FRATINIVERGANO
EUROPEAN LAWYERS
TRADE PERSPECTIVES©

**Issue No. 10 of 21 May 2010**

## Malaysia contemplates WTO case against the restriction of palm oil on the EU market

On 3 May 2009, Malaysia's Minister of Plantation Industries and Commodities made the allegation that the new EU Renewable Energy Directive (*i.e.*, Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable resources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC) will effectively ban Malaysian palm oil from the EU market.

The EU Renewable Energy Directive establishes mandatory national overall targets and measures for the use of energy from renewable sources in order to reduce CO2 emissions and to achieve the EU's climate change and energy policy objectives. In particular, each EU Member State has to increase the share of renewable energy used with the aim of achieving a 20% share of renewable energy in the EU's gross final consumption of energy by 2020. In addition, the EU Renewable Energy Directive establishes that 10% of the energy used in the EU for transport should be renewable by 2020. Finally, it also introduces sustainability criteria for biofuels (used for transport purposes) and bioliquids (used for electricity, heating and cooling purposes). Irrespective of whether the raw materials were cultivated inside or outside the territory of the EU, energy from biofuels and bioliquids will be taken into account for the purposes of compliance with the requirements of the EU Renewable Energy Directive concerning national targets for EU Member States, renewable energy obligations and eligibility for financial support.

More specifically, the EU Renewable Energy Directive focuses on two drivers for purposes of achieving sustainability: 1) The life cycle greenhouse gas emissions of biofuels, which must be reduced by 35% (as of 2017, such target will be 50% for existing installations and 60% for new installations); and 2) The land used to produce biofuels and bioliquids. This latter driver, in particular, dictates that land which contains high carbon stock or high biodiversity cannot be used to produce biofuels or bioliquids. Land with high carbon stock is defined as wetlands, continuously forested areas and land spanning more than one hectare with trees higher than three meters and a canopy cover of between 10% and 30%, or trees able to reach those thresholds *in situ*, unless a number of conditions are fulfilled (which are laid down in part C of Annex V to the EU Renewable Energy Directive). Land with high biodiversity is defined as primary forest and other wooded land, areas that are designated as such (*i.e.*, either by law or by the relevant competent authority for nature protection purposes or for the protection of rare, threatened or endangered eco-systems or species) or high-biodiversity grassland. The reasoning is that greenhouse gases (hereinafter, GHG) stored in the soil and in plants should not be released in the atmosphere and the delicate biodiversity and natural habitats should not be disrupted.

The controversy surrounding the EU Renewable Energy Directive rests in its sustainability criteria, which have been perceived by many as possible barriers to trade. In particular, Malaysia has voiced its concerns that such criteria might effectively lead up to a ban of biofuel produced from palm oil and a violation of Article XI of the GATT. The EU, however, claims that palm oil will not be excluded from the EU market, when and if it is produced according to the conditions set-out in the EU Renewable Energy Directive. The loss of (potential) market share could further be justified under Article XX of the GATT through the argumentation that such measures are (i) Necessary to protect human, animal and plant life or health; or (ii) Put in place in order to conserve exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. In fact, the palm oil industry has been accused of increasingly

contributing to the destruction of the rainforest, thereby endangering, *inter alia*, biodiversity and land stability. Furthermore, palm oil plantations are often expanded by burning down and draining peatland, which releases large amounts of GHG.

This is another case which shows the increasing importance of measures which relate to the protection of the environment and that have the potential to affect international trade. It has proven difficult to draw up criteria that satisfy both environmental concerns and safeguard international trade. Malaysia looks posed to coordinate its efforts with Indonesia, as combined they represent 85% of world palm oil production. Stakeholders should be prepared to identify the potential trade effects and to substantiate their allegations with evidence. If referred to the WTO, this dispute has the potential to bring greater clarity to the interaction between sometimes conflicting environmental and trade policies, along the lines of what may happen with the oil sands dispute between the EU and Canada (see Trade Perspectives, Issue No. 9 of 7 May 2010).

### The EU and the US express concerns in relation to Japan's planned postal reform

It has been reported that, on 21 May 2010, the Acting Head of the Permanent Delegation of the EU in Geneva, the Japanese Ambassador to the WTO, and the US Ambassador to the WTO held talks concerning Japan's anticipated postal reform.

In particular, the planned postal reform bill, adopted by the Cabinet on 30 April 2010 and submitted to the Lower House of the Diet for deliberations, plans to scale back the privatisation of Japan Post, which was launched in 2007. Japan Post was then split into four subsidiaries: Japan Post Insurance, Japan Post Bank, Japan Post Service and Japan Post Network. The planned reform would now foresee a merger of Japan Post Service and Japan Post Network into an entity referred to as 'Japan Post Holdings Co.'. Japan Post Bank and Japan Post Insurance would operate separately, but within the framework of this holding, thereby integrating management of mail, banking and insurance operations and providing the same financial services nationwide. The Japanese Government strives to hold on to 1/3 of all the shares of Japan Post Holdings Co. In addition, the legislative act would raise the ceiling on personal deposits from 10 million Yen per person to 20 million Yen per person. The latter would provide for an implicit Government guarantee on postal deposits and it would thereby distort competition with private sector financial institutions. Furthermore, the limit on life insurance coverage would be raised from 13 million Yen to 25 million Yen and Japan Post Insurance would be allowed to sell new products (*i.e.*, health insurance products such as 'cancer insurance').

The EU and the US are concerned that this new postal reform would undermine the commitments made by Japan within the framework of the WTO General Agreement on Trade in Services (GATS). WTO Members have the possibility to schedule commitments in relation to a number of services sectors for market access and national treatment. Such commitments can either be horizontal (*i.e.*, applying to all services sectors included in the WTO Member's Schedule) or specific (*i.e.*, limited only to certain services sectors or sub-sectors). Japan did not make any specific commitments for postal and courier services, but it did so for insurance and banking and other financial services, which stand to be affected by the proposed postal reform. Furthermore, Article II of the GATS provides that each WTO Member is to accord immediately and unconditionally to services and service suppliers of any other WTO Member treatment no less favourable, *de facto* and *de jure*, than it accords to like services and service suppliers of any other country, except when a measure to that extent is listed in, and meets the conditions of, the Annex to GATS Article II Exemptions and certain frontier measures. Japan has not listed any such measures with respect to Article II of the GATS.

In relation to Japan's obligations under the GATS, the US identified the following issues as allegedly providing an unfair competitive advantage to the subsidiaries of Japan Post Holdings Co.: (i) The implementation of a number of measures, *inter alia*, exemptions from consumption taxes and stamp taxes, in order to compensate the Japan Post Group for the costs it incurs in the

provision of its universal service obligations imposed by the Government; (ii) Raising the per person deposit and coverage ceilings currently imposed on Japan Post Bank and Japan Post Insurance's businesses; (iii) The permission for Japan Post's entities to enter into new business areas (*e.g.*, offering health insurance), including in such areas where foreign companies have important market shares; (iv) The provision of a number of exemptions, *inter alia*, from provisions of Japan's Banking Law, Insurance Business Law, and Road Traffic Law; and (v) The possibility for Japan Post to compete on a favourable basis with foreign express delivery companies, *inter alia*, by means of the preferential access that Japan Post Insurance would enjoy in the distribution of products through the Japan Post Network.

The aim of the talks between the EU, Japan and the US on 21 May 2010 in Geneva is to point out and discuss the different issues of concern and to find a way to address them before the postal reform Bill is adopted into law. Therefore, it is important for the different stakeholders in the EU and the US, but also in other affected WTO Members, to identify further the contentious parts of the postal reform bill and to coordinate with their respective authorities in order to ensure the WTO consistency of the provisions of this Bill. The upcoming informal consultations and those triggered by formal WTO dispute settlement may offer a good opportunity to avoid future lengthy and expensive trade litigation.

### Brazil requests WTO consultations with the EU over seizures of generic drugs in transit

On respectively 11 and 12 May 2010, India and Brazil have requested consultations with the EU and the Netherlands within the framework of the WTO over the seizure of generic medicines in transit.

In particular, in December 2008, a shipment of the generic drug Losartan Potassium, produced in India and destined for Brazil, was seized at Schiphol Airport in the Netherlands and was later returned to the country of origin. Upon investigation, it appeared that, on a number of occasions, medicinal consignments have been seized in transit at European ports, especially by the Netherlands, on grounds of alleged patent infringement. Brazil and India now allege that the EU has wrongfully confiscated the generic Indian medicines, which are used to treat medical conditions, such as AIDS, high blood pressure, dementia and schizophrenia. Their request addresses a number of EU regulations as such (*inter alia*, Council Regulation (EC) No. 1383/2003 of 22 July 2003, Commission Regulation (EC) No. 1891/2004 of 21 October 2004 and Council Regulation (EEC) No. 2913/92 of 12 October 1992), but also the rule of the general and prospective application in force in the EU and in the Netherlands (*i.e.*, the rule that, *ex officio* or following a request from right-holders, the competent authorities may seize, authorise the seizure, order the seizure, or otherwise restrict the passage of goods in transit for reasons of patent infringement, or the suspicion thereof, under a relevant national law).

At the basis of the request for consultations and of such seizures is, *inter alia*, Council Regulation (EC) No. 1383/2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights (hereinafter, the EU IP Border Regulation). The EU IP Border Regulation deals with the provisions applicable to goods found to infringe an intellectual property right in order to deprive those responsible for trading in such goods of the economic benefits and penalise them and also to constitute an effective deterrent to further transactions of the same kind. For purposes of this case, the scope of this regulation refers, *inter alia*, to goods which, in an EU Member State where 'an application for customs action' is made, infringe a patent under that EU Member State's law. Such application for customs action can be made by the holder of an intellectual property right whenever there are sufficient grounds for suspecting that goods infringe that intellectual property right. Article 16 of the EU IP Border Regulation provides that such goods shall not be: (i) Allowed to enter into the Community customs territory; (ii) Released for free circulation; (iii) Removed from the EU customs territory; (iv) Exported; (v) Re-exported; (vi) Placed under a suspensive procedure; or (vii) Placed in a free zone or free warehouse. Furthermore, the EU Member States' competent

authorities are to destroy the goods found to infringe an intellectual property right or dispose of them outside commercial channels in such a way as to preclude injury to the right-holder, without compensation of any sort.

Brazil and India have requested consultations in relation to the EU IP Border Regulation. In particular, they allege that the EU might be violating its obligations under, *inter alia*, Article V of the GATT concerning the freedom of transit of goods (including baggage), vessels and other means of transport, which covers also transit of medicines. In particular, Article V.2 provides that traffic in transit to or from the territory of a WTO Member must be accorded freedom of transit via the routes which are most convenient for international transit. According to the WTO panel in *Colombia – Ports of entry*, such freedom of transit must be extended to all traffic in transit when the goods' passage across the territory of a WTO Member is only a portion of a complete journey beginning and terminating beyond the frontier of the WTO Member across whose territory the traffic passes. This involves two main obligations: (i) The one that, with respect to all charges, regulations and formalities in connection with transit, each WTO Member has to accord to traffic in transit to or from the territory of any other WTO Member treatment no less favourable than the treatment accorded to traffic in transit to or from any third country; and (ii) The one that such traffic shall not be subject to unnecessary delays or restrictions and be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or administration.

The request for consultations is the first step in the framework of the WTO dispute settlement process in order to address trade irritants and alleged WTO inconsistencies. All parties involved could still reach an agreement. However, it is advised to keep a close eye on the development of this case. The Indian pharmaceutical industry (particularly in the generic medicines' sector) is booming. The EU IP Border Regulation clearly has the ability to affect shipments of goods that have minimal jurisdictional contact with EU Member States. While the enforcement of intellectual property rights is necessary, such purpose could stand in the way of international trade and hamper the provision (particularly by Developing Countries) of necessary public health care, which also goes against the Doha Declaration on the TRIPs Agreement and public health, which provides, in relevant part, that the TRIPs Agreement is to be interpreted and implemented in a manner supportive of WTO Members' rights to protect public health and to promote access to medicines for all. Reports indicate that the EU appears open to revise its regulation in a way which may safeguard all concerns. It is important for the industry and other stakeholders to provide their authorities with the necessary information for them to be able to put forward a comprehensive proposal during the consultations stage and find a mutually acceptable solution that will avoid full-fledged WTO dispute settlement.

### Argentina signals import bans of several foods

Reports say that on 6 May 2010 Argentina's Domestic Trade Secretary, Guillermo Moreno, verbally announced the adoption of an import ban against several food commodities, which would come into effect on 1 June 2010.

The exact nature of the announced measure remains obscure, as the Argentinean Government has not come forward with the enactment of a legal act or even with a specific list of affected products. It has been merely stated that only imported products having a domestically-produced (*i.e.*, Argentinean) equivalent will fall under the scope of the ban. Foreign products which are, nevertheless, manufactured in Argentina will allegedly not fall within the scope of the measure. Products expected to face an import ban include, *inter alia*, French cheese, Italian pasta, Spanish olive oil, Russian vodka, Brazilian sweet corn and Swiss chocolate.

The measure's abstract nature and the lack of any sort of legal act codifying it, makes it difficult to express a comprehensive opinion about its WTO compatibility. However, if the measure ends up being designed in such a way that it discriminates only against imported products competing with domestically-produced products, without any sort of legitimate justification (*i.e.,* considerations

relating to human, animal or plant life and health), it will almost surely collide with a number of cornerstone WTO norms and principles. It will likely not only constitute a prohibited quantitative restriction on imports, but also an internal regulation according to imported products treatment less favourable than the one accorded to like products of national origin (*i.e.*, a blatant National Treatment violation).

The announcement of the import ban has met with strong opposition from the EU and Brazil, which would be the two trading partners most affected in terms of trade volumes and investment, if the measure were to be finally implemented. The two countries already argued that restrictions of this kind are bluntly protectionist and clearly incompatible with the WTO system and the Argentinean commitments in the G20 context. According to reports, the import ban, even though not yet in place, has already caused trade disruptions with Brazil, as several Brazilian lorries appear to be immobilised at the Uruguayan customs, not being allowed to enter Argentina for lack of clear information.

Argentina's move appears inexplicable, if placed in the context of the re-launching of the EU-MERCOSUR trade negotiations, which was very recently announced by the EU Commission. Some argue that the import ban may be a way for the Argentinean Government to deal with the ongoing problem of inflation. However, banning a range of imported foods could backfire by eliminating foreign competition and arguably driving prices even higher. Others support the idea that Argentina fears that the current weakening of the EURO could lead to cheaper European food flooding the country and harming, in that way, domestic producers. Finally, there are those who perceive the announced measures as a response to the continuing soy oil dispute with China (see Trade Perspectives, Issue No. 8 of 23 April 2010) which has gravely affected Argentinean production. Whatever the case, the adoption of such measure would undoubtedly trigger a dangerous trade war, one which would negatively affect all countries and traders involved, particularly since Argentina is a significant agricultural and food exporter. The adoption of retaliatory measures by its main trading partners and the ensuing WTO litigation could further deteriorate its economy and have dangerous spill-over effects. All parties involved should take the necessary steps to avoid such outcomes.

## Recently Adopted EU Legislation

- *Commission Regulation (EU) No. 421/2010 of 17 May 2010 amending Regulation (EU) No. 53/2010 as regards catch limits for capelin in Greenland waters*

- *Commission Regulation (EU) No. 410/2010 of 11 May 2010 entering a name in the register of protected designations of origin and protected geographical indications (Εξαιρετικό Παρθένο Ελαιόλαδο Σέλινο Κρήτης (Exeretiko partheno eleolado Selino Kritis) (PDO))*

- *Commission Regulation (EU) No. 403/2010 of 10 May 2010 entering a name in the register of protected designations of origin and protected geographical indications (Tarta de Santiago (PGI))*

- *Commission Regulation (EU) No. 404/2010 of 10 May 2010 imposing a provisional anti-dumping duty on imports of certain aluminium wheels originating in the People's Republic of China*

- *Commission Regulation (EU) No. 401/2010 of 7 May 2010 amending and correcting Regulation (EC) No. 607/2009 laying down certain detailed rules for the implementation of Council Regulation (EC) No. 479/2008 as regards protected designations of origin and geographical indications, traditional terms, labelling and presentation of certain wine sector products*

- *Implementing Regulation of the Council (EU) No. 400/2010 of 26 April 2010 extending the definitive anti-dumping duty imposed by Regulation (EC) No. 1858/2005 on imports of steel ropes and cables originating, inter alia, in the People's Republic of China to imports of steel ropes and cables consigned from the Republic of Korea, whether declared as originating in the Republic of Korea or not, and terminating the investigation in respect of imports consigned from Malaysia*

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