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Draft of the Anti-Counterfeiting Trade Agreement made available to the public

On 21 April 2009, the negotiating parties of the Anti-Counterfeiting Trade Agreement (hereinafter, ACTA) made publicly available the draft texts of the 8th round of negotiations, held on 12-16 April in Wellington, New Zealand.

ACTA is a plurilateral agreement (*i.e.*, countries can join on a voluntary basis) that aims at setting international standards in relation to intellectual property (hereinafter, IP) rights' enforcement, in order to combat the upsurge of counterfeit products and pirated copyright-protected works in international trade. These illegal products, besides depriving businesses of their legitimate income, frustrate innovation and can often constitute a threat to consumer safety. Discussions on ACTA already started in 2007, but the negotiations were only launched in 2008 and are still in progress, outside the *fora* of the WTO, the WIPO, or any other international organisation. Participating countries include Australia, Canada, the EU, Japan, the Republic of Korea, Mexico, New Zealand and the US.

On the basis of the information provided so far by the negotiating parties and the draft text released, the introduction of ACTA does not intend to replace existing international IP agreements such as the TRIPs, but aims, instead, at further building on them by putting more emphasis on one particular IP chapter, that of enforcement. In very simplified terms, the provisions of ACTA can be classified into three groups. In the first place, there are those related to the establishment of international co-operation, which intend to introduce clear rules on the sharing of information and the administrative co-operation of Parties' enforcement agencies. Secondly, there are provisions relating to the creation of a comprehensive legal framework, extending, *inter alia*, to border measures, civil and criminal enforcement and the regulation of the digital environment. Finally, there are provisions introducing a series of best enforcement practices, such as the inclusion of IP experts within existing enforcement structures aimed at supporting the correct implementation of the applicable legal framework.

The trade significance of the released draft negotiating text of ACTA lies in the fact that it provides for border measures against goods that possibly violate IP rights. In more detail, according to the draft text, customs authorities are empowered, either pursuant to a complaint by the respective right holder or acting on their own initiative, to suspend the release of imported, exported or in-transit goods suspected of infringing IP rights. As an alternative, for exported or in-transit shipments, a Party to the agreement may refrain from suspending the shipments and choose, instead, to co-operate fully with the importing Party, in order to deter IP-infringing products from entering the latter's territory. The draft text also provides that, following the suspension of the suspected shipments, the competent authorities are to decide on the issue of the alleged infringement within a reasonable period of time and, in case of an affirmative response, destroy the products or remove them from the 'channels of commerce' in other ways.

From an EU law perspective, if the negotiations proceed as planned and the ACTA is to be finally adopted, the interesting question of whether it falls under the exclusive competence of the EU will arise. The EU Commission is expected to strongly argue the applicability of exclusive EU competence in this case, based on the agreement's inherent trade character and on the second paragraph of Article 3 of the Treaty on the Functioning of the EU, in order not to be obliged to go through an EU Member States ratification procedure(*i.e.*, go through ratification in every single EU

Member State according to the latter's respective legal procedures), as that would significantly stall the entry into force of the ACTA. Unfortunately, both the existing EU Court of Justice jurisprudence and the text of the recently adopted Lisbon Treaty indicate that arguments supporting the exclusivity of the EU competence in this case will be rather weak, as the ACTA does not limit itself to commercial aspects of intellectual property, but it also regulates sanctions, including criminal ones.

Discussion between Canada and the EU concerning upcoming EU fuel standards

The EU Parliament appears to have increased the pressure on trade relations between the EU and Canada, already tense due to the seals dispute (see Trade Perspectives, Issue No. 18 of 2 October 2009), by proposing to include a direct reference, in the EU fuel standards, to the negative effects (*e.g.*, deforestation, air and water pollution) generated by the production of oil from oil sands, of the kind that is taking place in Canada.

Oil sands, or tar sands, consist of a mixture of sand, water, clay and a very dense form of petroleum, called bitumen, which has a viscous, sticky and black appearance. Oil is extracted from oil sands for refinement into fuel. Oil sands can be found in many countries all over the world, but in particular large quantities in Canada and Venezuela. Canada's oil sands cover over 140,000 square kilometres in the boreal forest of the Canadian province of Alberta. The deposits can be found in three main regions: Athabasca-Wabiskaw, Peace River and Cold Lake. A report from the World Wildlife Fund (WWF) of 8 May 2008 describes the contentious issues concerning oil extraction from oil sands. In particular, the report finds that the extraction of oil from oil sands generates three times the carbon emissions of conventional oil production. In addition, it alleges that such operations are increasingly leading to significant deforestation, which in Canada threatens the boreal forest. Furthermore, it was argued that the extraction of oil from oil sands is also very water intensive. In fact, three barrels of water are used for each barrel of oil extracted. As a consequence, the Athabasca River has already reached critically low water levels.

Most of the oil production from Canadian oil sands is destined for the US. The State of California has already undertaken action in the form of the development of 'Low Carbon Fuel Standards' in order to reduce the lifecycle carbon intensity of California's transport fuels with 10% by 2020 (see Trade Perspectives, Issue No. 22 of 27 November 2009). In the EU, a number of regulations are in place to reduce carbon emissions, *e.g.*, Directive 2009/28/EC on the promotion of the use of energy from renewable sources, which establishes mandatory national overall targets and measures for the use of energy from renewable sources. In addition, the EU is considering adopting stricter fuel standards in the framework of Directive 2009/30/EC of the European Parliament and of the Council of 23 April 2009 as regards the specifications of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions (hereinafter, the EU Fuel Quality Directive), which provides for a framework for the EU to clean up its transportation fuels, in order to reduce air pollution, but also to diminish its dependence on fossil fuels. In this context, the European Parliament appears to be increasing the pressure on the Climate Action Commissioner Connie Hedegaard to include an explicit reference to the carbon intensity of fuels for purposes of the implementation of Article 7a of the EU Fuel Quality Directive concerning greenhouse gas (GHG) emission reductions. In particular, the EU Parliament wants such standards to create a 'barrier' for oil extracted from oil sands.

The introduction of these standards, which are to be considered as technical regulations with respect to the WTO Agreement on Technical Barriers to Trade (hereinafter, TBT Agreement), in as much as they would be mandatory in nature, could have WTO repercussions as the measures could be perceived to constitute barriers to trade. Even though no WTO panel has ever considered the possible trade effects of similar measures, it can be argued that WTO rules are applicable with respect to energy-related products and issues. In particular, the EU could be considered violating its obligations under the TBT Agreement. WTO Members are allowed to draw up technical regulations in order to protect the environment. Following Article 2 of the TBT Agreement,

however, such technical regulation cannot result in discriminatory treatment of the envisaged product vis-à-vis the like product of national origin or originating in any other country. Central to this discussion concerning likeness is the oil production process of (primarily) Canada that could lead the EU to grant a different, discriminatory treatment to Canadian oil as compared, for example to oil produced in conventional ways by other WTO Members (or by the EU itself). From a general WTO/GATT perspective, such different treatment can only be allowed if the process and production method (or PPM) affects the physical characteristics of the final product, so that the oil produced in such manner is not 'like' the oil produced in other conventional ways. In addition, technical regulations cannot result in unnecessary barriers to trade. By creating a trade barrier for oil generated from oil sands on the basis of its more polluting production process, such standards may lead to a *de facto* EU ban for this particular type of oil, contrary also to GATT Article XI.

The Canadian oil sand reserves are estimated to amount to 1.7 trillion barrels of oil, of which 315 billion barrels are accessible using technology which is currently under development. However, the entire industry, while generating profits, is having negative effects upon Canada's environment. In fact, Canada's greenhouse emissions were already 26% above its 1990 levels in 2006, whereas to comply with its Kyoto commitment, Canada should reach a 6% reduction of emissions compared to its 1990 level. The underlying question is also whether the WTO dispute settlement mechanism is a suitable instrument and *forum* where to address environmental claims concerning measures that take into account the lifecycle carbon intensity of energy sources

The European Parliament is exercising its right of scrutiny in relation to the approval of the food additive 'bovine and/or porcine thrombin', also known as 'meat glue'

The European Parliament opposes the approval of the food additive 'bovine and/or porcine thrombin', also known as 'meat glue', a measure envisaged under the comitology procedure of the EU Commission and the EU Member States. The measure at issue is a draft Commission Directive amending the Annexes to European Parliament and Council Directive 95/2/EC on food additives other than colours and sweeteners. The objection in the European Parliament's Environment Committee to the authorisation of one of the additives listed (*i.e.*, bovine and/or porcine thrombin), raised on the grounds that the use of this additive could mislead consumers, was backed with 31 votes in favour, 21 against, and no abstentions.

According to the EU Commission's proposal, bovine and/or porcine thrombin (to be used together with fibrinogen) shall be inserted in Annex IV of Directive 95/2/EC for the use in pre-packed meat preparations and pre-packed meat products intended for the final consumer. The food shall bear the information 'combined meat parts' in the proximity of its sales name. The European Food Safety Authority (EFSA) assessed the safety of use of the enzyme preparation based on thrombin with fibrinogen (both of which are obtained from blood plasma) derived from cattle and/or pigs as a food additive for reconstituting food and concluded in its opinion on 26 April 2005 ('Opinion of the Scientific Panel on Food Additives, Flavourings, Processing Aids and Materials in Contact with Food on a request from the Commission related to the use of an enzyme preparation based on thrombin-fibrinogen derived from cattle and/or pigs as a food additive for reconstituting food') that this use of the enzyme preparation, when produced as outlined in the opinion, is of no safety concern.

The thrombin-fibrinogen preparation is applied to meat where the thrombin transforms fibrinogen to fibrin which interacts with collagen enabling the binding of meat pieces in order to produce portion-controlled and standardised products with a uniform shape, thickness and quality. The preparation is also used to upgrade raw materials by binding together small pieces of meat into new size products. The EU Commission's proposal states that, however, in some cases, the use of this enzyme preparation could mislead the consumer as to the state of the final food and that it is, therefore, appropriate to restrict the use of thrombin with fibrinogen in combined meat preparations and meat products which are pre-packed and intended for the final consumer only, in order to

ensure that the consumer is informed by means of the labelling about the true nature of the combined food.

The regulatory procedure with scrutiny is regulated in Council Decision (EC) No. 1999/468 laying down the procedures for the exercise of implementing powers conferred on the EU Commission, as last amended by Council Decision (EC) No. 2006/512. Article 5a(3) thereof establishes that, in case the measures envisaged by the EU Commission are in accordance with the opinion of the Committee (as in this case), and the EU Commission has submitted the draft measures for scrutiny to the European Parliament, the European Parliament, acting by a majority of its component members, may oppose the adoption of the said draft by the EU Commission, justifying its opposition by indicating that the draft measures proposed by the EU Commission exceed the implementing powers provided for in the basic instrument or that the draft is not compatible with the aim or the content of the basic instrument or does not respect the principles of subsidiarity or proportionality. The European Parliament's Environment Committee has expressed that it opposes the draft on the grounds that this practice could mislead consumers, not on food safety grounds.

There is also an international trade angle to this matter. The EU notified on 4 December 2009 the draft Commission Directive amending Directive 95/2/EC on food additives other than colours and sweeteners additives to the WTO Committee on Sanitary and Phytosanitary Measures (G/SPS/N/EEC/361, G/SPS/N/EEC/361/Add.1 of 10 February 2010) with 'food safety' as objective and rationale, stating that there have been technical developments in the field of food additives since the adoption of Directive 95/2/EC.

The product, a Dutch patent of a public investigation entity, has been used in the Netherlands and the US for more than 15 years with the argument that sealing the meat is done in a natural way, similar to the process of forming a scar. Further authorisations of the product are reported to have occurred in Canada and Japan. From a processor's point of view, only a part of an animal's carcass can be used for commercial purposes (*i.e.*, steaks) and a large part has to be processed into lower-value products such as hamburgers and sausages. The so-called 'restructuring of meat' is considered as a method for transforming lower value cuts and quality trimmings into products of higher-value. Therefore, a ban of the additive in the EU, or strict labelling requirements, could have important trade implications.

The European Parliament is scheduled to vote on the objection in Strasbourg on 17-20 May 2010. If the majority of the Members of the European Parliament (*i.e.*, more than 369) backs the Environment Committee's objection, the draft EU Commission measure will be vetoed under the 'regulatory procedure with scrutiny'. The deadline for the Parliament to veto the proposal is 30 May 2010. If there is no veto, the European Parliament will, in effect, give its approval for 'bovine and/or porcine thrombin' to be listed in Annex IV of Directive 95/2/EC, which authorises additives other than authorised colours and sweeteners.

Feed-in tariffs for renewable energy sources and WTO rules

As part of their efforts to combat climate change, a number of WTO Members have enacted measures to promote the use and development of renewable energy sources. Among the range of different measures imposed, which include financial assistance and subsidies targeting production costs or encouraging the use of climate-friendly goods, the so-called 'feed-in tariffs' schemes are increasingly popular and are contributing greatly to the development of renewable energy in a number of countries.

Feed-in tariffs are often applied in order to promote green energy. It is a policy tool that constitutes of tariffs, which are fixed by the government at above-market prices (indicated per kilowatt-hour), that grid system operators or utility companies must pay for renewable energy fed into the national electricity grid by a private independent producer. In Germany, a feed-in tariffs scheme was first introduced in 1990 through the Electricity Feed-In-Law (Stromeinspeisungsgesetz). The current

version of the law, the German Renewable Energy Sources Act (Erneuerbare Energien Gesetz or EEG), has been drawn-up in order to facilitate the sustainable development of energy supply, to reduce the costs of energy supply to the national economy, to conserve fossil fuels, and to promote the development of technologies for the generation of electricity from renewable energy sources. The overall purpose of such scheme is to increase the share of renewable energy sources in electricity supply to at least 30% by 2020 and afterwards, to continue such increase further.

The main benefits are accrued by the operators of installations which generate renewable energy. In particular, under the German scheme, the connection of their installations, as well as the purchase, transmission and distribution of their electricity is to be prioritised by the grid operators and fixed minimum tariffs are set for the purchase of their electricity by the grid operators, the prices depending on the energy source used (be it hydropower, landfill gas, sewage treatment gas, mine gas, biomass, geothermal energy, wind energy or solar radiation) and on the exact size of the installation. When feed-in tariffs are applied, grid system operators or utility companies buy the electricity produced from renewable energy sources or from production plants using renewable energy at fixed rates. Subsequently, the costs are apportioned to all grid system operators and charged to the electricity consumers. Thereby, the cost of expansion of renewable energy sources is spread across all electricity consumers. Such cost, according to reports, amounted to 0.72 EUR-cent per kWh in 2006 or 2.20 EUR per month for a reference household.

Currently, in Germany, the feed-in tariffs are subject to reductions laid down in multiannual legislation. In particular, they were cut by 10% in 2009. In 2010, the feed-in tariffs are scheduled to be lowered by 9% and by a further 8% in 2011. Such actions were undertaken to reflect the improved and more cost-efficient market conditions under which the German solar industry currently operates. Reports indicate that feed-in tariffs caused a drop in market prices of solar panels of as much as 40%. It is argued that if no additional reductions were to be undertaken, a potential overcapacity of solar panels on the German market could occur. Further reductions of the feed-in tariffs are currently being considered by the German Parliament.

From an international trade viewpoint, it might be questioned whether a feed-in tariff scheme constitutes a subsidy within the meaning of Article 1 of the WTO Agreement on Subsidies and Countervailing Measures (hereinafter, ASCM). According to such provision, a subsidy exists when (i) there is a financial contribution of a government or any public body or, alternatively, there is a form of income or price support, in the sense of Article XVI of the GATT and (ii) a benefit is thereby conferred. With respect to feed-in tariffs, which embody minimum purchase requirements, the intervention of the government appears to be generally limited to the setting of the prices, which is an act of market regulation and does not appear to involve a financial contribution. Academics have also suggested that these measures should be assessed as constituting a form of price support within the meaning of Article 1.1(a)(2) of the ASCM, as they keep prices artificially high to the benefit of renewable energy producers. However, only one GATT report has in the past addressed the notion of price or income support, suggesting that income or price support could only constitute a subsidy when it involved a cost to government. As such interpretation is very narrow, the concept of ‘financial contribution’ is more easily resorted to by WTO panels.

However, not all schemes which include feed-in tariffs may be perceived as WTO-compliant. On 27 April 2010, Japan voiced its concerns in relation to the programme of feed-in tariffs applied by the Canadian province of Ontario at the meeting of the WTO Committee on Subsidies and Countervailing Measures. Canada could possibly be violating WTO obligations, not because of the adoption of feed-in tariffs, but due to the domestic content requirements incorporated into the programme. In particular, the programme provides long-term contracts to developers of green-energy projects. In order to be eligible for such favourable contract, the operators are to procure a fixed percentage of goods and services in Ontario. In particular, 50% of goods and services used in ‘large’ solar projects (60% as of 2011) have to originate in Ontario. In the *US – Cotton Subsidies* case, the WTO panel and the Appellate Body held that provisions that subject the achievement of a certain advantage to the use of domestic goods/services constitute a subsidy contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the ASCM and,

consequently, also inconsistent with Article 3.2 of the same agreement concerning prohibited subsidies.

Feed-in tariffs are currently the world's most widespread national renewable energy policy. However, caution is needed. With the drafting of such schemes, it has to be kept in mind that they have to be market-responsive, in order to be able to adapt to changing market situations like overproduction, and, they have to be WTO compatible. In particular, WTO Members have to ensure that the feed-in tariff schemes do not constitute subsidies under the WTO ASCM. As feed-in tariff schemes have gained popularity in the promotion of green energy, such developments have to be monitored closely in order to ensure that, while they achieve the all-important objective of lowering carbon emissions and stimulating the use of renewable sources of energy, they do not constitute unnecessary barriers to trade and do not discriminate between imported and domestic products.

Recently Adopted EU legislation

- *Commission Regulation (EU) No. 375/2010 of 3 May 2010 refusing to authorise a health claim made on foods, other than those referring to the reduction of disease risk and to children's development and health*

- *Commission Regulation (EU) No. 377/2010 of 3 May 2010 imposing a provisional anti-dumping duty on imports of sodium gluconate originating in the People's Republic of China*

- *Implementing Regulation of the Council (EU) No. 363/2010 of 26 April 2010 amending Regulation (EC) No. 1001/2008 imposing a definitive anti-dumping duty on imports of certain tube and pipe fittings of iron or steel originating, inter alia, in Malaysia*

- *Implementing Regulation of the Council (EU) No. 364/2010 of 26 April 2010 amending Regulation (EC) No. 1487/2005 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain finished polyester filament fabrics originating in the People's Republic of China*

- *Commission Regulation (EU) No. 353/2010 of 23 April 2010 approving minor amendments to the specification for a name entered in the register of protected designations of origin and protected geographical indications [Mirabelles de Lorraine (PGI)]*

- *Commission Regulation (EU) No. 347/2010 of 21 April 2010 amending Commission Regulation (EC) No. 245/2009 as regards the ecodesign requirements for fluorescent lamps without integrated ballast, for high intensity discharge lamps, and for ballasts and luminaires able to operate such lamps*

- *Council Decision of 9 October 2009 on the signing and conclusion of the Agreement in the form of an Exchange of Letters between the European Community and the Arab Republic of Egypt concerning reciprocal liberalisation measures on agricultural products, processed agricultural products and fish and fishery products, the replacement of Protocols 1 and 2 and their annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part*