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The WTO Appellate Body upholds the panel's ruling in the dispute *Indonesia – Safeguard on Certain Iron or Steel Products*

On 15 August 2018, the World Trade Organization's (hereinafter, WTO) Appellate Body issued its report in the case *Indonesia – Safeguard on Certain Iron or Steel Products*. The case concerns two complaints filed by Chinese Taipei and Viet Nam on 12 February 2015 and on 1 June 2015, respectively. The WTO Appellate Body upheld the WTO panel report, in which the panel had concluded that: 1) The specific duty applied by Indonesia on imports of galvalume (*i.e.*, flat rolled products of iron or non-alloy steel of a width of 600mm or more, containing by weight less than 0.6% of carbon, with a thickness not exceeding 0.7mm) did not constitute a safeguard measure within the meaning of Article 1 of the WTO Agreement on Safeguards (hereinafter, SG Agreement); and 2) The application of the specific duty on imports of galvalume originating in all but 120 countries was inconsistent with the most favoured nation (hereinafter, MFN) treatment under Article I:1 of the General Agreement on Tariff and Trade (hereinafter, GATT) 1994. The decision of the WTO Appellate Body reaffirms the principle that a WTO panel must make an independent assessment to determine whether a particular WTO agreement applies, while not being bound by the positions of the disputing parties on the issue.

On 22 July 2014, Indonesia imposed a specific duty on imports of galvalume. The specific duty was imposed after an investigation conducted under Indonesia's domestic safeguards legislation by Indonesia's competent authority (*i.e.*, *Komite Pengamanan Perdagangan Indonesia*). The specific duty was adopted pursuant to *Regulation No.137.1/PMK.011/2014* of the Minister of Finance of the Republic of Indonesia for a period of three years and was notified by Indonesia to the WTO Committee on Safeguards. Chinese Taipei and Viet Nam, as complainants, argued that the specific duty imposed by Indonesia was a safeguard measure (*i.e.*, was temporarily restricting imports of a certain product) within the meaning of the WTO SG Agreement, and that it was inconsistent with that agreement. Moreover, Chinese Taipei and Viet Nam argued that the specific duty, as a '*stand-alone*' measure, was inconsistent with Indonesia's MFN obligation under Article I:1 of the GATT. While Indonesia agreed that the specific duty was a safeguard measure within the meaning of the SG Agreement, it argued that it was consistent with it.

On 18 August 2017, the WTO panel circulated its report concluding that "*the specific duty applied by Indonesia on imports of galvalume by means of Regulation No.137.1/PMK.011/2014 does not constitute a safeguard measure within the meaning of Article 1 of the* [SG Agreement]". The panel recalled that one of the defining features of a

safeguard measure is "*the suspension, withdrawal, or modification of a GATT obligation or concession that precludes a member from imposing a measure to the extent necessary to prevent or remedy serious injury*". The panel noted that Indonesia had no binding tariff obligation with regard to galvalume in its WTO Schedule of Concessions (Article II of GATT 1994). Therefore, Indonesia was free to impose any duty it deemed appropriate on imports of galvalume, including the specific duty at issue in the dispute. The panel concluded that, since the specific duty did not suspend, withdraw, or modify Indonesia's obligations under Article II of the GATT, the SG Agreement did not apply, and, therefore, the panel dismissed the claims under the SG Agreement. Regarding the claim that the specific duty, as a '*stand-alone*' measure, was inconsistent with Article I:1 of the GATT, the panel noted that Article I:1 of the GATT requires that "*any favour, advantage, privilege or immunity*" granted by a WTO Member in relation to the application of, *inter alia,* "*customs duties and charges"* on imports originating in any other country must be "*accorded immediately and unconditionally to the like product originating in … the territories"* of all WTO Members. Therefore, the panel concluded that the application of the specific duty to all countries but to 120 countries constituted *"an 'advantage' in relation to a 'customs duty' granted to 'like products' that is not 'immediately and unconditionally accorded' to imports of galvalume from all WTO Members*". Therefore, the panel concluded that the application of the specific duty on imports of galvalume originating in all, but the 120 developing countries listed in *Regulation No. 137.1/PMK.011/2014,* was inconsistent with Article I:1 of the GATT.

On 28 September 2017, Indonesia notified the WTO Dispute Settlement Body (DSB) of its decision to appeal certain issues of law and legal interpretations of the panel report. On 15 August 2018, the WTO Appellate Body (hereinafter, AB) circulated its report. The AB upheld the WTO panel report and reaffirmed that the claims against Indonesia under the SG Agreement should be dismissed, as the measure at issue was not a safeguard measure and therefore not subject to the disciplines of the SG Agreement. Furthermore, the AB also upheld the panel's finding that the specific duty was inconsistent with Article I:1 of the GATT (MFN treatment).

The case *Indonesia – Safeguard on Certain Iron or Steel Products* is noteworthy because of its '*unusual*' outcome, diverting from the common understanding of all three parties to the dispute (*i.e*., Chinese Taipei, Viet Nam and Indonesia) that all agreed that Indonesia's specific duty on galvalume was indeed a safeguard measure and that the SG Agreement applied, only differing on whether Indonesia's specific duty was consistent with that agreement or not. However, the AB rejected that interpretation, even though Indonesia had conducted an investigation under its national safeguard legislation and had notified the specific duty to the WTO Committee on Safeguards. Two key elements can be deducted from the AB report: 1) The panel's obligation to determine the applicability of the covered agreement; and 2) The analysis and elements to determine if a measure constitutes or not a safeguard measure (or any other measure deemed to fall within the scope of a specific WTO agreement).

With respect to the panel's obligation to determine the applicability of the covered agreement, Indonesia argued in its appeal of the panel decision, that the panel had exceeded the scope of its terms of reference or failed to carry out an objective assessment of the matter by determining, on its own motion, "*whether the measure at issue constitutes a safeguard measure*" and by conducting a threshold analysis regarding the applicability of the SG Agreement despite the parties' "*concurring positions*" on the issue. The AB rejected these arguments stating that a panel was not precluded from determining the applicability of a specific covered agreement, even though the issue had not been raised by the parties. The AB underlined that the panel was "*not only entitled, but indeed required, under Article 11 of the DSU* [*i.e.*, the WTO Dispute Settlement Understanding] *to carry out an independent and objective assessment of the applicability of the provisions of the covered agreements invoked by a complainant as the basis for its claims, regardless of whether such applicability has been disputed by the parties to the dispute*". In addition, the AB reaffirmed that "*the description of a measure proffered by a party '*and the label given to it under municipal law*'*

are 'not dispositive*' of the proper legal characterization of that measure under the covered agreements*".

Secondly, the AB addressed the substantive issue of whether the WTO panel erred in determining that the specific duty imposed by Indonesia was not a safeguard measure under the SG Agreement. The AB stated that the SG Agreement applied to measures defined in Article XIX of the GATT 1994. The AB noted that Article XIX:1(a) of the GATT specifies that an action under that provision consists "*of the suspension, in whole or in part, of a GATT obligation or the withdrawal from or modification of a GATT concession*". Therefore, the AB stated that "[a]*bsent such a suspension, withdrawal, or modification, we fail to see how a measure could be characterized as a safeguard measure*". It added that "*the suspension of a GATT obligation or the withdrawal or modification of a GATT concession must be designed to pursue a specific objective, namely preventing or remedying serious injury to the Member's domestic industry*". Although the AB upheld the WTO panel report on the grounds that Indonesia had *"no binding tariff obligation with respect to galvalume in its WTO Schedule of Concessions*", it considered the reasoning used by the WTO panel to be '*problematic*' because it "*conflated the constituent features of a safeguard measure with the conditions for the conformity of a safeguard measure with the Agreement on Safeguards*". The AB noted that, under Article XIX:1(a) of the GATT 1994, a WTO Member has the right to suspend a GATT obligation or to withdraw or modify a GATT concession as an emergency measure "*to the extent and for such time as may be necessary to prevent or remedy serious injury"*. Similar wording is contained in Articles 5.1 and 7.1 of the SG Agreement. Contrary to the panel, the AB did not consider these requirements relevant for the legal characterisation of a measure as a safeguard measure. Instead, it considered these requirements relevant to the '*WTO-conformity*' of a safeguard measure. In other words, it appears that the domestic characterisation of the measure was not dispositive, and that the AB rejected the WTO panel's reasoning when it combined the issue of whether a measure was a safeguard with whether it was a permissible safeguard meeting all conditions. The AB considered that, at the moment of carrying out an independent and objective assessment, a WTO panel "*must identify all the aspects of the measure that may have a bearing on its legal characterization, recognize which of those aspects are the most central to that measure, and, thereby, properly determine the disciplines to which the measure is subject*". In doing so, the WTO panel "*should evaluate and give due consideration to all relevant factors, including the manner in which the measure is characterized under the domestic law of the Member concerned, the domestic procedures that led to the adoption of the measure, and any relevant notifications to the WTO Committee on Safeguards*". However, the AB stated that any of those factors was "*dispositive of the question of whether the measure constitutes a safeguard measure within the meaning of Article 1 of the* [SG Agreement]". The AB concluded that the design, structure and expected operation of the measure had to be assessed in relation to the two essential features of a safeguard measure: 1) Whether the measure withdraws a GATT obligation; and 2) Whether the measure is designed to prevent or remedy serious injury.

The decision by the WTO Appellate Body might prove relevant to the current challenges of the duties on aluminium and steel introduced by the US on the basis of Section 232 of the US Trade Expansion Act 1962 (hereinafter, Section 232), in particular on the basis of the rules related to '*national security*'. In March 2018, the US introduced import tariffs of 25% and 10%, respectively, on certain steel and aluminium products, from most countries (see *Trade Perspectives*, Issue No. 5 of 9 March 2018). A number of WTO Members filed complaints against those duties and argued that the US duties were safeguard measures and inconsistent with US obligations under the SG Agreement (see *Trade Perspectives*, Issue No. 9 of 4 May 2018). However, the US strongly rejected this argument, stating that the SG Agreement did not apply and that the imposition of the import tariffs under Section 232 is allowed on the basis of Article XXI of the GATT 1994 as a matter of '*national security*'. The key question in those disputes would be whether '*national security*' measures, under Section 232, could indeed be characterised as safeguard measures, with the consequence that the SG Agreement applies. Noteworthy is that, according to the AB report in the case *Indonesia – Safeguard on Certain Iron or Steel Products*, the domestic characterisation is not

dispositive, and that any determination on whether a measure actually constitutes a safeguard measure, would be the result of an independent assessment conducted by the WTO panel and possibly the AB. Although the US duties on aluminium and steel were not enacted under the relevant US law on safeguards, but under Section 232 on the basis of the rules related to '*national security*', it will be the task of the WTO panels to determine whether the US measures have to be considered safeguard measures and whether the SG Agreement applies. Importantly, the characterisation of the US measure as a safeguard measure has important consequences on the type of reactions that would be allowed to WTO Members, in particular with respect to '*retaliatory*' measures. In case those measures are determined to be safeguard measures, WTO Members may be allowed to re-balance the impact of the US measures on the basis of Article XIX(3) of the GATT 1994 or the SG Agreement.

The Appellate Body's decision in *Indonesia – Safeguard on Certain Iron or Steel Products* will no doubt have significant implications for future WTO cases, some of which look poised to be controversial because of how politically-charged they are. However, they underline the importance that the WTO dispute settlement system remain independent, effective and able to uphold WTO law and the agreed disciplines of the international trading system. All interested stakeholders and WTO Members should properly review this decision and closely monitor the ongoing challenges at the WTO with respect to the US import tariffs on aluminium and steel under US Section 232.

Following a worldwide trend in introducing Front-of-Pack nutrition labelling schemes, Belgium follows France by recommending the *Nutri-Score* scheme

On 22 August 2018, Belgium's Public Health Minister Maggie De Block announced that, following consultations with stakeholders, including consumer organisations, as well as food and retail representatives, Belgium would introduce the *Nutri-Score* Front-of-Pack (hereinafter, FoP) nutrition labelling system, previously introduced in France. Noting that "*we are facilitating the choice of healthy eating*," Minister De Block stressed that its use remained voluntary, with food manufacturers and distributors not obliged to employ the system in Belgium. Besides the announcement of the recommendation of *Nutri-Score*, no further details of the Belgian system were made public yet. Belgium follows a worldwide trend to introduce such FoP schemes, which follow two main models, colour codes in Europe and '*STOP*' signs in Latin America (see also the following article in this issue of *Trade Perspectives*).

Unlike traffic light labels, which highlight individual nutrients such as salt, sugar and fat, the *Nutri-Score* system provides a single score for the entire product, giving consumers an overall assessment of the product at a glance. *Nutri-Score* gives a rating to any food (except single-ingredient foods and water) going from a dark green A (best) to a red E (worst), by weighing the prevalence of '*good*' and '*bad*' nutrients. On 31 October 2017, France adopted the *Order fixing the form of additional presentation of the nutrition declaration recommended by the State*. Under the Order, the five-colour *Nutri-Score* system is the official (albeit voluntary) FoP nutrition label that France is recommending to food business operators (hereinafter, FBOs) in order to promote healthier food choices by French consumers.

Belgium announced the intention to follow the French model. Therefore, the detailed requirements are expected to be similar or identical. The Annex to the French Order describes the methods for calculating the unique, overall nutritional score of each food based on the nutrient content. On the one hand, nutrients and ingredients, which, according to the Order, have beneficial effects (*i.e.*, fruit and vegetables, nuts, vitamins, fibres and protein), are taken into account with positive component scores. On the other hand, nutrients, which according to the Order, should be limited in their intake (*i.e.*, saturated fats, simple sugars and salt), as well as calorie-dense foods, are taken into consideration with negative component scores. For three food categories (*i.e.*, added fats and oils, cheeses, and

beverages), there are more specific requirements to calculate the nutritional score. Foods are then divided into five categories on the basis of the nutritional score attained, which results from subtracting the positive from the negative component scores. The relevant food category is shown on the *Nutri-Score* logo, which consists of five colours, each displaying a different letter from the best nutritional value to the worst (*i.e.*, from dark green A, light green B, yellow C, orange D, to red E). According to the Order, the logo shall be placed on the FoP. FBOs that decide to adopt the recommendation on a voluntary basis, must inform the French Observatory of Food Quality (*i.e.*, *Observatoire de l'Alimentation*).

According to Article 35 of *Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers* (hereinafter, FIR), in addition to the forms of expression referred to in the FIR (*i.e.*, the harmonised panel with '*nutrition information*' on the side or back of the food packaging), the energy value and the amount of nutrients may be given by other forms of expression and/or may be presented using graphical forms or symbols in addition to words or numbers, provided that a number of requirements are met. According to Article 35(2) of the FIR, EU Member States may recommend to FBOs, providing the Commission with the details, the use of one or more additional forms of expression or presentation of the nutrition declaration that they consider as best fulfilling the following requirements: "*1) They are based on sound and scientifically valid consumer research and do not mislead the consumer; 2) Their development is the result of consultation with a wide range of stakeholder groups; 3) They aim to facilitate consumer understanding of the contribution or importance of the food to the energy and nutrient content of a diet; 4) They are supported by scientifically valid evidence of understanding of such forms of expression or presentation by the average consumer; 5) In the case of other forms of expression, they are based either on the harmonised reference intakes set out in Annex XIII of the FIR, or in their absence, on generally accepted scientific advice on intakes for energy or nutrients; 6) They are objective and non-discriminatory; and 7) Their application does not create obstacles to the free movement of goods*".

In order to justify the endorsement of its *Nutri-Score* scheme, France had stated that the introduction of nutritional information that is visible, legible, simple and easy to understand, particularly for populations with a low socio-economic status or low educational levels, was recommended among one of the many additional collaborative strategies and campaigns that, in France as at EU level, aim at achieving the objective of improving general nutrition. Furthermore, France argued that a number of scientific studies had proven the benefits and importance of a labelling system in improving the nutritional quality of consumers' grocery shopping, particularly for underprivileged households. Following consultations with a large number of stakeholders, scientists and consumers, France carried out an impact assessment study showing that, of the four systems tested, the *Nutri-Score* logo was the most effective scheme in terms of the consumers' ability to rate their groceries and improve the nutritional quality of their grocery shopping.

According to Article 35(2) of the FIR, Belgium must notify the details of its *Nutri-Score* FoP nutrition labelling scheme to the Commission. It appears that Belgium '*copied*' the French requirements. Reportedly, Public Health Minister De Block said that the *Nutri-Score* system was the preferred choice over other labelling systems, such as the UK's traffic light scheme, because tests in France, where it had already been adopted, showed it has "*greater impact*" on buying behaviours than other systems. An assessment of the French '*details*' may therefore be made for comparative reasons. The fifth requirement of Article 35 of the FIR provides that other forms of expression must be based either on the harmonised reference intakes (hereinafter, RIs) set out in Annex XIII of the FIR (*i.e.*, the average daily dietary intake of energy: 8,400 kJ/2,000 kcal, and nutrients: 70g total fat, 20g saturated fats, 260g carbohydrates, 90g sugars, 50g protein and 6g salt) or, in their absence, on generally accepted scientific advice on intakes for energy or nutrients. However, it is not clear whether the French Order (and, reportedly, the corresponding Belgian measure) takes them into account. There is no reference to the harmonised RIs in the description of the calculation of the nutritional score. Only for the three special cases (*i.e.*, added fats and oils, cheeses, and beverages), nutrient reference values are taken into account in order to adapt the calculation

method of the score according to the French Nutrition and Health Programme. On the *Nutri-Score* logo itself, there is no reference at all to RIs. In comparison, the UK's '*traffic light*' scheme is a '*hybrid*' FoP scheme that includes RIs (formerly known as '*guideline daily amounts*', or GDAs) and colour coding in the logo. The *Nutri-Score* logo and its colour codes appear to simply categorise foods from '*good*' foods to '*bad*' foods, without taking into account how much energy and nutrients are consumed per day. Regarding the sixth requirement of Article 35 of the FIR, namely that these additional forms of expression be objective and non-discriminatory, it appears that only saturated fats and '*simple*' sugars are relevant for the negative component of the calculation of the nutritional score. This appears to be a discrimination towards products containing saturated fats (which are not *per se* unhealthy) and presumably added sugars, which can also form part of a healthy diet, if consumed in moderation. France argued that the impact study showed that foods in the dark orange category are still being bought by consumers and that, from a public health perspective, additional studies had shown that "*improving the nutritional quality of people's diets using the score on which the Nutri-Score is based, leads to a reduction in the risk of a number of non-communicable diseases such as cancer, weight gain, cardiovascular diseases and metabolic syndrome*."

Various questions remain unanswered. First, whether such schemes are actually '*voluntary*' in nature or whether they implicitly force competing FBOs to apply the same labels, once one operator has started doing so. Second, whether certain elements of these schemes can be classified as '*non-beneficial*' nutrition claims. Finally, the proliferation of different schemes may become an obstacle to the free movement of goods within the EU and be contrary to EU law (see *Trade Perspectives*, Issue No. 21 of 20 November 2015 and Issue No. 6 of 24 March 2016). Regarding the first question, Belgium argues, like France had argued, that the objective of protecting public health in no way affects competition between manufacturers, as the additional information would only be recommended by public authorities, and was therefore in no way obligatory. However, the *Nutri-Score* nutrition labelling schemes in France and Belgium raise concerns as to whether they are, *de facto*, voluntary. Reportedly, major French retailers, as well as food manufacturers, have already committed to *Nutri-Score*. The same might happen in Belgium, where *Nutri-Score*'s use will also be also voluntary, but Public Health Minister Maggie De Block stated that she hoped that as many companies as possible would adopt it. Food retailer Delhaize already started rolling out *Nutri-Score* on some private label products lines in its Belgian supermarkets. Belgian retailer *Colruyt* has also signalled that it would begin to introduce the labelling scheme this autumn, starting with around ten product lines. *Carrefour Belgium* announced that it was in the process of installing the scheme for its own brand products. This may put pressure on other food manufacturers, particularly small enterprises and own-label product suppliers, to apply the same FoP labels. If evidence were to suggest that the FBOs not using the *Nutri-Score* label are being pushed out of the Belgian (and French) retail market, it would appear as though the scheme was not, at least *de facto*, '*voluntary*'.

The introduction of *Nutri-Score* in France has been criticised by a number of EU Member States. Bulgaria, the Czech Republic, Estonia, Germany, Hungary, Italy, Latvia, Poland, Portugal and Spain commented in the notification procedure of the French *Nutri-Score* scheme. For example, Hungary argued that *Nutri-Score* is "*not an additional form of expression or presentation of the energy value and nutrient content of foods, but instead classifies foods into categories A-E*" and might therefore fall under the scope of *Regulation (EC) No 1924/2006 on nutrition and health claims made on foods*. Germany stated in its opinion, *inter alia*, that "*since consumers cannot discern the amounts of nutrients that have led to a particular rating, individual dietary patterns cannot be taken into account*" and that it "*is unclear how the calculated rating can enable consumers to make an informed choice*". Italy argued, *inter alia*, that *Nutri-Score* was discriminatory, especially in relation to those products recognised at the EU level as a "*national heritage (PDO, PGI, TSG), which are required by law to maintain certain levels of nutrients provided for in the production specifications for the protection of traditions and consumers*".

In Germany, the consumer organisation *Foodwatch* called on the Federal Minister of Food and Agriculture, Julia Klöckner, to give up her opposition to the *Nutri-Score* scheme, after Belgium announced it would introduce such a label. In March 2018, Minister Klöckner rejected the idea of a colour food labelling system, saying that the simplified colour-coded labelling brought confusion. The German food industry views such food labelling schemes extremely critically. According to the German Government's coalition agreement, the German Government intends to further develop the system of nutritional labelling for packaged and processed foods by visualising the content "*in simplified form, if necessary*". A model for this is to be worked out with food and consumer associations, as well as with regard to the needs and views of smaller providers, by the summer of 2019.

Regarding the French *Nutri-Score*, the Pan-European industry group *FoodDrinkEurope* (FDE) issued a statement calling for discussions on a coordinated approach to FoP labelling to take place at EU level in close consultation and agreement with all stakeholders. The approach should also be consistent with the reference intakes approach (*i.e.*, taking into account the average daily dietary intake of energy) that the European food and drink sector had pioneered and should ensure meaningful, science-based and non-discriminatory information to consumers. In its statement, FDE regrets that the *Nutri-Score* scheme added yet another potential layer of complexity to what should be a harmonised EU approach to FoP labelling. Any proliferation of national schemes should be avoided, as this might affect the free movement of goods within the EU's Single Market.

After its notification, it is for the Commission and for the other EU Member States to assess whether the Belgian recommendation complies with EU rules, particularly with the FIR. It should be noted that, in October 2014, the Commission had initiated infringement proceedings against the UK over its '*traffic light*' FoP nutrition labelling scheme (see *Trade Perspectives*, Issue No. 19 of 17 October 2014), following complaints from food and retail operators that the use of such scheme would have negatively affected the marketing of several products, though proceedings were never taken further and will likely not be concluded in view of the impeding '*Brexit*'. The Commission appears to be still collecting information and arguments for the report on the effects of '*visual labelling*' schemes that it was required to submit to the Council of the EU and the European Parliament by December 2017 under the FIR. Stakeholders in the agri-food sector should monitor developments on FoP nutrition labelling and take action to ensure that their legitimate interests are voiced and represented within all relevant *fora*. In addition, given the unique situation of the EU Single Market, uniform legislation regarding FoP nutrition labelling should be adopted at the EU level, as piecemeal legislation across EU Member States will almost certainly have a negative impact on the free movement of goods within the EU Single Market.

Front-of-Pack Nutrition labelling: Developments in Latin America, within *Codex* and at the WHO

At the spearhead of a worldwide trend, various countries in Latin America are introducing Front-of-Pack (hereinafter, FoP) nutrition labelling systems. Such FoP schemes typically follow two main models, colour codes like in Europe and octangular black '*STOP*' signs, which were first introduced by Chile. On 1 June 2018, the World Health Organization's (hereinafter, WHO) Independent High-level Commission on Non-Communicable Diseases (hereinafter, NCDs) published its report '*Time to deliver*' (hereinafter, the Report). The Report lists a series of recommendations and is intended to advise the WHO Director-General, but is also addressed at Heads of State and Government, policy makers across all government sectors, as well as other stakeholders. The Report recognises, *inter alia*, that for the reformulation of food products and the implementation of FoP labelling, regulatory capacity along with multisectoral actions, involving relevant ministries and civil society, is needed (see *Trade Perspectives*, Issue No. 15 of 27 July 2018).

FoP labelling has become increasingly relevant for regulators and industries alike. Although there are countries that have implemented this kind of labelling, the implementation of such labels is always a topic of concern. A certain number of countries in Latin America have already taken measures to reduce the intake of salt, fats and sugar with the purpose of reducing obesity or improving their citizens' nutrition. Already back in 2013, Ecuador introduced a Sanitary Labelling Regulation for processed food (*i.e.*, *Reglamento Sanitario de Etiquetado de Alimentos Procesados para el Consumo Humano*) through a Ministerial Agreement (*i.e.*, *Acuerdo Ministerial 00004522 publicado en el Registro Oficial Suplemento No. 134 de 29 de noviembre de 2013*). Article 12 of the Regulation provides that, in addition to the nutritional information, a graphic system must be placed on the processed food product with colour bars placed horizontally. These colours would be red, yellow and green depending on the concentration of the nutritional components (total fats, sugars, salt). The red bar is assigned to the high content of a component and carries the phrase '*High In ...*'. The yellow bar is assigned to the medium content of a component and carries the phrase '*Medium In ...*'. The green bar is assigned to the low content of a component and carries the phrase '*Low In ...*'. Compared to the '*STOP*' signs later implemented by other countries, Ecuador's scheme is a less aggressive traffic light labelling system. In 2015, the Government of Chile adopted *Decree No. 13 of 16 April 2015* (hereinafter, Decree 13/2015) amending *Decree 977/1996*, the Food Health Regulation (*i.e.*, *Reglamento sanitario de los alimentos*). Decree 13/2015 requires warning messages in the shape of a black octagon in the form of a '*STOP*' sign to be placed on the FoP with the text '*High in…*', when food products exceed certain levels of energy, sodium, sugars or saturated fats. Chile's measure aims at addressing lifestyle risks by conveying certain information to the public (see *Trade Perspectives*, Issue No. 16 of 11 September 2015). Peru and Uruguay recently followed Chile with their own warning labels, while heated discussions on implementing FoP schemes are ongoing in Brazil, Argentina and Paraguay.

As of 16 June 2019, food manufacturers operating in Peru and importers will have to include warning labels on the packaging of and adverts for products with high levels of salt, sugar and fats. On 16 June 2018, the Peruvian Government published through a Decree (*i.e.*, *Decreto Supremo Nº 017-2017-SA*) its Advertising Warnings Manual (*i.e.*, *Manual de Advertencias Publicitarias*), constituting the final stage in the application of the Law of Promotion of Healthy Nutrition for Boys, Girls and Teenagers (*i.e.*, *Ley Nº 30021 de promoción de la alimentación saludable para niños, niñas y adolescentes*). According to the Decree, companies will have 12 months, from the date of publication on 16 June 2018 of the manual, to comply with the new warning labels. The labels will be black and white warnings shaped as octagons on the front of the packaging, placed in the top right corner. In its justifications, the manual states that "*the incorporation of advertising labels in the front side of processed products makes it easier for the consumer to make informed decisions in the selection of healthier products*". The labels should read (in Spanish) '*High in Sodium*', '*High in Sugar*' or '*High in Saturated Fats*', followed by the text '*Avoid its excessive consumption*', as well as '*Contains Trans Fats*', followed by the text '*Avoid its consumption*'. According to the manual, the same labels must appear in printed ads, as well as in the online advertising, and they should cover up to 15% of the advertising space. The warning must also be clearly mentioned in broadcast media advertising. Reportedly, the publication of the Decree took the food industry by surprise, since the Peruvian Industries Association (*i.e.*, *Sociedad Nacional de Industrias*, SNI) is currently discussing another regulation with Members of the Peruvian Congress to establish a system of '*nutritional traffic light*' labels.

Most recently, on 30 August 2018, Uruguay adopted a Decree of the Presidency of the Republic establishing FoP nutrition labelling of foods packaged in the absence of the client, whose final composition exceeds the established values of sodium, sugars, fats or saturated fats. The corresponding labels are black and white octagons which state '*excess in …*' followed by the corresponding nutrient. The Decree entered into force on 30 August 2018, but manufacturers and importers have 18 months to adapt to the new rules.

The Brazilian Health Regulatory Agency (*i.e.*, *Agência Nacional de Vigilância Sanitária*, hereinafter, ANVISA) is currently reviewing two proposals for compulsory FoP nutrition

labelling on food and beverage products: 1) A traffic light nutrition labelling system similar to the UK model, which is widely supported by the food and beverage industry; and 2) A warning label similar to the Chilean model, which is favoured by Brazil's consumer protection organisation and various non-governmental organisations active in the health sphere. The proposed FoP traffic light labels would determine percentages of sugar, total fat and sodium in the product, based on portion size, using red, orange or green to indicate high, medium or low levels. The warning label system would feature separate triangular black labels on products that are high in sugar, sodium, total fats, saturated fats or trans fats. Reportedly, ANVISA will likely finalise its decision on the compulsory FoP nutrition labelling by the end of this year.

The question arises whether the different measures imposing warning messages on food comply with international trade law. With respect to these measures, the different Latin American Governments were required to comply with the transparency obligation set out in Article 2.9 of the WTO Agreement on Technical Barriers to Trade (TBT) by notifying them to the WTO Secretariat. Arguably, the different FoP schemes present the characteristics of a technical regulation, as defined in Article 1 of Annex 1 to the TBT Agreement, which states that a technical regulation is a document that lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. According to Article 2.2 of the TBT Agreement, WTO Members must ensure that technical regulations do not create unnecessary obstacles to international trade. For this purpose, technical regulations must not be more trade-restrictive than necessary to fulfil a legitimate objective (*e.g.*, the protection of human health). It appears that the different measures' objectives could be addressed and achieved by more effective and less trade-restrictive public policies. Other less trade-restrictive information measures (such as launching campaigns to encourage the population to eat healthily and promoting physical activity programmes or consistent traffic light labels) also appear to be available for consideration.

Article 2.4 of the TBT Agreement provides that technical regulations must be based on the relevant international standards. Section 5 of the *Codex Alimentarius Guidelines on Nutrition Labelling* (CAC/GL2-1985) recommends, in relation to supplementary nutrition information, that it should intend to increase consumers' understanding of the nutritional value of their food and that it should assist in interpreting the nutrient declaration. The *Codex Guidelines on Nutrition Labelling* state that the information contained in the nutrient declaration "*should not lead consumers to believe that there is exact quantitative knowledge of what individuals should eat in order to maintain health, but rather to convey an understanding of the quantity of nutrients contained in the product"*. In addition, these guidelines provide that the use of supplementary nutritional information on food labels should be optional and should only be given in addition to (and not in place of) the nutrient declaration. There are alternative approaches under the *Codex Guidelines* that provide consumers with information to make appropriate dietary choices and reduce their risk of diet-related NCDs. For example, the *Codex Guidelines for Use of Nutrition and Health Claims* (CAC/GL 23-1997) and the *Codex Guidelines on Nutrition Labelling* establish conditions for voluntary '*low*', '*free*', or '*no added*' claims in tandem with mandatory nutrition labelling for energy and the nutrients fat, saturated fat, cholesterol, sodium, sugars (and consideration of trans fatty acids in countries where this nutrient is a public health concern). Section 3.5 of the *Codex Guidelines on Nutrition Labelling*, concerning '*tolerances and compliance*', may also be relevant. It does not establish nutrient thresholds for the nutrients targeted by the different measures. In spite of evidence of a positive association between the intake of certain nutrients and the risk of developing a disease or disorder, there is no scientific evidence suggesting that there is an identifiable threshold above which such risk exists. On this basis, considering that they set such specific nutrient thresholds, the measures would arguably contradict Section 3.5 of the *Codex Guidelines on Nutrition Labelling*. Additionally, the manner through which the measures pursue their legitimate public *heath* objective appears to be incompatible with the list of prohibited claims under section 3 of the *Codex General Guidelines on Claims* (CAC/GL 1-1979). For instance, Section 3.5 of these guidelines prohibits "*claims which could give rise to doubt about the safety of similar food or which could arouse or exploit fear in the*

consumer". '*High in*' or even '*Excess in*' warnings, such as those in Uruguay's legislation, should be avoided, as they are not foreseen by the applicable *Codex Guidelines on Nutrition Labelling*, and they risk demonising some foods whose moderate consumption can be part of a healthy diet.

One of the main issues regarding FoP nutrition labelling is the lack of global consistency, despite high-level WHO recommendations. In October 2017, the *Codex Alimentarius Committee on Food Labelling* noted that there was a need for international guidelines on best practices for FoP labelling, which would provide clear and transparent scientific guidance to governments. It also noted that new work on FoP labelling would help in harmonising FoP labelling and should provide a definition for FoP labelling and fundamental principles for monitoring and assessing the effectiveness of such schemes. Such definition should be scientifically substantiated, voluntary, and exclusively applicable to processed foods (possibly with a number of exceptions). Furthermore, FoP labelling should provide consumers with accurate and transparent nutrition information to help them to make informed decisions (see *Trade Perspectives*, Issue No. 20 of 3 November 2017). In the 41st Session of the *Codex Alimentarius* Commission in Rome in July 2018, the *Codex Alimentarius* Commission agreed to undertake new work to develop guidance on providing simplified FoP nutrition information to consumers to enable them to identify healthier food choices, while avoiding creating unnecessary obstacles to the food trade. Food labelling bearing this information is an important tool to help stop the increased incidence of obesity and some chronic non-communicable diseases.

The recommendations contained in the report by the *WHO's Independent High-level Commission on NCDs* only makes recommendations. However, the adoption of such recommendations could have a significant impact on the food industry, for instance as certain FoP nutrition labels could damage the reputation of a product when categorising it as *de facto* unhealthy. With the global trend of FoP labelling schemes, it is very important that a certain degree of consistency or harmonisation be maintained (or achieved) in order to ensure that: 1) Consumers are not misled; 2) Such labelling systems do not distort or restrict trade, particularly in protectionist fashion; and 3) It does not distort competition. Wilson Mello, President of the Directors Council of Brazil's Food Industry Association (*i.e.*, *Associação Brasileira das Indústrias da Alimentação*, ABIA) reportedly stated that "*the regional harmonization of nutritional labelling standards brings important benefits to countries and populations in the region and, therefore, ABIA advocates that ANVISA's guidelines on the subject should be discussed in Mercosur for having a joint regulation in the region*".

Stakeholders in the agri-food sector in Latin America and trading partners around the world should monitor developments on FoP nutrition labelling and take action to ensure that their legitimate interests are voiced and represented within all relevant *fora*, including the WTO.

Recently Adopted EU Legislation

Customs Law

- *Commission Implementing Regulation (EU) 2018/1206 of 28 August 2018 opening and providing for the management of Union tariff quotas for sheep meat and goat meat and processed sheep meat originating in Iceland*

Trade Remedies

- *Commission Implementing Decision (EU) 2018/1193 of 21 August 2018 terminating the anti-dumping proceeding concerning imports of silicon originating in Bosnia and Herzegovina and in Brazil*

Food and Agricultural Law

- *Commission Implementing Regulation (EU) 2018/1210 of 30 August 2018 on the minimum selling price for skimmed milk powder for the 23rd partial invitation to tender within the tendering procedure opened by Implementing Regulation (EU) 2016/2080*

Other

- *Commission Implementing Decision (EU) 2018/1203 of 21 August 2018 authorising Member States to provide for a temporary derogation from certain provisions of Council Directive 2000/29/EC in respect of ash wood originating or processed in the United States of America and repealing Commission Implementing Decision (EU) 2017/204*

- *Council Decision (EU) 2018/1152 of 26 June 2018 on the signing on behalf of the Union of the Agreement between the European Union and the Government of the People's Republic of China on certain aspects of air services*

- *Council Decision (EU) 2018/1153 of 26 June 2018 on the signing on behalf of the Union of the Agreement on civil aviation safety between the European Union and the Government of the People's Republic of China*

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