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A WTO compliance panel issues its report on the *US – COOL* dispute

On 20 October 2014, a WTO panel examining the consistency of the US measures with the recommendations and rulings of the WTO Dispute Settlement Body (hereinafter, DSB) in relation to the dispute *US – Certain Country of Origin Labelling (COOL) Requirements* (hereinafter, *US – COOL*) issued its report. In essence, the panel found the relevant US measures not to be in line with the DSB's recommendations and rulings.

The *US – COOL* dispute originates from separate requests for WTO consultations filed in December 2008 by Canada and Mexico against a series of US regulatory and statutory instruments concerning certain mandatory country of origin labelling (hereinafter, COOL) measures. In relevant part, these provisions required that consumers be informed at the retail level of the country of origin of certain covered agricultural commodities, including beef and pork. Under the COOL scheme, in order to be eligible for designation as a covered commodity having exclusive US origin, the commodity must be derived from an animal that was exclusively born, raised and slaughtered in the US. Beef and pork exported to the US for immediate slaughter would therefore be excluded from this designation.

The panel report was circulated in November 2011. *Inter alia*, the panel found that the COOL scheme constituted a technical regulation within the meaning of the WTO Agreement on Technical Barriers to Trade (*i.e.*, TBT Agreement) and that it violated a number of obligations under the said agreement. In particular, the panel established that the scheme was inconsistent with Articles 2.1 and 2.2 of the TBT Agreement, to the extent that it accorded less favourable treatment to imported Canadian and Mexican cattle and hogs over those of domestic US origin, as well as that the measure did not fulfil the legitimate objective of providing information to consumers, respectively (for further background on the panel report, see Trade Perspectives Issue No. 22 of 2 December 2011). On appeal, the Appellate Body upheld (albeit on different grounds) the panel's findings that the COOL scheme amounted to a violation of Article 2.1 of the TBT Agreement. However, the Appellate Body reversed the findings in relation to Article 2.2, although it was unable to complete the legal analysis under such provision (see Trade Perspectives Issue No. 14 of 13 July 2012).

Following the expiry of the reasonable period of time granted to the US to bring its system in conformity with WTO law (set on 23 May 2013), the parties to the dispute reached an understanding regarding the procedures under Articles 21 and 22 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (*i.e.*, *Dispute Settlement Understanding* – hereinafter, DSU). *Inter alia*, the parties agreed that, should the complainants

estimate that the US had not complied with the recommendations and rulings of the DSB upon expiry of the reasonable period of time, Canada and Mexico could request the establishment of a compliance panel pursuant to Article 21.5 of the DSU. The parties also agreed that, in the event that such panel found that the US had failed to comply with the relevant recommendations and rulings, the complainants would be able to seek authorisation from the DSB to suspend the application of concession or other obligations (*i.e.*, to '*retaliate*') to the US. Addressing the so-called '*sequencing issue*' (*i.e.*, the relationship between compliance proceedings and arbitration proceedings under Articles 21.5 and 22.6 of the DSU), the parties agreed that the US would not be able to argue that any request for '*retaliation*' was outside the prescribed 30-day period of time.

In order to comply with the recommendations and rulings of the DSB, on 23 May 2013 the US Department of Agriculture (USDA) issued an amended COOL measure which, in part, increased the level of precision of the information given to consumers. However, in its recently circulated report, the compliance panel found the amended scheme to "*increase the original COOL measure's detrimental impact on the competitive opportunities of imported livestock*". The panel submitted that the amended COOL scheme is a technical regulation within the meaning of the TBT Agreement and it is inconsistent with Article 2.1 thereof, but that Canada and Mexico were not able to make a *prima facie* case that it is more trade restrictive than necessary in the sense of Article 2.2 of the TBT Agreement. With regards to the Article 2.1 violation, the compliance panel found that the increased segregation of meat and livestock according to its origin and the consequent higher recordkeeping burden envisaged in the amended COOL measure enhance the incentive to choose domestic over imported livestock. Concerning the findings in relation to Article 2.2 of the TBT Agreement, the panel noted that it was not able to conclude whether the amended COOL measure is more restrictive than necessary. In its analysis, the panel found the amended scheme to contribute to its objective "*to a considerable but necessarily partial degree*". In conducting a comparative analysis of the alternatives put forward by the complainants, it established that such proposed measures were either not properly identified or that they would make a lower contribution to the attainment of the relevant policy objective than the amended COOL measure. The compliance panel also found the amended measure to contravene Article III:4 of the GATT but, exercising judicial economy, it refrained from making any findings under Canada and Mexico's non-violation claims under Article XXIII:1(b) of the GATT.

While the US has the option of appealing the compliance panel's findings, it appears that an important segment of the affected US industry is advocating for the US regulator (*i.e.*, USDA) to amend the COOL scheme in a manner that ensures US compliance with its international obligations and poses no additional burdens to the industry. In parallel, the possibility that Canada and Mexico request (and obtain) authorisation to '*retaliate*' against the US should encourage the US to promptly engage with the concerned sectors and find a solution that satisfies its domestic consumers and trading partners equally. The precedent established by the recent termination of the WTO *US — Subsidies on Upland Cotton* dispute, where Brazil retained the right to '*retaliate*' against the US for over four years, may play an important role in the US authorities' decision on how to go forward with regards to the COOL scheme. In the meantime, businesses involved in the relevant sector are advised to continue engaging at the private level and with the responsible authorities in order to ensure that their commercial interests be duly taken into account, safeguarded and/or promoted.

South Africa may soon initiate a WTO dispute against the EU's measures affecting the importation of citrus fruits

Reportedly, South Africa has decided to refocus its attempts to have the EU remove its measures against citrus fruits infected with the fungal disease Citrus Black Spot (hereinafter, CBS) by pursuing options available to it as a Member of the WTO. In a press release dated 16

October 2014, South Africa's Department of Trade and Industry emphasised that it has been left with no choice, but to elevate the matter to the WTO. A challenge regarding the science used to support the EU's sanitary and phytosanitary (hereinafter, SPS) measures is almost certain, but the potential dispute also provides an opportunity for South Africa to assert what is arguably overlooked language regarding '*regionalisation*' within the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

CBS is a plant disease caused by the fungus *Guignardia citricarpa Kiely* (renamed *Phyllosticta citricarpa (McAlpine) Van der Aa*), which affects citrus fruits. Harmless to humans, CBS damages fruits' appearance by causing spots on fruit leaves and blemishes in fruits, potentially reducing both quality and quantity of harvests. Although CBS disease is present in regions of Africa, Asia, Oceania and South America, it has never been detected in Europe. *Guignardia citricarpa Kiely* (all strains pathogenic to Citrus) is classified as a harmful organism under *Council Directive 2000/29/EC of 8 May 2000 on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community* (hereinafter, Directive 2000/29), which, in relevant part, lays down requirements for the importation into the EU of plants and fruits susceptible of carrying this and other harmful organisms.

The EU Commission first adopted emergency measures against citrus from South Africa on 11 December 2013 through *Commission Implementing Decision of 11 December 2013 on measures to prevent the introduction into and the spread within the Union of Guignardia citricarpa Kiely (all strains pathogenic to Citrus), as regards South Africa*, enacted following an agreement reached on 28 November 2013 by EU Member States within the Standing Committee on Plant Health (see Trade Perspectives, Issue No. 1 of 10 January 2014). The decision came following data showing that, in 2013, EU Member States notified the EU of 36 consignments of citrus fruit from South Africa that were infected with CBS. On 2 July 2014, the EU Commission adopted a new set of requirements on imports of citrus fruits from South Africa, following the release by the European Food Safety Authority of the "*Scientific Opinion on the risk of Phyllosticta citricarpa (Guignardia citricarpa) for the EU territory with identification and evaluation of risk reduction options*", which concluded that a risk of CBS disease entering the EU was "*moderately likely*" for citrus fruits without leaves, and that the possibility of the establishment of CBS disease was also "*moderately likely*" (see Trade Perspectives, Issue No. 15 of 25 July 2014). The new requirements, which are contained in *Commission Implementing Decision of 2 July 2014 setting out measures in respect of certain citrus fruits originating in South Africa to prevent the introduction into and the spread within the Union of Phyllosticta citricarpa (McAlpine) Van der Aa,* and that apply throughout the EU, in part include the use of an import certificate identifying the field from which the fruits originated, visual inspection of the consignment, and full traceability of the fruits. As of 8 September 2014, the South African Citrus Growers' Association voluntarily suspended exports of citrus fruits to the EU, with the exception of mandarins, following the detection of CBS in a shipment of citrus in July 2014 and reportedly decided not to escalate trade tensions until the matter is resolved with the EU.

However, it appears as though the EU has been unwilling to resolve the matter in bilateral discussions, and thus South Africa has decided to address the issue as a trade barrier before the WTO. The main issues concern the validity of the EU's scientific assessment regarding the entry, spread and effects of CBS, as well as the EU's unwillingness to accept proposals from South Africa to divide the EU into different zones that would allow the importation of citrus fruits to areas in the EU where the climate conditions are arguably not favourable to the establishment of the disease. Articles 2.2 and 5.1 of the SPS Agreement require the existence of a "*rational or objective relationship*" between the disputed SPS measure and the scientific evidence warranting the measure, and between the disputed SPS measure and the conclusions of a risk assessment. In this regard, the EU appears to believe that its scientific assessment supports the adoption of a zero- or near zero-risk approach. The potential dispute

also provides an opportunity for South Africa to advocate for the enforcement of what is arguably overlooked text in Article 6 of the SPS Agreement, which may pressure the EU to apply what are currently internal '*protected zones*', to foreign countries.

This concept of '*regionalisation*' is based on language in Article 6 of the SPS Agreement, which requires that WTO Members "*shall ensure that their [SPS] measures are adapted to the [SPS] characteristics of the area ... from which the product originated and to which the product is destined*". Though WTO Members frequently require countries from which products originate to practice '*regionalisation*', it appears that the application of '*regionalisation*' in the country to which a product is destined has been seldom used, if not overlooked. The concept of '*regionalisation*' is tied to Articles 5.4 and 5.6 of the SPS Agreement, which require WTO Members to minimise trade restrictions by encouraging them to account for the objective of minimising negative trade effects and ensure that the measures adopted and maintained be not more trade restrictive than required to achieve the appropriate level of SPS protection, respectively. Moreover, Article 5.3 must also be considered, as it suggests relevant economic factors to be used when assessing the risk to plant life, including the: (i) potential loss of production or sales; (ii) establishment or spread of a disease; (iii) costs of control or eradication in the territory of the importing Member; and (iv) relative cost-effectiveness of alternative approaches to limiting risks. Consideration of this '*balance*' was present in the EFSA's final opinion published in January 2014. There, the EFSA identified the demarcation of endangered and non-endangered areas in the EU as a highly effective possible option for the reduction of risk of entry, establishment and spread of CBS, but considered the option to be of low technical and economic feasibility "*because of the difficulties to establish and maintain the required control and monitoring systems, associated with the designation of protected zones with respect to CBS*".

However, the EU already applies trade restrictions internally under the '*protected zones*' mechanism in Directive 2000/29/EC. According to Directive 2000/29/EC, EU countries may request protection for all or part of their respective territories when a harmful organism is not present in an area where the environmental conditions are favourable to its establishment or when the organism is present, but under eradication. If granted, the different zones are also defined in relation to each harmful organism. As a result, the EU already has a system in place that could be adapted for application to imports of CBS-infected citrus fruits. There is also little reason to believe that the EU would need to bear the entire burden of additional import controls. As it was done in November 2011 with respect to certain seed potatoes imported into the EU from Canada, the EU could impose testing and labelling requirements such as a colour-coding on consignments of citrus fruit from South Africa (depending on their specific origin), identifying specific ports for importation and imposing post-importation responsibilities. With these types of options available to the EU, South Africa is well-positioned to question whether the EU's stance is primarily driven by protectionist, rather than plant health, concerns.

The SPS Agreement is fundamentally based on the idea of balancing the risk of SPS-related harm with the economic benefits of increased trade. WTO Members have the right to adopt measures to protect plant life or health provided that such measures are consistent with their obligations and commitments under the SPS Agreement. In relevant part, this agreement requires that SPS measures be science-based and be not more trade-restrictive than necessary to achieve the level of SPS protection deemed appropriate. In the context of this trade dispute, the EU appears to have moved closer to a zero-risk approach in a manner that unduly inhibits trade.

Questions on the classification and labelling of '*colouring foods*' and food additives in the EU

In the EU, there is an ongoing trend for the manufacture of natural and organic foods, which is driven by consumer demand. One area within this trend relates to the manner in which food products are visually altered in terms of colour, where some manufacturers increasingly use '*colouring foods*', while others use food additives. However, food additives must be designated in the products' lists of ingredients on the label by the name of their functional class, followed by their specific name or E-number laid down in *Regulation (EC) No. 1333/2008 of the European Parliament and of the Council on food additives*, such as: "*colour (chlorophylls)*" or "*colour (E 140)*".

Given the trend by manufacturers and retailers to promote the natural characteristics of their products, it is preferable for many to use '*colouring foods*' (in particular in dairy products and soft drinks) to make products visually more attractive to the younger population; being able to specify the extracts that are being used appears to enhance the natural image of a product. '*Colouring foods*' are food extracts with colouring properties. '*Colouring foods*' may be considered food ingredients rather than food additives (in this case colours) and, as such, would not require to be labelled with an E-number, which to some looks artificial. However, it is not always clear whether or not a substance used in the manufacture of food should be deemed a '*colouring food*' or a food additive.

The EU Commission's Standing Committee on the Food Chain and Animal Health (Section Toxicological Safety of the Food Chain, hereinafter SCoFCAH), in its meeting of 29 November 2013, endorsed the *Guidance notes on the classification of food extracts with colouring properties* (hereinafter, Guidance Notes) by a large majority of EU Member States' representatives, after consultation with EU Member States' experts on food additives and relevant stakeholders. The Guidance Notes' purpose is to provide a working tool for business operators and enforcement authorities of EU Member States when considering if a substance is a colour or a '*colouring food*'. The Guidance Notes must be read in conjunction with the applicable legislation, especially Regulation (EC) No. 1333/2008, which constitutes the legal basis for the placing on the market and use of food additives, including colours, in the EU.

The objective of the Guidance Notes is to establish criteria for classifying food extracts as colours (*i.e.*, food additives) or foods with colouring properties (*i.e.*, '*colouring foods*'). It describes the criteria that determine the difference between selective and non-selective extraction (especially the so-called '*Enrichment factor*'). The term '*extract*' used in the Guidance Notes refers to preparations obtained from a food obtained by physical and/or chemical extraction, no matter whether they are labelled as extracts or concentrates (*i.e.*, it includes concentrates of extracts), used to colour foods (*i.e.*, water soluble and oil soluble extracts). The Guidance Notes only relate to extracts in which the colouring constituents are intact (*i.e.*, not chemically modified) and indigenous to the source material. The term '*pigment*' in the Guidance Notes refers to both types of colouring principles, (*i.e.* insoluble, usually associated with the term '*pigment'*, as well as soluble, usually associated with the term '*dye*').

Annex I of Regulation (EC) No. 1333/2008 describes '*colours*' as "*substances which add or restore colour in a food, and include natural constituents of foods and natural sources which are normally not consumed as foods as such and not normally used as characteristic ingredients of food. Preparations obtained from foods and other edible natural source materials obtained by physical and/or chemical extraction resulting in a selective extraction of the pigments relative to the nutritive or aromatic constituents are colours*". Article 3(2)(a) of Regulation(EC) No. 1333/2008 defines '*food additive*' as "*any substance not normally consumed as a food in itself and not normally used as a characteristic ingredient of food, whether or not it has nutritive value, the intentional addition of which to food for a technological purpose in the manufacture, processing, preparation, treatment, packaging, transport or storage of such food results, or may be reasonably expected to result, in it or its by-products becoming directly or indirectly a component of such foods*". Furthermore, Article 3(2)(a)(ii) of Regulation (EC) No. 1333/2008 states that "*foods, whether dried or in*

concentrated form, including flavourings incorporated during the manufacturing of compound foods, because of their aromatic, sapid or nutritive properties together with a secondary colouring effect" are not considered to be food additives. Finally, recital 5 of Regulation (EC) No. 1333/2008 establishes when substances should be considered food additives and when not: "*However, substances should not be considered as food additives when they are used for the purpose of imparting flavour and/or taste or for nutritional purposes, such as salt replacers, vitamins and minerals. Moreover, substances considered as foods which may be used for a technological function, such as sodium chloride or saffron for colouring and food enzymes should also not fall within the scope of Regulation (EC) No. 1333/2008. However, preparations obtained from foods and other natural source material that are intended to have a technological effect in the final food and which are obtained by selective extraction of constituents (e.g. pigments) relative to the nutritive or aromatic constituents, must be considered additives*..."

The starting point for the classification of a substance as a '*colouring food*' or as colour is the exception established in Article 3(2)(a)(ii) of Regulation (EC) No. 1333/2008. It eliminates foods and flavourings with a secondary colouring effect from the scope of the food additive definition. According to the definition of '*food additive*' in Article 3(2)(a) and the term '*colours*' in Annex I of Regulation (EC) No. 1333/2008, foods normally consumed as such, or normally used as characteristic ingredients of food, should not be considered as food additives.

The Guidance Notes state that foods normally consumed as such in the EU, such as fruit juices (for example, cherry juice added to yoghurt), tomato concentrates, or coffee, often have colouring properties. Such foods would be regarded as ingredients, even when added principally for colouring purposes. On the other hand, products that are extracted from those foods by other processes than drying or concentration, in order to be used in food for their colouring properties, should not automatically be regarded as '*colouring food*' (unless they are normally used as such, such as red palm oil). Provided that these foods or food ingredients retain their essential characteristics, foods with colouring properties must not be regarded as food colours whether used in the raw state or in a processed form, for example by concentration, drying, cooking or milling. In this sense, spinach used in the manufacture of noodles as such or dried, or in the form of concentrated juice, without a selective extraction of pigments, would be considered as a food ingredient and not as a food colour. On the other hand, the Guidance Notes state that if pigments are '*selectively extracted*' from the spinach and added to noodles in order to add colour, then these are regarded to be food additives (*i.e.*, food colour: chlorophylls (E140) in Annex II to Regulation (EC) No. 1333/2008).

When a product is obtained from a food for the primary function of colouring, the key to determining whether or not the product is a colour is whether it has been obtained by way of '*selective extraction*'. This leaves some room for preparations obtained from foods using a process of physical and/or chemical extraction, which may be interpreted as not being selectively extracted (*i.e.*, pigment(s)/nutritive constituents; pigment(s)/aromatic constituents). If it concerns a food normally consumed as such, or normally used as a characteristic ingredient of food, these preparations are food ingredients. Extraction can range from simple extraction, to degrees of selective extraction up to isolation of the pure pigments. According to the Guidance Notes, in order to decide upon the classification of the product, it is essential to identify when the product is no longer "*a food normally consumed as such or normally used as a characteristic ingredient of food",* but a colour which needs approval. Whether an extraction is selective or not depends, according to recital 5 of Regulation (EC) No. 1333/2008, on the ratio of the pigments relative to the nutritive or aromatic constituents. Once the pigments are selectively extracted relative to the nutritive or aromatic constituents, the extract is a colour within the meaning of Regulation (EC) No. 1333/2008. No other guidance (numerically expressed) is provided by the legislation.

In order to assess the primary extract, the relationship between the ratio of the pigment(s) content to the nutritive or aromatic constituents in the colouring product (primary extract) compared to the corresponding ratio of the pigment(s) content to the nutritive or aromatic constituents of the source material has to be considered. This ratio can be expressed as an '*Enrichment factor*'. The threshold value provides a quantitative borderline between '*selective extraction*' and '*non-selective extraction*'. The threshold value must be high enough to cover seasonal and geographical differences and differences in source material varieties. On the other hand, it must be low enough that the primary extracts could still be considered as foods or food ingredients (*i.e.*, not selectively extracted) and should assure that such products do not overlap with food colour specifications. The EU Commission explained in the SCoFCAH meeting that the Guidance Notes (which established that the key decision factor, *i.e.* the threshold value for a selective extraction, should be "*>6*", *i.e.* higher than six), were the best compromise taking into account the divergent views of some EU Member States.

Concerns were raised in the SCoAHFC meeting by a few EU Member States, in that the Guidance Notes do not reflect the traditional interpretation of EU food additives legislation and, therefore, will have a considerable impact on food manufacturers by being more favourable towards water based extracts compared to oil based extracts. It was also argued that the Guidance Notes will lead to an increased use of extracts that have not been assessed for their safe use at the cost of food additives that have been evaluated and whose use must comply with the conditions of the food additives legislation, such as not to mislead consumers. The Guidance Notes, which do not necessarily represent the official views of the EU Commission, took effect on 1 January 2014 and recommend that all food products comply from 29 November 2015. It must be noted that the Guidance Notes do not address the labelling of colouring foods in the ingredients list of finished products, so that consumers will know what is being used. However, although being a useful tool for manufacturers, the Guidance Notes do not produce legally binding effects. To establish legal certainty, interpretation decisions could be adopted under Article 19(c) of Regulation (EC) No. 1333/2008, as to whether given substances meet the definition of food additives (or are '*colouring foods*'). Another field, where legal certainty is needed, is the labelling of '*colouring foods*' as ingredients.

Recently Adopted EU Legislation

Customs Law

- *Regulation (EU) No. 1150/2014 of the European Parliament and of the Council of 29 October 2014 amending Regulation (EU) No. 374/2014 on the reduction or elimination of customs duties on goods originating in Ukraine*

- *Commission Implementing Regulation (EU) No. 1130/2014 of 22 October 2014 opening a tariff quota for the year 2015 for the importation into the European Union of certain goods originating in Norway resulting from the processing of agricultural products covered by Regulation (EU) No. 510/2014 of the European Parliament and of the Council*

Food and Agricultural Law

- *Commission Regulation (EU) No. 1137/2014 of 27 October 2014 amending Annex III of Regulation (EC) No. 853/2004 of the European Parliament and of the Council as regards the handling of certain offal from animals intended for human consumption*

- *Commission Regulation (EU) No. 1135/2014 of 24 October 2014 on the authorisation of a health claim made on foods and referring to the reduction of disease risk*

- *Commission Regulation (EU) No. 1136/2014 of 24 October 2014 amending Regulation (EU) No. 283/2013 as regards the transitional measures applying to procedures concerning plant protection products*

- *Commission Regulation (EU) No. 1146/2014 of 23 October 2014 amending Annexes II, III, IV and V to Regulation (EC) No. 396/2005 of the European Parliament and of the Council as regards maximum residue levels for anthraquinone, benfluralin, bentazone, bromoxynil, chlorothalonil, famoxadone, imazamox, methyl bromide, propanil and sulphuric acid in or on certain products*

- *Commission Regulation (EU) No. 1123/2014 of 22 October 2014 amending Directive 2008/38/EC establishing a list of intended uses of animal feedingstuffs for particular nutritional purposes*

- *Commission Regulation (EU) No. 1127/2014 of 20 October 2014 amending Annexes II and III to Regulation (EC) No. 396/2005 of the European Parliament and of the Council as regards maximum residue levels for amitrole, dinocap, fipronil, flufenacet, pendimethalin, propyzamide, and pyridate in or on certain products*

- *Commission Regulation (EU) No. 1126/2014 of 17 October 2014 amending Annexes II, III and V to Regulation (EC) No. 396/2005 of the European Parliament and of the Council as regards maximum residue levels for asulam, cyanamide, dicloran, flumioxazin, flupyrsulfuron-methyl, picolinafen and propisochlor in or on certain products*

- *Commission Regulation (EU) No. 1119/2014 of 16 October 2014 amending Annex III to Regulation (EC) No. 396/2005 of the European Parliament and of the Council as regards maximum residue levels for benzalkonium chloride and didecyldimethylammonium chloride in or on certain products*

Other

- *Commission Implementing Regulation (EU) No. 1147/2014 of 23 October 2014 amending Council Regulation (EC) No. 2368/2002 implementing the Kimberley Process certification scheme for the international trade in rough diamonds*

- *Agreement on a sustainable fisheries partnership between the European Union and the Republic of Senegal*

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