FRATINIVERGANO
EUROPEAN LAWYERS
TRADE PERSPECTIVES©

Issue No. 3 of 10 February 2011

WTO Appellate Body upholds Panel's ruling in *China – Measures Related to the Exportation of Various Raw Materials*

On 30 January 2012, the WTO Appellate Body issued its final report in the case *China – Measures Related to the Exportation of Various Raw Materials* (hereinafter, *China – Raw Materials*). The dispute dates back to 2009 (for more background on export restrictions and this dispute, see Trade Perspectives, Issues No. 21 of 13 November 2009, No. 8 of 23 April 2010, and No. 14 of 15 July 2011), when the EU, Mexico and the US alleged, *inter alia*, that China's imposition of export duties and export quotas – in the form of 32 measures, and additional unpublished restrictive measures – on certain raw materials (*i.e.,* bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorus and zinc), which can be used for the manufacturing of aluminium, cars, light bulbs, microchips, mobile phones, pesticides, planes, steel, and other products, violated China's WTO obligations under the Accession Protocol of China to the WTO (hereinafter, China's Accession Protocol, or the Protocol).

The Panel found that China's export duties on fluorspar were inconsistent with China's obligations under Paragraph 11.3 of China's Accession Protocol. Paragraph 11.3 of the Protocol binds China to eliminate all export taxes and charges, unless they are specifically provided for in Annex 6 of the same Protocol. The Panel also ruled that China did not demonstrate that its export quota on refractory-grade bauxite was '*temporarily applied*' to either prevent or relieve a '*critical shortage*' within the meaning of Article XI:2(a) of the General Agreement on Tariffs and Trade (hereinafter, the GATT). The Panel further found that the wording and context of Paragraph 11.3 of China's Accession Protocol precluded to China the possibility of invoking the general exceptions in Article XX of the GATT to justify the imposition of WTO-inconsistent export duties in violation of Paragraph 11.3 of China's Accession Protocol. Both China and the EU appealed the Panel's report.

The Appellate Body upheld the Panel's major findings. In particular, it agreed with the Panel's conclusion that there was no legal basis in China's Accession Protocol to permit the application of Article XX of the GATT to China's obligations under Paragraph 11.3 of its Accession Protocol. Examining the text of this provision, the Appellate Body noted that China could not rely on Article XX of the GATT in order to support the imposition of export duties on products that are *not* listed in Annex 6 of its Accession Protocol, or the imposition of export duties on listed products in excess of the maximum levels set out in Annex 6. However, the Appellate Body ruled that the Panel erred in interpreting the phrase '*made effective in conjunction with*' in Article XX(g) of the GATT as requiring that the purpose of the challenged measure be primarily aimed at making effective the restrictions on domestic production or consumption. The Appellate Body also upheld the Panel's conclusion that China did not demonstrate that its export quota on refractory-grade bauxite was '*temporarily applied*' to either prevent or relieve a '*critical shortage*' within the meaning of Article XI:2(a)

of the GATT. The Appellate Body concurred with the Panel that such a restriction must be of a limited duration and not persist for an indefinite period of time.

The Appellate Body's ruling in *China – Raw Materials* is an important decision, as it represents the final ruling in the first major WTO dispute settlement case dealing with the issue of export controls in relation to Article XX of the GATT. WTO jurisprudence has historically under-analysed export controls compared to import restrictions. Although two prior GATT/WTO cases, *Japan – Semiconductor* and *Argentina – Hides and Leather*, dealt extensively with export controls, these cases respectively covered export controls primarily in the context of Articles XI:1 and X:3(a) of the GATT. In *China – Raw Materials*, the Appellate Body has gone further by providing helpful clarification regarding the meaning of the terms '*critical shortage*' and '*essentiality*' in the context of Article XI:2(a) of the GATT regarding products subject to export quotas. The Appellate Body ruled that the exception for '*critical shortages*' under Article XI:2(a) of the GATT is more narrowly circumscribed than those falling within the scope of Article XX(j) of the GATT (*i.e.*, a general exemption for measures which are essential to the acquisition or distribution of products in general or local short supply). In the Appellate Body's view, Article XI:2(a) refers to critical shortages of foodstuffs or otherwise absolutely indispensable or necessary products, and inherent in the notion of '*criticality*' is the expectation of reaching a point in time at which conditions will no longer be '*critical*', and the impugned measures will no longer be required. This usefully elaborates on the Panel's finding that China did not demonstrate that its export quota on refractory-grade bauxite was '*temporarily applied*' to either prevent or relieve a '*critical shortage*' within the meaning of Article XI:2(a).

Although the Appellate Body's decision in *China – Raw Materials* explores new jurisprudential '*territory*' in the context of Articles XI:2(a) and XX of the GATT, the case is somewhat disappointing in that the Appellate Body missed an opportunity to elaborate on the meaning of '*even-handedness*' as outlined by the Panel in relation to export controls and the Article XX(g) exemption for the conservation of natural resources. This concept was initially discussed by the Appellate Body in the *US – Gasoline* case, then elaborated further in the Panel's decision in *China – Raw Materials*, when the Panel noted that '*[a]s long as even-handed restrictions are imposed on domestic supply, Article XX(g) does not oblige resource-endowed countries to ensure that the economic development of other user-countries benefits identically from the exploitation of the resources of the endowed countries*'. Here, the Appellate Body failed to analyse this statement, or offer a fuller conceptual definition of '*even-handedness*' in the context of Article XX(g) of the GATT, an interpretative vacuum that may prove problematic if further WTO export control cases arise.

Additional WTO export control cases are, indeed, likely to emerge in the coming years. China is already involved in a separate dispute regarding its export controls on rare earth minerals (see Trade Perspectives, Issue No. 1 of 14 January 2011 and Issue No. 21 of 18 November 2011). In this and other cases, export controls frequently appear to be protectionist measures designed to stimulate domestic processing industries and restrict strategic industrial inputs from reaching foreign competitors. This has also occurred in the context of the food industry. Crop failures in Australia and Europe in 2007 and 2008 led to a reduced supply of cereals in developing countries. The fear of food shortages, as well as a possible desire to support domestic industries, prompted many countries, such as Argentina, Brazil, India, and Russia, to restrict the exportation of certain foodstuffs and agricultural commodities. Continuing economic expansion in emerging countries such as Brazil and China, and thus a growing appetite for scarce natural resources, may further accelerate the use of export controls. Trade disputes regarding export controls centred on energy, foodstuffs, and natural resources are thus increasingly relevant for commercial parties, and must be monitored closely.

EU Parliament opposes draft EU Commission regulation permitting a '*now contains X% less*' claim on food and drinks

On 2 February 2012, the EU Parliament exercised its veto right and adopted a resolution opposing a draft EU Commission Regulation amending *Regulation (EC) No. 1924/2006 on nutrition and health claims made on foods with regard to the list of nutrition claims*. Therefore, the proposed claims '*now contains X% less [name of nutrient, e.g., fat]*' and '*no added salt/sodium*' will not be included in the list of permitted nutrition claims.

According to Article 2(2) No. 4 of *Regulation (EC) No. 1924/2006*, *'nutrition claim' means any claim which states, suggests or implies that a food has particular beneficial nutritional properties due to: (a) the energy (calorific value) it (i) provides; (ii) provides at a reduced or increased rate; or (iii) does not provide; and/or (b) the nutrients (i.e., protein, carbohydrate, fat, fibre, sodium, and certain vitamins and minerals) or other substances (other than nutrients that have a nutritional or physiological effect) it (i) contains; (ii) contains in reduced or increased proportions; or (iii) does not contain.* Initially, *Regulation (EC) No. 1924/2006* listed the following nutrition claims: '*low energy*', '*energy reduced*', '*energy-free*', '*low fat*', '*fat free*', '*low saturated fat*', '*saturated fat free*', '*low sugars*', '*sugars-free*', '*with no added sugars*', '*low sodium/salt*', '*very low sodium/salt*', '*sodium-free*' or '*salt-free*', '*source of fibre*', '*high fibre*', '*source of protein*', '*high protein*', '*source of [name of vitamin/s] and/or [name of mineral/s]*', '*high [name of vitamin/s] and/or [name of mineral/s]*', '*contains [name of the nutrient or other substance]*', '*increased [name of the nutrient]*', '*reduced [name of the nutrient]*', '*light/lite*', and '*naturally/natural*'. The nutrition claims '*source of Omega-3 fatty acids*', '*high Omega-3 fatty acids*', '*high monounsaturated fat*', '*high polyunsaturated fat*' and '*high unsaturated fat*' were later introduced by *Commission Regulation (EU) No. 116/2010 of 9 February 2010*. The use of these nutrition claims is only permitted if they are in conformity with detailed conditions set out in the Annex to *Regulation (EC) No. 1924/2006*. For example, a claim that a food is low in sugars may only be made where the product contains no more than 5 g of sugars per 100 g for solids or 2.5 g of sugars per 100 ml for liquids. A claim stating that the content in one or more nutrients has been reduced may only be made where the reduction in content is at least 30% compared to a similar product, except for micronutrients, where a 10% difference is acceptable, and for sodium, or the equivalent value for salt, where a 25% difference is acceptable.

Adopted with 393 votes in favour, 161 against and 21 abstentions, the EU Parliament's resolution opposed the EU Commission's proposal which, besides intending to introduce the claims: '*now contains X% less [nutrient]*' and '*no added salt /sodium*' into the Annex of *Regulation (EC) No. 1924/2006*, also proposed to amend the conditions for the use of the claim '*reduced [name of the nutrient]*'. The proposed conditions for the '*now contains X% less*' claim stated, in relevant part, that: '*Reformulated products where the reduction in content is at least 15% for energy, fat, saturated fat, salt/sodium or sugars may bear the claim 'now contains X% less [energy, fat, saturated fat, sodium/salt and/or sugars]' or any claim likely to have the same meaning for the consumer. This claim shall be followed by a statement indicating the content of the nutrient or energy for which the claim is made, prior to reformulation, expressed per 100 g or 100 ml. (...)*'

According to the EU Parliament's resolution, the claim '*now contains X% less of [nutrient]*' violates, in particular, the principle of comparative claims, as laid down in Article 9(2) of *Regulation (EC) No. 1924/2006*, 1) whereas it allows for the nutritional values of a product to be compared with a previous version of that product, regardless of the starting level of the nutrient in question, which could be excessively high by comparison with other products on the market; and 2) whereas products, which have not been reformulated, but that are nevertheless lower in a certain nutrient than the reformulated product of a different brand, will not be allowed to bear a nutrition claim, and this will inevitably mislead consumers.

According to the EU Parliament, a '*15% less sugar*' claim, which would be based on a previous formulation of the same product, would be difficult to compare, or could misleadingly appear healthier, than a '*reduced sugar*' claim, which must contain 30% less than other similar products, as described above. It appears quite obvious that, for example, a bag of potato chips with '*15% less fat*' could still contain a high percentage of fat and it seems easier to reduce fat and sugar levels by a few percentages in products that have a very high content at the outset, than in products that do not initially have high levels of fat.

The food industry argues that a '*now contains X% less*' claim would have offered food manufacturers the opportunity to communicate incremental nutrition changes made to foods to the consumer by comparing old and new formulations. The possibility of using the claim could have encouraged manufacturers to reformulate products and to reduce its salt, sugar, and fat content progressively. According to reports, the EU Commission argues that such an incremental approach to food and drink reformulation would be in line with the standpoint of the EU Platform for Action on Diet, Physical Activity and Health, and with the Second WHO European Action Plan on Food and Nutrition Policy 2007-2012. Indeed, the achievement of food industry commitments to reformulate food products is a key activity and objective of both initiatives.

The EU Parliament's resolution of 2 February 2012 calls on the EU Commission to submit an amended draft of the measure. The EU Commission will therefore have to propose, after consulting all stakeholders, new and better conditions for a '*now contains X% less*' claim which are acceptable for the EU Parliament. Perhaps a formula or *ratio* could be introduced, providing that, for foods that are from the outset high in fat or sugar, manufacturers must reduce fat or sugar content by a higher degree in order to utilise the claim '*now contains X% less*' fat or sugar. A balanced and fair *ratio* (of reformulation percentages for products with a high percentage of fats and sugar *vis-à-vis* products with a lower content) could encourage manufacturers of products that are very high in fat or sugar to reformulate their products by reducing the percentage of fat or sugar in order to be permitted to bear the claim, while at the same time not discouraging manufacturers of products with a medium or low fat or sugar content to reformulate and reduce fat and sugar even more, as their conditions to bear the claim were not as strict from the outset. This should be viewed as food for thought.

Panel Report issued in the WTO dispute on *Dominican Republic – Safeguards on Polypropylene Bags*

On 31 January 2011, the WTO Panel issued its report on the complaints by Costa Rica, El Salvador, Guatemala and Honduras regarding the dispute '*Dominican Republic - Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*'. The challenged measures comprised safeguard duties enforced by the Dominican Republic and the alleged procedural violations of the underlying investigation that led to the adoption of those duties. On 5 October 2010, the investigating authorities of the Dominican Republic issued a Definitive Resolution imposing a duty of 38% *ad valorem* on imports of tubular fabric and polypropylene bags, to be applied as of 18 October 2010 until 20 April 2012, with a schedule of a gradual reduction trough the course of the application period. Imports originating in Colombia, Indonesia, Mexico and Panama were excluded from the application of the definitive duty as imports from developing countries which together accounted for 1.21% of the imports under investigation. In their requests for the establishment of the Panel, the complainants stated, *inter alia*, that the determinations by the Dominican Republic's authorities do not contain reasoned and adequate analysis of the '*unforeseen developments*' and '*the effect of the obligations incurred under the GATT*', which triggered the import surge, and, therefore are contrary to Article XIX:1(a) of the GATT. The complainants also alleged

that the imports counted in the course of the investigation were excluded from the payment of duties, contrary to the principle of parallelism between the scope of the *investigation* and the scope of the *application* of a safeguard. The Dominican Republic claimed in response, *inter alia*, that the dispute was devoid of purpose, since Article XIX of the GATT and the Agreement on Safeguards (hereinafter, the ASG) were not applicable to the impugned measures.

The Panel started the substantive analysis with the issue of the applicability of GATT Article XIX and the ASG to the case at hand. Article XIX of the GATT is two-fold: the first part of the provision establishes conditions to be fulfilled for a WTO Member to implement a remedy described in the second part, namely, '*to suspend in whole or in part the obligation incurred in respect of a product or withdraw or modify the concession*'. The respondent stated that, if a WTO Member does not perform any kind of suspension, withdrawal or modification of its concessions under the GATT, it should not be bound to fulfil the conditions set out in the first part of Article XIX of the GATT to impose a duty. The Dominican Republic argued that the duty at issue constituted neither a surcharge, nor an additional or alternative tariff, but rather an increase in the MFN tariff, in accordance with its Schedule of Concessions, replacing the MFN tariff previously applied. In the Dominican Republic's view, these measures did not violate its obligations under Article II of the GATT, inasmuch as through its Schedule of Concessions it committed not to impose tariffs above 40% *ad valorem* on the products in question. As far as this obligation was not suspended (what would be typical of safeguards under the wording of Article XIX of the GATT), Article XIX of the GATT should not apply to the measures at issue. Conversely, the complainants claimed that the measure prejudiced their rights under Articles I and II of the GATT.

The Panel disagreed with the Dominican Republic's arguments. In the view of the Panel, definitive duties indeed constituted safeguard measures which resulted in the suspension of the obligations of the respondent under Articles I and II of the GATT. It was concluded that the Dominican Republic suspended its obligations under Article I:1 of the GATT, as Colombia, Indonesia, Mexico and Panama were excluded from the application of a duty due to their marginal share in investigated products trading. Moreover, the Panel stated that the obligations under Article II:1(b) of the GATT were also suspended as the Dominican Republic imposed a tariff surcharge, different from an ordinary customs duty, which was not set forth in its Schedule of Concessions. Based on these considerations, the Panel concluded that the measures at issue were indeed safeguards.

The Panel also found that the Dominican Republic acted inconsistently with its obligations under Article XIX:1(a) of the GATT because the competent authorities failed to provide a clear explanation of the existence of (i) '*unforeseen developments*' and (ii) '*the effect of the obligations incurred under the GATT 1994*', which should both trigger the import surge according to Article XIX. The Dominican Republic maintained that the '*unforeseen developments*' clause in Article XIX of the GATT does not constitute a binding obligation and, consequently, does not have to be demonstrated in order for a safeguard measure to be invoked. In the view of the respondent, available WTO jurisprudence does not offer clear guidance as to how the existence of '*unforeseen developments*' can be adequately demonstrated. Still, the Dominican Republic identified two '*unforeseen developments*', which could cause the increase in imports of investigated products: the effects of China's accession to the WTO and the tariff reduction accompanying the entry into force of the Dominican Republic – CAFTA and Central America – Dominican Republic FTAs. The Panel stated that no adequate analysis of these two developments could be found in the determinations by the authorities of the Dominican Republic. Moreover, increases in imports because of regional trade deals are not covered by Article XIX of the GATT, which requires import surges to be caused by '*the effects of the obligations incurred under the GATT*' and not other trade arrangements. Thus, in the view of the Panel, both necessary conditions for

the safeguard imposition, specified in Article XIX of the GATT, were not met in the case at hand.

Furthermore, the Panel considered if the investigation by the authorities of the Dominican Republic was executed in violation of the *parallelism* principle, rooted in Articles 2.1 and 2.2 of the ASG. The principle implies that the imports considered for the purposes of the safeguards investigation and the products to which the measure is applied must be the same. Still, Article 9.1 of the ASG prescribes specific rules on the application of safeguards to imports from certain developing countries. The provision reads that safeguards shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3%, provided that developing country Members with such shares collectively account for no more than 9% of total imports of the product concerned. The question raised by the complainants was whether imports from such country Members should be still taken into account for the purposes of the investigation, as was done by the Dominican Republic in the given case. In the view of the Panel, Article 9.1 of the ASG contains an explicit departure from the obligation in Article 2.2 on the application of safeguard measures, and does not affect any other provisions of the ASG concerning the investigation to be conducted. The Panel therefore stated that the Dominical Republic has not breached the *parallelism* principle when taking imports from the developing country Members with minor shares into account in the course of the investigation. However, it determined that the Dominican Republic acted inconsistently with Article 9.1 of the ASG as it did not take all reasonable measures available to it to exclude from the application of the measures all developing countries which export less than the *de minimis* levels, in particular, Thailand.

The recent decision of the Panel addresses most of the contentious issues related to the application of safeguard measures by WTO Members. At the heart of the debate remains the concept of '*unforeseen developments*', which was introduced into the assessment of safeguard measures by the WTO adjudicators in *Korea – Diary* and *Argentina – Footwear*. Those decisions have been widely criticised for excessive judicial activism and failure to grant necessary deference to the intentions of the ASG negotiators, who deliberately did not mention '*unforeseen developments*' as part of the safeguards imposition test in the ASG. The reiteration of the stringent approach in the recent Panel report demonstrates the tendency of the WTO dispute settlement system to impose rigid restrictions on the use of safeguards by WTO Members so as to reduce the incidence of use of this type of trade defence instrument. Notably, there has not been a single safeguard measure so far examined by WTO adjudicators which was found compatible with Article XIX of the GATT and the ASG. In addition, the recent report clarifies an essential notion, which has not gained sufficient attention in prior jurisprudence. According to the language of Article XIX of the GATT, the import surge to be set-off by a safeguard must result from '*the effects of obligations incurred by a Contracting Party under the GATT*' 1994. As emphasised by the Panel findings, import surges which arise out of the conclusion of regional deals should not be accountable for the determination of serious injury under Article XIX of the GATT and therefore should not trigger the use of the GATT safeguard mechanisms.

As the measure was expected to be in force until 20 April 2012 only, the decision of the DSB would not significantly facilitate the complainant's access to the Dominican Republic's market of tubular fabric and polypropylene bags. Still, following the Panel Report, the respondent could not lawfully extend the application of a safeguard measure under Article 7 of the ASG. The Panel report is of particular interest for both government officials and businesses involved in the application of trade defence instruments. In addition to useful legal insights, it demonstrates an intricate interplay of the policy instruments available to the WTO Members under the GATT to protect the domestic market. The argument of the Dominican Republic in this respect remains of high significance: the definitive duty did not ever exceed the bound rates in the respondent's Schedule of Concessions. Still, the

inaccurate application of the measure, in particular the exclusion of a number of developing countries with the minor trading share, made it impossible to treat the measure as a usual MFN tariff increase. The report highlights the need for a consistent use of different policy instruments, giving helpful guidance for the domestic investigating authorities and policy makers. The Dominican Republic may appeal this decision to the WTO Appellate Body within 60 days of the date of circulation.

EU businesses are worried about the new country of origin labelling rules for food

European businesses have voiced their concerns in relation to the revised text of the Food Information Regulation (*Regulation (EU) No. 1169/2011 of the European Parliament and of the Council of 25 October 2011*, hereinafter, FIR) adopted in the end of 2011 (for the detailed discussion of the Regulation, see Trade Perspectives, Issue 4 of 25 February 2011 and Issue 10 of 20 May 2011). One of the major novelties of the FIR, which attracted a lot of debate, is the set of disciplines on mandatory country of origin labelling (hereinafter, COOL). FIR significantly expands the product coverage of the EU mandatory COOL schemes and proposes further expansions after a study to be performed by the Commission. In the view of many European producers and processors, the new rules may be excessively burdensome and may result in significant costs for EU entrepreneurs. Considering that the new rules are set to come into effect in December 2014, market players expressed hopes that the enactment of the new rules could be postponed or even suspended through powerful lobbying.

Prior to the enacted FIR, origin labelling has been compulsory for a limited number of food products in the EU. Notably, under the EC Regulations No. 1760/2000 and No. 1825/2000, compulsory labelling rules apply to all fresh, chilled and frozen beef and veal, including mince. Council Directive 2001/110/EC requires the country or countries of origin where the honey has been harvested to be indicated on the label. Council Regulation No. 2200/96 and Commission Regulation No. 1580/2007 require certain fruits and vegetables to be sold at all points in the marketing chain with the identification of their origin. Certain origin labelling requirements apply to fresh and live fish. However, the new text of the FIR aims at significantly increasing the product coverage of the EU mandatory COOL. Annex XI of the FIR already expands mandatory COOL requirements to fresh, chilled or frozen meat of swine, sheep or goats and certain types of poultry meat. According to Article 26 of the FIR, in the future COOL mandatory schemes may also apply to milk (as a separate good and as an ingredient in dairy products), to unprocessed foods and to ingredients that represent more than 50% of a food product. The new COOL rules fully apply to the importers of covered products into the EU market. According to Article 55 of the FIR, new compulsory COOL rules for meat will apply from 13 December 2014. Already by 13 December 2013, and following the appropriate impact assessment, the Commission shall adopt necessary implementing acts in relation to origin labelling of meat for which the indication of the country of origin or place of provenance is mandatory.

In recent years, origin labelling has attracted significant attention from the public. *Per se*, marks of origin are explicitly allowed by Article IX of the GATT. The provision requires national marking requirements regarding the origin of goods to have minimal effects on international commerce. Moreover, according to the Panel's findings in *EC – Geographical Indications*, rules on marks of origin specifically fall within the definition of '*technical regulations*' in Annex 1 to the WTO Agreement on Technical Barriers to Trade (hereinafter, the TBT Agreement). Thus, the FIR is also subject to the rules of the TBT Agreement, and particularly Article 2.2 thereof, requiring that marking requirements '*do not create unnecessary barriers to trade*'. According to the provision, a technical regulation shall not be

more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.

The interpretation of this provision was recently reviewed by the WTO in the *US – COOL* dispute, which concerned certain provisions of the US legislation, requiring that consumers be informed at the retail level of the country of origin of certain covered agricultural commodities, including beef and pork. In that case, the Panel emphasised that the list of legitimate objectives in Article 2.2 of the TBT Agreement is not exhaustive: '*the fact that the objective of the COOL measure is not related to health, safety or environmental objectives, does not in itself provide a sufficient basis for finding the objective in question to be not legitimate*'. The Panel found that providing consumer information on origin is a legitimate objective within the meaning of Article 2.2. However, according to the Panel, for a measure to comply with Article 2.2 of the TBT Agreement, two other conditions should be met: (i) consumer information on origin is to be the true objective of the COOL measure; and (ii) the COOL measure must sensibly fulfil the consumer information objective. In the *US – COOL* case, the US measures were found to violate the latter requirement, as the origin labelling rules prescribed the use of several categories of origin identification, which, in the view of the Panel, were not clear as such (for the detailed analysis of the Panel ruling, see Trade Perspectives, Issue 22 of 2 December 2011). The FIR appears to avoid this potential violation, inasmuch as there are no specific categories of labelling introduced by the measure. However, additional WTO concerns may arise in the course of its application; thus, the affected foreign businesses should make a careful assessment of the WTO compatibility of the new rules upon their entry into force.

The imposition of additional COOL requirements by the EU demonstrates the general trend in most jurisdictions to secure complete, full and accurate provision of information to the consumers, at least on the most sensitive agricultural products. The EU businesses have already stated that the new rules may trigger significant implementation and record-keeping costs. Interestingly, the implementation of the US COOL scheme for meat was estimated by the US businesses to have resulted in USD 3.9 billion costs in the first year and 458 million costs per year after that. However, the major trade implications the measure may have will depend on the further decision to expand mandatory COOL to primary ingredients in food. According to Article 26(6) of FIR, by 13 December 2013 the Commission shall submit to the European Parliament and the Council the report on the results and perspectives of mandatory COOL regulation. If the Commission were to insist on origin marks for all primary ingredients, the COOL requirements could be extended to ingredients that represent more than 50% of any food. The inclusion of primary ingredients into the EU mandatory COOL scheme would have significant consequences for all producers, processors and traders in food products within the EU, which should therefore monitor the developments in this field with particular attention.

Recently Adopted EU Legislation

Market Access

- *Commission Regulation (EU) No. 71/2012 of 27 January 2012 amending Annex I to Regulation (EC) No. 689/2008 of the European Parliament and of the Council concerning the export and import of dangerous chemicals*

Trade Remedies

- *Council Implementing Regulation (EU) No. 102/2012 of 27 January 2012 imposing a definitive anti-dumping duty on imports of steel ropes and cables originating in the People's Republic of China and Ukraine as extended to imports of steel ropes and cables consigned from Morocco, Moldova and the Republic of Korea, whether declared as originating in these countries or not, following an expiry review pursuant to Article 11(2) of Regulation (EC) No. 1225/2009 and terminating the expiry review proceeding concerning imports of steel ropes and cables originating in South Africa pursuant to Article 11(2) of Regulation (EC) No. 1225/2009*

Customs Law

- *Commission Implementing Regulation (EU) No. 80/2012 of 31 January 2012 establishing the list of biological or chemical substances provided for in Article 53(1)(b) of Council Regulation (EC) No. 1186/2009 setting up a Community system of reliefs from customs duty*

- *Commission Implementing Regulation (EU) No. 74/2012 of 27 January 2012 concerning the classification of certain goods in the Combined Nomenclature*

Food and Agricultural Law

- *Commission Implementing Regulation (EU) No. 98/2012 of 7 February 2012 concerning the authorisation of 6-phytase (EC 3.1.3.26) produced by Pichia pastoris (DSM 23036) as a feed additive for chickens and turkeys for fattening, chickens reared for laying, turkeys reared for breeding, laying hens, other avian species for fattening and laying, weaned piglets, pigs for fattening and sows (holder of authorisation Huvepharma AD)*

- *Commission Implementing Decision of 3 February 2012 amending Decisions 2007/305/EC, 2007/306/EC and 2007/307/EC as regards the tolerance period for traces of Ms1xRf1 (ACS-BNØØ4-7xACS-BNØØ1-4) hybrid oilseed rape, Ms1xRf2 (ACS-BNØØ4-7xACS-BNØØ2-5) hybrid oilseed rape and Topas 19/2 (ACS-BNØØ7-1) oilseed rape, as well as of their derived products (notified under document C(2012) 518)*

- *Commission Implementing Regulation (EU) No. 93/2012 of 3 February 2012 concerning the authorisation of Lactobacillus plantarum (DSM 8862 and DSM 8866) as a feed additive for all animal species*

- *Commission Implementing Regulation (EU) No. 91/2012 of 2 February 2012 concerning the authorisation of Bacillus subtilis (CBS 117162) as a feed additive for weaned piglets and pigs for fattening (holder of authorisation Krka d.d.)*

- *Commission Implementing Regulation (EU) No. 81/2012 of 31 January 2012 concerning the denial of authorisation of Lactobacillus pentosus (DSM 14025) as a feed additive*

- *Commission Implementing Regulation (EU) No. 78/2012 of 30 January 2012 amending the representative prices and additional import duties for certain products in the sugar sector fixed by Implementing Regulation (EU) No. 971/2011 for the 2011/12 marketing year*

- *Commission Implementing Regulation (EU) No. 72/2012 of 27 January 2012 amending and derogating from Implementing Regulation (EU) No. 543/2011 laying down detailed rules for the application of Council Regulation (EC) No. 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors*

Other

- *Information on the date of entry into force of the Protocol setting out the fishing opportunities and financial contribution provided for in the Partnership Agreement in the fisheries sector between the European Community and the Republic of Cape Verde*

Ignacio Carreño, Eugenia Laurenza, Anna Martelloni, Vladimir V. Talanov and Paolo R. Vergano contributed to this issue.