



## **TRADE POLICY DEVELOPMENTS PAPER NO. 3**

### **REPORT ON THE EUROPEAN UNION** (for the period April 2011- June 2011)

Authors: James J. Nedumpara & Preksha Malik  
*Centre for International Trade and Economic Laws (CITEL)*  
*Jindal Global Law School, Sonapat, NCR of Delhi*

*This report has been prepared by the Centre for International Trade and Economic Laws (CITEL), Jindal Global Law School, Sonapat, NCR of Delhi under a project of the Centre for WTO Studies, Indian Institute of Foreign Trade (IIFT), New Delhi.*

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### Abbreviations

AD	-	Anti Dumping
ASEAN	-	Association of South East Asian Nations
ATA	-	Air Transport Association of America
BIT	-	Bilateral Investment Treaty
BNC	-	Bi-Regional Negotiations Committee
BTI	-	Binding Tariff Information
CCT	-	Common Customs Tariff
CEPA	-	Comprehensive Economic Partnership Agreement
CETA	-	Comprehensive Economic and Trade Agreement
EBA	-	Everything but Arms
ECON	-	Economic and Monetary Affairs Committee
ECT	-	European Court of Justice
EEA	-	European Economic Area
EFTA	-	European Free Trade Agreement
EMU	-	Economic and Monetary Union
ENs	-	Electronic Entry Summary
ENSREG	-	European Nuclear Safety Regulator's Group
EPC	-	European Patent Convention
EPO	-	European Patent Office
ERM	-	Exchange Rate Mechanism
ETD	-	Energy Taxation Directive
EU	-	European Union
EU-ETs (Euratom)	-	European Union Emission Trading Scheme European Atomic Energy Community
FDI	-	Foreign Direct Investment
FIR	-	Foreign Investment Regime
FTA	-	Free Trade Agreement
GATT	-	General Agreement On Tariff And Trade
GDP	-	Gross Domestic Product
GM	-	Genetically Modified
GMOs	-	Genetically Modified Organisms
GPA	-	Government Procurement
GSP	-	Generalized System of Preferences
ICT	-	Information and Communication Technology
IMF	-	International Monetary Fund
JRC	-	Joint Research centre
LDCs	-	Least Developed Countries

MEP	-	Member of European Parliament
OLAF	-	European Anti Fraud Office?
SMA	-	Single Market Act
SPS	-	Sanitary and Phytosanitary measures
SVHCs	-	Seven Substances of very High Concern
TBR	-	Trade Barriers Regulation
TBT	-	Technical Barriers to Trade
TEC	-	Transatlantic Economic Council
TEC	-	Treaty Establishing European Community
TEU	-	Treaty on European Union
TFEU	-	Treaty on Functioning of the European Union
TKM	-	Tonne Kilometre Benchmark
USDOC	-	United States Department Of commerce
VAT	-	Value Added Tax
WTO	-	World Trade Organization
WWAN	-	Wireless Wide Area Networking

## Executive Summary

1. EU's external trade and investment policy has been substantially affected after the adoption of the Lisbon Treaty. The EU's standard law-making procedure is known as 'co-decision', according to which the directly elected European Parliament and the Commission co-adopt decisions. The legislative proposals have to emanate from the European Commission.
2. Several trade policy instruments including trade contingency measures are being adapted to the new comitology procedure. On 15 June 2011, the Commission introduced a legislative proposal popularly known as "Omnibus II Proposal" that seeks to review whether procedures currently based on the 1999 comitology decision should be converted into delegated powers. Grant of delegated powers from the Commission or Parliament would empower the Commission to adopt non-legislative acts of general application in order to supplement or amend certain non-essential aspects in the legislation. The "Omnibus II Proposal" examines all of the remaining decision making procedures in the field of trade policy which were not examined within the framework of the Omnibus I Proposal. The introduction of Omnibus I and II proposals deserve special focus.
3. EU has recently signed FTAs with Korea and has concluded negotiations with Colombia, Peru and another FTA with Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama. EU is currently engaged in FTA negotiations with a number of countries. The details of ongoing negotiations are provided in the sections on Preferential Trade Agreements.
4. A new EU Regulation introducing revised rules of origin (ROO) entered into force in early 2011. The objective of this Regulation is to relax and simplify rules and procedures for developing countries that are desirous of taking advantage of EU's preferential trade agreements. Under the new ROO, products under HS Chapters 50-63 remain subject to specific tolerance levels. Specifically, with respect to the textiles and clothing sector, which is of particular importance to many developing countries, single-stage processing (manufacture from fabric) is allowed in many cases, instead of the two stages of processing (manufacture from yarn) required by the present rules.
6. EU has provided and continues to provide financial support to firms which have been affected by the ongoing financial crisis. Sectors such as automobiles, construction and tourism received substantial support in the recent past. The G-20 report prepared by the WTO Secretariat has highlighted some details of the financial support. In addition to this, member countries are individually provided various kinds of support.
7. Major Patent and Copyright reforms are currently ongoing in the EU. However, the Court of Justice of the EU recently provided a ruling which could block the creation of a unitary patent and unified patent court.
8. EU has been an active user of trade contingency measures. Both fresh and review investigations have been undertaken in the field of antidumping, subsidies and countervailing measures.
9. The current GSP scheme will come to an end in December 2011. The Commission has put forward a "roll-over" Regulation (Regulation No. 512/2011), which seeks to extend the present system until the end of 2013. The EU Parliament has approved the Regulation on 24 March 2011 and the Council on 14 April 2011. The revised new GSP Scheme is expected to come at the latest by January 2014. The development in the GSP reform has to be monitored in the upcoming quarterly reports.
9. In 2008, the EU passed legislation to include aviation in the EU-Emission Trading Scheme (EU-ETS). This means that from 2012, overall CO<sub>2</sub> emissions of the aviation industry will be capped. All operators flying to and from the EU will have to surrender one allowance for every ton of CO<sub>2</sub> emitted on a flight to and from (and within) Europe. India needs to closely monitor the developments in this area as a number of Indian air carriers operate their flights via the EU.

**EUROPEAN UNION**  
**TRADE POLICY DEVELOPMENTS REPORT**  
**FOR THE QUARTERLY PERIOD**  
**APRIL 2011- JUNE 2011**

**I. INTRODUCTION**

The European Union is a unique economic and political partnership between 27 European countries. After the creation of the European Union, first step was to foster economic cooperation between countries that traded with one another, and are economically interdependent. The Coal and Steel Community was the first to be set up by virtue of the Treaty of Paris in 1951, followed by an Economic Community and an Atomic Energy Community (Treaties of Rome, 1957). Under the Single European Act (1986), the Communities finally dismantled all internal borders to establish a single market. The Treaty on European Union, signed in Maastricht in 1992, created a European Union combining a Community moving towards economic and monetary union with intergovernmental cooperation in certain areas.

Following the entry into force of the Treaty of Lisbon on 1 December 2009, the European Union now has legal personality and has acquired the competences previously conferred on the European Community. Community law has therefore become European Union law, which also includes all the provisions previously adopted under the Treaty on European Union as applicable before the Treaty of Lisbon.

Before the enactment of the Treaty of Lisbon in 2009, there were two treaties governing EU - The Treaty establishing the European Community (TEC) and The Treaty on European Union (TEU). Treaty of Lisbon does not constitute a third treaty; rather it amends both the existing Treaties.

The powers and responsibilities of these institutions are laid down in the Treaties, which are the foundation of everything the EU does. They also lay down the rules and procedures that the EU institutions must follow. The Treaties are agreed to by the Heads of States or the concerned Constitutional authorities of all the EU countries, and ratified by their Parliaments.

The EU has number of other institutions and bodies that play specialized roles: the European Economic and Social Committee (EESC) represents civil society, employers and employees; the Committee of the Regions represents regional and local authorities; the European Investment Bank (EIB) finances EU investment projects and helps small businesses via the European Investment Fund; the European Central Bank (ECB) is responsible for European monetary policy; the European Ombudsman investigates complaints about maladministration by EU institutions and bodies; the European Data Protection Supervisor safeguards the privacy of people's personal data; the Office for Official Publications of the European Communities publishes information about the EU; the European Personnel Selection Office recruits staff for the EU institutions and other bodies and the European Administrative School provides training in specific areas for members of EU staff. In addition, specialized agencies have been set up to handle certain technical, scientific or management tasks. Following the entry into force of the Treaty of Lisbon, the European Council appointed Catherine Ashton as the High Representative of the Union for Foreign Affairs and Security Policy. The High Representative is assisted by the European External Action Service.

The following is an evolutionary chart on how the most ambitious regional economic cooperation available in the world today, developed from a post-war grouping called the European Coal and Steel Community established in 1952. (**See Chart-I**)

**Chart I: Evolution of the EU**

Signed	1948	1951	1954	1957	1965	1985	1986	1992	1997	2001	2007
In force	1948	1952	1955	1958	1967	1985	1987	1993	1999	2003	2009
Document	Brussels	Paris Treaty	Modified EU Treaty	Rome Treaty	Merger Treaty	Schengen Treaty	Single European Treaty	Maastricht Treaty	Amsterdam Treaty	Nice Treaty	Lisbon (TFEU)

Source : constructed from O.J. of EU- C Series

## II. ECONOMIC ENVIRONMENT AND MONETARY POLICY

As of preparing this Trade Policy Monitoring report, the European Union is in the midst of the worst financial crisis since the Great Depression in the 1930s. The economic recession which started in early 2008 was triggered by a sovereign debt crisis in the ‘Euro zone’.

To provide a bit of historical perspective, the single European currency, the Euro, was officially adopted by 11 member states in 1999. Greece, which took longer to meet convergence criteria, joined two years later. Denmark, Sweden and the UK chose not to join. At present, sixteen EC Member States have the euro (€) as their currency and form the "euro area" or the “euro zone”.<sup>1</sup> Slovenia adopted the euro in January 2007; Cyprus and Malta followed in January 2008; and Slovakia in January 2009. The Maastricht convergence criteria for adopting the euro are: price stability (i.e. the average inflation rate should not exceed more than 1.5 percentage point that of, at most, the three best inflation performing Member States); sustainable fiscal position (public deficit not exceeding 3% of GDP or close to that limit, and the ratio of general government debt to GDP not over 60% or declining at a "sufficient pace" towards that level); exchange rate stability through participation in the Exchange Rate Mechanism II (ERM II)<sup>2</sup>, respecting the normal fluctuation margins without severe tensions for at least two years; and low interest rates (the average nominal long-term interest rate should not exceed by more than two percentage points that of, at most, the three best inflation performing Member States).<sup>3</sup>

The failure of many euro zone countries to stick to the self-imposed rules on government debts is considered to be one of the reasons for the current sovereign debt crisis affecting the ‘Euro zone’.

The first country to face the debt-crisis in the euro zone was Greece. On May 10, 2010, the EU agreed on a €750 billion bailout plan that was made available to rescue euro zone economies that got into financial

<sup>1</sup> The euro is currently legal tender in: Austria, Belgium, Cyprus, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia, and Spain.

<sup>2</sup> The ERM provides the framework for coordination of exchange rate policies. It was formed in 1979 in an attempt to create a zone of exchange rate stability, a prerequisite to the introduction of the euro. A new exchange rate mechanism (ERM II) entered into force on 1 January 1999, aimed at ensuring that Member States outside the euro area, but participating in the mechanism, align their policies towards stability and foster convergence, which should help them in their efforts to adopt the euro. At the same time, the mechanism is intended to help protect the Member States adopting the euro from unwarranted pressures in the foreign exchange market.

<sup>3</sup>WORLD TRADE ORGANIZATION, *WTO Trade policy review of European Communities*, (April 6, 2009), available at [http://trade.ec.europa.eu/doclib/docs/2009/april/tradoc\\_142759.pdf](http://trade.ec.europa.eu/doclib/docs/2009/april/tradoc_142759.pdf).



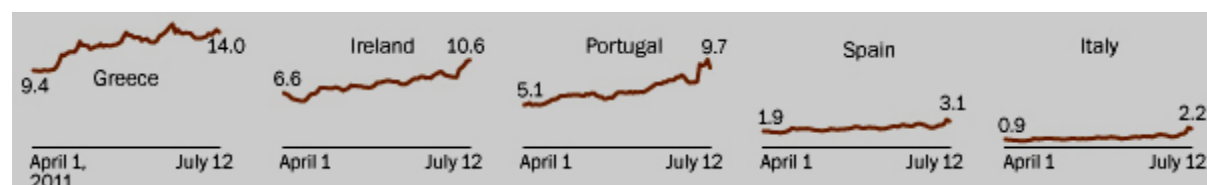
trouble. The plan consisted of €440 billion of loans from euro-zone governments, €60 billion from an EU emergency fund and €250 billion from the IMF. In May 2010, Greece received a bailout package for € 110bn from the EU/IMF. In November 2010, an EU/IMF bail-out package totaling €85bn was agreed on for Ireland, and in May 2011 a 78bn-euro bail-out was approved for Portugal. It is also reported that Greece has requested IMF and the euro zone countries for a second bailout package to ensure that it does not default on its public debt. The other heavily indebted EU countries—notably Ireland, Portugal and Spain also came under scrutiny. Cyprus is another euro zone member that is highly exposed to the debt crisis. Other EU Member States such as Italy and UK are also probably at risk if the contagion spreads.

According to a report released in 2010 by Eurostat, the statistical office of the EU, fourteen out of the twenty seven countries in the EU had public debt exceeding 60 % of the GDP. Topping the European debt league is Greece with 142.8% government debt to GDP ratio, followed by Italy (119.0%), Belgium (96.8%) Ireland (96.2%), Portugal (93.0%), Germany (83.2%), France (81.7%) Hungary (80.2%) and the United Kingdom (80.0%)

The immediate effects of this debt crisis would be the ability of sovereign governments to raise capital from the private markets. The Italian 10-year government bond yields more than 6% during July, 2011 while the corresponding yields in Spain rose to 5.6% during this period.<sup>4</sup>(See Chart II)

The debt crisis is likely to weaken the Euro which may have an impact on countries such as India. In 2010, more than one-fifth of India's exports were destined to the EU. Again loss of consumer confidence in EU is likely to result in less import demand, which could be worrisome from India's standpoint. However, the export trends so far have indicated that the debt crisis in the six countries in the Euro zone has not considerably affected India, as a major share of India's exports to the EU are directed at large countries such as Germany, France and the Belgium who are relatively unaffected by the crisis.

### Borrowing costs 10-year bond yield spreads (Chart II)



Source: ECB

The EU has set up the European Financial Stability Fund (EFSF) as a bail out mechanism to help the distressed economies. In July, 2011 there was an agreement to provide € 440 to the EFSF, out of which €190 has already been drawn so far. The EFSF intervention will be on the basis of the ECB analysis. However, there is a strong feeling that this amount is ill-equipped and insufficient to grapple with the unfolding crisis. There is a suggestion that EFSF must be enhanced to allow this fund to be used in precautionary programs and to recapitalize financial institutions.

### III. IMPORTANT INSTITUTIONS IN THE EUROPEAN UNION

The EU's decision-making process in general involve three main institutions: a democratically elected Parliament, a Council representing the Member States and consisting of government ministers, a European Council of Heads of State or Government, a Commission which acts as guardian of the Treaties and has the

<sup>4</sup>Editorial, *Second thoughts on the euro rescue*, FINANCIAL TIMES, July 29, 2011, at A6; Francois Baroin and Wolfgang G, *Our plan will rescues Greece and Protect Europe*, FINANCIAL TIMES, July 29, 2011, at A7.

power to initiate and implement legislation, a Court of Justice which ensures that Community law is observed and a Court of Auditors which monitors the financial management of the Union. In addition, there are a number of advisory bodies, which represent economic, social and regional interests. The European Investment Bank was set up to facilitate the financing of projects which contribute to the balanced development of the Union.

This 'institutional triangle' produces the policies and laws that apply throughout the EU. In principle, it is the Commission that proposes new laws, but it is the Parliament and Council that adopts them. The Commission and the Member States then implement them, and the Commission ensures that the laws are properly taken on board.

One of the landmark changes introduced by the Lisbon Treaty was the change in nomenclature of the European Community as the European Union. The term 'Community law' will nevertheless be used where reference is being made to the case-law of the Court of Justice before the entry into force of the Treaty of Lisbon. It is also interesting to note that from the date of entry of the Treaty of Lisbon, all proceedings involving the European Union are represented by the abbreviation "EU" as opposed to the "EC" in all WTO proceedings.<sup>5</sup>

**European Parliament:** Parliament members are directly elected by the citizens of Europe every five years. The European Parliament has been elected by direct universal suffrage since 1979. The Nice Treaty set the number of European Parliament members at 785, but with the enactment of Treaty of Lisbon, the number was brought down to 736 elected, in the 27 Member States of the enlarged European Union.<sup>6</sup> Each revision of the Treaties has seen an increase in the power of the European Parliament in relation to the other institutions. Under powers conferred by the Treaties, the Parliament shares legislative and budgetary power with the Council and exercises democratic supervision over the Commission.

**EU Council:** The Council of the European Union is the institution in the legislature of the EU representing the governments of member states. The Council also coordinates the economic policies, concludes external international agreements, holds budgetary power with the Parliament, takes decisions to define, implement the common foreign, security policy, coordinates Member State activities and adopts measures in the field of police and judicial cooperation in criminal matters. The Council is composed of one ministerial level representative from each Member State; the ministers vary depending upon the subject of the meeting. With the entry into force of the Treaty of Lisbon on 1 December 2009, it became an institution.

**European Commission:** The European Commission is the first and pre-eminent guardian of the Treaties. The Commission ensures that the Treaty provisions and decisions based on the Treaties are correctly applied. It can initiate infringement proceedings against any Member State and may, if necessary, refer matters to the Court of Justice of the European Union. It can also impose fines on individuals or companies, notably when they act in breach of the Union's competition rules. The Commission is also the catalyst of the Union. It has the sole right to initiate legislation, and it can exert its influence at every stage of the process leading up to the adoption of a new "European law." In other words, the Commission is the European Union's executive body. This involves issuing rules for the implementation of certain Treaty Articles and administering budget appropriations earmarked for EU operations.

The European Commission under the Treaty of Nice has one member from each Member State. The Commission's term of office is now five years, the same as the life of the European Parliament. Parliament is

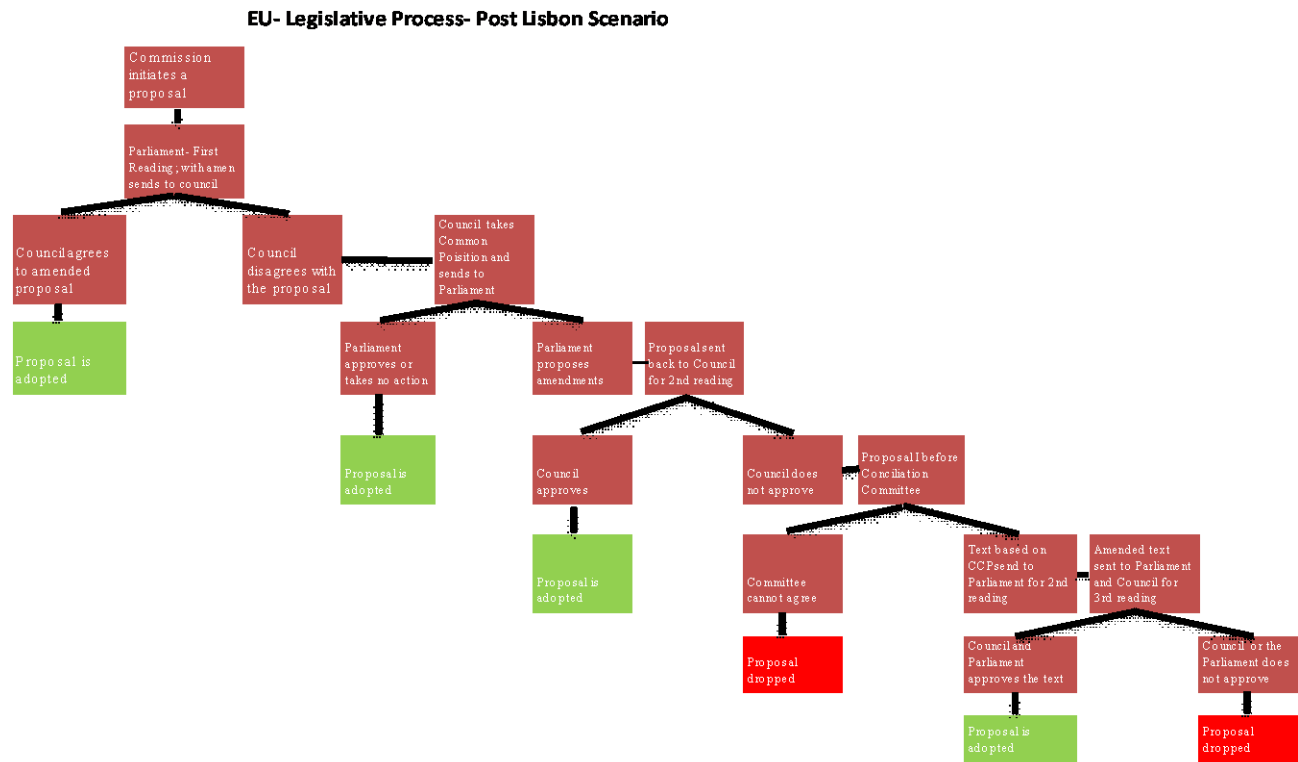
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<sup>5</sup>See WTO Secretariat, *WTO Annual Report*, WT/L/779, and (Nov. 30, 2009), available at <http://www.wto.org>.

<sup>6</sup>EUROPEAN PARLIAMENT, <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=45&pageRank=3>, (last visited July 20, 2011).

consulted before the Member States appoint the President of the Commission and the full Commission has to be approved by Parliament before it too is formally appointed.

Chart-III



Source : EU Council and Parliament websites

### EU Legislative Process

The EU's standard law-making procedure is known as 'co-decision'. This means that the directly elected European Parliament has to approve EU legislation together with the Council (the governments of the 27 EU countries). The Commission drafts and implements the EU legislation.

Article 294 TFEU outlines ordinary legislative procedure in the following manner. The EU Commission submits a legislative proposal to the EU Parliament and EU Council. At the first reading Parliament adopts its position. If the Council approves the Parliament's wording then the act is adopted. If not, it shall adopt its own position and pass it back to Parliament with explanations. The Commission also informs Parliament of its position on the matter. At the second reading, the act is adopted if Parliament approves the Council's text or fails to take a decision. The Parliament may reject the Council's text, leading to a failure of the law, or modify it and pass it back to the Council. The Commission gives its opinion once more. Where the Commission has rejected amendments in its opinion, the Council must act unanimously rather than by majority. (See Chart III)

If, within three months of receiving Parliament's new text the Council approves it, then it is adopted. If it does not, then the Council President, with the agreement of the Parliament, convenes the *Conciliation Committee* composed of the Council and an equal number of MEPs. The committee draws up a joint text on the basis of the two positions. If within six weeks it fails to agree to a common text, then the act has failed. If it succeeds and the committee approves the text, then the Council and Parliament (acting by majority) must then approve the said text. If either fails to do so, the act is not adopted.

The procedure was introduced with the Maastricht Treaty as the ‘co-decision’ procedure. This procedure was amended by the Treaty of Amsterdam and the number of legal bases where the procedure applies was greatly increased by both the latter treaty and the Treaty of Nice.

The major change introduced by the Lisbon Treaty is that the European Parliament is established as a co-legislator and has budgetary powers and exercises democratic controls over all the European institutions. The European Parliament now decides on the vast majority of EU legislation. The Lisbon Treaty extends the ordinary legislative procedure to some forty new cases of decision making in several policy areas, including the Common Agricultural Policy and the Common Fisheries Policy.<sup>7</sup> Parliament has also the final say on the EU budget. This implies that it is empowered to adopt European laws (directives, regulations etc.). It can accept, amend or reject the content of European legislation.

The European Parliament and the Council together constitute the Union’s budgetary authority, which decides each year on its expenditure and revenue. The European Union itself does not levy any taxes. Instead, the European Union’s budget is funded from ‘own resources’ made available by the Member States after consultation with the European Parliament.

In terms of Article 207(2) of the TFEU, the EU Trade Policy is made by Joint decisions of the EU Council and the EU Parliament according to the ordinary legislative procedure (i.e. ‘co-decision’). Accordingly, the EU Parliament is fully involved in trade policy making. As laid out under the ordinary legislative procedure, legislative proposals must be submitted by the EU Commission to both the EU Council and the EU Parliament. (See Chart III). Under the ‘ordinary legislative procedure’, only the EU Commission can put forward legislative proposals, with some exceptions. The European Parliament and the Council may amend the proposals. Further, as spelt out by Article 294 of the TFEU, for a proposal of the EU Commission to be formally adopted, an agreement must be reached between the EU Council and the EU Parliament. International trade treaties are eventually adopted by the Council after the EU Parliament has granted its consent. Previously, external trade legislation was adopted by the Council alone and did not involve the Parliament.

TFEU, in addition to setting the ordinary legislative procedure, also introduced changes in the framework for the adoption of ‘delegated’ and ‘implementing acts’. Article 290 of the TFEU outlines the possibility of the Commission ‘filling up certain gaps’ in the treaty enforcement. This would imply that the Commission will have the power to adopt non-legislative acts of general application. This is to supplement or amend certain non-essential elements of an existing legislative action. These powers are known as ‘delegated’ acts. This delegation may be subject to specific conditions, such as a limitation that the delegation may be revoked, or that its exercise may be subject to the control of the EU Parliament or the Council. Article 291<sup>8</sup> of the TFEU also creates a possibility of conferring ‘implementing powers’ to the Commission in situations in which uniform conditions for implementing legally binding EU laws are required, such as in the case of adoption of antidumping measures. The exercise of the implementing powers by the EU Commission is controlled by EU Member States as per Regulation (EU) No. 182/2011 of the EU Parliament and of the EU Council dated 16 February 2011 (“Comitology Regulation”).

TFEU also makes a distinction between the delegations of powers to the Commission, meaning the Commission’s delegated and implementing powers, which before the Lisbon Treaty’s entry into force were all subject to the comitology procedure. (See Box I). There are two different legal frameworks; Article 290 entails no comitology procedures, but the committee proceedings will continue to apply to implementing acts. The main responsibility for implementing EU laws belongs to the Member States; nevertheless a basic act must confer implementing powers to the Commission when there is a need for uniform implementing

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<sup>7</sup>For the full list of areas subject to the ordinary legislative procedure, See *Ordinary Legislative Procedure Step by Step*, EUROPEAN COMMISSION, [http://ec.europa.eu/codecision/stepbystep/tet/index\\_en.htm](http://ec.europa.eu/codecision/stepbystep/tet/index_en.htm).

<sup>8</sup> Article 291 (1) provides: “Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission.”

conditions. It is, therefore, for the European Parliament and the Council, by respecting the criteria laid down in this provision, to decide in each legislative act to confer implementing powers on the Commission. The Lisbon Treaty has put the European Parliament and the Council on an equal footing as regards the conferral of delegated and implementing powers.

### **Box 1**

#### **New ‘Comitology’:**

The Commission is often empowered to implement EU legislation with the assistance of committees composed of representatives from EU countries.

TFEU contains two provisions which entail substantial modifications of the ‘comitology’ procedures. They concern on the one hand ‘quasi-legislative measures’ which are referred to as ‘delegated acts’ (Article 290) and on the other hand straight-forward implementing measures, which are referred to as ‘implementing acts’. Implementing powers are needed where decisions to implement rules established in basic regulations are required, while delegated acts supplement or amend the basic regulation itself.

Before the adoption of the Lisbon treaty, there were four types of procedures: the advisory, the management, the regulatory and the regulatory with scrutiny. The new Regulation provides for a simplified system with only two procedures for the implementation of EU legislation: an ‘advisory procedure’ where Member States give non-binding advice to the Commission, as the ordinary procedure, and an “examination procedure” – with Member States’ veto rights – for matters such as agricultural policy, environmental policy, commercial policy and taxation. Again, the European Parliament and the Council will no longer participate in the committee proceedings.

Source: *Official website of the EU*

On 7 March, 2011, the Commission issued a legislative proposal known as “Omnibus I Proposal”, which in its opinion was one of the first steps to update the way decisions on trade policy are adopted in the EU. This followed changes in the Lisbon Treaty and the Comitology Regulation. Accordingly, 24 trade policy regulations including trade defense instruments, EU’s Generalized System of Preferences, Economic Partnership Agreement Market Access Regulation, Trade Barriers Regulation, etc were adopted to the new comitology procedures.

In light of the above developments, the EU Parliament will be informed of the Commission’s draft measures taken under the implementing acts and could potentially challenge those decisions if it considers that the Commission has exceeded its powers. The Parliament has an equal say with the Council in the adoption of delegated acts. The Member States of the EU will continue to be involved in the decision making for implementing acts as they used to remain earlier. The Member States will also need to vote on draft measures such as antidumping, countervailing measures and safeguards. A qualified majority will be required to reject a draft Commission measure. A global safeguard measure will need a qualified majority in favor to be implemented, whereas the adoption of definitive antidumping and countervailing duty may require a qualified majority to be rejected.

On 15 June 2011, the Commission introduced a legislative proposal popularly known as “Omnibus II Proposal” that seeks to review whether procedures currently based on the 1999 comitology decision should be converted into delegated powers. Grant of delegated powers from the Commission or Parliament would empower the Commission to adopt non-legislative acts of general application in order to supplement or amend certain non-essential aspects in the legislation. The “Omnibus II Proposal” examines all of the

remaining decision making procedures in the field of trade policy which were not examined within the framework of the Omnibus I Proposal. Omnibus I Proposal examines 14 regulations which include, among others, Council Regulation (EEC) No. 3030/93 of 12 October 1993 on the common rules for imports of certain textile products from third countries, Council Regulation (EC) No. 953/2003 of 26 May 1993 which regulates trade diversion of certain medicines into the EU, Council Regulation (EC) No. 732/2008 of 22 July 2008 which applies a GSP scheme for the period from 1 January 2009 to 31 December 2011.

The Lisbon Treaty significantly enhances the role of European Parliament in the ratification of trade agreements by requiring the Parliament's consent before the Council can ratify an agreement. The Parliament and the Council vote on trade agreements as a whole. The Council may agree to the provisional application of a trade agreement, which does not require parliamentary consent. However, if the Parliament refused consent to the conclusion of an agreement, provisional application would have to be continued.

## **COURTS AND LEGAL INSTITUTIONS IN THE EUROPEAN UNION**

***The Court of Justice of the European Union (Formerly 'European Court of Justice')***: The Court of Justice of the European Union is the judicial institution of the European Union and of the European Atomic Energy Community (Euratom). It is made up of three courts: the Court of Justice, the General Court and the Civil Service Tribunal. Their primary task is to examine the legality of European Union measures and ensure the uniform interpretation and application of European Union law.

The Court of Justice has been given clearly defined jurisdiction, which it exercises on references for preliminary rulings and in various categories of proceedings. The Court of Justice has the following powers (i) actions for failure to fulfil obligations, i.e. the power to examine whether a Member State has fulfilled its obligations under European Union law; (ii) actions for annulment, i.e., to decide on the application by a Member State for the annulment of a measure (in particular a regulation, directive or decision) adopted by an institution, body, office or agency of the European Union, (iii) actions for failure to act, i.e. to examine the legality of the failure of the institutions, bodies, offices or agencies of the European Union to act, (iv) appeals on points of law only may be brought before the Court of Justice against judgments and orders of the General Court and, (v) review of the decisions of the General Court of appeals against decisions of the European Union Civil Service Tribunal in exceptional circumstances.

The Judges of the Court of Justice of the European Union elect one of themselves as President for a renewable term of three years. The President directs the work of the Court and presides at hearings and deliberations of the full Court or the Grand Chamber.

The Court of Justice cooperates with all the courts of the Member States, which are the ordinary courts in matters of European Union law. To ensure the effective and uniform application of European Union legislation and to prevent divergent interpretations, the national courts may, and sometimes must, refer to the Court of Justice and ask it to clarify a point concerning the interpretation of EU law, so that they may ascertain, for example, whether their national legislation complies with that law. A reference for a preliminary ruling may also seek the review of the validity of an act of EU law. The Court of Justice's reply is not merely an opinion as it takes the form of a judgment or a reasoned order. The national court to which it is addressed is, in deciding the dispute before it, bound by the interpretation given. The Court's judgment likewise binds other national courts before which the same problem is raised. These actions enable the Court of Justice to determine whether a Member State has fulfilled its obligations under European Union law. Before bringing the case before the ECJ, the Commission conducts a preliminary procedure in which the Member State concerned is given the opportunity to reply to the complaints addressed to it. If that procedure does not result in the Member State terminating the failure, an action for infringement of EU law may be brought before the Court of Justice. Also by an action for annulment, the applicant seeks the annulment of a measure (in particular a regulation, directive or decision) adopted by an institution, body, office or agency of the European Union. The Court of Justice has exclusive jurisdiction over actions brought

by a Member State against the European Parliament and/or against the Council (apart from Council measures in respect of State aid, dumping and implementing powers) or brought by one European Union institution against another. Where the failure to act is held to be unlawful, it is for the institution concerned to put an end to the failure by appropriate measures. Jurisdiction to hear actions for failure to act is shared between the Court of Justice and the General Court according to the same criteria as for actions for annulment. Appeals on points of law only against judgments and orders of the General Court may be brought before the Court of Justice. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself decide the case.

***General Court (Formerly 'Court of First Instance')***: The Court of First Instance was renamed the 'General Court' in the Lisbon Treaty. Private litigants have the right to file applications before the General Court in respect of State aid, dumping and implementing powers.

***The European Court of Auditors***: The European Court of Auditors audits EU finances. Its role is to improve EU financial management and report on the use of public funds. It was set up in 1975 and is based in Luxembourg. The purpose of the court is to ensure that EU taxpayers get maximum value for their money. The Court of Auditors has the right to check ('audit') any person or organization handling EU funds. The Court frequently carries out on-the-spot checks. Its findings are written up in reports submitted to the Commission and EU national governments. The Court of Auditors has no legal powers of its own. If auditors discover fraud or irregularities they inform OLAF – the European Anti-Fraud Office.

#### **IV. TRADE POLICY FORMULATION AND EVALUATION IN THE EU**

EU law is divided into 'primary' and 'secondary' legislation. The treaties which form the primary legislation are the basis or ground rules for all EU action.

***Primary Legislation***: The primary legislations are the foundation Treaties of the European Communities, i.e. the European Coal and Steel Treaty, the European Atomic Energy Treaty and the European Economic Treaty as amended, together with the various Annexes and Protocols attached to them. These Treaties have been amended and supplemented on a number of occasions since the foundation of the European Communities through the respective Treaties of Accession. Instances include the accession of the United Kingdom, Denmark and Ireland in 1973, Greece in 1981, Spain and Portugal in 1986 and somewhat later, Finland, Austria and Sweden in 1995. The Treaty of Accession 2003 signed in Athens on 16 April 2003 provided for the accession of the following countries to the European Union: Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia. More recently, the Accession Treaties for Bulgaria and Romania were signed on 21 June 2005 and these countries became members of the EU on 1 January 2007. The most recent amendment to the foundation Treaties is the Treaty of Lisbon 2007. The ratification of this Treaty throughout the EU means that the primary law of the EU now consists of the Treaty on European Union and the Treaty on the Functioning of the European Union.

***Secondary Legislation***: Law made by the European Union institutions in exercising the powers conferred on them by the Treaties is referred to as secondary legislation. Secondary legislation consists of the legal acts listed and defined in Article 288 of the Treaty on the Functioning of the EU (TFEU) i.e. regulations, directives, decisions, recommendations and opinions.

***Regulations***: Regulations are legislative instruments of general application. They apply to abstract rather than individual situations. For example, many regulations apply to operators in the agricultural sector. Regulations are binding in their entirety. This means that a Member State has no power to apply regulations incompletely or to apply only those provisions of which it approves. Regulations are also directly applicable. This means that regulations do not need to be transposed into national law by the respective Member States in order to take effect.

*Directives:* Directives are legislative instruments, which reconcile the dual objective of securing the necessary uniformity of Community law and respecting the diversity of national traditions and structures. Directives are binding on Member States as to the result to be achieved but left to the respective national authorities to decide how the Community objective set out in the Directive is to be incorporated into their domestic legal systems before a specified date. Directive does not acquire legal force and effect until the date for implementation of the directive has expired.

*Decision:* A decision is an individual act addressed to a specified person or persons. Decisions are binding only on those to whom they are addressed without any need for implementation into national law. Examples of situations where decisions are used include the granting or refusal of State aid, the annulment of agreements or arrangements contrary to fair competition and the imposition of fines or corrective measures.<sup>9</sup>

*Preparatory documents:* Include Commission legislative proposals, Council common positions, legislative and budgetary resolutions, initiatives of the European Parliament, opinions of the European Economic, Social Committee and of the Committee of the Regions, etc. The EU member countries have transferred some of their law-making authority to the EU in certain policy areas, such as agriculture and fisheries. In other areas, such as culture, policy-making is shared between the EU and national governments.

**Box II**  
**Type of Legislation and Reporting: Summary**

- **Regulations:** directly and automatically binding and applicable throughout the Member States. Published in the O.J. L Series.
- **Directives:** binding as to the result to be achieved but each Member State chooses the form and method for national implementation of the directive. Published in the O.J. L Series
- **Decisions:** issued by the Council or the Commission and bind only the Member State(s) or natural or legal person(s) to whom they are addressed. Published in the O.J. L Series.
- **Recommendations, Resolutions** and **Opinions:** Not binding. Published in the O.J. C Series.
- **OFFICIAL JOURNAL:** Legislative acts and non-binding acts are collected and published in the Official Journal of the European Union (O.J.) Prior to February 1, 2003; the title was the Official Journal of the European Communities.
- **L Series:** Legislation (regulations, directives and other binding acts)
- **C Series:** Information and Notices

**Source:** EUR-Lex

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<sup>9</sup>EUROPA, [http://europa.eu/documentation/index\\_en.htm](http://europa.eu/documentation/index_en.htm)(last visited July 23, 2011).



## **V. TRANSPARENCY IN TRADE POLICY FORMULATION**

The EU Commission uses ‘trade sustainability impact assessments to analyze the economic, environmental, and social impact of EU trade agreements for the EU and its trading partners. Trade sustainability impact assessments are carried out by external consultants for major trade negotiations, after the Commission has been authorized by the EU Council to initiate negotiations. The assessments are published online.<sup>10</sup> The objective of the impact assessment is to assess the potential economic, social and environmental consequences that they may have. It does this by preparing 'Impact assessments' which set out the advantages and disadvantages of possible policy options.

The Commission also consults interested parties such as non-governmental organizations, local authorities, representatives of industry and civil society. Groups of experts give advice on technical issues. In this way, the Commission ensures that legislative proposals correspond to the needs of those most concerned and avoids unnecessary red tape.

Citizens, businesses and organizations can participate in the consultation procedure via the website Public consultations. National parliaments can formally express their reservations if they feel that it would be better to deal with an issue at the national rather than EU level.

## **VI. TRADE AGREEMENTS AND ARRANGEMENTS**

### **VI A. World Trade Organization**

EU is one of the largest trading blocs in the world. The EU is an original Member of the WTO; each of its Member States is also a WTO Member. It is also a Member to the Agreement on Government Procurement and a signatory to the Information Technology Agreement which entered into force in 1997.

The 27 member States of the EU are also WTO members in their own right. The EU is a single customs union with a single trade policy and tariff. The European Commission — EU’s executive arm — represents all EU member States at almost all WTO meetings.

### **VI B. Regional Trade Agreements**

The Agreement establishing the European Economic Area (EEA Agreement), negotiated between the EC and EFTA states, entered into force on January 1, 1994. Among EFTA states, the EEA remains in force for Iceland, Liechtenstein, and Norway (but not Switzerland), and allows them to participate in the internal market without assuming the full responsibilities of EC membership. The Agreement covers all four pillars of the internal market, i.e. freedom of movement of goods (excluding agriculture and fisheries, which are included to a very limited extent), persons, services, and capital. It also covers other horizontal issues on social policy, consumer protection, environment, company law, and statistics.<sup>11</sup>

### **EU’s Ongoing FTA/Economic Cooperation Negotiations**

The EU is currently engaged in negotiations on free trade agreements with the following partners. Some of the most recent developments are indicated below.

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<sup>10</sup>Speech by Peter Mandelson, Putting Sustainability Impact Assessments at the heart of EU trade policy, EUROPEAN COMMISSION TRADE, (<http://ec.europa.eu/trade/analysis/sustainability-impact-assessments/assessments>. (last visited July 23, 2011)

<sup>11</sup> See generally, *Supra* note 5

**Bosnia and Herzegovina:** The second round of negotiations on a Free Trade Agreement between the EFTA States and Bosnia and Herzegovina took place on May 23-25, 2011 in Sarajevo.<sup>12</sup>

**India:** Negotiations are underway for concluding a broad-based Free Trade Agreement between the EU and India. Discussions took place between February 15 and 18, 2011 in New Delhi. The discussions, as reported, allowed for significant progress particularly with respect to trade in goods. Areas covered by experts groups included: Market access for industrial products, fish and agricultural goods; sanitary and phytosanitary measures; technical barriers to trade; rules of origin; customs procedures and trade facilitation; trade defense measures; competition; investment; intellectual property rights; and dispute settlement. Service experts will continue their discussions in separate meetings. The parties agreed on a roadmap for further steps, including follow-up discussions between experts in several areas and a next full round of negotiations before mid-2011.<sup>13</sup>

**Canada:** Canada and EU exchanged a second set of formal offers prior to the eighth round of negotiations for concluding a Comprehensive Economic and Trade Agreement (CETA). The CETA negotiations have already made significant progress. Canada and EU have agreed to eliminate tariffs on 90% of the goods, and a preliminary agreement regarding government procurement was reached by both sides in early 2011.

The offensive interests for Canada appear to include eliminating EU tariffs on Canadian exports of seafood, recognition of Canadian professional qualifications and increased mobility of Canadian workers. The important defensive interests of Canada include its ability to maintain restrictions on imports of dairy, chicken, egg, turkey, and retention of production quotas on several agricultural products.

The offensive interests of EU include better access to the Canadian government procurement markets, especially in some of the key provinces such as Quebec. EU is also urging Canada to establish stronger protection of intellectual property rights mainly for the benefit of the research based EU pharmaceutical industry.

Meanwhile, it is reported that some members of the EU Parliament have encouraged the EU Commission to link further progress in the CETA negotiations with Canada's willingness to withdraw its challenge of the EU's ban on seal products from Canada. A resolution by the EU Parliament passed on 8 June 2011 expressed "hope that disagreements between the parties [regarding EU's ban on seal products] can be overcome amicably and without affecting the CETA negotiations."

**Indonesia:** After commencing negotiations on a Comprehensive Economic Partnership Agreement (CEPA) earlier this year, delegations from the EFTA States and Indonesia held a second round of talks from 6-8 June 2011 in Geneva.<sup>14</sup>The discussions allowed the groups of experts to explore the possibility of further liberalization on a broad range of topics, including trade in industrial and agricultural products, fish, technical barriers to trade, phytosanitary measures, trade remedies, rules of origin and customs matters, trade in services, investment, intellectual property rights, government procurement, competition, sustainable development and general provisions.

The negotiations follow the recent release of a study entitled, "Invigorating the Indonesia- EU Partnership: Towards a Comprehensive Economic Partnership Agreement" by a joint EU-Indonesian 'Vision Group' of eminent experts. The commencement of the negotiations and the publication of the Report, according to

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<sup>12</sup>Press Release, *EFTA holds second round of free trade negotiations with Bosnia and Herzegovina*, EFTA, and (May 26, 2011), available at <http://www.efta.int/free-trade/free-trade-news/>.

<sup>13</sup>Press Release, *EFTA and India hold seventh round of free trade negotiations*, EFTA, (Feb 21, 2011), available at <http://www.efta.int/free-trade/free-trade-news/>.

<sup>14</sup>Press Release, *EFTA and Indonesia meet for second round of negotiations*, EFTA, (June 9, 2011), available at <http://www.efta.int/free-trade/free-trade-news/2011-06-09-cfta-indonesia-cepa.aspx>.

some sources<sup>15</sup>, fall within the larger framework of the EU's drive to conclude FTAs with ASEAN countries such as Singapore and Malaysia.<sup>16</sup> The Report recommends that the FTA negotiations be structured in order to achieve a 'deep FTA', which means that the FTA negotiations should encompass trade in goods, services, FDI, and a variety of 'behind-the-border' commitments which include sanitary and phytosanitary regulations and technical standards. The Report recommends that the EU and Indonesia remove 95% of tariff lines, adopt a 'best endeavor' approach to reduce duties on the remaining 5% in future and render assistance to small and medium enterprises in Indonesia.

The most notable demand of the EU is to require Indonesia to agree for higher intellectual property standards with respect to EU exports. The EU is also seeking access to the public procurement market in Indonesia. Indonesia has reportedly asked the EU to provide access to its palm oil exports which are potentially affected by the EU Renewable Energy Directive.<sup>17</sup>

**Montenegro:** The EFTA States and Montenegro, as was reported, are approaching the conclusion of their negotiations on a Free Trade Agreement after a second round held between 19 and 20 May 2011 in Balzers, Liechtenstein.<sup>18</sup> In the meetings, significant progress was achieved towards the finalization of an FTA, which will focus on liberalization and facilitation of trade in goods. Further discussions are scheduled to take place with respect to arriving at market access commitments on agricultural products and fish.

**Russia, Belarus and Kazakhstan:** Delegations from the EFTA States and Russia, Belarus and Kazakhstan met for a second round of negotiations on a broad-based Free Trade Agreement from April 11-13, 2011 in Almaty, Kazakhstan.<sup>19</sup>

**EU and MERCOSUR:** Trade Negotiations between the EU and MERCOSUR are based on the EU-MERCOSUR Interregional Framework Cooperation Agreement, signed in 1995. The negotiations were formally launched in 1999 and tariff and services negotiations started in July 2001. Market access offers which were exchanged in September 2004 included goods, services, government procurement, investment, but were not deemed enough for an agreement. Since then, a number of high level meetings have taken place, but negotiations have not resumed. However, at the XXI Bi-Regional Negotiations Committee (BNC), Chief Negotiators of both sides reaffirmed their commitment to move negotiations forward to reach a comprehensive, balanced and ambitious Association Agreement.

**EU and Korea:** The EU's free trade agreement with South Korea, the most comprehensive it has ever negotiated, came into force on July 1, 2011. The Agreement aims at removing 98% of listed customs duties, which will cover almost 70% of the trade between South Korea and the EU. The FTA includes agreements on intellectual property, services and safety testing. However, some questions still remain about implementation, with concerns that some agencies are lagging behind in their preparations for the new trading environment. The EU has a strong agricultural presence in the Korean market with major exports in pork (worth €240 million), whisky (€176 million) and dairy products (€99 million). Today only 2% of EU agricultural exports enter South Korea duty free and the agricultural import tariffs are very high. Duties on some EU products, for instance, wine will be eliminated on day one of the implementation of the FTA and import duties on whisky at the end of year 3. EU agricultural exporters are expected to save at least €380

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<sup>15</sup>*Trade Perspectives*, News Letter of Fratin Vergano, Issue No. 13, July 1, 2011.

<sup>16</sup>*Trade Perspectives*, News Letter of Fratin Vergano, Issue No. 6, March 25, 2011

<sup>17</sup>Erwida Mauliya, Indonesia, EU eyeing 'ambitious' free trade agreement, Asia News Network, June 16, 2011, available at: <http://www.asianewsnet.net/home/news.php?id=19448&sec=2>

<sup>18</sup>*EFTA and Montenegro make headway in free trade negotiations*, EFTA, (May 23, 2011), <http://www.efta.int/free-trade/free-trade-news/2011-05-23-efta-montenegro-fta.aspx>

<sup>19</sup>*EFTA holds second round of free trade negotiations with Russia, Belarus and Kazakhstan*, EFTA, (April 15, 2011) <http://www.efta.int/free-trade/free-trade-news/2011-04-15-efta-rubeka-fta-2nd-round.aspx>.

million annually. Overall, this is the most ambitious tariff elimination achieved in any of the EU's bilateral trade agreements.<sup>20</sup>

**EU-Japan Trade Ministers Meeting:** Commissioner De Gucht and Minister Matsumoto held discussions on the issue of the possible launch of a comprehensive bilateral agreement with Japan, which would include a free trade area. EBC Committees are starting work on identifying, prioritising, and technically fleshing out the key issues and compiling them in an English-language digital compendium, listing items, committees-by-committee.

**ASEAN-EU Business Summit:** The Summit will help intensify business-to-business relations but also promote dialogue between governments and the private sector. The EU aims to open up new business opportunities in this fast growing region and create strong partnerships that help to support ASEAN's economic integration.

**Central America:** The Association Agreement between Central America and EU is awaiting ratification. After its legal review, the text was initialled in Brussels on 22 March 2011. This Association Agreement includes a comprehensive trade pillar. According to a Press Release issued by the EU, the Association Agreement can enter into force once legislative procedure involving the EU Parliament and Commission is concluded.<sup>21</sup> The Association seeks to eliminate tariffs on manufactured goods, fisheries and agricultural products at the end of the phase-out period. Protection of IPRs and elimination of subsidies and other forms of support also constitute a key component of the Association Agreement, according to the EU Press Release.

**Vietnam:** High officials from the EFTA States and Vietnam met on 7 and 8 March 2011 to welcome the report of a Joint Study Group mandated to examine closer trade and investment relations between the parties.<sup>22</sup>

**EU-Chile:** Representatives of the EFTA Member States and Chile convened on May 5, 2011 in Geneva for the third meeting of the Joint Committee under the Free Trade Agreement (FTA) between the two sides.<sup>23</sup> During the Joint Committee meeting, the parties reviewed recent developments in their extensive networks of preferential trade agreements. They discussed possible future steps to update the FTA in relation to industrial and agricultural products, customs matters, services, investment, intellectual property and government procurement.

## VI C. Bilateral Sectoral Agreements

The EU and the Republic of Indonesia signed on 29 June 2011, in Brussels, an aviation agreement which will restore a sound legal basis for developing future aviation relations between Indonesia and the EU Member States. This 'horizontal agreement' will place several provisions in the bilateral air services agreements between 19 EU Member States and Indonesia on a sound legal footing by ensuring compliance with EU legislation. Most importantly, it will remove nationality restrictions in bilateral air services agreements between EU Member States and Indonesia. It will thereby allow any EU airline to operate flights between Indonesia and any EU Member State in which it is established, where a bilateral agreement between the EU Member State concerned and Indonesia already exists and traffic rights are available<sup>1</sup>.

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<sup>20</sup> Press Release, European Commission, *EU-South Korea Free Trade Agreement 10 Key Benefits for the European Union*, (June 2011), [http://trade.ec.europa.eu/doclib/docs/2010/october/tradoc\\_146695.pdf](http://trade.ec.europa.eu/doclib/docs/2010/october/tradoc_146695.pdf)

<sup>21</sup> Press Release, European Commission, *Highlights of the trade pillar of Central American and European Union* (June 20, 2011), <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/regions/central-america/>

<sup>22</sup> Press Release, *EFTA-Vietnam high-level meeting welcomes positive recommendation on Free Trade Agreement*, EFTA, (March 11, 2011), <http://www.efta.int/free-trade/free-trade-news/2011-03-11-efta-vietnam-fta.aspx>.

<sup>23</sup> Press Release, European Commission, *EFTA-Chile Joint Committee meets in Geneva*, EFTA, (May 6, 2011), <http://www.efta.int/free-trade/free-trade-news/2011-05-05-efta-chile-joint-committee.aspx>.

The agreement represents an important step towards strengthening aviation relations and enhancing overall cooperation with Indonesia, while encouraging traffic between the EU and Indonesia. Currently, there are 46 such horizontal aviation agreements with partner countries worldwide. More than 900 bilateral air services agreements have already been modified by the joint efforts of the European Commission and EU Member States to replace nationality rules with the principle of EU airline designation.<sup>24</sup> This means that all EU carriers will be able to be designated by any of the 19 Member States with which Indonesia has bilateral agreements – but they will only be able to fly if there are unused traffic rights in these agreements. It therefore means that EU carriers will not be able to fly from those Member States with which Indonesia does not have bilateral agreements.

## VII. UNILATERAL PREFERENCE SCHEMES

### VII A. Generalized System of Preferences and other preferential arrangements

The Generalized System of Preferences (GSP) is an autonomous trade arrangement through which the EU provides non-reciprocal preferential access to the EU market to 176 developing countries and territories, in the form of reduced tariffs for their goods when entering the EU market. It is implemented by EU Council Regulation applicable for a period of three years at a time. GSP covers three separate preference regimes: The standard GSP, which provides preferences to 176 Developing Countries and Territories on over 6300 tariff lines; also the special incentive arrangement for Sustainable Development and Good Governance, known as GSP+, which offers additional tariff reductions to support vulnerable developing countries in their ratification and implementation of relevant international conventions in these fields; and the Everything But Arms (EBA) arrangement, which provides Duty-Free, Quota-Free access for the 50 Least-Developed Countries (LDCs).

The primary objective of the GSP is to contribute to the reduction of poverty and the promotion of sustainable development and good governance. Tariff preferences on the EU market enable Developing Countries to participate more fully in international trade and generate additional export revenue to support implementation of their own sustainable development and poverty reduction policy strategies. There has been a significant increase in recent years in the value of preferential imports under GSP. Imports under the scheme totaled €51 billion in 2006 (an increase of 10% over 2005) and €57 billion in 2007 (an increase of 12% over 2006)<sup>25</sup>. The current Regulation especially focused preferences on those countries mostly in need of the benefits from trade. In this regard, imports from LDCs increased by 35% in 2006 and then remained broadly stable in 2007, while GSP+ beneficiaries saw a rise in their exports to the EU by 15% in 2006 and a further 10% in 2007.<sup>26</sup>

The EU is planning to rescind trade benefits for dozens of developing countries, including Russia and Brazil, as it is believed that the economies of these countries have grown appreciably and no longer deserve preferential access to the world's largest market. The EU Trade Commissioner seeks to change the rules so that the economically better off countries would be excluded. Under the new criteria which the EU is now suggesting, 80 of the 176 current GSP countries would no longer be eligible for the program. Besides, Russia

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<sup>24</sup>Press Release, *International Aviation*, EUROPEAN COMMISSION, available at [http://ec.europa.eu/transport/air/international\\_aviation/international\\_aviation\\_en.htm](http://ec.europa.eu/transport/air/international_aviation/international_aviation_en.htm).

<sup>25</sup>Factsheet, *EC Generalised Scheme of Tariff Preferences (GSP) 2009-2011*, available at [http://trade.ec.europa.eu/doclib/docs/2008/july/tradoc\\_139988.pdf](http://trade.ec.europa.eu/doclib/docs/2008/july/tradoc_139988.pdf).

<sup>26</sup>Press Release, *The Generalizes System of Preferences (GSP) 2009-2011*, EUROPA, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/524&format=HTML&aged=1&language=EN&guiLanguage=en>, also EU Commission MEMO, *More benefits from preferential trade tariffs for countries most in need: Reform of Generalized System of Preferences*, MEMO/11/284, (July 23, 2008)

and Brazil, other GSP graduates are Argentina, Qatar and Saudi Arabia.<sup>27</sup>

According to Council Regulation (EC) No 732/2008, Common Customs Tariff duties on products listed in Annex II as non-sensitive products shall be suspended entirely, except for agricultural components. Common Customs Tariff *ad valorem* duties on products listed in Annex II as sensitive products shall be reduced by 3.5 percentage points. For products from Sections XI (a) and XI (b), this reduction shall be 20 percent. India (S-XI (a) Textiles<sup>28</sup>) was a beneficiary in the earlier scheme but in the new scheme it is eligible but may be not a beneficiary.<sup>29</sup>

The current GSP scheme will come to an end in December 2011. The Commission has put forward a “roll-over” Regulation (Regulation No. 512/2011)<sup>30</sup>, which seeks to extend the present system until the end of 2013. The EU Parliament has approved the Regulation on 24 March 2011 and the Council on 14 April 2011. The revised new GSP Scheme is expected to come at the latest by January 2014.<sup>31</sup>

According to the EU, India is one of the major beneficiaries of the GSP scheme and has been benefited to the tune of Euro 13.1 bn. The changes happening to the scheme need to be monitored.

### **Other developments during the review quarter**

The EU's proposal for zero duty on the import of 64 textile items from Pakistan and other concessions with a view to helping the 2010 victims of flood has been opposed by WTO Members including India, Bangladesh and Peru. The objections were raised during a discussion at the Committee of Trade in Goods (CTG) of the WTO.<sup>32</sup> The overwhelming view is that such a unilateral tariff concession would require a “waiver” under the WTO since such a measure is against the principle of indiscriminate (Art. 1 of GATT). According to a press release issued by the WTO, EU has not been able to secure a waiver on the proposed tariff preference as of 22 March 2011.<sup>33</sup>

## **VIII. FOREIGN INVESTMENT REGIME**

### **Developments during review quarter**

**Transitional Arrangement for BITs:** On 10 May 2011, the EU Parliament voted on an EU Commission proposal establishing transitional arrangements for bilateral investment treaties (BITs) signed between EU Member States and third countries.

The TFEU established exclusive competence of the EU regarding foreign direct investment. As was clarified by Article 2(1) of the TFEU, the EU may legislate and adopt legally binding acts in areas where exclusive competence has been conferred upon it. It posed questions as to how the approximately 1,200 BITs signed

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<sup>27</sup>EU to Cut Emerging Nations' Trade Benefits, FINANCIAL TIMES, May 8, 2011, at 1 ; See also EU Commission MEMO, *More benefits from preferential trade tariffs for countries most in need: Reform of Generalized System of Preferences*, MEMO/11/284, (May 10, 2011), available at [http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc\\_147892.pdf](http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147892.pdf)

<sup>28</sup> 2008 O.J. (L211) 1.

<sup>29</sup> *Supra* note 27

<sup>30</sup> EU Parliament and Council, 2011 O.J. (L145/28).

<sup>31</sup> EU to Cut Emerging Nations' Trade Benefits, FINANCIAL TIMES, (May 8, 2011), at 1 ; See also EU Commission MEMO, *More benefits from preferential trade tariffs for countries most in need: Reform of Generalized System of Preferences*, MEMO/11/284, (May 10, 2011).

<sup>32</sup> Amiti Sen, Dhaka, *Peru too protest EU's free access to Pakistan*, The Economic Times, Dec. 29, 2010.

<sup>33</sup> Press Release, Council for Trade in Goods, WTO, EU consulting with Members on trade preference for Pakistan, (March 22, 2011), <http://www.wto.org>, then follow home>WTO news>2011 news

between the EU Member States and third countries which entered into force before December 1, 2009 could be managed.

One of the significant amendments adopted by the EU Parliament relates to the procedure to be taken for authorising the existing BITs. According to the procedure adopted by the EU Parliament, the Commission would no longer be required to conduct a review of each BIT. This appears to lend greater credibility to the BITs. However, the EU Commission still retains some power to withdraw authorisation in certain specified cases. According to the amendment accepted by the EU Parliament, the authorisation must be withdrawn where the EU has already ratified an agreement with the same country relating to investment.

In terms of the co-decision procedure established by the TFEU, the draft regulation adopted by the EU Parliament will be placed before the Council and voted upon in a qualified majority vote. In conclusion, the EU Parliament and Council will have to jointly approve the draft regulation before it can be adopted.

## **IX. TRADE POLICIES AND PRACTICES BY MEASURE**

### **IX A. Customs Clearance and Valuation**

EU is the world's largest Customs Union. Within a customs union all goods circulate freely, whether made within the EU or imported from outside. The EU has also exclusive competence in the field of customs governing the Member States. Under the EU Legislation, 'customs procedure' includes release of goods for free circulation, transit, warehousing, inward processing, outward processing, etc. The customs in the Member States and national administrative agencies is responsible for implementing the EU legislation under the oversight of the Commission and EU Courts. Most Member States of the EU also provide for administrative review of decisions taken by the national customs officials and customs administration. National courts can also entertain judicial review of such actions taken. National Courts can also refer cases to the Court of Justice of EU. It is pertinent to note that a number of customs classification decisions made by the EU were subject matter of some landmark decisions at the WTO. *EC- LAN*<sup>34</sup> and *EC- Chicken Cuts*<sup>35</sup> are a few such examples.

From the year 2011, carriers are required to lodge an electronic Entry Summary Declaration (ENS) with the 'customs office of first entry' into the EU.<sup>36</sup> Where there is a security agreement between the EU and a third country, no such declaration is required. ENS is required to be submitted within the time limits specified for each mode of transportation.

The transaction value is the basic premise for determining the customs value of a product. The Customs Valuation Section of the Customs Code Committee has published a compendium with commentaries and conclusions. This is available at the official website of the European Union.

### **IX B. Rules of Origin**

A new EU Regulation introducing revised rules of origin entered into force in early 2011.<sup>37</sup> The objective of this Regulation is to relax and simplify rules and procedures for developing countries that are desirous of

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<sup>34</sup>Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, (June 22, 1998)

<sup>35</sup>Appellate Body Report, *European Community- Customs Classification of Frozen Boneless Chicken Cuts, Complaint by Thailand*, WT/DS286/R, (May 25, 2005)

<sup>36</sup> 2008 O.J. (L211)1

<sup>37</sup> 2010 O.J. (L307) 1

taking advantage of EU's preferential trade agreements while ensuring the controls which may be necessary to prevent customs fraud.

The revised GSP rules of origin is expressed as changes of HS tariff heading or subheading, specific processing requirements or value added requirements. Some of the sectors which use methods other than value addition include agricultural and processed agricultural products, footwear, textiles and clothing, leather, etc—sectors where developing countries have a competitive advantage. In terms of the revised EU Regulation, products under HS Chapters 50-63 remain subject to specific tolerance levels. Specifically, with respect to the textiles and clothing sector, which is of particular importance to many developing countries, single-stage processing (manufacture from fabric) is allowed in many cases, instead of the two stages of processing (manufacture from yarn) required by the present rules.<sup>38</sup>

The amended rules of origin maintain the possibility of cumulating origin among the members of a regional group, subject to certain conditions. Regional cumulation operates within three regional groups. Countries within South Asia including India, Bangladesh, Bhutan, Maldives, Nepal, Pakistan, and Sri Lanka come within Group III. Over and above the three groups, the new Regulation has carved out a new group comprising Argentina, Brazil, Paraguay, and Uruguay and provide for cumulation across certain groups subject to conditions.

### **IX C. Customs Tariffs**

Since the completion of the internal market, goods can circulate freely between Member States. The 'Common Customs Tariff' (CCT) therefore applies to the import of goods across the external borders of the EU. The tariff is common to all EU members, but the rates of duty differ from one kind of import to another depending on what they are and where they come from. The rates depend on the economic sensitivity of products.

There is however a kind of working tariff, called TARIC, which is not actually a piece of legislation, but a database. The online database integrates tariff rates and other measures, including quantitative restrictions and trade contingency measures. The codes under TARIC are specified at the ten-digit level.<sup>39</sup>

In accordance with the TFEU, the CCT is set by the EU Parliament and the Council on a recommendation from the Commission. The tariff nomenclature, popularly known as CN code, is based on Harmonised Commodity Description and Coding System. Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature is the basic regulation on CCT. An updated version of the Annex I to the Combined Nomenclature Regulation is published as a Commission Regulation every year in the L-series of the Official Journal of the European Communities. The latest combined nomenclature is based on the fourth amendment to the HS (HS 2007). The most recent nomenclature and the EU rates of duty are contained in Commission Regulation (EU) No. 861/2010 dated 5 October 2010. The Explanatory Notes to the CN are considered to be an important aid for interpreting the scope of the various tariff headings but do not have legally binding force. The latest version is now available from EU Official Journal C 137 of 6 May 2011.

EU has bound 100% of the tariff lines. In general, the applied tariffs are almost the same as the bound rates. The simple average applied most-favoured nation (MFN) tariff rate is at 6.4 per cent. The applied rate of tariff on agriculture stands at 15.2 per cent, while the average applied rates on non-agricultural goods stood at 4.1 per cent.

The EU applies both *ad valorem* and non-*ad valorem* types of duties. Around 11% of the tariff lines are non-*ad valorem*. The non-*ad valorem* rates of duty are applied mostly on agricultural products. The EU also applies

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<sup>38</sup>*Id.* at Annex I.

<sup>39</sup>Customs Tariff Database, EU TAXATION AND CUSTOMS UNION, [http://ec.europa.eu/taxation\\_customs](http://ec.europa.eu/taxation_customs)



seasonal duties on certain fruits and perishable goods such as citrus fruits, grapes, tomatoes, apricots, plums, etc where the duties are reduced if the declared price of a product is above a particular price.

The European Community has created the Binding Tariff Information (BTI) system as a tool to assist economic operators to obtain the correct tariff classification for goods they intend to import or export. Binding Tariff Information is issued on request to economic operators by the customs authorities of the Member States. It is valid throughout the Community, regardless of the Member State which issued it.

The main benefit to the holder is legal certainty with regard to tariff classification. This is important as tariff classification is the basis for determining customs duties, export refunds and the application of other related legal provisions (e.g. import/export certificates).

The BTI contains information on the tariff classification of a specific product that an economic operator intends to import or export. It is issued at the request of economic operators<sup>40</sup>, by the customs authorities of individual Member States<sup>41</sup> and is valid throughout the EC.<sup>42</sup> Ultimately, the uniform application of the EC customs legislation is ensured.

### Development during review quarter

The following are some of the developments involving tariff changes in the recent quarter:

- Temporary suspension of import tariffs (to zero) on certain cereals, i.e. common wheat of low and medium quality (HS 1001.90.99), and feed barley (HS 1003.00), for all imports under reduce-duty tariff quotas.<sup>43</sup>
- Temporary suspension of import tariffs for an exceptional tariff quota of sugar (HS1701) (300,000 tonnes) in the 2010-11 marketing year.<sup>44</sup>

### IX D. Tariff Rate Quotas

Commission Implementing Regulation (EU) No 412/2011 of 27 April 2011 on the issue of licenses for importing rice under the tariff quotas was opened for the April 2011 sub-period by Regulation (EC) No 327/98.<sup>45</sup>

### IX E. Import Restrictions

Introduction of specific and detailed procedures for imports of polyamide and melamine plastic kitchenware (HS 3924.10.00) from China and Hong Kong, China. Imports to be submitted to a	Commission Regulation No. 284/2011 (22 March 2011)
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<sup>40</sup>EU Taxation and Customs database, EUROPEAN COMMISSION, available at [http://ec.europa.eu/taxation\\_customs/resource/documents/bti\\_application\\_form-en.pdf](http://ec.europa.eu/taxation_customs/resource/documents/bti_application_form-en.pdf).

<sup>41</sup> The latest list of competent authorities was published in OJ C 126, 23 May 2008 at 11.

<sup>42</sup> A BTI is generally valid for six years from the date of issue unless it ceases to be valid earlier for specific reasons. Towards the end of the validity period, an economic operator may wish to apply for a new BTI if he intends to continue importing or exporting the product concerned. A total of 51,411 BTIs were issued in the EC in 2007, 46,106 in 2006 and 41,590 in 2005. For further background information concerning BTI, see [http://ec.europa.eu/taxation\\_customs/customs/customs\\_duties/tariff\\_aspects/classification\\_goods/index\\_en.htm](http://ec.europa.eu/taxation_customs/customs/customs_duties/tariff_aspects/classification_goods/index_en.htm). (last visited July 22, 2011) (last updated Feb 2, 2009)

<sup>43</sup> 2011 O.J. (L51) 8.

<sup>44</sup> 2011 O.J. (L81) 8.

<sup>45</sup> 2011 O.J. (L 108) 28.

declaration confirming that the items meet the requirements concerning the release of primary aromatic and formaldehyde	
Introduction of limited temporary special conditions for imports of feedstuffs and foodstuffs from regions of Japan affected by the nuclear crisis. Imports to be submitted to a declaration attesting that: (i) the product has been harvested and/or processed before 11 March 2011; and (ii) it does not contain levels of radionuclides iodine-131, caesium-134, and caesium-137 above the maximum levels provided by Euratom	Commission Regulation No. 297/2011 (25 March 2011) and Commission Implementing Regulation No. 351/2011 (11 April 2011)

*Source:* G-20 report

## **IX F. Technical Barriers to Trade (TBT)**

### **EU's proposed 'dirty fuel' label on oil extracted from Canadian oil sand**

The EU Climate Action Commissioner has informed members of the EU Parliament that the Commission would soon submit for ratification by EU Member states a draft regulation that targets oil sands and shale oil from Canadian oil sands as high-carbon fuels. EU Directive 2009/30/EC provide for specification of petrol, diesel and gas-oil and seek to introduce a mechanism to monitor and reduce greenhouse gas omissions.

The EU has reportedly instructed its suppliers to reduce the carbon footprint of fuels by 6 percent over the next decade. The EU Commission is also in the process of determining certain 'default value' which could be associated with its greenhouse gas emissions. Canada has been seeking to avoid a separate default value for oil derived from oil sands.

To the extent that EU's proposed fuel quality standards could lead to discriminatory treatment and import restrictions for oil extracted from Canadian oil sands, a new trade dispute could potentially arise. The EU Climate Action Commissioner has reportedly assured that the EU Commission would ensure that clean fuel regulations do not specifically target Canadian oil sands.

The proposed regulation would likely meet the definition of a "technical standard" under Article 2.1 of the TBT Agreement. The moot question is whether the proposed EU regulation would result in discriminatory treatment vis-à-vis like products of national origin or originating in any other country.

## **IX G. Sanitary and Phytosanitary Measures (SPS)**

In the EU, SPS Measures are adopted mostly at the EU level, although the Member States can also adopt measures. After the entry into force of the Lisbon Treaty, the adoption of EU basic acts on SPS require the assent of the EU Parliament and Council. SPS measures are usually adopted on the basis of the implementing powers conferred on the Commission under an EU act. Thus, the formulation and adoption of such measures has been subject to the 'comitology' procedure. The key regulatory agencies involved in the development of the SPS measures are the Standing Committee on the Food Chain and Animal Health and the Standing Committee on the Plant Health. Following the entry into force of the Lisbon Treaty, new rules govern the Commission's exercise of implementing powers. Furthermore, under the Lisbon Treaty, SPS measures may also be established on the basis of powers conferred on the Commission to adopt 'delegated acts'.

### **Development reported during review quarter**

## **Voluntary Private Standards**

In the context of global sourcing, European retailers and supermarkets require private food certification of their suppliers to ensure that the products they import to the EU are safe. In this regard, the developments taking place in the WTO SPS Committee may be of importance for this monitoring report.

The WTO SPS Committee, at its meeting on 30-31 March, 2011 adopted a new report that outlines five actions that WTO Members might take to deal with private sector standards for foods and animal and plant health.

The SPS Committee agreed on five actions in relation to private sector SPS standards: (1) develop a working definition of private sector standards with respect to SPS; (2) promote regular dialogue between the SPS Committee and the three internationally recognised standards-setting organisations: the WHO-FAO Codex Alimentarius Commission on food safety; the World Organization for Animal Health; and the International Plant Protection Convention; (3) the developments in WTO councils and Committees to be expeditiously passed on to the SPS Committee; (4) have the WTO Members assist domestic private sector bodies that are dealing with these SPS standards in order to understand the issues raised before the SPS Committee, and (5) have the SPS Committee explore the possibility of cooperation with three internationally recognised standard-setting organisations in order to disseminate information that underlines the importance of international SPS standards.

The discussions taking place at the SPS Committee have raised the question whether the SPS Committee has even the mandate to deal with private sector standards. The possible use of SPS Agreement to assist in the development of private sector standards was not envisaged by the negotiators of the SPS Agreement. In the long term, dealing with the complexities of the private sector standards is likely to be a sensitive issue for both exporters and importers in developed and developing countries.

## **Regulation on Cultivation of GM Crops**

The use of Genetically Modified Organisms (GMOs) is regulated on the basis of Regulation No. 1929/2003 on genetically modified food and feed, Directive 2001/18/EC on the deliberate release of GMOs into the environment, and Regulation 1830/2003 on the traceability and labelling of GMOs, and food and feed produced from GMOs.<sup>46</sup> On April 12, 2011, the EU Parliament's Committee on Environment, Public Health and Food Safety voted on a draft report seeking amendment of EU Directive No. 2001/18/EC that allowed the EU Member States to restrict or prohibit the cultivation of GMOs in their territory. Member States may not legislate with respect to the cultivation of GMOs, but only their use. The EU Parliament emphasised that 'cultivation is in fact closely linked to land use and the conservation of fauna and flora, areas in which the Member States retain significant powers'.

The EU Parliament noted that in the opinions issued by the legal services of the EU Council and the EU Parliament, there were strong reservations about the legality of national measures that could be taken by Member States as they had very little to do with environmental considerations, or public morality or other known exceptions. The EU Parliament Reports states as follows:

“Member States may adopt measures restricting or prohibiting the cultivation of all or particular GMOs authorised in accordance with Directive 2001/18 or Regulation EC No. 1829/2003, and consisting of genetically modified varieties placed on the market in accordance with relevant EU legislation on the marketing of seed and plant propagating material, in all or part of their territory, provided that these measures are based on (i) grounds relating to environmental impacts which

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<sup>46</sup> 2003 O.J. (L268) 1.

might arise from deliberate release or the placing on the market of GMOs, and which are complimentary to the environmental impacts examined during the assessment of the negative impacts on the environment; (ii) the absence of data or lack of data on the potential negative impacts of the release of GMOs on the territory or bio-diversity of the Member State; or (iii) other grounds that may include, inter alia, changes in agricultural practices, land use, town and country planning, socio-economic impacts, or other legitimate factors.”

The proposed change would allow the EU Member States to state environmental grounds, such as pesticide resistance, for restricting or banning the cultivation of EU-approved genetically-modified crops. Restriction or prohibition of GM crop production within its borders by an EU Member State need not constitute a prima facie violation of WTO law. This is mainly because the ban would not appear to restrict the actual trade of the product. Such a ban may nevertheless lead to trade related issues if it also involves the import ban of GM seeds used to produce GM crops. It needs to be examined whether such a ban could fall within the definition of SPS measure defined in Annex A of Paragraph 1 of the WTO SPS Agreement.

**Fruit Juice Proposal:** On May 26, 2011, the Committee on Environment, Public Health and Food Safety recommended the adoption of a Commission proposal of 21 September 2010 to amend the Council Directive 2001/112/EC relating to fruit juices and certain similar products meant for human consumption. The proposal provided for banning addition of sugar to fruits juices, while the addition of sugar would be allowed for nectar and some very specific products covered by the Directive. It also proposed to adapt the Directive to technological progress, taking into account the developments such as quality factors and other labelling requirements recognised by international bodies such as the Codex Alimentarius Commission.

At the heart of the EU Commission’s proposal is the removal of sugar from the list of authorised ingredients for juices. Only nectars and similar products listed in Annex to the Directive may, in future, be sweetened. In sum, this proposal seeks to prohibit added sugar in fruit juices. The proposal also includes two important new matters: permitting 10% mandarin or tangerine juice in orange juice and the addition of sweeteners to fruit nectars. The developments are considered to be in alignment with the Codex standards. These two proposals are also likely to involve costly changes to the labelling of products. This proposal is likely to be put for vote in the plenary of the EU Parliament in July, 2011.

**EU- Beef (Hormones):** Memorandum on Beef Hormones dispute signed with the United States<sup>47</sup>

The representatives of the European Communities (EC) and United States to the World Trade Organization in Geneva signed a Memorandum of Understanding on 13 May 2009 on a provisional solution to the long-running dispute over hormone-treated beef. This Memorandum provided for a substantial reduction of sanctions imposed by the United States on European products, while the EC improved market access opportunities for high quality beef, a product traditionally exported by the United States.

In terms of the MOU, the duties would have expired only in August 2012. However, a ruling of the US Federal Court of Appeal implied that the US government no longer has the authority to continue to impose the duties beyond 29 July 2007. As a result the duties have now been lifted. It may be pertinent to note that this development brings to a close a dispute filed by the US against the then EC in 1997 against measures that banned the use of growth-promoting hormones as well as imports of meat and meat products treated with hormones. In 1998, the WTO Appellate Body found that the EU import prohibition on meat and meat products from cattle treated with any of the six specific hormones was inconsistent with Article 3.3 and 5.1 of SPS Agreement. Pursuant to EU’s non-compliance with the WTO DSB recommendations, retaliatory duties were imposed against products such as meat, poultry, cheese, vegetables, cereals, spices, minerals,

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<sup>47</sup> Press Release, *Memorandum of Beef Hormones Dispute signed with the United States*, EUROPA, (May 13, 2009), <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/239&type=HTML&aged=0&language=EN&guiLanguage=fr>, MEMO/09/239( May 13, 2009)

mustard and other manufactured goods.

**Imports of Fruits to EU:** EC Council Regulation 1182/2007 provides that all fruit and vegetables should comply with the general marketing standard (sound, fair and marketable quality) and indicate the country of origin. The latter must be in a language understandable by the consumer of the country of destination.

The standard shall apply in all marketing stages including import and export, unless stated otherwise. The holder of these products may not display or market them in any manner than in conformity with the standard. The holder is responsible for ensuring this conformity.

Certain countries including India have a special status whereby the EC Commission approves conformity checks within these countries. This infers that produce adheres to EU marketing standards prior to its actual importation, monitored by approved inspection bodies within the third country.

Recently, the EU Commission issued an implementing legislation EU Regulation 327/11 on 16 April 2011, for establishing the standard import value for determining the entry price of fresh fruits and vegetables.

Commission Regulation (EU) No 420/2011 of 29 April 2011 amended Regulation (EC) No 1881/2006 setting maximum levels for certain contaminants in foodstuffs. <sup>48</sup>

### **'REACH'- EU Chemical Regulation**

Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) is a European Community Regulation on chemicals and their safe use. EC Regulation 1907/2006 entered into force on 1 June 2007. REACH is expected to cover approximately 30,000 of the 100,000 chemicals currently available on the European market. REACH is being implemented in phased manner over the period of 10 years, with important deadlines scheduled on 1 December 2008, 30 November 2010, 31 May 2013 and 31 May 2018.

Under REACH, any chemical traded in the EU, has to pass through the following stages:

- ❖ Registration of Chemical substance
- ❖ Evaluation of Registration Application/ hazardous Chemical Substance
- ❖ Authorization of hazardous Chemicals, or
- ❖ Restriction of Chemicals posing unacceptable level of hazards/ risk

The most hazardous chemicals and those used in the largest volumes are required to be registered first.

One of the objectives of REACH is to ensure the availability of hazard and safe use information for every chemical to the consumers in form of a central inventory.

### **Current Status of REACH**

Around 143,000 chemical substances were pre-registered by some 65,000 by first deadline i.e. 1st June 2008, to avail the extended registration deadlines for phase-in products. Businesses across the globe have filed 25,000 applications for around 4300 chemical substances under the first registration deadline of 30 November 2010. ECHA, the regulatory body, managing the implementation of REACH is preparing for subsequent steps like revaluations of registration application as well of chemical substances, authorization and restriction of chemicals. Enforcement of EU REACH is responsibility of each EU member state.

### **REACH: Implications for India**

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<sup>48</sup> 2000 O.J. (L 111) 3

EU is one of the largest markets for Indian exports. REACH may have direct and indirect implications for major exporting sectors like iron and steel, organic chemicals, textiles, apparel, carpets, footwear, electronic equipment, medicament mixtures, etc. Non-compliance with REACH will result in loss of access to EU market. As of now, the legislation extends to all substances manufactured / imported in / into EU in quantity more than 1 ton per year. The detailed criterion for the functioning of REACH is as follows:

- ❖ Chemical substance,
- ❖ Tonnage (used / imported/ manufactured in EU) and
- ❖ Risk/ hazards posed by it. If a chemical poses unjustifiable hazards/ risks then EU would restrict the use of such chemicals.

Initially applied to chemicals and their safe use, it will now be extended to all articles containing any identified Substances of Very High Concern (SVHC) from 1 June 2011. Because of the extended stipulation on articles, the European buyers have already started seeking supplier / third party declarations on REACH compliance and absence of the SVHCs on products being exported to EU countries

### **Box: III**

#### **EU Emission Trading Scheme and the Aviation Industry**

The aviation industry accounts for almost 2-3 % of global carbon emissions. In 2008 the EU passed legislation to include aviation in the EU-Emission Trading Scheme (EU-ETS). This means that from 2012, overall CO<sub>2</sub> emissions of the aviation industry will be capped. All operators flying to and from the EU will have to surrender one allowance for every ton of CO<sub>2</sub> emitted on a flight to and from (and within) Europe. By March 31, 2011 each aircraft operator must file two independently verified reports – a TKM report (tonne-kilometre benchmark) and their 2010 emissions report for fuel consumed during all flights in/out of the EU.

Allocation of free allowances is based on a benchmark relating to transported persons and cargo in the base period 2010. Under current rules, 15% of allowances will be auctioned but this share may increase with the planned revision of the EU-ETS Directive. Operators emitting more than their allocated amount of CO<sub>2</sub> will need to reduce emissions or - more likely - procure extra allowances. A special reserve of 3% of the total quantity of allowances will be allocated to new aircraft operators and operators experiencing sharp growth.

The EU-ETS affects all aircraft operators regardless of where they are based, provided that they operate flights departing from and / or arriving at an aerodrome in the EU. The EU-ETS affects passenger and cargo flights in aircraft with a maximum take-off weight of more than 5700kg. A set of special flights, e.g. to remote regions, training flights, military flights, etc., will be altogether exempt from the scheme.

Every aircraft operator will be administered by one EU Member State. For operators with a European operating license this will be the Member State which granted the operating license. Where this is not the case, operators will be assigned the Member State with the greatest estimated attributed emissions from flights in the base year. The EU Commission has already published a provisional list assigning a Member State to each aircraft operator, and national competent authorities have started contacting operators.

In case of non-compliance, operators face a penalty of € 100 per missing allowance on top of the obligation to purchase (and surrender) missing allowances. Additionally, an operating ban may be imposed on the aircraft operator.

Three US airlines (American, Continental, and United) and the Air Transport Association of America (ATA) have taken legal action against the EU legislation before the European Court of Justice claiming it is against

international law.

Source: *Economic Times*, July 14, 2011; *Financial Times* July 13, 2011 & ICTSD Reporting; Jul 6, 2011 (Geneva)

## Other developments during review quarter

A Directive on environmental quality standards for surface water was among the 27 legal acts incorporated into the EEA Agreement on 20 May 2011. The EU Directive aims to improve protection of rivers, lakes and coastal waters against pollution from a wide range of chemical substances.<sup>49</sup>

## X. Contingency Trade Protection

### Anti Dumping

After the establishment of the TFEU, there has been a change in the applicable EU legislation dealing with antidumping. The updated antidumping provisions are incorporated in the Council Regulation No. 1225/2009.<sup>50</sup> The EU Commission is responsible for the conduct of the AD investigations. The adoption of AD measures is subject to the new 'comitology' rules which entered into force in March, 2011. The Commission's proposal must now be adopted by the EU Parliament and Council in accordance with the ordinary legislative procedure. These new rules and procedures establish the conditions for control by Member States of the Commission's exercise of its implementing powers.

EU is one of the most active users of antidumping measures. During the first half of 2011, EU initiated eight antidumping investigations, four interim reviews and four expiry reviews. The EU also initiated two anti-circumvention proceedings. During the period 1995-2010, 269 measures were imposed by the EU out of which 124 measures are currently in force.

### Antidumping Measures adopted by EU during 1995-2010

China	68
India	17
Federation of Russia	17
Thailand	17
Others	150
Total	269

Source: WTO

### EU and China

Almost 45% of the antidumping measures applied by the EU are directed at a single country, namely People's Republic of China. A list of the measures invoked by the EU against China during the quarter under review is mentioned below.

- On 19 April 2011, Commission Notice 2011/C 121/26 initiations on imports of concentrated soy protein products, containing by weight 65% or more of proteins (N x 6.25) calculated on the dry matter by excluding added vitamins, minerals, amino acids and food additives (HS 2106.10.20; 2106.90.92; 2309.90.10; 2309.90.99; 3504.00.90) from China.

<sup>49</sup>*New Water Quality Standards*, EFTA, (May 20, 2011), <http://www.efta.int/eea/eea-news/2011-05-20-new-water-quality-standards.aspx>.

<sup>50</sup>O.J.(L 343)

- On 23 May 2011, the Commission decided to granting certain parties an exemption from the extension to certain bicycle parts of the anti-dumping duty on bicycles originating in the Chinese mainland imposed by Council Regulation 2474/93, last maintained and amended by Regulation 1095/2005, lifting the suspension and revoking the exemption of the payment of the anti-dumping duty extended to certain bicycle parts originating in the Chinese mainland granted to certain parties pursuant to Commission Regulation 88/97.<sup>51</sup>
- On 17 May 2011, Commission Regulation (EU) No 477/2011 initiated an investigation concerning the possible circumvention of anti-dumping measures imposed by Council Implementing Regulation (EU) No 511/2010 on imports of certain molybdenum wires originating in the People's Republic of China.<sup>52</sup>
- On 13 May 2011 Council Implementing Regulation (EU) No 475/2011 imposes a definitive anti-dumping duty on imports of certain plastic sacks and bags originating in the People's Republic of China and Thailand.<sup>53</sup>
- On 3 May 2011- Council Implementing Regulation (EU) No 474/2011 imposed a definitive anti-dumping duty on imports of certain plastic sacks and bags originating, inter alia, in the People's Republic of China.<sup>54</sup>
- On 30 May 2011, Council Implementing Regulation (EU) No 554/2011 terminated the anti-dumping proceeding on imports of polyester staple fibers originating in People's Republic of China.<sup>55</sup>
- On 10 May 2011- Council Implementing Regulation (EU) No 457/2011 imposed a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of melamine originating in the People's Republic of China.<sup>56</sup>
- On 4 May 2011- Council Implementing Regulation (EU) No 453/2011 imposed a definitive anti-dumping duty on imports of furfuraldehyde originating in the People's Republic of China.<sup>57</sup>
- On 9 June 2011, Council Implementing Regulation 554/2011 terminated the anti-dumping proceeding on imports of polyester staple fibres originating in the China. It may be recalled that a definitive anti-dumping duty was imposed on the imports of the product concerned from China in Regulation 428/2005.<sup>58</sup>
- On June 21, 2011, Council Implementing Regulation (EU) No. 627/2011 was issued terminating the expiry review and the new shipper review of antidumping measures concerning certain magnesia bricks originating in the People's Republic of China<sup>59</sup>
- On June 27, 2011, Council Implementing Regulation (EU) No. 627/2011 imposed provisional antidumping duty on imports of certain seamless pipes and tubes of certain seamless pipes and

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<sup>51</sup>2011 O.J.(L 136) 99

<sup>52</sup>2011 O.J.(L 131) 14

<sup>53</sup>2011 O.J.(L 131) 10

<sup>54</sup>2011 O.J.(L 131) 2

<sup>55</sup>2011 O.J.(L 150) 1

<sup>56</sup>2011 O.J.(L124) 2

<sup>57</sup>2011 O.J.(L 123) 1

<sup>58</sup>2011 O.J.(L 211) 1

<sup>59</sup>2011 O.J.(L 169) 1



tubes of stainless steel originating in the People's Republic of China.

### **Antidumping measures against India**

- On 10 May 2011, Commission Regulation (EU) No. 446/2011 was issued imposing a provisional anti-dumping duty on imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia<sup>60</sup>
- On 13 May 2011, Council Implementing Regulation (EU) No. 469/2011 was issued amending Regulation (EC) No 1292/2007 imposing a definitive anti-dumping duty on imports of polyethylene terephthalate (PET) film originating in India.<sup>61</sup>

### **Other developments during review quarter**

On 5 May 2011 the Council Implementing Regulation (EU) No 444/2011 imposed anti-dumping duty imposed by Regulation (EC) No 599/2009 on imports of biodiesel originating in the United States of America to imports of biodiesel consigned from Canada<sup>62</sup>. The investigation concluded that the definitive anti-dumping duties imposed on imports of biodiesel originating in the USA were circumvented by imports into the Union of biodiesel in a blend containing by weight 20 % or less of biodiesel.

### **Anti-Subsidy Investigations**

The updated EU countervailing/ antisubsidy provisions are incorporated in the Council Regulation No. 597/2009.<sup>63</sup>

During the review quarter, EU issued two anti-subsidy investigations. The details are provided below.

#### *Anti-subsidy proceeding on coated paper from China*

Recently, an EU antidumping subsidy found that that the Chinese government was significantly subsidizing its coated fine paper industry. This was the first-ever anti-subsidy proceeding conducted by the EU against China.<sup>64</sup> The EU Commission found that China was granting subsidies through a number of schemes which included preferential lending to the coated paper industry, income tax exemptions, indirect tax and import tariff program exemptions, grants, and government provision of goods and services. The Chinese government and exporters argued that the imposition of countervailing duties, in addition to the antidumping duties, would amount to double counting. The NME methodology implies reliance on third country surrogate prices and costs to calculate the normal value for dumping margin comparison based on non-subsidized values. In practice, the antidumping duties resulting from the application of NME methodology may already offset the distortions allegedly caused by subsidization and simultaneous imposition of countervailing duties may result in double counting.

For more details see the Section on the findings of WTO Panel/Appellate Body more exhaustively covered in the *US-Trade Policy Monitoring Report for Q1*.

The 'double counting' argument was raised by the Chinese Government and exporters during the investigation. The EU Commission has, however, argued that double counting does not apply in view of the

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<sup>60</sup>2011 O.J.(L122) 47

<sup>61</sup>2011 O.J. (L 129) 1

<sup>62</sup>2011 O.J.L 122) 12

<sup>63</sup>2009 O.J.(L 188)

<sup>64</sup>2011 O.J.(L 128) 2.

application of the lesser duty rule. According to the Commission since both the antidumping and anti-subsidy duty was calibrated not to exceed the injury margin, which was lesser of the two in the underlying investigation, the countervailing duty investigation did not have the effect of providing additional protection to the EU industry.

#### *Anti subsidy proceedings against India*

Commission issued a notice of initiation of an anti-subsidy proceeding concerning imports of certain stainless steel fasteners and parts thereof originating in India.<sup>65</sup> The initiation was based on a complaint filed by the European Industrial Fasteners Institute (EiFi)

On 19 April 2011, Council Implementing Regulation (EU) No 405/2011 imposed a definitive countervailing duty and provisional duty was imposed on imports of certain stainless steel bars and rods originating in India.<sup>66</sup>

### **Safeguard measures**

The EU rules on the conduct of safeguard investigations are contained in Regulation 260/2009. This Regulation applies to imports from outside the EU. Regulation No. 625/2009 applies on imports from some of the erstwhile CIS countries including Armenia, Azerbaijan, Belarus, Russia, Tajikistan, Turkmenistan, Uzbekistan as also from Vietnam and People's Republic of Korea. The EU has also adopted Regulation No. 427/2003 regarding imposition of transitional product specific safeguards on imports from China.<sup>67</sup> The special safeguard mechanism against China is scheduled to expire in December 2013, i.e., upon the completion of 12 years of the signing of the Protocol of Accession.

The EU has also reserved the right to use special safeguard measures against agricultural products as part of its UR commitments. Although SSG measure are reserved for 539 tariff lines, in practice actual use has been limited to only a few lines such as chicken, turkey, and sugar.

The EU Commission is responsible for the conduct of the safeguard investigations. Pursuant to the Lisbon Treaty, the adoption of the safeguard measures is not amenable to the new 'comitology' rules. The adoption of definitive safeguard measures requires positive opinion voted by qualified majority of a committee composed of the Member state representatives. To this extent, that the adoption of safeguards follows a different procedure vis-à-vis antidumping and countervailing duty measures.

The EU has not applied any safeguard measures since 2005. One investigation was launched under Council Regulation (EC) No 260/2009 and (EC) No 625/2009 regarding imports of wireless wide area networking (WWAN) modems. However, the EU Commission terminated the investigation in January 2011 as the request for the investigation was withdrawn by the concerned party.<sup>68</sup>

## **XI. MEASURES AFFECTING PRODUCTION AND TRADE**

### **XI A. Public Procurement**

In the EU, consolidation of public procurement is an ongoing process. The EU government procurement framework is based on a clear-cut dichotomy between public utilities and the rest of the public sector.

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<sup>65</sup> 2011 O.J. (C 142) 36

<sup>66</sup> 2011 O.J. (L 108) 3

<sup>67</sup> 2003 O.J. (L 65) 16

<sup>68</sup> 2011 O.J. (C 24/19)

The Public Sector Directive<sup>69</sup> applies to most governmental agencies including Ministries, Central Governments and Municipal bodies. This Directive covers all public works, service and supply contracts.

The new Utilities Directive covers contracting authorities cooperating in specific fields such as water, energy, transport, airport facilities and postal services sectors. This Directive includes public undertakings and also private sector bodies which provide or operate fixed networks for utilities such as sewerage, public transport, energy, etc.

The EU public procurement rules apply to all countries that are signatories to the WTO GPA, the EFTA and countries such as Chile and Mexico. As required under the WTO GPA, EU has notified its threshold limits, i.e., procurement contracts beyond certain value to the WTO Secretariat.<sup>70</sup>

Most of the barriers to market entry in relation to government procurement relate to national policies on issues such as market liberalisation, state-aid, and sensitive issues such as defence.

## **XI B. Taxation and tax-related matters in EU**

The European Commission's tax policy strategy was explained in a Communication of 23 May 2001.<sup>71</sup> In this Communication, the Commission reiterated its belief that there is no need for an across the board harmonisation of Member States' tax systems. Provided that they respect EU rules, Member States are free to choose the tax systems that they consider most appropriate and according to their preferences. In addition, any proposal for EU action in the tax field needs to take account of the principles of subsidiarity and proportionality. There should only be action at EU level where action by individual Member States could not provide an effective solution.

Taxation of parent companies and subsidiaries: The Council agreed on a general approach on a draft directive recasting existing rules on the common system of taxation applicable in the case of parent companies and subsidiaries of different member states (8619/11).<sup>72</sup>

Removing cross-border tax obstacles for EU citizens: The Council adopted conclusions, on the basis of a communication from the Commission, on removing cross-border tax obstacles for EU citizens. The conclusions take note of the most relevant complaints made by EU citizens about cross-border tax obstacles, as identified in the communication, and recognised the importance of ensuring that citizens do not face tax obstacles when exercising the freedoms provided by the EU's internal market.<sup>73</sup>

The Council adopted a decision authorizing Lithuania to exempt from value added tax small enterprises whose annual turnover is below the equivalent in national currency of EUR 45,000. Previously the maximum threshold for Lithuania was EUR 29 000. The decision authorizes Lithuania to apply a measure derogating from Article 287 of directive 2006/112/EC on the common system of value added tax.

## **XI C. Subsidies and other financial assistance**

Subsidies and various Government assistances are provided by the EU and in certain cases by the Member States to both manufacturing and service industries. The EU provides support for agricultural products,

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<sup>69</sup>2004 O.J. (L134) 114

<sup>70</sup>Secretariat, *Trade Policy Review*, GPA/W/309/Add.4, (Feb. 5, 2010)

<sup>71</sup> Communication from the Commission to the Council, the European Parliament, and the Economic and Social Committee, *Tax policy in the European Union - Priorities for the years ahead*, COM(201)260, ( May 23, 2001)

<sup>72</sup> Press Release, Council of European Union, *Economic and Financial Affairs*, (May 17, 2011)

<sup>73</sup>*Id.*

fisheries, ship building, civil air craft research, pharmaceuticals and mining.

Article 107(1) of the TFEU prohibits “any aid granted by a Member State or through the Member State or through the State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods...in so far as its affects trade between Member States”. There are only a few categories for which State Aid is permitted such as employment, environment protection and growth which are considered compatible with the EU Common Market.

Although the TFEU prohibits state aid, Article 122 expressly authorises Member States of the EU to provide financial aid to other Member countries of the EU facing distress. Article 122 reads as follows: "Where a member state is in difficulties or is seriously threatened with difficulties caused by natural disasters or exceptional occurrences beyond its control, the council, on a proposal from the commission, may grant, under certain conditions, union financial assistance to the member state concerned." This provision has been relied upon by the by various Member States of the EU to require other Members who are not part of the Euro zone to participate in the bail-out programme of distressed countries within the EU. The UK which is not part of the Euro zone has expressed its resistance to support bail-out of other ailing economies citing that this obligation should be limited to countries with the monetary union.

On 20 June 2011, the European Commission has launched a public consultation as the first step of a review of the criteria used to apply EU state aid rules to Member States' financial support for making and distributing films. The current Cinema Communication is 10 years old. The Commission has published an issue paper identifying areas for reflection, such as competing to attract major film productions using state aid, and supporting activities other than production. The Commission has invited interested parties to submit their comments by 30 September 2011

## **XII. INTELLECTUAL PROPERTY RIGHTS**

The Lisbon Treaty specifically incorporates an EU-wide Intellectual Property Regime (IPR). Article 118 of the TFEU stipulates that measures “shall be established for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for setting up of centralized Union-wide authorization, coordination and supervisions arrangements.”

The IPR regime in the EU is governed by EU legislation and legislation in Member States. The separate Member State legislation implements and complements, where appropriate, EU legislation and commitments under international agreements.

On 8 March 2011, the Court of Justice of the European Union gave its Opinion regarding compatibility with the EU Treaties of a draft agreement published by the EU Council of Ministers in April 2009. The agreement would create a single EU-wide patent court with jurisdiction over both European patents, as currently granted by the European Patent Office ('EPO') under the European Patent Convention ('EPC'), and future EU patents.

The EPC is an international agreement to which 36 states, including all 27 EU Member States, are currently parties. While it provides for a single procedure for the granting of European patents by the EPO, successful grants are issued and treated by each contracting party as a national patent. Moreover, questions relating to the validity or infringement of an EPO patent must be litigated nationally. This results in multiple national court procedures and creates the risk of diverging judgments in different EU Member States on the substantive questions such as patent infringement.

Indeed, the discrepancies between the Europe-wide granting system on the one hand and multiple national enforcement systems on the other, was a concern to industries such as the pharmaceuticals. In order to

remedy these discrepancies, the European Commission adopted a proposal for a Regulation providing for the creation of an EU patent in the year 2000.<sup>74</sup> An EU patent would allow an individual or company to obtain a single patent effective and enforceable across all states within the EU.

The ECJ was asked to give its opinion on the legality of the draft agreement under Article 300(6) EC (now Article 218(11) TFEU) which allows the EU institutions to seek the opinion of the ECJ about the compatibility of an international agreement with EU law before it is concluded.

The Court of Justice ruled against the compatibility of the draft agreement, on the basis that by conferring on the future patent court, which is outside the institutional and judicial framework of the EU the exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the EU patent and to interpret and apply EU law in that field, the agreement will alter the essential character of the powers which the Treaties confer on the ECJ and on national courts

### ***IPR enforcement at the customs***

The EU Commission published its annual report on customs enforcement of IPRs on 14 July 2011. The number of shipments stopped almost doubled from last year to 103 million. One of the major trends this year is the growing number of detentions of postal packages. China continued to be the main source of IPR infringing products, totalling 85% of all IPR infringing articles. Other countries such as Turkey, Thailand, Hong Kong or India accounted for the majority in certain product categories. 90% of all detained products were either destroyed or a court case was initiated to determine the infringement.<sup>75</sup>

### **EU Regulations on Labelling and Eco-labelling**

The Council did not oppose the proposed revised ecological criteria for the award of the EU Ecolabel to personal computers (6829/11), notebook computers (6843/11), light sources (6964/11), and copying and graphic paper (6965/11).

EU Parliament approved new textile labelling rules for fur and leather<sup>76</sup> on 11 May 2011.

## **XIII. EU COMPETITION POLICY**

Competition policy in the European Union remains a central pillar of the Single Market. The EU Competition Policy also covers state aid, which could potentially distort competition in the common market.

The Lisbon Treaty also effected modifications to the provisions dealing with EU Competition Policy. In the place of Article 81 of the old Treaty Article 101 of the TFEU has come into effect. Article 101 makes illegal any agreement or concerted practice between undertakings that significantly restricts competition within EEA. Article 82 of the old Treaty has been replaced by Article 102 of the TFEU. Article 102 makes it illegal for dominant company to abuse its dominant position in market.

Article 101 of the TFEU does not apply to agreements of minor importance or *de minimis* where the aggregate market share of the undertakings is less than 10%. Again, block exemptions apply automatically in case of certain restrictive agreements, both vertical and horizontal, if they tend to improve economic efficiency. In order to benefit from block exemptions, an agreement must not contain hardcore restrictions such as price fixing, output restrictions, or market sharing.

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<sup>74</sup>2011 O.J. C 337 E/278

<sup>75</sup>Press Release, *Fight against fakes, Increased customs actions boost protection for IPR*, EUROPEAN COMMISSION, (July 14, 2011).

<sup>76</sup> Press Release, *Parliament approves new textile labelling rules for fur and leather*, EUROPEAN PARLIAMENT, May 11, 2011, <http://www.europarl.europa.eu/en/headlines/content/20110429FCS18372/13/html/Parliament-approves-new-textile-labelling-rules-for-fur-and-leather>

The main legislative texts for merger decisions are the EC Merger Regulation (EUMR) and the Implementing Regulation notified vide Regulation No. 139/2004 issued on 20 January 2004. The Merger Regulation is implemented vide Commission Regulation No. 802/2004 issued on 7 April 2004. The Merger Regulation contains the main rules for the assessment of concentrations, whereas the Implementing Regulation concerns procedural issues. In terms of the Merger Regulation, all concentrations with a “Community dimension” are subject to review by the EU Commission before the merger could take place. There are various threshold requirements under the Merger Regulation.<sup>77</sup>

The EUMR applies to concentrations with the EU dimension. There are two elements to this test: (1) is there a concentration, and (2) does it have an EU dimension? A concentration arises where there is a change in control on a lasting basis. Temporary changes of control will not meet this test.

Whether a concentration has an EU dimension is determined by the turnover of the parties. A merger, however, will not have to be notified to the EU unless the merging parties have: (1) a combined worldwide turnover of more than € 2.5 bn , (2) at least two of the merging parties have a combined turnover exceeding 25 mn Euros in each of at least three EU Member States.

In relation to substantive operation of EU competition law, there is a view that EU has been progressively moving towards a more ‘economics-based approach’ in all the three key areas: the regulation of anti-competitive agreements; the abuse of dominance; and merger control. The study highlights that the EU Commission routinely insistence on more substantive economics analysis regarding most aspects of the three areas.

#### **XIV. TRADE POLICIES BY SECTOR**

##### **XIV A. Agriculture**

The EU is the fourth largest agricultural producer in the world after the United States, China and India. The EU is one of the biggest producers of dairy milk, wheat, grapes, olives, rapeseed, beef, eggs, pork and potatoes. It is also one of the leading producers of wine and spirits.

The EU Agricultural Policy has undergone significant changes in recent years. The legal texts were shortened and made easier to read. Almost eighty legal acts have been scrapped as part of what is technically known as the single Common Market Organization.

EU Agricultural Policy is constantly evolving. 50 years ago, the emphasis was on providing enough food for a Europe emerging from a decade of war-induced shortages. Subsidising production on a large scale and buying up surpluses in the interests of food security are now largely a thing of the past. EU policy aims to enable producers of all forms of food - from crops and livestock to fruit and vegetables or wine - to survive by themselves in EU and world markets.

##### ***EU quality policy for agricultural goods***

On 14 April 2011, the Agriculture and Fisheries Council discussed an EU Commission proposal for a regulation on agricultural product quality schemes, the first part of the so-called ‘quality package’. This is the beginning of a review of EU quality policy for agricultural products. The review aims at streamlining current rules and procedures, ensuring that consumers receive high-quality agricultural products, and boosting the

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<sup>77</sup>Macerdoti, *Competition Law and Economics through case studies*, EUROPEAN UNIVERSITY INSTITUTE, <http://www.eui.eu/DepartmentsAndCentres/Law/ResearchAndTeaching/Seminars/2010-2011> (last visited July 25, 2011)

diversity of agricultural activities, especially traditional production. The proposed single regulation for agricultural product quality schemes includes three complementary schemes (i.e., PDOs and PGIs, TSGs, and optional quality terms) in a single regulatory structure, overseen by a single quality policy committee.

### ***Agricultural Subsidies***

The Common Agricultural Policy is the most integrated of all EU policies and consequently takes a large share of the EU budget. It is reported by the EU that the portion of the EU budget has dropped from a peak of nearly 70% in the 1970s to 34% over the 2007-2013 period.<sup>78</sup>

### ***E-Coli Crisis: EU Support to Vegetable Producers.***<sup>79</sup>

The Commission proposal to increase the EU support under the emergency plan for vegetable producers affected by the E-Coli crisis from € 210 million to € 227 million was agreed to by the Member States. This will allow the Commission to pay 100% of the demands for compensation from the different Member States.<sup>80</sup>

### **Developments during review quarter**

**G20 - Ministerial meeting on Agriculture:**<sup>81</sup> The G-20 Ministerial took place in Paris in June 2011. The meeting discussed addressed various issues including food price volatility, high food prices and export bans and although no concrete action was proposed.<sup>82</sup> Interestingly, the G-20 members are yet to see a convergence on issues such as bio-fuel subsidies and regulation on commodities markets.

**Sugar Policy:** The EU Sugar regime considers sugar to be either 'in-quota' (i.e., sugar produced within a fixed production quota or 'out of quota' (i.e., sugar produced in excess of the production quota and which is ineligible for export refunds). In response to rising world sugar prices, which have reportedly eclipsed the internal EU sugar prices for the first time in three decades, on 12 May 2011, the EU Commission decided to allow an additional 700,000 tonnes of "out-of-quota" white sugar to be exported from the EU on to the world market. This brought the total amount of 'out-of-quota' white sugar approved by the EU Commission for export between October 1, 2010 and September 30, 2011 to 1.35 million tonnes.

**Common Fisheries Policy:** It is learnt that the EU Commission is at an advanced stage of formulating a Common Fisheries Policy which is aimed at fisheries management and sustainable fishing practices in the EU. The reform proposal is likely to contain several parts, which include: formulating a new Basic Regulation, forming the policy objectives setting out the cornerstones of the CFP; a new Markets Regulation; and sometime later a new regulation for the European Fisheries Funds. The proposed European Maritime

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<sup>78</sup>European Commission, *Meeting the needs of farmers and consumers*, [http://europa.eu/pol/agr/index\\_en.htm](http://europa.eu/pol/agr/index_en.htm) (last visited July 23, 2011)

<sup>79</sup>*E-Coli crisis: the European Union provides support to the vegetables producers*, DACIAN CIOLOȘ THE EUROPEAN COMMISSIONER FOR AGRICULTURE AND RURAL DEVELOPMENT, [http://ec.europa.eu/commission\\_2010-2014/ciolos/headlines/news/2011/06/20110608\\_en.htm](http://ec.europa.eu/commission_2010-2014/ciolos/headlines/news/2011/06/20110608_en.htm) (last visited June, 2011 )

<sup>80</sup>*EU increases support to vegetable sector affected by E-Coli*, EURSIAREVIEW, (June 28, 2011), <http://www.eurasiareview.com/eu-increases-support-to-vegetables-sector-affected-by-e-coli-crisis-28072011/> (last visited June, 2011 )

<sup>81</sup>Council\_EN\_170511\_Council\_3087th Council meeting

<sup>82</sup>Javier Bias, *G20 set to avoid tough talks*, FINANCIAL TIMES, June 22, 201, at A3

and Fisheries Fund (EMFF) supposed to be set up by late 2011. EU Business, an online informational portal indicates that the Commission has proposed a budget of € 6.7 billion for the EMFF.<sup>83</sup>

The legislation may take more time for implementation as the proposal has to be sent to the Council and the European Parliament as co-legislators. The developments taking place in the field of Common Fisheries Policy have to be closely monitored in the future Monitoring reports.

### **Border measures**

Council Implementing Regulation (EU) No 422/2011 of 29 April 2011 fixing the import duties in the cereals sector has been made applicable from 1 May 2011.<sup>84</sup>

Council Implementing Regulation (EU) No 413/2011 of 28 April 2011 amended Regulation (EC) No 1580/2007 as regards the trigger levels for additional duties on cucumbers and cherries, other than sour cherries<sup>85</sup>.

Council Implementing Regulation (EU) No 529/2011 of 30 May 2011 amended the Commission Regulation (EC) No 1580/2007 as regards the trigger levels for additional duties on tomatoes, apricots, lemons, plums, peaches including nectarines, pears and table grapes.<sup>86</sup>

Limited temporary special conditions for imports of feedstuffs and foodstuffs from regions of Japan affected by the nuclear crisis have been introduced recently. Imports are to be submitted with a declaration attesting that: (i) the product has been harvested and/or processed before 11 March 2011; and (ii) it does not contain levels of radionuclides iodine-131, caesium-134, and caesium-137 above the maximum levels provided by Euratom<sup>87</sup>; Effective 26 March 2011 to 30 June 2011.

### **Domestic measures**

Commission Implementing Regulation (EU) No 396/2011 of 20 April 2011 was issued fixing representative prices in the poultry meat and egg sectors and for egg albumin, and amending Regulation (EC) No 1484/95.<sup>88</sup>

Commission Implementing Regulation (EU) No 426/2011 of 2 May 2011 was issued amending Regulation (EC) No 889/2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007 on organic production and labeling of organic products.

Commission Implementing Regulation (EU) No 542/2011 of 1 June 2011 amended Implementing Regulation (EU) No 540/2011 and implementing Regulation (EC) No 1107/2009 of the European Parliament and of the Council as regards the list of approved active substances to take into account Directive 2011/58/EU amending Council Directive 91/414/EEC to renew the inclusion of carbendazim as active substance.<sup>89</sup> The Council noted that there was not a qualified majority either for or against the proposal to renew the inclusion of carbendazim in Annex I to directive 91/414. As the Council has concluded its proceedings on this issue, the Commission is now entitled to finalise the decision-making

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<sup>83</sup>*Common Fisheries Policy-Guide*, EUBUSINESS, <http://www.eubusiness.com/topics/fisheries/cfp-reform-11> (last visited July 15, 2011)

<sup>84</sup> 2011 O.J. (L 111) 9

<sup>85</sup> 2011 O.J.(L 110) 14

<sup>86</sup>2011 O.J.(L 143) 12

<sup>87</sup> 2011 O.J. (L80) 5; 2011 O.J. (L97) 20

<sup>88</sup> O.J. (L105) 3

<sup>89</sup> O.J. (L153) 189



procedure in respect of this proposal

### **Agreement on forests in Europe**

In March 2011 draft documents were adopted by the representatives of the Forest Europe countries, including those from all member states and the Commission to be presented for decision in Oslo in June. On this occasion, all non-EU Forest Europe countries expressed their support for the opening of negotiations including Russia, Turkey, Ukraine, Norway and Switzerland. In June, ministers could sign a mandate for opening negotiations on an LBA on forests in Europe. After the mandate is signed, negotiations on an LBA on forests in Europe are expected to begin no later than 31 December 2011 and are to be concluded by 30 June 2013.

Following a public debate, the Council took note of a progress report submitted by the Presidency (10519/11) on a proposal for extending, for a two-year period, the current European Atomic Energy Community (Euratom) framework program, which expires at the end of 2011. The Euratom programme is organized in two parts corresponding to actions on fusion energy research and nuclear fission and radiation protection (7402/11), and to research activities of the Joint Research Centre (JRC) (7404/11). The proposal envisages a maximum amount of EUR 2.5 billion for the implementation of the 2012-2013 Euratom programs.

The European Commission on 13 April 2011 presented its proposal to overhaul the outdated rules on the taxation of energy products in the European Union. The new rules aim to restructure the way energy products are taxed to remove current imbalances and take into account both their CO<sub>2</sub> emissions and energy content. Existing energy taxes would be split into two components that, taken together, would determine the overall rate at which a product is taxed. The Commission wants to promote energy, efficiency and consumption of more environmentally friendly products and to avoid distortions of competition in the Single Market.<sup>90</sup>

A new proposal was put forward regarding energy taxation. The new proposal sets the minimum rate for taxation of the CO<sub>2</sub> component at € 20 per ton of CO<sub>2</sub> for all uses of the energy products. This component does not apply to electricity. The rate of the energy component depends on whether the energy product is used as a motor fuel (in which case it is € 9, 6 per GJ, to be reached gradually by 2018) or as heating fuel or motor fuel used for the purposes set out in Article 8(2) of the Energy Taxation Directive (ETD) (in which case it is € 0, 15 per GJ as of 2013). This component also applies to electricity.<sup>91</sup>

## **XIV.b SERVICES**

### **ENERGY AND UTILITIES**

More than 50% of the EU's energy comes from countries outside the EU – and the percentage is growing. Much of that energy comes from Russia, whose disputes with transit countries have repeatedly disrupted supplies in recent years. This highlights the need for the EU to monitor its oil and gas supplies more closely and be prepared in the event of an energy emergency. For decades, EU countries have maintained emergency oil stocks. The EU is working to make those stocks more readily available and clarify when and how they can be used. Driving the policy is the EU's bid to achieve a 20% reduction in its greenhouse gas emissions by 2020 (compared with 1990 levels), mainly by boosting the use of renewable energy and curbing energy consumption. The measures will also reduce dependence on imports of gas and oil and help shelter the economy from volatile energy prices and uncertain supplies.

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<sup>90</sup>COM(2011)169, available at

[http://ec.europa.eu/taxation\\_customs/taxation/excise\\_duties/energy\\_products/legislation/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/excise_duties/energy_products/legislation/index_en.htm)

<sup>91</sup>2003 O.J. (L283) 51

In a public session, the Presidency informed the Council on the state of play (10203/11) of a draft regulation on energy market integrity and transparency. As the EU internal energy market for electricity and gas is becoming more and more liberalized and interconnected the potential for its abuse and manipulation is also growing. The proposed regulation (Regulation No. 17825/10) sets up a framework for monitoring wholesale energy markets in order to detect market abuse and manipulation, thereby ensuring the integrity and transparency of those markets.

From 1 June 2011 onwards, all 143 nuclear power plants in the EU will be re-assessed using EU wide criteria. These are comprehensive tests as the Commission has called for which embrace both natural and man-made hazards (i.e. effects of airplane crashes and terrorist attacks). On 13 May 2011, the Commission and the European Nuclear Safety Regulators' Group (ENSREG) agreed on the criteria covered and the way controls will be done.<sup>92</sup>

### **High-level conference on infrastructure**

The Presidency briefed the Council on the outcome of the high-level conference on energy infrastructure held in Budapest on 16 and 17 May 2011. This event is the follow-up to the European Council conclusions of 4 February 2011, which addressed the issue of the future development of the EU's energy infrastructure, focused in particular on financing challenges, the primordial role of a stable regulatory framework, smart grids, permit procedures, EU cost allocation mechanism and the option of EU funding for infrastructure.<sup>93</sup>

### **Employment Guidelines**

Council approved 2011 Employment Guidelines<sup>94</sup> on 19 May, 2011. In terms of the *Guidelines*, Member countries must take into account guidelines on job market participation, the fight against social exclusion and poverty, and the quality and performance of education and training systems.

## **XV. WTO DISPUTE SETTLEMENT UPDATE**

### **Ongoing Disputes:**

The EU remains one of the most active Members in WTO dispute settlement. During the review period EU was a part of three dispute settlement proceedings.

#### ***United States — Anti-Dumping Measures on Imports of Stainless Steel Sheet and Strip in Coils from Italy (Complaint by the European Union)*<sup>95</sup>:**

On 1 April 2011, the European Union requested consultations with the United States concerning anti-dumping measures imposed on imports of stainless steel sheet and strip in coils ("stainless sheet and strip") from Italy. More specifically, the European Union requested consultations with respect to the impact of an arithmetic error, due to the application of the 'zeroing methodology', allegedly made by the US Department of Commerce ("USDOC") during the following USDOC proceedings: the original investigation of July 1999; the Section 129 proceeding of September 2007; the Ministerial Error Determination of October 2007;

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<sup>92</sup> Declaration of ENSREG, 13<sup>th</sup> May 2011

<sup>93</sup> Press Release, COUNCIL OF THE EUROPEAN UNION, *Transport, Telecommunications and Energy*, (June 10, 2011), available at [http://www.worldenergy.ch/file/News/10610\\_ER\\_EU\\_Hauptresultate.pdf](http://www.worldenergy.ch/file/News/10610_ER_EU_Hauptresultate.pdf).

<sup>94</sup> Press Release, COUNCIL OF THE EUROPEAN UNION, *Employment, Social Policy, Health and Consumer Affairs*, (May 19, 2011), available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/lisa/122116.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lisa/122116.pdf).

<sup>95</sup> WTO, *United States—Anti Dumping Measures on Imports of Stainless Steel Sheet and Strip in Coils from Italy*, WT/DS424/1, (April 6, 2011), available at [http://www.worldtradelaw.net/cr/ds424-1\(cr\).pdf](http://www.worldtradelaw.net/cr/ds424-1(cr).pdf)

and the second sunset review of December 2010. The European Union alleges that the above mentioned proceedings are measures that appear to be inconsistent with the United States' obligations under Articles 2, 5.8, 6.8, 9.3, 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement, and Article VI: 2 of the GATT 1994. On 18 April 2011, Japan requested to join the consultations with EU.

***European Union and a Member State — Seizure of Generic Drugs in Transit (Complaint by India)<sup>96</sup>***

On 11 May 2010, India requested consultations with the European Union and the Netherlands regarding the repeated seizures on patent infringement grounds of generic drugs originating in India but transiting through ports and airports in the Netherlands to third country destinations. India alleges that the measures at issue are, in several respects, inconsistent as such and as applied, with the obligations of the European Union and the Netherlands under Articles V and X of GATT 1994 and under various provisions of the TRIPs Agreement, namely, Article 28 read together with Article 2, Articles 41 and 42, and Article 31 read together with the provisions of the August 2003 Decision on TRIPs and Public Health.

On 28 May 2010, Brazil, Canada and Ecuador requested to join the consultations. On 31 May 2010, China, Japan and Turkey requested to join the consultations. Subsequently, the European Union informed the DSB that it had accepted the requests of Canada, China, Ecuador, India, Japan and Turkey to join the consultations.

***European Communities — Measures Prohibiting the Importation and Marketing of Seal Products (Complaint by Canada)<sup>97</sup>***

On 2 November 2009, Canada requested consultations with the European Communities concerning Regulation (EC) No. 1007/2009 of the European Parliament and of the EC Council of 16 September 2009 on trade in seal products, and subsequent related measures. According to Canada, the regulation in question prohibits the importation and the placing on the EC market of all seal products.

Canada claims that the above measures are inconsistent with the obligations of the European Communities under Article 2.1 and 2.2 of the TBT Agreement; Articles I:1, III:4 and XI:1 of the GATT 1994 and Article 4.2 of the Agriculture Agreement.

On 16 November 2009, Iceland requested to join the consultations. On 18 October 2010, Canada requested supplementary consultations with the European Union to take into account that, on 17 August 2010, the European Commission published Commission Regulation (EU) No. 737/2010, which lays down detailed rules for the implementation of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on trade in seal products (“implementing measure”). In addition, Canada further stated that it may also wish to consult further on matters pertaining to Regulation EC No. 1007/2009 that were previously raised at the consultations held on December 15, 2009 or that have since arisen as a result of the implementing measure or otherwise. Canada claims that the ‘implementing measure’, either in itself or in combination with Regulation EC No. 1007/2009, is inconsistent with Articles 2.1, 2.2, 5.1, 5.2, 5.4, 5.6, 6.1, 6.2, 7.1, 7.2, 7.4, 7.5, 8.1 and 8.2 of the TBT Agreement; Articles I:1, III:4 and XI:1 of the GATT 1994 and Article 4.2 of the Agriculture Agreement. On October 29, 2010, Norway requested to join the supplementary consultations. On 11 February 2011, Canada requested the establishment of a panel. At its meeting on 24 February 2011, the DSB deferred the establishment of a panel.

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<sup>96</sup> WTO, *European Union and a Member State-Seizure of Generic Drugs in Transit*, WT/DS408/2, (June 1, 2010), available at [http://trade.ec.europa.eu/doclib/docs/2011/january/tradoc\\_147465.pdf](http://trade.ec.europa.eu/doclib/docs/2011/january/tradoc_147465.pdf).

<sup>97</sup> WTO, *European Communities-Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/4, (Feb. 14, 2011), available at [http://www.worldtradelaw.net/pr/ds400-4\(pr\).pdf](http://www.worldtradelaw.net/pr/ds400-4(pr).pdf).

At its meeting on 25 March 2011, the DSB established a panel. China, Colombia, Iceland, Japan, Mexico, Norway and the United States reserved their third party rights. Subsequently, Argentina and Ecuador reserved their third party rights. At its meeting on 21 April 2011, the DSB established a panel in dispute DS 401. As provided for in Article 9.1 of the DSU with regard to multiple complainants, it was agreed that that panel and the panel established on 25 March 2011 for dispute DS400 would be a single panel.

### **European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (Complaint by China)**

Article 9(5) of Council Regulation (EC) No. 384/96 (the EC's Basic Anti-Dumping Regulation) requires exporters from non-market economies to satisfy certain criteria in order to receive individual dumping margins and individual duty rates. Council Regulation (EC) No. 384/96 was subsequently repealed and replaced by Council Regulation (EC) No. 1225/2009 of 30 November 2009.

On 31 July 2009, China requested consultations with the European Communities concerning Article 9(5) of the Basic Anti-Dumping Regulation which provides that in case of imports from non-market economy countries, the duty shall be specified for the supplying country concerned and not for each supplier and that an individual duty will only be specified for exporters that demonstrate that they fulfill the criteria listed in that provision. According to China, Article 9(5) of the Basic Anti-Dumping Regulation is inconsistent, as such, with the European Communities' obligations under:

### **Potential Trade Disputes**

#### ***The EU may initiate a WTO dispute settlement over Chinese export credits***

According to EU Commission officials, favorable conditions exist as regards availability of export credit insurance programs and loans to Chinese firms which enable them to bid for lucrative infrastructure projects in third countries (including in Africa, Southeast Asia and Eastern Europe) in fields such as energy, telecoms and transport. An EU Commission report, circulated to EU Member States on 1 February 2011, and containing preliminary findings of an investigation into the trading practices of two Chinese telecommunications infrastructure companies, apparently suggested that these two companies received loans constituting WTO-inconsistent export credit financing providing Chinese telecommunications infrastructure firms with a major competitive advantage over European rivals. The EU Commission is reportedly preparing to initiate a WTO dispute against China over the aforesaid export credit policies, provided that affected companies in the EU supply the necessary evidence of instances in which such policies have led to a distortion of competition, through the submission of a complaint.

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