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WTO negotiations for the Environmental Goods Agreement: which goods are green goods?

On 8 July 2014, 14 WTO Members commenced negotiations for the definition of a plurilateral Environmental Goods Agreement (hereinafter, EGA), a new trade agreement aimed at promoting green growth and sustainable development by liberalising trade in environmental goods.

Formal plurilateral negotiations involving a list of environmental goods actually began among the Member Economies of the Asia-Pacific Economic Cooperation (hereinafter, APEC) at the 2012 APEC *Forum*. There, the 21 APEC Member Economies agreed on a list of 54 environmental goods for which they would reduce the import tariffs to 5 percent *ad valorem* or less by 2015. The WTO negotiations on the EGA, which currently include Australia, Canada, China, Chinese Taipei, Costa Rica, the EU, Hong Kong China, Japan, New Zealand, Norway, Singapore, the Republic of Korea, Switzerland and the US, will build on the APEC list. The EGA will apply in accordance to the most-favoured nation (MFN) principle once a '*critical mass*' of WTO Members have agreed to participate, and thus all WTO Members, even those that did not participate in the negotiations and did not commit to the obligations, will eventually benefit from the reduced tariff rates. If the EGA participants are to follow the example of the negotiating parties to the WTO Information Technology Agreement, '*critical mass*' may be reached once the participants negotiating the EGA account for 90 percent of the global trade in environmental goods. The 14 WTO Members that are currently involved in the negotiations account for 86 percent of said trade.

The types of goods covered by the APEC list include, *inter alia*, renewable bamboo-based products, parts and components for various '*green*' manufacturing items (*e.g.*, parts for biomass boilers, components to industrial air pollution control plants, parts for gas and wind turbines and solar panels and related items), products related to waste processing or disposal and instruments for testing and analysis of samples. Indeed, many of the goods included in the list are industrial in nature. There are no concrete indications of exactly how WTO Members will '*build*' upon the APEC list of environmental goods, though in April 2014, US Trade Representative, Mr. Froman, sent a letter to the US International Trade Commission requiring a report containing its advice as to the '*probable economic effect of providing duty-free treatment for imports of environmental goods for all U.S. trading partners*'. The list of goods contemplated by the US Trade Representative, for potential inclusion in the EGA,

reportedly included commodities not considered by APEC, such as liquefied natural gas, ethylene, wood pellets and palm oil, all of which can provide (*inter alia*) clean sources of energy.

Although the products currently listed by APEC countries may have environmentally-friendly end uses, it appears that the applicable tariff lines that would be subject to duty-relief do not include goods that are '*green*' by definition, such as commodities that are available in nature and constitute feedstock for biofuels, like palm oil, soybeans, sugarcane, rapeseed (*etc*.). This approach, based on the type of environmental good scheduled, will likely create a divide that results in a clear unbalance that will disfavour developing countries, given that these are the ones that mainly produce renewable commodities and derived products. The unbalance is reflected in the participants, which include, in relevant part, processors and industrialised countries, but not developing countries (such as Brazil, Indonesia, Malaysia, etc.) that pollute considerably less (on a *per capita* basis) and export commodities for (*inter alia*) renewable energy production. In this respect, it is rather surprising that these very countries (*i.e.*, Brazil, Indonesia, Malaysia and other Southeast Asian and South American countries), do not join the initiative as they are producers of renewable products and green commodities that are relevant for the production of (*inter alia*) renewable energy, such as palm oil, soy and sugarcane.

If, by means of example, we look at the case of palm oil, it is clear that palm oil must be considered as an environmental good, as it is a renewable product and one of the major sources of feedstock for biofuels, a '*green*' alternative to fossil fuel whose use is being encouraged through various policies in a number of jurisdictions. Trade in palm oil-based products has, however, been subject to increased levels of regulation in certain countries, driven by environmental concerns relating to palm oil's production process. The EU and the US, for example, apply, respectively, '*sustainability*' criteria and standards for renewable fuel in order to distinguish palm oil that is allegedly sustainably-produced from that which is not. These unilateral policies rest on criteria and mechanisms that are hardly grounded on uncontroverted scientific evidence (Argentina has challenged the EU's Renewable Energy Directive at the WTO, and the US has revealingly argued at the TBT Committee that the implementation of this measure had to be done in a flexible manner to avoid unintended consequences), are not trade-facilitating, are often the consequence of successful pressures exercised by domestic competing groups, and result in a *de facto* discrimination of palm oil and palm oil-based products *vis-à-vis* competing products of domestic or foreign origin.

In this context, while defining the list of environmental goods to be subjected to preferential tariff treatment within the EGA, WTO Members should consider setting the grounds for a globally-recognised certification system for palm oil, supporting the transition towards the sustainable certification of all palm oil and palm oil-based products, to be based on multilaterally (or plurilaterally) agreed standards. For example, in the context of the EGA, WTO Members could agree to grant preferential tariff treatment only to palm oil products that are certified as sustainable, just like preferential tariff treatment is granted, on the basis of the adherence by exporting countries to other important standards (*i.e.*, environmental, social, labour, human rights standards), to certain goods under the generalised system of preferences for developing countries (*e.g.*, the EU's GSP+ scheme). Such scheme would facilitate the diffusion of sustainable production practices, while reducing or eliminating barriers to trade affecting a number of applications of palm oil based on unsubstantiated claims.

Trade in environmental goods amounts to approximately USD 1 trillion and the current negotiating parties account for 86 percent of that trade. However, in order to achieve the stated objectives of promoting green growth and sustainable development, WTO Members must ensure that the definition of environmental goods does not result in product exclusions, which enhance discriminatory practices that ultimately run counter to the objectives of

promoting green trade. The EGA provides a landmark opportunity to meet environmental objectives by liberalising trade and agreeing on a set of global standards for environmental products.

Surely the definition of what is '*green*' must be a sophisticated one and cannot be merely based on the traditional international trade categories of '*like products*' and tariff nomenclature. Sustainable and non-sustainable products must not be discriminated on the basis of the process and production methods (PPMs) that are used to produce them (see Trade Perspectives, Issue No. 17 of 20 September 2013, which has historically taken a very critical stand on the legality of proposed schemes such as the EU's RED and FQD (*i.e.*, Fuel Quality Directive) and the US Renewable Fuel Standard), but the argument is made that the WTO system should be able to reward sustainable products (when certified on the basis of internationally-agreed standards or national standards that conform to the international ones) as '*green*' and reward them with tariff preferences under the terms of the EGA. Countries like Brazil, Indonesia and Malaysia should actively negotiate the EGA and promote this approach.

The EU requests the establishment of a WTO panel to examine pork import restrictions imposed by Russia

On 27 June 2014, the EU filed a request for the establishment of a panel before the WTO Dispute Settlement Body (hereinafter, DSB) with respect to certain Russian measures affecting the importation of live pigs and their genetic material, pork and certain other pig products from the EU. The EU submits that the measures at stake, which Russia adopted on grounds connected to outbreaks of African Swine Fever (hereinafter, ASF) in wild boar in certain areas of the EU earlier this year, amount to a WTO-illegal import ban.

In effect, a number of cases of ASF in wild boar, which appeared to originate from the prolonged presence of ASF in the western regions of Russia and Belarus, have been identified in Latvia, Lithuania and Poland since January 2014. ASF is most common at small farms and it is often spread by wild boar. There are no vaccines or drugs available for ASF, which is considered, although harmless to humans, one of the most dangerous diseases for pigs. Following the outbreaks, and in accordance with the applicable EU legislation (*i.e.*, *Council Directive 2002/60/EC of 27 June 2002 laying down specific provisions for the control of African swine fever and amending Directive 92/119/EEC as regards Teschen disease and African Swine Fever*), the affected areas in the EU were identified and subjected to a number of protective measures and restrictions. In part, these measures included intensified surveillance of wild boars and pigs, sending samples to the EU's reference laboratory, keeping pigs isolated in their holdings and banning the dispatch of live pigs, pig semen, ova and embryos, as well as exports of pork, from the infected areas (see Trade Perspectives, Issue No. 3 of 7 February 2014).

Simultaneously, the EU and Russia maintained bilateral contacts to agree on a set of measures providing for a satisfactory level of protection for both trading partners, while ensuring that trade flows on the concerned products not be overly affected. Nonetheless, Russia and the EU were unable to reach any agreement and, in April, the EU formally lodged a request for WTO consultations with Russia (see Trade Perspectives, Issue No. 8 of 17 April 2014). However, such WTO consultations also failed to settle the controversy.

In its request for the establishment of a panel, the EU maintains that Russia's import restrictions appear to be inconsistent with a number of Russia's obligations under the WTO Agreement on Sanitary and Phytosanitary Measures (hereinafter, SPS Agreement) and the General Agreement on Tariffs and Trade (*i.e.*, the GATT). In relevant part, the EU alleges that the Russian measures appear to violate Article 2.2 of the SPS Agreement, which provides that measures be necessary, based on scientific principles and not maintained without sufficient

scientific evidence. Article 5 of the SPS Agreement, which the EU also considers to be breached, further elaborates on these obligations. *Inter alia*, this provision requires that SPS measures be based on an appropriate risk assessment and that they be not more trade-restrictive than required to achieve the chosen level of protection.

The EU also holds that Russia's import restrictions appear to be discriminatory and to amount to a disguised restriction to international trade (in contravention of Articles 2.3 and 5.5 of the SPS Agreement). In this regard, the EU refers to the fact that Russia does not apply measures similar to those against the EU neither in its own territory (despite the widespread existence of ASF in certain regions of Russia) nor against third countries, such as Belarus and Ukraine (where Russia agreed to the '*regionalisation*' measures adopted in those countries following ASF outbreaks in their territories).

In fact, the EU submits that Russia has not acted in accordance with the rules on '*regionalisation*' laid down in Article 6 of the SPS Agreement. In particular, the EU argues that Russia has failed to ensure that its SPS measures be adapted to the characteristics of the area on the basis of a number of factors, including the level of ASF prevalence in geographically-limited areas, the existence of eradication and control programmes and the existence of relevant international guidelines. According to the EU, Russia has further failed to recognise that the EU's territory (excluding the areas affected by ASF, which were duly '*regionalised*'), is a "*disease-free area*", despite the measures adopted by the EU in that regard.

In a communication circulated within the WTO SPS Committee in March, Russia indicated that its measures were covered by Article 5.7 of the SPS Agreement which, on the basis of the precautionary principle, allows for the adoption of provisional SPS measures provided that (*inter alia*) there is insufficient scientific evidence. In its request for the establishment of a panel, the EU maintains that it is "*incorrect*" to proceed on such basis and that Russia's measures "*do not appear to be provisional*".

In addition to these and other alleged violations of the SPS Agreement (including that Russia failed to comply with its transparency and notification obligations), the EU submits that Russia's import restrictions are in contravention of Articles I:1 and III:4 of the GATT (which envisage the most-favoured nation and national treatment obligations, respectively), as well as Article XI:I of the GATT, which establishes the general prohibition on quantitative restrictions.

The EU's request for the establishment of a panel was discussed by the WTO DSB on 10 July, where Russia opposed the request and maintained that the measures at stake are in line with its WTO obligations. According to Article 6 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (*i.e.*, the WTO Dispute Settlement Understanding), the responding party may block the first request for the establishment of a panel. However, Russia will not be able to prevent that a panel of experts be established if the EU so requests for a second time.

In line with the importance of trade in pig and pork products between the EU and Russia (which amounted to EUR 1.4 billion last year), the adoption and maintenance of the import restrictions at hand has caused (and continues to cause) huge losses to concerned economic actors, as well as grave market distortions, in both the EU and Russia. While an assessment of the WTO-(in)compatibility of these measures is pending, economic operators in the affected sectors are advised to maintain fluent communications with the relevant authorities, in order to ensure that efforts to lift the restrictions as soon as practicable do not cease. In addition, the outcome of this dispute stands to shed some light on the application of '*regionalisation*' under the WTO, a clarification that has recently proven much needed, especially in the context of

instances where restrictive measures on imports were adopted without fully resorting to '*regionalisation*' (see Trade Perspectives, Issue No. 3 of 7 February 2014).

In parallel to the general EU food labelling rules established in the FIR, new labelling rules for fishery and aquaculture products enter into effect on 13 December 2014

New labelling rules for fishery and aquaculture products have been established in *Regulation (EU) No. 1379/2013 of the European Parliament and of the Council of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products, amending Council Regulations (EC) No. 1184/2006 and (EC) No. 1224/2009 and repealing Council Regulation (EC) No. 104/2000* (hereinafter, Regulation (EU) No. 1379/2013) and apply as of 13 December 2014, in parallel to the new general EU food labelling rules set out in *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).

The rationale behind the new labelling rules for fishery and aquaculture products set out in Regulation (EU) No. 1379/2013 is that it is necessary for consumers to be provided with clear and comprehensive information on, *inter alia*, the origin and the method of production of the products in order to enable them to make informed choices. Regulation (EU) No. 1379/2013 also announces the establishment of an eco-label for fishery and aquaculture products, whether they originate from inside or outside the EU, which offers the possibility of providing clear information on the ecological sustainability of such products.

The labelling rules set out in Regulation (EU) No. 1379/2013 apply to fishery and aquaculture products referred to in points (a), (b), (c) and (e) of Annex I to the Regulation (*i.e.*, (a) live fish; fresh, chilled or frozen fish; fresh, chilled or frozen fish fillets and other fish meat (whether or not minced); (b) fish in brine, dried or salted fish; smoked fish; flours, meals and pellets of fish; (c) crustaceans and molluscs; and (e) seaweeds and other algae). Article 35 of Regulation (EU) No. 1379/2013 lists the mandatory information that, without prejudice to the FIR, must appear on fishery and aquaculture products in order for them to be marketed within the EU and offered for sale to the final consumer or to a mass caterer: the commercial designation of the species and its scientific name; the production method, in particular the following words '*… caught …*' or '*… caught in freshwater …*' or '*… farmed …*'; the area where the product was caught or farmed, and the category of fishing gear used in capture of fisheries; whether the product has been defrosted (this requirement does not apply to ingredients present in the final product; foods for which freezing is a technologically necessary step in the production process; fishery and aquaculture products previously frozen for health safety purposes; fishery and aquaculture products that have been defrosted before the process of smoking, salting, cooking, pickling, drying or a combination of any of those processes); and the date of minimum durability, where appropriate. For non-pre-packaged fishery and aquaculture products, the mandatory information may be provided for retail sale by means of commercial information such as billboards or posters.

Under Article 38 of Regulation (EU) No. 1379/2013, the indication of the catch or production area must consist of the following: in the case of fishery products caught at sea, the name in writing of the sub-area or division listed in the FAO fishing areas, as well as the name of such zone expressed in terms understandable to the consumer, or a map or pictogram showing that zone, or, by way of derogation from this requirement, for fishery products caught in waters other than the Northeast Atlantic and the Mediterranean and Black Sea, the indication of the name of the FAO fishing area; in the case of fishery products caught in freshwater, a reference to the body of water of origin in the EU Member State or third country of provenance of the product; and in the case of aquaculture products, a reference to the EU Member State or third country in which the product reached more than half of its final weight or stayed for

more than half of the rearing period or, in the case of shellfish, underwent a final rearing or cultivation stage of at least six months. There are also detailed labelling requirements for mixed products offered for sale to the final consumer or to a mass caterer. Finally, EU Member States may exempt from the detailed requirements listed above small quantities of products sold directly from fishing vessels to consumers, provided that those do not exceed certain value.

Overall, the amount of information, which is mandatory to indicate under Regulation (EU) No. 1379/2013, is much higher than the one established in *Council Regulation (EC) No. 104/2000 of 17 December 1999 on the common organisation of the markets in fishery and aquaculture products*. The latter requires, in Article 4 thereof, only the commercial designation of the species; the production method (caught at sea or in inland waters or farmed); and the catch area. Under Regulation (EU) No. 1379/2013, *inter alia*, the indication of the category of fishing gear used in the capture of fisheries and whether the product has been defrosted is mandatory.

New elements, like a future EU eco-label and requirements for voluntary labelling are introduced as well. Article 36 of Regulation (EU) No. 1379/2013 foresees that, after consulting EU Member States and stakeholders, the EU Commission must, by 1 January 2015, submit to the EU Parliament and to the Council a feasibility report on options for an eco-label scheme for fishery and aquaculture products, in particular on establishing such a scheme on an EU-wide basis and on setting minimum requirements for the use by EU Member States of an EU eco-label. Article 39 of Regulation (EU) No. 1379/2013 concerns additional information, which may be provided on a voluntary basis, provided that it is clear and unambiguous: the date of catch of fishery products or the date of harvest of aquaculture products; the date of landing of fishery products or information on the port at which the products were landed; more detailed information on the type of fishing gear; in the case of fishery products caught at sea, details of the flag State of the vessel that caught those products; environmental information; information of an ethical or social nature; information on production techniques and practices; and information on the nutritional content of the product. It is important to note that voluntary information must not be displayed to the detriment of the space available for mandatory information on the marking or labelling and that no voluntary information shall be included that cannot be verified.

EU Member States must, according to Article 37 of Regulation (EU) No. 1379/2013, draw-up and publish a list of the commercial designations accepted in their territory, together with their scientific names. The list must indicate the scientific name for each species, in accordance with the FishBase Information System or the ASFIS database of the Food and Agriculture Organisation (FAO), where relevant; and the commercial designation (*i.e.*, the name of the species in the official language or languages of the EU Member State concerned; and, where applicable, any other name or names that are accepted or permitted locally or regionally). For the purpose of consumer protection, the competent national authorities responsible for monitoring and enforcing the fulfilment of the obligations laid down in Regulation (EU) No. 1379/2013 should make full use of available technology, including DNA-testing, in order to deter operators from falsely labelling catches.

The amount of information that has to be indicated on the labelling of fishery and aquaculture products as of 13 December 2014 appears overly-burdensome and will be a major challenge for the respective operators in the EU and third countries. Further elements, such an eco-label scheme may be introduced in the future. It is important to note that the additional voluntary information provided, *inter alia*, in relation to the environment, to ethical or social matters, to production techniques and practices, and to the nutritional content of the products, can only be indicated if this information is evidence-based and can be verified. Additionally, in laying down the requirements for an eco-label, the EU will have to factor-in the outcome of the WTO *US – Tuna II (Mexico)* dispute (see Trade Perspectives, Issue No. 10 of 18 May 2012), which

constitutes a milestone in the assessment of voluntary labelling schemes with stringent requirements, such as those adopted on grounds related to protection of the environment or consumer information. In that case, the Appellate Body agreed with the panel that, although compliance with the '*dolphin-safe*' labelling scheme was not required for offering the concerned products for sale, it was designed in a manner that regulated the definition of '*dolphin-safe*' in a binding way, thereby making it mandatory. Therefore, even if the EU's eco-label will be designed in a manner that allows unlabelled products to lawfully enter and be marketed in the EU, it appears possible that, in the context of a potential WTO challenge, the scheme may be considered mandatory and, on that basis, be subject to WTO scrutiny.

Recently Adopted EU Legislation

Trade Remedies

- *Commission Implementing Regulation (EU) No. 727/2014 of 30 June 2014 initiating a 'new exporter' review of Council Implementing Regulation (EU) No. 1389/2011 imposing a definitive anti-dumping duty on imports of trichloroisocyanuric acid originating in the People's Republic of China, repealing the duty with regard to imports from one exporter in this country and making these imports subject to registration*

Food and Agricultural Law

- *Commission Implementing Decision of 7 July 2014 approving the plans for the eradication of African swine fever in feral pigs in certain areas of Lithuania and Poland*

- *Commission Implementing Decision of 2 July 2014 setting out measures in respect of certain citrus fruits originating in South Africa to prevent the introduction into and the spread within the Union of Phyllosticta citricarpa (McAlpine) Van der Aa*

- *Commission Implementing Regulation (EU) No. 718/2014 of 27 June 2014 amending Regulation (EC) No. 669/2009 implementing Regulation (EC) No. 882/2004 of the European Parliament and of the Council as regards the increased level of official controls on imports of certain feed and food of non-animal origin*

Other

- *Commission Regulation (EU) No. 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid in the fishery and aquaculture sector*

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