FRATINIVERGANO
EUROPEAN LAWYERS
TRADE PERSPECTIVES©

Issue No. 1 of 11 January 2013

A WTO panel has found the local content requirement of Ontario's feed-in-tariff scheme to be discriminatory

On 20 December 2012, the WTO panel established to assess certain aspects of the Canadian province of Ontario's green energy programme issued its report. Japan and the EU had both requested the establishment of a panel to examine the WTO consistency of an aspect of Ontario's '*feed-in-tariff programme*' (hereinafter, FIT). FIT programmes consist in governmentally-fixed above-market tariffs (indicated per kilowatt-hour) that grid system operators or utility companies must pay for renewable energy fed into the national electricity grid by private independent producers (see Trade Perspectives, Issue No. 9 of 7 May 2010). The contentious aspect of Ontario's FIT programme was the local content requirement incorporated into the Green Energy Act of 2009, which foresees payments for renewable energy at an above-market price, but makes such prices conditional upon the inclusion of Ontario-sourced equipment and services in wind and solar projects - the specific requirement for those undertaking either of these two projects is the incorporation of at least 50% or 60% Ontario-sourced components and labour, respectively.

The Panel accepted the arguments put forward by the EU and Japan (see Trade Perspectives, Issues No. 12 of 17 June 2011 and No. 2 of 27 January 2012) in relation to the measure, namely that it violated the rules on National Treatment pursuant to Article III:4 of the General Agreement on Tariffs and Trade (hereinafter, the GATT). In particular, the Panel determined that less favourable treatment had been accorded to imported equipment for renewable energy facilities, in that the rules required reliance on domestic goods in order to qualify under the FIT programme. On this basis, the Canadian requirement also amounted to a trade-related investment measure and, therefore, was deemed inconsistent with the provisions of Article 2.1 of the WTO Agreement on Trade-Related Investment Measures (hereinafter, the TRIMs Agreement), which prohibits the application of any trade-related investment measure that is inconsistent with Article III of the GATT. The Panel found that the requirement to use Ontario-sourced products qualified as '*purchase or use…from any domestic source*' under Paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement.

Interestingly, however, the Panel rejected a further claim, namely, that the requirement in question constituted a prohibited subsidy within the meaning of Article 3.1(b) and 3.2 of the WTO Agreement on Subsidies and Countervailing Measures (hereinafter, ASCM). The EU and Japan had asserted that the local content requirement in question constituted a '*subsidy*' in the form of a transfer of a funds as defined in Article 1.1(a)(1)(i) of the ASCM; or, alternatively, a price support within the meaning of Article 1.1(a)(2) of the ASCM, because the initiative ensured payments in excess of what generators would otherwise receive. The Panel held that the local content requirement of the FIT constituted a government purchase of goods within the meaning of Article 1.1(a)(iii) of the ASCM, but that, ultimately, no benefit had been conferred because: (i) the '*Hourly Ontario Electricity Price*' did not result from the operation of a competitive market, but rather a market significantly influenced by government

regulation and so the evidence adduced by the complainants for the purpose of the benefit analysis could not be accepted; (ii) the complainants had failed to establish that generators would have to operate in a competitive market in the absence of the FIT programme as the competitive wholesale electricity market would '*rarely attract the degree of investment in the generation capacity needed to secure a reliable electricity system*' and (iii) that the market conditions in Ontario suggest that a competitive wholesale electricity market would fail to achieve this outcome.

The consequences of the ruling in this case should be closely assessed by all potential stakeholders in schemes concerning renewable energy, especially considering reports that Canada is likely to appeal the case. Any appeal on this point would be particularly interesting in that the subsidies determination was not unanimous. One member of the Panel actually accepted that the challenged measures conferred a '*benefit*' by offering better prices to more expensive and less efficient generators, and in turn enabling them to enter the wholesale electricity market when they would not have otherwise been able to. The Panel majority, for its part, may also have provided potential arguments for the appeal stage by pointing out the lack of a comparable risk profile offered as evidence of a benefit. The Panel majority pointed out that the appropriate way to determine the existence of a '*benefit*' under the terms of Article 1.1(b) of the ASCM Agreement would involve comparing the relevant rates of return of the challenged contracts with the average cost of capital in Canada for comparable projects.

Although this decision made determinations in relation to the local requirement aspect of the FIT programme, and not to the programme as a whole, countries should be mindful of this decision in their implementation of schemes promoting renewable energy, considering the fact that FIT programmes are currently the most widespread renewable energy policy schemes used globally in order to increase the share of electricity from renewable resources, and often involve local content requirements (see Trade Perspectives, Issue No. 12 of 17 June 2011). Most recently, on 5 November 2012, China lodged a complaint at the WTO in relation to the local content requirements under similar programmes being implemented within the EU, namely in Greece and Italy (see Trade Perspectives, Issue No. 9 of 7 May 2010).

Potential consequences of EFSA's scientific opinion concluding that maize MON810 pollen is safe for the labelling of honey

On 18 December 2012, the European Food Safety Authority's (hereinafter, EFSA) Panel on Genetically Modified Organisms (hereinafter, GMOs) delivered a positive scientific opinion on Monsanto's application to place genetically modified (hereinafter, GM) pollen on the market for use *'in or as foods*'. In its opinion, the EFSA GMO Panel addressed the safety of maize MON810 pollen to complete the scope of the pending renewal of the authorisation for the marketing of GM maize MON810 with the use of MON810 pollen in or as food. In its opinion, the EFSA GMO Panel concludes that data on molecular characterisation of maize MON810 did not raise any safety concerns with respect to its pollen. The EFSA GMO Panel has previously assessed the safety of the newly expressed *Cry1Ab* protein in maize MON810 and stated that the assessment and conclusions of the GMO Panel on the safety of this protein, including its potential toxicity and allergenicity, also apply to the *Cry1Ab* protein expressed in MON810 pollen. The EFSA GMO Panel finally states that, '*while* [it] *is not in a position to conclude on the safety of maize pollen in or as food in general (as only limited data is available), the genetic modification in maize MON810 does not constitute an additional health risk if maize MON810 pollen is to replace maize pollen from non-GM maize in or as food*'.

Pollen is, in simple terms, the carrier of genetic information in plants and contains, *inter alia*, protein, fat and carbohydrates. The bees use pollen as a food source, such as for the rearing of larvae and young bees. Bees collect pollen and store it in the hive. This way pollen gets, almost incidentally and unintentionally, into the nectar collected by the bees in small amounts and thus also into the honey. The proportion of pollen in honey appears to be very low, usually less than 0.1%. Pollen is considered a so-called insoluble component of honey, which also include wax constituents and other contaminants such as bees' hair. According to *Council Directive 2001/110/EC relating to honey*, honey may contain generally not more than 0,1g/100g of water-insoluble content (including pollen). Furthermore, *Directive 2001/110/EC* provides that no pollen or constituent particular to honey may be removed from honey, except where this is unavoidable in the removal of foreign inorganic or organic matter.

In this context, it is important to recall the judgment of the Court of Justice of the EU of 6 September 2011 in case C-442/09 (reference for a preliminary ruling from the *Bayerischer Verwaltungsgerichtshof* (Germany) – *Karl Heinz Bablok and Others v. Freistaat Bayern*), which held that pollen in honey is to be considered an ingredient within the meaning of *Directive 2000/13/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs*. However, it is important to note that an EU Commission proposal of 21 September 2012 amending *Council Directive 2001/110/EC relating to honey,* intends to clarify this by adding a paragraph 5 to Article 2 of the Directive that pollen, '*being a natural constituent particular to honey* (which is a natural substance that has no ingredients) *shall not be considered an ingredient within the meaning of Directive 2000/13/EC'*. The EU Commission argues in its proposal that the judgment of the Court in case C-442/09 was based on the consideration, relying on the facts brought before it, that pollen in honey is mainly due to the centrifugation carried out by the beekeeper for the purposes of honey collection. However, the EU Commission states that pollen only enters into the hive as a result of the activity of the bees and it is naturally present in honey regardless of whether or not the beekeeper extracts the honey through centrifugation. Consequently, since pollen is considered a natural constituent of honey, EU labelling rules requiring a list of ingredients would not apply.

Nevertheless, the judgment of the Court of Justice in case C-442/09 is interpreted as meaning that honey containing traces of pollen from GM plants must receive prior authorisation before it may be marketed as food in the EU. The labelling rules on GMO in food will also be applicable. According to *Regulation (EC) No. 1829/2003 of the European Parliament and of the Council on genetically modified food and feed*, the presence of material containing, consisting of or produced from authorised GMOs in food shall be labelled except where that presence does not exceed 0.9% of each ingredient.

This is where the renewal of the authorisation procedure of MON810 maize (now including the authorisation of GM maize pollen) and the corresponding EFSA opinions become important. It could be argued that, if the EU adopts favourable decisions (endorsing EFSA's favourable scientific opinions) on Monsanto's applications, honey containing MON810 pollen would be marketable in the EU, different from the present. It would have to be labelled only with a concentration of 0.9%, according to Article 12(2) of *Regulation (EC) No. 1829/2003*, under which the presence of material containing, consisting of, or produced from authorised GMOs in food shall not be labelled where that presence does not exceed 0.9% of the food ingredients considered individually or food consisting of a single ingredient, provided that this presence is adventitious or technically unavoidable. Following the interpretation of the Court of Justice (without the planned clarification by the EU Commission), it would be 0.9% of the total pollen (as an ingredient), not of the total honey (as a food consisting of a single ingredient).

The EU Commission's position that pollen is a constituent of honey and not an ingredient is supported by the Codex Alimentarius Standard for honey (CODEX STAN 12-1981, adopted in 1981 and revised in 1987 and 2001), which provides under point 3.1 of the essential composition and quality factors that *'honey sold as such shall not have added to it any food ingredient, including food additives, nor shall any other additions be made other than honey.*' The interpretation of the European Court of Justice that pollen is an ingredient in case C-442/09 has also been raised by Argentina (supported by Brazil, Mexico, the US and Uruguay) as a specific trade concern in the meeting of the WTO Committee on Technical Barriers to Trade on 13 June 2012. The EU Commission referred to the pending authorisation procedure for MON810 pollen and declared that it is also currently *'shaping the EU Honey Directive'* to avoid causing unnecessary disruptions to the supply of honey to the EU.

In conclusion, it can be argued that, if the EU Commission endorses, by regulatory decisions, EFSA's positive scientific opinions on Monsanto's genetically modified maize MON810 and also on genetically modified pollen, and, at the same time, an amendment to *Directive 2001/110/EC relating to honey* is adopted, which clarifies that pollen is not an ingredient of honey, as a consequence honey containing less than 0.9% of MON810 GM pollen (which is unlikely as there is usually not more than 0.1% of pollen in honey) could be marketed in the EU – as GM pollen would be authorised - and would not even have to be labelled as *'containing GM pollen'* as the 0.9% applies to the honey content as such and not to the proportion in pollen (which shall not be considered an ingredient). The EU Commission has launched a public consultation on EFSA's opinion on the application for the authorisation of MON810 pollen as or in food. Comments can be submitted until 31 January 2013. The EU Commission's Proposal for a Directive of the European Parliament and of the Council amending *Council Directive 2001/110/EC relating to honey* is scheduled to be voted in first reading of the EU Parliament's ENVI (Environment, Public Health and Food Safety) Committee on 20 March 2013. The indicative EU Parliament plenary sitting date is the 21 May 2013.

The EU Commission has adopted its proposal for the enforcement of EU rights under the international trading system

On 18 December 2012, the EU Commission adopted its '*Proposal for a Regulation of the European Parliament and of the Council concerning the exercise of the Union's rights for the application and enforcement of international trade rules*' (hereinafter, the Proposal), aimed at creating a common regulatory framework that enables the EU to enforce its rights in a more effective and timely manner, under a number of circumstances in the international trading system. In particular, the Proposal is aimed at bringing an end to the current situation whereby the EU acts on a case-by-case basis when third countries adopt certain trade-restrictive measures that jeopardise the economic interests of EU economic operators under international trade agreements.

Until the entry into force of the Lisbon Treaty, the enforcement of EU rights was ensured through the *ad hoc* adoption of regulations by the EU Council on the basis of a proposal from the EU Commission. This system has proven overlong (the adoption of legislative acts under the ordinary legislative procedure takes on average between 15 and 31 months) and consequently, not optimal. Serve as illustration the lengthy processes of adoption of the EU Council Regulations envisaging customs duties increases on specific products within the context of the WTO cases *US – Foreign Sales Corporations* and *US – Offset Act (Byrd Amendment).*

The Proposal would allow the EU Commission to adopt implementing acts under Article 291 of the Treaty on the Functioning of the EU, for the safeguard of EU rights in cases where: (1)

the EU has been authorised to suspend concessions or other obligations under the WTO Understanding on Rules and Procedures governing the Settlement of Disputes (hereinafter, DSU); (2) similarly, the EU has been granted the right to suspend concessions or other obligations under other international trade agreements, whether bilateral or multilateral; (3) for the rebalancing of concessions or other obligations authorised by a safeguard measure adopted by a third country, whether under the WTO Agreement on Safeguards, or under any bilateral or multilateral EU agreement; (4) a WTO Member has proceeded with a modification of concessions under Article XXVIII of the WTO General Agreement on Tariffs and Trade and no compensatory adjustments have been agreed with the EU, provided that the EU holds a right to adopt such measure, and it is adopted within six months after the modification of concessions. Should one of these circumstances arise, the Proposal would enable the EU Commission to rapidly adopt, suspend, modify or terminate implementing acts envisaging commercial policy measures designed to provide effective compliance with the EU rights and bring relief to EU economic operators, in light of the available information and the EU's general interest (Article 4.3 of the Proposal). In particular, the Proposal suggests that measures take the form of new or increased customs duties, quantitative restrictions on imports or exports of goods, and the suspension of concessions in the area of public procurement (Article 5 of the Proposal). The EU Commission implementing acts must be adopted in accordance with the so-called '*examination procedure*', which involves consultation with EU Member States and the scrutiny of the EU Parliament.

The Proposal contains provisions directed to the adoption of implementing acts envisaging measures concerning trade in goods and in the area of public procurement, inasmuch as those are the fields where the proposed measures have proven to deliver '*effective*' results. Both WTO law and the EU's free trade agreements provide for the possibility to cross-retaliate (*i.e.*, to suspend concessions or other obligations in a different sector from the one where the violation was found). Article 22 of the WTO DSU provides that countermeasures are generally to be adopted in relation to the same sector where the initial violation was found, while their adoption in other sectors is reserved to those cases where the former is not practicable. Therefore, a violation of the provisions of the WTO General Agreement on Trade in Services, or the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, could still be addressed through the mechanism foreseen in the Proposal. However, the EU Commission reserves the possibility of those violations being addressed by new proposals, covering measures in trade in services or intellectual property rights. In any case, this is certainly an issue that is likely to give rise to subsequent discussions and that could benefit from further clarification on the side of the EU Institutions.

The Proposal is now going through the ordinary legislative procedure (formerly, co-decision), which requires agreement between the EU Council and the EU Parliament for it to be finally adopted. It has been drafted with the goal of designing a framework that allows for the swift adoption of measures aimed at safeguarding the interests of EU operators, when actions of third countries imperil them. It is, therefore, intended to have an immediate effect on internal legislative processes involving the EU Institutions, but undoubtedly also an impact on EU businesses, which ultimately bear the negative consequences of the trade-restrictive measures adopted by third countries and which can hence benefit from initiatives along these lines.

EU – Singapore FTA specially designed to promote green growth

On 16 December 2012, the EU and Singapore concluded negotiations on a free trade agreement (hereinafter, EUSFTA). The agreement is considered to be the first EU '*green FTA*', inasmuch as it includes provisions aimed at promoting '*green'* growth. Both parties will now seek endorsement from their respective authorities and the signature of this FTA is expected to occur in March 2013.

Although the text of the agreement is not yet publicly available, a press release of the EU Commission (hereinafter, the Report) indicates that the EUSFTA contains provisions aimed at ensuring environmental protection and social development through sustainable development, in line with the EU targets under the '*Europe 2020*' strategy which includes, *inter alia*, the reduction of impacts on climate change and the enhancement of renewable energies. It is noted that previous efforts to include in bilateral trade agreements provisions on green growth have been made in the recently negotiated EU-Korea FTA. This agreement includes a chapter on trade and sustainable development, which recognises that environmental protection is a crucial component of sustainable development. Article 13.6 thereof provides that Parties shall '*strive*' to facilitate and promote trade and foreign direct investment in environmental goods and services, including through addressing related non-tariff barriers. However, the wording of such a provision merely requests Parties to make an effort to contribute to sustainable development through the facilitation of trade in environmental goods and services, but does not establish an obligation as such. Conversely, the EUSFTA appears to include, according to the Report, specific commitments in environmental services, rules on green tendering, provisions for cooperation to address illegal fishing and timber, and disciplines for the reduction of non-tariff barriers on renewable energy equipment.

The inclusion of '*green'* provisions in an FTA, in this case the EUSFTA, may set the trend for future FTA negotiations to create possible platforms to discuss regulatory environmental convergence and undertake solid commitments on environmental issues, and to help overcome (i) tariff and non-tariff measures currently affecting environmental goods and services (*e.g.*, subsidies granted to renewable energy equipment, sustainability requirements affecting renewable energy products); and (ii) trade frictions arising from environmental regulation (*e.g.*, in the areas of timber trade, fisheries), arguably preventing disputes linked to the wider debate on the interaction between trade rules and environmental policies.

The EUSFTA will be the entry gate for most EU companies wishing to do business in South-East Asia. It has been reported that more than 8,000 European companies, trading in a range of goods and services, including green technologies, are already established in Singapore. Currently, the EU is negotiating a number of FTAs with different countries and the EUSFTA may set the benchmark for the '*green'* chapter that will be negotiated in each new agreement. In light of this development, EU businesses operating in the relevant sectors are advised to assess the impact of these clauses under the EUSFTA on their economic activities, and to closely follow the negotiation of '*green*' chapters of future EU FTAs.

Recently Adopted EU Legislation

Market Access

- *Regulation (EU) No. 1217/2012 of the European Parliament and of the Council of 12 December 2012 on the allocation of tariff-rate quotas applying to exports of wood from the Russian Federation to the European Union*

- *Agreement between the European Union and New Zealand amending the Agreement on mutual recognition in relation to conformity assessment between the European Community and New Zealand*

Trade Remedies

- *Council Implementing Regulation (EU) No. 1269/2012 of 21 December 2012 amending Implementing Regulation (EU) No. 585/2012 imposing a definitive anti-dumping duty on imports of certain seamless steel pipes, of iron or steel, originating, inter alia, in Russia, following a partial interim review pursuant to Article 11(3) of Regulation (EC) No. 1225/2009*

- *Council Implementing Regulation (EU) No. 1241/2012 of 11 December 2012 amending Implementing Regulation (EU) No. 1138/2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia*

Customs Law

- *Council Regulation (EU) No. 1232/2012 of 17 December 2012 amending Regulation (EU) No 1344/2011 suspending the autonomous Common Customs Tariff duties on certain agricultural, fishery and industrial products*

- *Commission Implementing Regulation (EU) No. 1213/2012 of 17 December 2012 suspending the tariff preferences for certain GSP beneficiary countries in respect of certain GSP sections in accordance with Regulation (EU) No. 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preferences*

Food and Agricultural Law

- *Commission Implementing Regulation (EU) No. 1235/2012 of 19 December 2012 amending Annex I to 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*

- *Commission Implementing Regulation (EU) No. 1223/2012 of 18 December 2012 laying down detailed rules for the application of an import tariff quota for live bovine animals of a weight exceeding 160 kg and originating in Switzerland provided for in the Agreement between the European Community and the Swiss Confederation on trade in agricultural products*

Trade-Related Intellectual Property Rights

- *Regulation (EU) No. 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection*

Other

- *Council Regulation (EU) No. 1242/2012 of 18 December 2012 fixing for the 2013 fishing year the guide prices and Union producer prices for certain fishery products pursuant to Regulation (EC) No. 104/2000*

- *Commission Implementing Decision of 12 December 2012 establishing the type, format and frequency of information to be made available by the Member States for the purposes of reporting on the implementation of Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions (notified under document C(2012) 9181.*

- *Regulation (EU) No. 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries*

- *Commission Implementing Decision of 11 December 2012 determining quantitative limits and allocating quotas for substances controlled under Regulation (EC) No. 1005/2009 of the European Parliament and of the Council on substances that deplete the ozone layer, for the period 1 January to 31 December 2013(notified under document C(2012) 8899)*

- *Commission Directive 2012/48/EU of 10 December 2012 amending the Annexes to Directive 2006/87/EC of the European Parliament and of the Council laying down technical requirements for inland waterway vessels*

- *Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part*

Patricia Arratíbel, Ignacio Carreño, Eugenia Laurenza, Anna Martelloni, Louise O'Farrell, Blanca Salas and Paolo R. Vergano contributed to this issue.