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In the light of its new competences, the EU Commission publishes the EU investment package

On 7 July 2010, the EU Commission published a package on EU investment, consisting of two documents: a Communication on a comprehensive EU international investment policy and a draft regulation establishing transitional arrangements for bilateral investment agreements between EU Member States and third countries.

The publication of a new EU investment package has been expected since the entry into force of the Treaty of Lisbon on 1 December 2009, as the latter provides for significant changes in the field of investment. Article 207 of the Treaty on the Functioning of the EU (hereinafter, TFEU) has explicitly rendered foreign direct investment an exclusive EU competence. Although even before the entry into force of the new constitutional treaty the traditional practice was for the EU to deal with the pre-establishment phase and the market access aspects of investments, under the new regime investment protection and, potentially, portfolio investment also fall under the Union's exclusive competence.

In legal terms, the key challenge that the EU has to face at this point is the fact that the approximately 1,200 bilateral investment treaties (hereinafter, BITs) signed by EU Member States with third countries are rendered illegal under EU law, as from the entry into force of the Treaty of Lisbon they operate in a field of exclusive EU competence. Ensuring legal certainty over the validity of these BITs is of primary importance to the Union, as '*investors thrive in a stable, sound and predictable environment*', in the EU Commission's words. In an effort to address this matter, the EU Commission has come forward with a draft EU regulation the aim of which is to 'grandfather' the EU Member States' BITs and lay down the conditions under which the EU Member States are empowered to enter into new investment agreements or modify old ones. In practical terms, EU Members States will have to notify the BITs that they wish to maintain to the EU Commission in order for them to be authorised (and, therefore, legalised). The EU Commission will then conduct a review to assess the BITs' compatibility with EU law and EU interests and will issue a report with recommendations on their continuance, modification or discontinuance. In any case, it is provided that the EU Commission will have the possibility to withdraw a granted authorisation at any point, if need be.

Foreign direct investment being a sector largely unexplored by the EU, investors await to see with great interest how the Union develops an EU-wide investment policy that, on the one hand, liberalises even further the EU investment environment (*i.e.*, the internal aspect) and, on the other hand, ensures advantageous conditions for EU investments abroad (*i.e.*, the external aspect). In the Communication published as part of the investment package, the EU Commission lays down its views in relation to the development of an EU-wide investment policy, indicating, *inter alia*, that: (i) it does not intend to draft a model EU BIT with a standard text in order to be able to better adapt to each specific negotiating context; (ii) the choice of the partner countries with which agreements will be pursued will be based on the added value that the latter's entry into force would offer; and (iii) an investor-to-state dispute settlement mechanism will probably have to be introduced at EU level. Nevertheless, the preparation of a grandfathering regulation indicates that the EU does not intend to fully grasp its exclusive competence in the field yet.

Despite the comprehensive nature of the published EU investment package, questions arise in relation to the 'transition period', *i.e.* the period from the entry into force of the Treaty of Lisbon to the entry into force of the grandfathering regulation. Could EU Member States continue their ongoing negotiations, or even start new ones? While, according to reports, the EU Commission has requested EU Member States to abstain from entering into new negotiations, the situation is not so clear in relation to the ones that were already initiated when the Treaty of Lisbon entered into force. It appears that EU Member States choosing to continue such negotiations should be particularly cautious, as they take a serious legal risk, acting in what has now become an area of exclusive EU competence.

Discussions on whether WTO rules should apply to private sector standards in food safety and animal health revive

During the meeting of the WTO Sanitary and Phytosanitary Measures Committee on 29-30 June 2010, the issue of private sector standards in food safety and animal health was discussed, with some participants even questioning the committee's legal authority to get involved in the matter.

In short, the issue relates to concerns expressed by a number of developing countries on the costs and the increased difficulty they come across when trying to gain access to developed country markets for their agricultural products, due to the imposition of strict conditions by purchasers (particularly large retailer chains in the importing countries) in form of private voluntary standards. Such private standards may deal with production methods, as well as actual product attributes, and may cover not only food safety, but also food quality, animal feedstuffs, animal welfare, environmental protection (a well known example being that of eco-labelling for flowers), labour practices and occupational health and safety. Actors in the importing countries (*i.e.*, retailers) assert that their private standards are necessary to ensure compliance with official requirements, complement or reinforce official import controls, respond to consumer concerns, and protect the value of private brands and retailers' reputations. In reaction to the trend towards increasingly strict private voluntary standards, developing countries have since 2005 addressed the WTO, requesting it to explore whether such standards may fall under the provisions of the relevant WTO agreements; in particular the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter, the SPS Agreement) and the Agreement on Technical Barriers to Trade (hereinafter, the TBT Agreement).

The SPS and TBT Agreements were negotiated in the Uruguay Round of WTO negotiations, between 1986 and 1994, when food safety standards were typically considered to be a matter for action by governments, in the form of technical regulations (in the terminology of the TBT Agreement) or sanitary measures (in the terminology of the SPS Agreement). Increased consumer concerns on, *inter alia*, animal welfare, occupational health and safety, consumer safety and environmental aspects of foodstuffs are issues that appeared mainly after the negotiation of the SPS and TBT Agreements.

In this respect, the key provision of the SPS Agreement is Article 13, sentence three, which provides that '*Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, […], comply with the relevant provisions of this Agreement'*. The crucial questions are, first, what the exact scope of the term 'reasonable measures' is and, second, whether the notion 'non-governmental entities' (not defined in the SPS Agreement) includes the various private standard-setting bodies and standard-implementing bodies.

The preparatory works to the TBT and SPS Agreements, or the works in the respective WTO Committees, do not appear to relate to the activities of non-governmental standard-setting and standard-applying organisations. It appears that there were no propositions that the SPS Agreement would apply to the activities of private sector organisations. In addition, there is no specific WTO case-law in relation to non-governmental entities and Article 13 of the SPS

Agreement, but it appears that a minimum degree of government involvement is required to put a measure under the scrutiny of the WTO Agreements.

Imposing provisions of WTO law to private entities, without the involvement of any public/governmental intervention by the individual WTO Member having jurisdiction on those private entities, would require the direct effect of WTO law. WTO agreements have remained neutral on the issue of whether their rules should produce direct effect, leaving it to each WTO Member to decide how to incorporate WTO law into its national legal order. The question, therefore, appears to be whether obligations stemming from WTO law can be imposed on private parties.

While private voluntary standards may in many cases provide a stimulus to improved production practices and performance in exporting countries, and potentially give a competitive advantage to complying producers, they may also act as significant barriers to market access for some industries in a number of countries, especially least developed ones. The discussion on whether WTO rules should apply to private voluntary standards, in particular in the areas of food safety and animal health, is a matter that requires further attention, and not only by developing countries. The next meeting of the SPS Committee will be held in October of this year.

Signs of progress in WTO talks on the liberalisation of trade in environmental goods

Reports say that, during the special session of the WTO Committee on Trade and Environment taking place on 30 June and 1 July 2010, the talks on the liberalisation of trade in environmental goods (hereinafter EGs) showed signs of progress, with a number of WTO Members submitting new proposals on some of the issues that have been flagged as contentious, such as, *inter alia*, the identification of environmental goods.

The mandate to pursue negotiations on the liberalization of trade in environmental goods is found in Article 31(iii) of the Doha Ministerial Declaration, stating that '*the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental good and services*' is to be achieved. This article created high expectations from the very beginning, as the liberalisation of trade in EGs was seen as an opportunity to combine what is perceived by many to be incompatible, *i.e.*, the boost of world trade figures and the fight against climate change. Lowering or eliminating tariffs and non-tariff barriers for EGs would facilitate their access to the markets of WTO Members, rendering them in that way more economically appealing to operators and consumers and enhancing their competitiveness *vis-à-vis* cheap, but more environmentally degrading products. However, since the beginning of the Doha Round, the relevant talks have been slow and turbulent, as there appears to be no agreement among the WTO Members on which EGs should be the object of the negotiations. In that sense, WTO Members have expressed different opinions on how to define the EGs destined for liberalisation.

Throughout the negotiations, it appears that WTO Members have, to a large extent, reached an agreement that a positive list approach (*i.e.*, the identification of a number or EGs for which market access is to be enhanced) is to be employed. However, disagreements among them remain on the choice of the specific EGs for which trade is to be liberalised. The inability of WTO Members to find a common base is largely attributed to the extremely broad range of products that the category of EGs contains: from equipment, material or technologies destined to combat an environmental problem, till products which are environmentally preferable when compared to their alternative commodities. To help in solving the negotiating impasse on the issue of the definition of EGs, a number of proposals were submitted. Some WTO Members (mainly the 'Friends of Environmental Goods' group of countries, *i.e.*, Canada, Chinese Tapei, the EU, Japan, Korea, New Zealand, Norway, Switzerland and the US) and the OECD advocate a 'list approach', *i.e.*, the creation of a unique list containing the EGs to be granted enhanced market access by all WTO Members. Other WTO Members (*e.g.*, India) support a 'project approach', *i.e.*, the temporary liberalisation of some EGs, lasting for as long a delineated environmental project would last. Another fraction of WTO

Members (*e.g.*, Argentina) maintains that an 'integrated approach' is the most suitable one. This consists in a middle solution between the two aforementioned approaches whereby the EGs to be liberalised for an environmental project would be pre-identified on a multilateral level. Finally, a number of WTO Member States (*e.g.*, Brazil) propose a 'request and offer approach', *i.e.*, the traditional method of countries negotiating specific concessions with each other on EGs of interest to them, which would then be applied on a MFN basis.

Even though it is not yet clear which, if any, of the aforementioned approaches will be followed, there are a number of preliminary conclusions that can be reached in relation to them. First, it appears that, because EGs have a relative environmental performance when compared to each other, the technological and scientific evolution will undoubtedly at some point reverse what is now considered to be environmentally advantageous for some of them. Restricting the negotiations to a list of EGs whose environmental value is already perceived to be low might, therefore, be impractical in the long term. Second, it appears that the way out of the present deadlock is for negotiations to focus on those EGs which are of interest to both developed and developing countries. This would render the choice of the exact approach a simpler task.

In particular, developing countries should try to include products of export interest to them in the list of liberalised EGs, so that they can benefit to the largest possible extent from the reduction or removal of tariff and non-tariff barriers. Such products are, for example, the so-called 'environmentally preferable natural products' (hereinafter EPPs), which are biodegradable and can be used as alternatives to less environmentally friendly products and which, at the same time, are available to developing countries in large amounts. EPPs include, *inter alia*, products made with natural fibres (*e.g.*, with coir, produced mostly in India, Indonesia, Malaysia, Philippines, Sri Lanka and Vietnam), non-timber forest products (*e.g.,* bamboo and rattan, found abundantly in India and the Philippines, respectively) and biofuels (*e.g.*, biodiesel and ethanol, produced mostly in developing countries).

The alleged Argentinean ban on food imports was discussed in the WTO Council for Trade in Goods

At the meeting of the WTO Council for Trade in Goods on 5 July 2010, the EU formally indicated its concern over what, it alleged, constitutes an Argentinean import ban against foodstuffs, including foodstuffs originating in the EU.

The EU claimed that, as of May 2010, significant delays upon importation and increasing cancellations of orders have been noticed in relation to EU food products destined for export to Argentina. It attributed these trade disruptions to, first, the verbal announcement by Argentina's Domestic Trade Secretary of the adoption of an import ban against several foods (see Trade Perspectives, Issue No. 10 of 21 May 2010) and, second, the circulation of an internal Argentinean governmental note making reference to the placement of restraints on the importation of foodstuffs from third countries. According to reports, similar concerns were also expressed by Australia, Canada, Colombia, Japan, Switzerland and the US. On its side, Argentina refuted the EU's allegations, arguing that, according to statistics, an increase of imports of EU products (*inter alia*, chocolate, juices, pasta, rice and canned products) was noted during the period January to May 2010. In relation to the alleged internal governmental note circulated, Argentina claimed that it only served surveillance purposes and did not constitute a measure actually initiating an import ban.

The lack of an official binding legal instrument codifying the alleged import ban on foodstuffs could make WTO-incompatibility arguments harder to prove. Still, the institution of a quantitative restriction inconsistent with Article XI GATT could be maintained, as in *Japan-Trade in Semi-Conductors* the panel ruled that any kind of measure, irrespective of its legal status, falls within the ambit of that provision. The panel further added that a government measure can be effective, even if it lacks the statutory or mandatory element (*e.g.*, an administrative guidance or a governmental appeal for the adoption of private measures). In addition, WTO case-law indicates that to prove a

de facto restriction to imports, the complaining party must provide evidence of the causal link between the contentious measure and the change in the flow of trade. Depending on the way the measure is applied, it could, also, be argued that it discriminates against imported products competing with domestically produced products, without any sort of legitimate justification (*e.g.*, considerations relating to human, animal or plant life and health).

The involvement of the WTO Council for Trade in Goods constitutes an important evolution of the situation, as it indicates the great discontent of the EU in relation to Argentina's stance and could, therefore, pose significant problems to the already turbulent EU-MERCOSUR Free Trade Agreement (hereinafter, FTA) negotiations which were only recently re-launched. Argentina's move might add up to the heavy political climate surrounding the talks between the two trading blocs, as, according to reports, France, Ireland and Poland have long before signaled their disagreement with the impact that the signing of a such an agreement could have on their agricultural sectors. The MERCOSUR countries being significant exporters of agricultural commodities, accounting for 19.8% of all EU agricultural imports in year 2009, the relevant European industry could be faced with considerable competition from cheaper imports.

A potential request by the EU for the institution of a WTO panel in case the dispute is not otherwise solved, together with the EU Member States' dissent triggered by their agricultural interests, could lead to yet another suspension of the talks between the two blocs. Such an evolution would be detrimental to, *inter alia*, the EU machinery, chemicals and transport equipment industries, which are expected to be the greatest beneficiaries of an enhanced trade cooperation agreement between the two trading partners.

Recently Adopted EU Legislation

- *Commission Regulation (EU) No. 622/2010 of 15 July 2010 entering a name in the register of protected designations of origin and protected geographical indications (Pesca di Leonforte (PGI))*

- *Commission Regulation (EU) No. 623/2010 of 15 July 2010 entering a name in the register of protected designations of origin and protected geographical indications (Farro di Monteleone di Spoleto (PDO))*

- *Commission Regulation (EU) No. 624/2010 of 15 July 2010 entering a name in the register of protected designations of origin and protected geographical indications [Melanzana Rossa di Rotonda (PDO)]*

- *Commission Decision of 13 July 2010 repealing Decision 2006/109/EC accepting an undertaking offered in connection with the anti-dumping proceeding concerning imports of certain castings originating in the People's Republic of China*

- *Commission Regulation (EU) No. 611/2010 of 12 July 2010 approving minor amendments to the specification for a name entered in the register of protected designations of origin and protected geographical indications (Basilico Genovese (PDO))*

- *Commission Regulation (EU) No. 612/2010 of 12 July 2010 entering a name in the register of protected designations of origin and protected geographical indications (Fasola korczyńska (PGI))*

- *Commission Regulation (EU) No. 613/2010 of 12 July 2010 entering a name in the register of protected designations of origin and protected geographical indications (Miód kurpiowski (PGI))*

- *Commission Regulation (EU) No. 595/2010 of 2 July 2010 amending Annexes VIII, X and XI to Regulation (EC) No. 1774/2002 of the European Parliament and of the Council laying down health rules concerning animal by-products not intended for human consumption*

- *Commission Regulation (EU) No. 585/2010 of 2 July 2010 amending Regulation (EC) No. 2535/2001 laying down detailed rules for applying Council Regulation (EC) No. 1255/1999 as regards the import arrangements for milk and milk products and opening tariff quotas*