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EFSA releases its Scientific Opinion on the organism responsible for citrus black spot disease

On 30 January 2014, the European Food Safety Authority (hereinafter, EFSA), adopted its "*Scientific Opinion on the risk of Phyllosticta citricarpa (Guignardia citricarpa) for the EU territory with identification and evaluation of risk reduction options*" (hereinafter, EFSA's Scientific Opinion), although it was not released until 21 February. Essentially, EFSA's Scientific Opinion seeks to: (i) provide a pest risk assessment of *Guignardia citricarpa* (*i.e.*, the *fungus* causing the black spot disease in citrus fruits); (ii) identify options for the reduction of risk of entry, establishment and spread of this organism in the EU and evaluate their effectiveness in achieving such risk reduction; and (iii) assess whether the relevant requirements in place in the EU (in relevant part, those specified under *Council Directive 2000/29/EC of 8 May 2000 on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community* (hereinafter, Directive 2000/29), which lays down requirements for the importation into the EU of plants and plant products susceptible of carrying harmful organisms), are effective in reducing the risk that the harmful organism introduces and spreads into the EU territory. It is recalled that the black spot disease (hereinafter, CBS disease) is harmless to humans, although it causes spots on fruit leaves and blemishes in fruits, potentially reducing their marketability.

In relevant part, EFSA's Scientific Opinion follows the draft opinion published by EFSA in July 2013, which essentially concluded that the risk that the *fungus* entered the EU was '*likely*' for citrus plants and citrus fruits with leaves, while the risks of establishment and spread were '*moderately likely*'. EFSA also found that the EU's measures in place were '*effective*'. After taking into account the comments received during the public consultation period opened following the publication of its draft opinion, the findings in EFSA's Scientific Opinion in this regard appear not to deviate substantially from those reflected in the draft.

The EU's plant health regime is laid down in Directive 2000/29, which disciplines imports of plants and plant products into the EU by, *inter alia*, imposing (reportedly stringent) sanitary and phytosanitary requirements on imports and mandating that control checks be carried out at the place of export. In addition, the EU's framework allows that temporary measures be adopted in instances where consignments from third countries pose an imminent danger of introduction and spread of harmful organisms into the EU. On this basis, the EU Commission adopted emergency measures on 11 December 2013 directed at preventing that CBS disease from South Africa enter and spread in the EU (see Trade Perspectives, Issue No. 1 of 10 January 2014). The significant trade-restrictiveness of these measures arguably rendered them tantamount to an EU import ban. One of the most problematic aspects of the EU's measures consisted in the fact that trade restrictions were applied throughout the entire EU territory, although the CBS disease would, in the worst case scenario, negatively affect only certain areas in the EU (*i.e.*, those where citrus fruits are grown and harvested). Although the EU's emergency measures were targeted at citrus fruits produced during the 2012-2013 growing season, it appears likely that similar measures will be adopted with respect to fruits grown in following seasons.

Concerns that the current EU framework, as well as temporary measures previously in force, might be overly trade-restrictive, could be addressed by resorting to the principle of regionalisation in the EU, which in the area of plant health translates in the establishment of '*protected zones*'. This would allow for measures to be applied solely in selected areas, on the basis of epidemiological criteria. Article 2(h) of Directive 2000/29 foresees that '*protected zones*' be established in the EU, *inter alia*, in areas where, due to favourable ecological conditions, a harmful organism not endemic or established in the EU (such as the *fungus* causing the CBS disease) might establish. In fact, EFSA's Scientific Opinion acknowledges that "*[p]lants susceptible to CBS are not grown throughout the EU, and climatic conditions are not suitable for the disease throughout the EU*". Taking stock of Article 2(h) of Directive 2000/29, EFSA identifies the demarcation of endangered and non-endangered areas in the EU as a possible option for the reduction of risk of entry, establishment and spread of the harmful *fungus*. Under this option, while no restrictions would be placed on trade with non-endangered areas, the introduction and movement of citrus fruits within endangered areas (*i.e.*, '*protected zones*') would be subject to import requirements or even to a complete ban. EFSA's Scientific Opinion considers this option to be highly effective although, according to EFSA, challenging in its implementation.

The principle of regionalisation is also embodied in the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter, SPS Agreement), in a manner that suggests that regionalisation not only be applied by the exporting WTO Member, but also by the importing WTO Member. In particular, Article 6 of the SPS Agreement foresees that SPS measures be adapted to the characteristics of the area "*from which the product originated and to which the product is destined*" on the basis of a number of factors (such as the level of disease prevalence, the eradication or control programmes in place and the existence of relevant guidelines). In addition, the EU's measures need to comply with the requirements of Article 2.2 of the SPS Agreement, which provides that measures must be necessary (*i.e.*, proportionate), that they be based on scientific principles and that they not be maintained without sufficient scientific evidence. This provision is further elaborated in Article 5 of the SPS Agreement, which requires, *inter alia*, that SPS measures be based on an appropriate risk assessment and that they not be more trade-restrictive than required to achieve the chosen level of protection.

In light of the above, and considering the statements delivered by the EU in the WTO SPS Committee that it has applied the principle of regionalisation "*both in the internal market and with third country partners*", as well as the EU's availability to regionalise its territory in the context of recent animal disease outbreaks (see Trade Perspectives, Issue No. 3 of 7 February 2014), it is noticeable that the EU did not establish '*protected zones'* with respect to citrus fruits from South Africa. It remains to be seen whether EFSA's Scientific Opinion, which was set to be presented before the Standing Committee on Plant Health within the EU Commission's DG SANCO at its meeting of 27-28 February, will trigger regulatory changes in the EU's framework. It will be interesting to see if discussions envisage the possibility of regionalisation in the EU, as reflected in EFSA's Scientific Opinion, especially in the event that further temporary restrictions be imposed on imports of citrus fruits from South Africa. Companies operating in the relevant sectors in South Africa and the EU are advised to closely monitor all coming developments in the case at hand. Additionally, companies are recommended to maintain fluent communications with their relevant authorities in order to potentially trigger the various mechanisms that the WTO offers, including technical discussions and, eventually, dispute settlement proceedings.

What the Korea-Australia Free Trade Agreement may reveal regarding future investment protection provisions in international trade agreements

On 10 February 2014, the chief negotiators from Australia and Korea initialled the text of the Korea-Australia Free Trade Agreement (hereinafter, KAFTA). A week later, the text of the agreement was released to the public. Some commentators have dubbed the agreement a "*cars for cows deal*", given that the pact eliminates tariffs on 98% of Australian agricultural exports to Korea in return for increased market access for Korean automobile exports. However, the KAFTA also represents the most recent international agreement to address investor-to-state dispute settlement (hereinafter, ISDS) and it is concluded in the midst of a period of increased negotiation and discussion on investment policies and instruments around the world, including growing concerns surrounding ISDS.

In international agreements where investment provisions are included, ISDS provides investors with the ability to directly sue host governments, when those governments violate the investment protection to which the relevant investor is entitled. ISDS serves as an alternative to traditional state-to-state dispute settlement mechanisms, which arguably do not provide sufficient recourse for investors (for more information, see Trade Perspectives Issue No. 3 of 7 February 2014). Recently, the debate regarding ISDS has become more vocal. Some commentators have argued that ISDS favours investors, especially large multi-national corporations from developed countries, limits or even removes a government's ability to set its own laws, adds unnecessary expenses to government budgets and grants foreign investors more rights than those available to domestic investors. It appears that governments have begun to account for these concerns in already-agreed upon investment agreements, or have at least voiced their intention to address them in future agreements.

For example, India recently announced that it is reviewing the 83 investment agreements to which it is a party. According to its Minister of Commerce and Industry, the agreements are being reviewed in an effort to apply lessons that they have learned following numerous claims invoked by investors relating to cancellation of telecom licensing in 2012. The EU is also planning to release this month its proposed draft text relevant to investment for inclusion in the Transatlantic Trade and Investment Partnership Agreement with the US. The KAFTA, for its part, represents the most recent international agreement to illustrate the latest developments in ISDS.

Generally, the investment protections included in Chapter 11 of the KAFTA are those which have become the standard in other agreements dealing with investment. Under the KAFTA, Australia and Korea must accord to investors from the other country, and covered investments, treatment no less favourable than that they accord, in like circumstances, to: (i) their own investors; and (ii) investors of any non-Party (*i.e.*, the '*national treatment*' and '*most-favoured-nation treatment*' (hereinafter, MFN treatment) principles, respectively). Additionally, the parties must grant covered investments treatment pursuant to the minimum standards applicable under customary international law on the treatment of aliens, which includes '*fair and equitable treatment*' and '*full protection and security*'. Next, the KAFTA includes provisions intended to protect investors against improper, direct or indirect, expropriation or nationalisation of foreign investments. The agreement also obliges Australia and Korea to permit all monetary transfers relating to covered investments and it prohibits both countries from imposing nationality requirements regarding the senior management of foreign enterprises, although it does provide for some ability by the parties to impose requirements relating to boards of directors. Section B of Chapter 11 provides for an ISDS mechanism, and outlines the associated procedures. Lastly, though financial services do not fall within the scope of Chapter 11, they are the focus of Chapter 8 of the KAFTA. There, similar protections are afforded to investments relating to financial services, including the use of ISDS.

New agreements governing the application of ISDS have become more complex through the use of clarifications, reservations, exclusions and general exceptions in an attempt to improve upon areas where previous agreements lacked clarity. Arguably, the most significant of these adjustments is the inclusion of detailed definitions and factors relating to expropriation, especially indirect expropriation. Whereas Article 11.7 of the KAFTA contains a fairly standard provision on expropriation, Annex 11-B provides further clarity by outlining factors that should be considered when assessing whether tangible or intangible property in an investment was improperly expropriated. The Annex also addresses the distinction between indirect expropriation and non-discriminatory regulatory actions, providing that, "*[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations*". The associated footnotes to the provision also explain that said list of objectives are not exhaustive and indicate specific examples of public health regulatory action. The distinction is important: differently than for (direct or) indirect expropriation, non-discriminatory regulatory actions are not subject to compensation by the governments enacting the measure.

The provisions dealing with reservations, exclusions and general exceptions are also worth mentioning. The KAFTA allows for reservations from the obligations regarding '*national treatment*', MFN treatment, performance requirements and senior management and boards of directors, which are expanded upon in its annexes. Of the over 50 sectors, sub-sectors or activities reserved under Annex II, some include, *inter alia*, gambling and betting, broadcasting and audiovisual services, energy, advertising services, the publishing of newspapers, human health services and education. With regard to exclusions, Annex 11-G states that any "*decision by Australia with respect to whether or not to refuse, or impose orders or conditions on, an investment that is subject to review under Australia's foreign investment policy shall not be subject to [ISDS]*". Lastly, Chapter 22 provides general provisions and exceptions including, in relation to investment, a provision which ensures that the parties may adopt and enforce measures, *inter alia*, necessary to protect human, animal or plant life or health or relating to the conservation of living or non-living exhaustible natural resources.

As more texts of modern investment chapters or agreements are concluded and released, this trend may continue. However, the path taken by negotiators to include reservations, exclusions and general exceptions, including on ISDS, will inevitably encourage a practice of investment protection '*a la carte*', increasing fragmentation and creating confusion among investors. This cannot but complicate the landscape for businesses, diminish the significance of the protection granted by investment agreements and the rule of law that ISDS caters for, and expand the scope for certain governments to take advantage of these tailored exceptions, which may harbour *de facto* if not *de jure* discrimination, and in general terms discourage investment.

In the context of some trade and investment negotiations, the very applicability of ISDS is called into question. Such a '*blanket approach*' is arguably easier for governments to follow, so that they can '*please*' certain domestic constituencies and avoid future costly litigation, while preserving the legal certainty of the regulations adopted. It is, however, not to be favoured. Whereas countries should be able to preserve their right to regulate and adopt (non-discriminatory and not arbitrary) measures for the protection of health, safety, the environment and other important societal values, investment agreements must be designed in such a way as to enable affected investors to seek redress before an independent arbitrator, when in the presence of arbitrary conducts put in place by governments, and to receive adequate compensation against instances of expropriation. As argued in the past (see Trade Perspectives Issue No. 3 of 7 February 2014), an outright exclusion of ISDS would also undermine the role that such instrument plays in attracting investments and in securing the application of the rule of law. This approach would also arguably subject the very applicability of ISDS to negotiating '*bargains*', with the potential for its inclusion conditioned to other competing interests and their weight on the overall negotiating outcome. The result would be, again, the creation of differential levels of protection based on the applicable rules in any given country, which would in turn affect trust and confidence in the protection granted by investment treaties and ultimately impair investment flows.

Recently Adopted EU Legislation

Market Access

- *Commission Delegated Regulation (EU) No. 182/2014 of 17 December 2013 amending Annex III to Regulation (EU) No. 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preferences*

Trade Remedies

- *Council Implementing Regulation (EU) No. 191/2014 of 24 February 2014 imposing a definitive anti-dumping duty on imports of certain manganese dioxides originating in the Republic of South Africa following an expiry review pursuant to Article 11(2) of Regulation (EC) No. 1225/2009*

- *Council Implementing Regulation (EU) No. 190/2014 of 24 February 2014 amending Implementing Regulation (EU) No. 461/2013 imposing a definitive countervailing duty on imports of certain polyethylene terephthalate (PET) originating in India following an expiry review pursuant to Article 18 of Regulation (EC) No. 597/2009*

Customs Law

- *Commission Implementing Regulation (EU) No. 174/2014 of 25 February 2014 on amending Regulation (EEC) No. 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code as regards the identification of persons in the context of AEO Mutual Recognition Agreements*

- *Commission Regulation (EU) No. 167/2014 of 21 February 2014 amending Annex I to Regulation (EC) No. 689/2008 of the European Parliament and of the Council concerning the export and import of dangerous chemicals*

Food and Agricultural Law

- *Commission Regulation (EU) No. 175/2014 of 25 February 2014 refusing to authorise certain health claims made on foods, other than those referring to the reduction of disease risk and to children's development and health*

- *Directive 2014/27/EU of the European Parliament and of the Council of 26 February 2014 amending Council Directives 92/58/EEC, 92/85/EEC, 94/33/EC, 98/24/EC and Directive 2004/37/EC of the European Parliament and of the Council, in order to align them to Regulation (EC) No. 1272/2008 on classification, labelling and packaging of substances and mixtures*

- *Commission Delegated Regulation (EU) No. 179/2014 of 6 November 2013 supplementing Regulation (EU) No. 228/2013 of the European Parliament and of the Council with regard to the register of operators, the amount of aid for the marketing of products outside the region, the logo, the exemption from import duties for certain bovine animals and the financing of certain measures relating to specific measures for agriculture in the outermost regions of the Union*

Other

- *Commission Regulation (EU) No. 176/2014 of 25 February 2014 amending Regulation (EU) No. 1031/2010 in particular to determine the volumes of greenhouse gas emission allowances to be auctioned in 2013-20*

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