless such measures are discriminatory. It will be very interesting to see how the US will manage to balance its seemingly contradicting public health and tobacco industry interests, in this case and in future tobacco disputes.

The US expects increased market access for beef in 2012, while EFSA issues guidance on the submission of data for AMT approvals

The European Food Safety Authority (hereinafter, EFSA) published on 11 March 2010 a revision of the guidance document on the submission of data for the evaluation of the safety and efficacy of substances for the removal of microbial surface contamination of foods of animal origin intended for human consumption. Approval of AMTs *(i.e.*, 'anti-microbial treatments') appears to be necessary, particularly for US exporters to be able to take advantage of the increased market access for beef under the second phase of a bilateral agreement completed in 2009 between the US and EU (*i.e.*, the Memorandum of Understanding between the EU and the US on the importation of beef from animals not treated with certain growth-promoting hormones and increased duties applied by the US to certain products of the EU). The second phase of that agreement, which is set to start in August 2012, will grant US exporters a tariff-rate quota (TRQ) of 45,000 tonnes for beef from cattle not raised with growth hormones, up from the current TRQ of 20,000 tonnes granted under the first phase of the agreement (see Trade Perspectives, Issue No. 18 of 2 October 2009).

The EFSA guidance document is intended to provide companies with guidelines for dossiers of applications for the authorisation of AMTs. It refers generically to all candidate substances for the removal of microbial surface contamination of foods of animal origin intended for human consumption and, therefore, it does not address specific situations, like the import of US beef. EFSA states that it is up to the applicant to use the appropriate methodologies and to design the studies, which would generate the data to comply with the requirements described in the guidance.

After adopting a draft document in December 2009, a public consultation was launched and comments from stakeholders were received until 22 February 2010, particularly by the US Meat Export Federation, the USDA Foreign Agricultural Service and Health Canada. The US Meat Export Federation argues, *inter alia*, that revisions to the guidance document make it significantly more difficult to gain approval of novel products due to the considerable amount of new research that would need to be funded in order to gain one approval. The USDA's Foreign Agricultural Service stated, *inter alia*, that the environmental aspects of treatments in exporting countries are beyond the scope of measures that can be applied to the imported product, so this guidance would appear to only apply to treatments when used within the EU and to the question as to how these requirements would apply to imported products.

Article 3(2) of Regulation 853/2004 of the European Parliament and EU Council, which lays down specific hygiene rules for foods of animal origin, constitutes the legal basis for the use of substances to remove surface contamination from foods of animal origin intended for human consumption. In principle, food business operators shall not use any substance other than potable

water or clean water to remove surface contamination from products of animal origin, unless use of the substance has been approved under the EU Commission's comitology procedure. In its role as the EU risk assessment body in food safety, EFSA is consulted by the EU Commission for the evaluation of the safety and efficacy of substances to be used to remove microbial surface contamination of foods of animal origin. To date, the only substances where both the safety and efficacy has been assessed by EFSA were, in 2005, peroxyacids intended to be used to reduce the microbial surface contamination of poultry carcasses. While the EFSA Panel on additives, flavourings, processing aids and materials in contact with food (AFC) concluded that, based on the data available, there was no safety concern, the Scientific Panel on Biological Hazards (BIOHAZ) concluded that, owing to lack of sufficient data available to the Panel, including those submitted by the applicant, it was unable to say if this substance effectively killed or reduced pathogenic microorganisms on poultry carcasses.

It appears that the future EU approval of beef AMTs is more likely because the substances are generally citric-based and not chlorine-based like the AMTs for poultry. However, in submitting new data to EFSA, or when adapting already filed applications for AMTs, operators should consider in detail the new guidelines as it appears that the failed assessment of poultry AMTs was more due to the lack of sufficient available data than to safety concerns. On the other hand, the measures applied by the EU Commission based on the new guidance, particularly the possible rejections of AMT approvals, appear to fall under the scope of the WTO Agreement on Sanitary and Phytosanitary Measures (hereinafter, SPS Agreement). Therefore, it should be noted that any SPS measure must be applied only to the extent necessary to protect human, animal or plant life or health, and it must be based on scientific principles. In addition, there should be a link between the applied SPS measures and the risk assessment undertaken to impose such measures. As the possible new EU guidance document concerning the use of AMTs could affect the imports of beef from the US to the EU under the TRQ established by agreement in the aftermath of the WTO dispute *EC – Hormones*, it is advised to closely monitor any evolution thereto and to consider undertaking the appropriate actions when industry interests stand to be affected.

China blocks imports of Argentinean soybean oil

Reports indicate that China has blocked all Argentinean soybean oil imports since 1 April 2010, following the announcement of the Chinese Government's decision to impose sanitary restrictions on imported soy-oil.

According to these reports, China's Ministry of Commerce urged major Chinese traders to call off any soybean oil cargoes ordered from Argentina, due to the imminent imposition of high sanitary standards, which Argentina's oil cannot be deemed to meet. In fact, the new rules on solvent residues used for processing soybean oil provide that they must not surpass 100 parts/million, while the solvent residues in Argentinean soybean oil are approximately 300 parts/million. In addition, the reports state that China recently announced its decision to remove the responsibility of granting soy-oil importation permits from the Chinese provinces and assign it, instead, to the Ministry of Commerce.

Sanitary and phytosanitary measures affecting international trade fall within the scope of the SPS Agreement. The latter allows the imposition of SPS measures by WTO Members, even if these result into trade restrictions, therefore allowing the right of any country to choose the level of health protection that it deems appropriate. However, at the same time, SPS Agreement contains a number of provisions to ensure that such measures are not a camouflage for protectionism. Among them is the obligation of any country wishing to introduce an SPS measure to conduct a scientific risk assessment; to demonstrate a level of consistency in its SPS actions; not to discriminate among countries where alike conditions prevail; to try minimising negative trade effects, when designing and adopting its respective SPS measures; and to ensure the transparency of the procedures followed when assessing the risk under consideration.

While Chinese authorities insist that the blockade of Argentinean soybean oil imports is a necessary sanitary measure based on safety grounds, some observers claim that the real causes behind the Chinese Government's actions are not related to health considerations. Some commentators argue, in fact, that China would rather be attempting to exercise pressure on Argentina, in order for the latter to remove the anti-dumping measures that it has adopted on a wide range of products imported from China, including shoes, textiles and steel pipes. In addition, they state that China's move is a way for the Government to deal with the problem of the massive soybean, rapeseed and palm oil stockpiles, which have reached a record level this year and caused distress to the domestic soybean industry. Whatever the case, the Chinese SPS measure could be challenged under the SPS Agreement in order to determine whether it is in line with China's obligations under the SPS Agreement, the Agreement on Agriculture and the GATT, or whether it is a protectionist policy, not based on a valid scientific risk assessment and, therefore, WTO illegal.

Argentina and China are currently engaged in negotiations, in an effort to find a mutually acceptable solution. Brazil and the US, key soy-oil exporters themselves, have indicated their vigilance in relation to the evolution of the dispute. They have stated that they are both ready to boost their exports to China, in order to fill the considerable gap left open in the Chinese soybean oil market, in case the current blockade against Argentinean imports is prolonged.

Export restrictions on certain raw materials are increasingly being imposed by WTO Members

The Democratic Republic of Congo is considering imposing export taxes on upstream cobalt products, *i.e.*, all materials except for metal and alloy. 'Upstream' in this respect refers to the exploration, mining and transport of cobalt. Cobalt is used as an input for a number of products, *inter alia*, batteries (particularly for mobile phones), super alloys, chemicals, wear resistant alloys, catalysts and magnets. Export restrictions on a range of raw materials and commodities are already being imposed by a number of WTO Members, in particular developing countries. For example, China's exports restrictions on certain raw materials are currently being challenged at the WTO (see Trade Perspectives, Issue No. 21 of 13 November 2009).

Export taxes, as export restrictions in general, are labelled as non-tariff measures, *i.e.*, measures other than tariffs with an impact on trade. A recent paper by the OECD entitled 'Export restrictions on strategic raw materials and their impact on trade and global supply' states that export restrictions can further be maintained under the form of export quotas, mandatory export minimum prices, in certain cases the withdrawal/reduction of the VAT refund on the exports of raw materials (as opposed to the VAT rebates on the exports of the processed product) and stringent export licensing requirements. Raw materials are referred to in this report mainly as selected metals and minerals that serve as input for high-technology products. However, also commodities and secondary products, *e.g.*, wood, hides, chemicals and certain agricultural products can be placed within the same category of raw materials.

Export restrictions can be imposed for a number of reasons. For instance, they can be put in place for environmental purposes or to preserve natural resources. However, it can be argued that in order for such measures to achieve such objectives, it is more efficient to limit the production of the raw materials rather than restricting their exportation, which, in a number of cases, does not have the restrictive effect that was expected. Another reason for export restrictions to be imposed is to stimulate the domestic processing industry.

Quantitative export restrictions can be challenged through the WTO, which provides for a prohibition on quantitative restrictions in Article XI of the GATT. However, such policy could still be justified under Article XX GATT by the exception relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. Export taxes as such are not prohibited by the WTO, although they

have to be administered in a non-discriminatory and transparent manner, in accordance with Articles I and X of the GATT. The mechanism of the withdrawal/reduction of VAT refunds on the exports of raw materials (as opposed to the VAT rebates on the exports of the processed product) is an interesting tool that is often applied, the effect of it possibly being that the domestic industry will be forced to concentrate on the downstream processing of the raw materials as the exports of the raw materials is too costly. The application of VAT refunds on the exports of downstream products has been identified as an implicit subsidy by the WTO Secretariat in China's 2006 Trade Policy Review. However, it is unclear as to what extent such policies could be challenged before the WTO dispute settlement body under the WTO Agreement on Subsidies and Countervailing Measures (hereinafter, SCM Agreement) as a WTO panel in *US – Export Restraints* established that export restrictions cannot be regarded as a 'financial contribution' as required by Article 1.1 of the SCM Agreement.

Due to the popularity of export restrictions, especially in developing and least-developed countries, and a lack of a formal system to address such regimes within the WTO, such practices are being addressed in the context of bilateral agreements and WTO accessions. For example, within free trade areas such as MERCOSUR and NAFTA and others, export taxes are prohibited. In addition, efforts should be made to come up with more efficient strategies than export restrictions to achieve certain goals. As stated above, in order to protect the environment or to preserve natural resources, it appears to be better to target production rather than exports. Also, less trade distorting measures could be envisaged in order to stimulate domestic production of processed raw materials, like WTO-compatible government support schemes.

Recently Adopted EU Legislation

- *Commission Regulation (EU) No. 326/2010 of 21 April 2010 amending Regulation (EEC) No. 3846/87 establishing an agricultural product nomenclature for export refunds*
- *Commission Regulation (EU) No. 320/2010 of 19 April 2010 entering a name in the register of protected designations of origin and protected geographical indications (Prosciutto di Sauris (PGI))*
- *Commission Regulation (EU) No. 316/2010 of 16 April 2010 entering a name in the register of protected designations of origin and protected geographical indications (Pommes des Alpes de Haute Durance (PGI))*
- *Commission Regulation (EU) No. 305/2010 of 14 April 2010 replacing Annexes I and II to Council Regulation (EC) No. 673/2005 establishing additional customs duties on imports of certain products originating in the United States of America*
- *Commission Regulation (EU) No. 306/2010 of 14 April 2010 approving non-minor amendments to the specification for a name entered in the register of protected designations of origin and protected geographical indications (Pecorino Toscano (PDO))*
- *Commission Regulation (EU) No. 300/2010 of 12 April 2010 entering a name in the register of protected designations of origin and protected geographical indications (Gentse azalea (PGI))*