FRATINIVERGANO
EUROPEAN LAWYERS
TRADE PERSPECTIVES©

Issue No. 22 of 29 November 2013

WTO Panel report issued in the dispute *EC – Seal Products*

On 25 November 2013, a WTO Panel issued its report on the complaints put forward by Canada and Norway in the dispute *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (hereinafter, *EU – Seal Products*).

The dispute was initiated by Canada in November 2009 when it requested WTO consultations with the EU (formerly, the European Communities) concerning *Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products* (hereinafter, the Basic Regulation), subsequently complemented by *Regulation (EU) No. 737/2010 laying down detailed rules for the implementation of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on trade in seal products* (hereinafter, the Implementing Regulation). Later in November 2009, Norway also requested consultations with the EU concerning the same subject matter. In April 2011, the WTO Dispute Settlement Body (hereinafter, DSB) established that the two complaints from Canada and Norway would be examined by the same panel (see Trade Perspectives, Issue No. 6 of 25 March 2011).

The measure imposed by the EU prohibits the placing on the market of seal products (*e.g.* seal skin, meat, fat, oil, organs, fur, clothing and footwear containing any components deriving from seals) with some exceptions (see Trade Perspectives, Issue No. 18 of 5 October 2012). The complainants argued that the EU Seal Regime (*i.e.*, the Basic Regulation and the Implementing Regulation) was inconsistent, *inter alia*, with the EU's obligations under Article 2.2 of the WTO Agreement on Technical Barriers to Trade (hereinafter, the TBT Agreement). They also claimed that the EU violated Articles I:1, III:4 and XI:1 of the General Agreement on Tariffs and Trade (hereinafter, the GATT) and that the EU Seal Regime could not be justified under Articles XX(a) or XX(b) of the GATT, *i.e.*, the '*General Exceptions*' clause. In addition, Canada also claimed a violation of Article 2.1 of the TBT Agreement.

In its assessment of the complainants' arguments, the Panel first established that the EU's Basic and Implementing Regulations provided the legal framework for a general ban with three exceptions for placing seal products on the EU's market: (i) the '*Indigenous Communities exception*' (hereinafter, the IC exception), which allows the placing on the EU market of seal products resulting from hunts traditionally conducted by Inuit and other indigenous communities when the products are at least partially used or consumed by communities according to their traditions; (ii) the '*Travellers exception*', which permits the occasional importation of seal products consisting exclusively of goods for the personal use of travellers or their families; and (iii) the '*Marine Resources Management exception*' (hereinafter, the MRM exception), which allows the placing on the market of seal products resulting from by-products of hunting for the purpose of sustainable management of marine resources on a non-profit basis.

With respect to the claims under the TBT Agreement, the Panel found that the EU Seal Regime resulted in a technical regulation within the meaning of the TBT Agreement, inasmuch as it fulfilled the three main criteria laid down by the Appellate Body in *EC – Sardines, i.e.*: (i) it is a document applied to an identifiable product or group of products; (ii) it lays down one or more characteristics of the product; and (iii) compliance with the product characteristics is mandatory. While the fulfilment of criteria (i) and (iii) was not disputed by the parties, the Panel established that the second criterion was met because the exceptions to the ban imposed certain conditions or characteristics for products to be placed on the market, such as the hunter's identity (Inuit or indigenous), type of hunt (traditional), purpose of hunt, etc.

Having established that the EU Seal Regime consisted in a technical regulation, the Panel found that the IC exception and the MRM exception were inconsistent with Article 2.1 of the TBT Agreement. In particular, on the basis of the Appellate Body's reasoning in the *US-Clove*, *US-Tuna II* and *US-COOL* disputes, the Panel considered that the detrimental impact on imports from Canada and Norway to the EU that resulted from the application of these exceptions did not stem solely from legitimate distinctions applied by the EU between seal products '*conforming*' with the ban (*i.e.*, those resulting from Inuit hunts or MRM) and '*non-conforming*' seal products (*e.g.*, resulting from commercial hunts). Notably, the Panel found that despite the three exceptions, the majority of Canadian seal products were *de facto* excluded from the EU's market as '*non-conforming*' while the design, structure and operation of the EU Seal Regime appeared to allow products from the EU and Greenland to qualify for the IC and MRM exceptions in many instances. *Inter alia*, according to the Panel, evidence showed that, due to the higher degree of commercialisation of seal hunting and their access to international sales networks, Inuit communities in Greenland exploited the IC exception much more effectively than Inuit people in other parts of the world, including Canada. In practical terms, the Panel found that the operation of the exceptions to the ban accorded less favourable treatment to imported seal products *vis-à-vis* '*like*' domestic and (other) foreign seal products.

The Panel established that the EU did not act inconsistently with its obligations under Article 2.2 of the TBT Agreement, to the extent that the EU Seal Regime was found to contribute to its legitimate objective, *i.e*., addressing EU citizens' concerns on seal welfare, as identified by the Panel. In this respect, the Panel also noted that the EU's objective to limit exposure of EU citizens to products derived from seals killed inhumanely was not completely fulfilled, since the IC and MRM exceptions still allowed seals to be killed in an inhumane manner, albeit in limited quantities. According to the Panel, the alternative proposed by the complainants that seal products of non-Inuit origin produced on a commercial basis and meeting certain animal welfare requirements be sold in the EU (for example, through certification schemes), was not reasonably available to the EU. In particular, the Panel noted that although Canada and Norway proposed a wide range of regimes of varying stringency in relation to the required standard of animal welfare and accuracy of certification, they failed to define an alternative that was able to address the moral concerns of EU citizenship.

In the analysis of the EU's conformity with its obligations under the GATT, the Panel found that the IC exception under the EU Seal Regime was inconsistent with the most-favoured nation principle envisaged in Article I:1 of the GATT, insofar as the exception discriminated between seal products from Greenland, which were predominantly exported to the EU, and '*like*' products originating from Canada and Norway. Further, the Panel found that the MRM exception was not consistent with the national treatment obligation under Article III:4 of the GATT because it led to discrimination of imported seal products with respect to domestic '*like*' products. In fact, the Panel acknowledged that the majority of seal products from Canada and Norway are excluded from the EU market under the terms of the MRM exception, while virtually all domestic EU products are likely to qualify for placement in the

EU market. The Panel also established that neither the IC nor MRM exception could be justified under the '*General Exceptions*' clause in Article XX of the GATT. Lastly, the Panel did not find a violation of Article XI:1 of the GATT, stating that it was not persuaded by the complainants' arguments that each of the three exceptions in the EU Seal Regime imposed an import restriction within the meaning of such provision.

In substance, the Panel approved the EU's general ban on grounds of public morals, stating, however, that the exceptions to it were discriminatory in nature. Arguably the outcome of the dispute could have been different should the claimants have maintained that the EU Seal Regime as a whole had a restrictive impact on imported seal products inconsistently with Article XI:1 of the GATT. In their first written submissions the complainants argued that the EU Seal Regime was a border measure which was operating as a quantitative restriction and import prohibition for foreign seal products. However, it appears that, in the course of the proceedings, both Canada and Norway clarified their argument, claiming that each of the three exceptions, rather than the EU Seal Regime as a whole, independently violated Article XI:1 of the GATT, imposing quantitative restrictions on the importation of Canadian and Norwegian seal products. The Panel disagreed with the complainants, stating that the EU Seal Regime constituted one measure (*i.e.* a general ban with exceptions) which restricted the importation of seal products to the EU and rejected on these grounds the complainants' claim under Article XI:1 of the GATT. Inasmuch as the Panel did not find that the exceptions to the import ban were justified under Article XX of the GATT, an assessment of the EU Seal Regime as a whole under Article XI could have arguably led to a finding of inconsistency of the entire scheme with the GATT.

The systemic implications of this ruling can also not be ignored. In particular, it has been suggested that this ruling may potentially lead to future WTO disputes where the moral grounds underlying similar practices carried out in certain industries producing food of animal origin may be challenged. Moreover, this ruling certainly adds to the ongoing debates concerning frictions between domestic regulations in areas such as public health, environment and animal welfare and trade rules. Canada has reportedly already stated that it is willing to appeal the report. According to the WTO rules, the panel report must be adopted by the DSB within 60 days after its circulation, unless appealed. Therefore, an appeal must be filed within such timeframe.

The EU adopts definitive anti-dumping measures against biodiesel from Argentina and Indonesia

On 19 November 2013, the EU Council imposed definitive anti-dumping duties on imports of '*fatty-acid mono-alkyl esters and/or paraffinic gasoils obtained from synthesis and/or hydro-treatment, of non-fossil origin, in pure form or as included in a blend*' (*i.e*., biodiesel) originating in Argentina and Indonesia. In particular, *Council Implementing Regulation (EU) No. 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia* (hereinafter, the EU Council's Implementing Regulation), entered into force on 27 November 2013 and will be in place for a period of five years (if not reviewed or extended).

The imposition of anti-dumping measures terminates the investigation launched by the EU Commission on 29 August 2012, initiated after the *European Biodiesel Board* (hereinafter, EBB) lodged a complaint alleging that shipments of biodiesel from Argentina and Indonesia were imported into the EU at dumped prices. Investigation proceedings, conducted in accordance with the *EU Basic Anti-Dumping Regulation* (*i.e.*, *Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community*), concluded that: (i) Argentinean and Indonesian

biodiesel exporters engaged in dumping; (ii) the EU industry suffered material injury; (iii) there was a causal link between dumping and such injury; and (iv) the imposition of anti-dumping duties would not be against the EU's interests. *Inter alia*, the EU Commission found that Argentinean and Indonesian biodiesel producers benefitted from high export taxes on soybean oil and palm oil in their countries, which allowed them to enjoy access to raw materials at artificially lower prices than those available to EU producers. In light of the findings of the investigation, including that the export prices of the imported biofuels at stake were lower than their '*normal value*' (*i.e*., their cost of production in the absence of the distortion created by the differential export taxes), the EU Council, upon the EU Commission's proposal, adopted definitive anti-dumping measures.

Duties imposed range between EUR 216.64 and EUR 245.67 per tonne net of biodiesel (an average of 24.6% of its price) for Argentinean exporters, and between EUR 76.94 and EUR 178.85 per tonne net of biodiesel for Indonesian companies (on average, 18.9% of biodiesel's price). Anti-subsidy proceedings against the same goods were also triggered by the EBB, but they were recently terminated without the imposition of measures, as formalised by *Commission Regulation (EU) No. 1198/2013 of 25 November 2013 terminating the anti-subsidy proceeding concerning imports of biodiesel originating in Argentina and Indonesia and repealing Regulation (EU) No. 330/2013 making such imports subject to registration* (for further background on the anti-subsidy proceedings, see Trade Perspectives, Issue No. 20 of 31 October 2013).

Argentina and Indonesia have reportedly indicated that legal remedies and counteractions would be explored should the EU adopt definitive anti-dumping duties against imports of biodiesel from the two countries. In particular, sources suggest that action before the Court of Justice of the EU and WTO dispute settlement could be triggered.

Private parties which are directly and individually prejudiced by an act stemming from an EU Institution may seek redress before the Court of Justice of the EU. In the case at hand, Argentinean and Indonesian exporters negatively affected by the EU Council's Implementing Regulation may seek judicial annulment provided they can show that the EU Council's Implementing Regulation is, *e.g*, contrary to '*the Treaties or...any rule of law relating to their application*' and of '*direct and individual concern*' to them. This particular avenue was pursued by two US trade associations (*i.e*., *Growth Energy* and *Renewable Fuels Association*) to challenge the imposition of definitive anti-dumping duties adopted by the EU Council against imports of bioethanol from the US earlier this year (see Trade Perspectives, Issue No. 5 of 8 March 2013). In particular, *Growth Energy* and *Renewable Fuels Association* filed an action before the EU's General Court in July 2013, whereby they sought the annulment of the EU's *Council Implementing Regulation (EU) No. 157/2013 of 18 February 2013 imposing a definitive anti-dumping duty on imports of bioethanol originating from the United States of America* (*i.e*., case T-276/13 *Growth Energy and Renewable Fuels Association v Council*). In their pleas, the applicants argued that the EU Commission incurred in manifest errors throughout the anti-dumping investigation concerning, *inter alia*, the dumping margin calculations and the injury determination, and that the EU Commission violated the principle of non-discrimination in a number of manners.

The same avenue was triggered by an Indonesian producer of fatty alcohols (*i.e*., *Ecogreen Oleochemicals*) in January 2012, when it lodged an application before the EU's General Court (*i.e*., case T-28/12 *PT Ecogreen Oleochemicals and Others v Council*) for the annulment of *Council Implementing Regulation (EU) No. 1138/2011 of 8 November 2011 imposing a definitive antidumping duty and collecting definitively the provisional duty imposed on imports of certain fatty alcohols and their blends originating in India, Indonesia, and Malaysia*. The EU anti-dumping proceedings at hand also triggered WTO action from the Government of Indonesia, which filed a request for WTO consultations with the EU in July 2012. In December 2012, the EU adopted *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, whereby it revised and lowered the anti-dumping duties imposed on Indonesian exporters. As a result of the adoption of such instrument, the EU's General Court found, in April 2013, that it was no longer necessary to rule in such case, to the extent that the new *status quo* led to the desired results sought by the applicants. However, the new situation did not affect the WTO front, where Indonesia continued to pursue dispute settlement procedures by filing a request for the establishment of a panel in May 2013. Although no panel to this case has yet been composed, from Indonesia's request for the establishment of a panel it can be inferred that the Panel will examine the EU's provisional and definitive anti-dumping measures imposed on fatty alcohols, as well as certain aspects of the underlying EU Commission's investigation and determinations in light of the relevant provisions of the WTO Anti-Dumping Agreement and the GATT.

Regardless of the outcome of the examples provided above in relation to EU and WTO remedies, it is clear that there is an increasing web of measures in place in the EU against imports of biofuels, which result in additional hurdles to international trade in such goods. In the field of trade defence, in addition to the aforementioned proceedings against biodiesel from Argentina and Indonesia and bioethanol from the US, the EU maintains anti-dumping and countervailing duties also on biodiesel originating from the US (see Trade Perspectives, Issue No. 23 of 16 December 2011). In addition to trade remedies, the EU also maintains non-tariff measures on biofuels, such as the '*sustainability criteria*' envisaged by the *Fuel Quality Directive* and the *Renewable Energy Directive*, as well as those potentially resulting from the ongoing legislative procedure to amend these directives to include, *inter alia*, the requirement that food crop-based biofuels be *de facto* limited and that indirect land use change (*i.e.*, ILUC) emissions be monitored and factored-in when determining biofuels' overall sustainability as of 2020 (see Trade Perspectives, Issue No. 17 of 20 September 2013).

In this light, it is the primary responsibility of companies involved in the sector at hand to engage in carefully-designed strategies to secure that the measures and policies adopted do not conflict with their legitimate commercial interests and comply with countries' WTO commitments. In order to be successful, strategies need to be designed in close cooperation with their respective Governments, whose backing is needed to lodge complaints at the WTO. Lack of action is no longer an option, to the extent that the immediate threat of loss of market access posed by the recently imposed anti-dumping duties will only be aggravated by the foreseeable further tightening of biofuels' regime in the EU, should the planned amendments to the *Fuel Quality Directive* and the *Renewable Energy Directive* be finalised and adopted by EU decision-makers. The next few months will be critical to avoid that a blanket of trade-distortive or -discriminatory policies will be adopted against certain types of biofuels and seriously undermine the industry's trade potential for years to come.

The US FDA is considering removing the GRAS status of partially hydrogenated oils, while individual EU Member States establish restrictions on trans fats

On 8 November 2013, the US Food and Drug Administration (hereinafter, FDA) issued a notice (with a period for the submission of comments and for scientific data and information that ends on 7 January 2014) in which it proposes to remove the '*generally recognised as safe*' (hereinafter, GRAS) status of partially hydrogenated oils (hereinafter, PHOs), which are the primary dietary source of industrially-produced trans fatty acids, or trans fats. In Europe, individual EU Member States (*i.e.*, Denmark, Austria, Hungary and Belgium) and other

countries (Switzerland and Iceland) have established or are planning to establish restrictions of the content of trans fats in foods.

Chemical hydrogenation is the process by which hydrogen atoms are added to unsaturated sites on the carbon chains of fatty acids, in the presence of catalysts, thereby reducing the number of double bonds. '*Partial hydrogenation*' describes an incomplete saturation of the double bonds, in which some double bonds remain, but may shift to a different position along the carbon chain of fatty acids and alter their configuration from cis to trans. The trans arrangement of hydrogen atoms results in a relatively straight configuration of the fatty acids and increases the melting point, shelf life, and flavour stability of the hydrogenated oil. Because of these technical properties, PHOs have been used by the food industry in such products as margarine, shortening, and baked goods.

Based on new scientific evidence and the findings of expert scientific panels, the FDA has tentatively determined that PHOs are not GRAS for any use in food based on current scientific evidence establishing the health risks associated with the consumption of trans fats, and therefore that PHOs are food additives subject to section 409 of the Federal Food, Drug, and Cosmetic Act (hereinafter, FDC Act). Although the FDA has not listed the most commonly used PHOs, they have been used in food for many years based on self-determinations by industry that such use is GRAS. If finalised, this would mean that food manufacturers would no longer be permitted to sell PHOs, either directly or as ingredients in another food product, without prior FDA approval for use as a food additive. The FDA's evaluation of the GRAS status of PHOs is centred on the trans fat component of these oils. Although all refined edible oils contain some trans fat as an unintentional by-product of their manufacturing process, trans fats are an integral component of PHOs and are purposely produced in these oils to affect the properties of the oil and the characteristics of the food to which they are added. In 2003, the FDA established that the presence of trans fats in foods should, if appropriate, be indicated in the labelling of a product, unless it is less than 0.5g, in which case the product may be marked as '*zero trans fat*'. This way manufacturers were able to claim '*zero trans fat*' when a product contained up to 0.5g trans fat. This loophole would be closed by the FDA focussing on the GRAS status of PHOs, where there would be no such threshold.

In the EU, neither the content of trans fats in foodstuffs has been restricted, nor has its labelling been harmonised by EU legislation. A number of EU Member States (*i.e.*, Austria and Denmark) and other European countries (*i.e.*, Iceland and Switzerland) have already introduced limitations for trans fats in food (for more details, see Trade Perspectives Issue No. 15 of 26 July 2013). The Danish *Executive Order No. 160 of 11 March 2003 on the Content of Trans Fatty Acids in Oils and Fats (BEK nr. 160 Transfedtsyrebekendtgørelsen*) and the Austrian *Ministerial Decree No. 267 of 20 August 2009 on trans fat content in food (267. Verordnung des Bundesministers für Gesundheit über den Gehalt an trans-Fettsäuren in Lebensmitteln)*, both provide that the maximum permitted amount of trans fats in foodstuffs must not exceed 2g per 100g of oil or fat. On 20 November 2013, the Hungarian Decree 71/2013 of the Ministry of Human Resources on the highest permitted amount of trans fats in food products, the conditions of, and inspections by, the authorities on the distribution of food products containing trans fats and the rules for tracking the population's consumption of trans fats (*Az emberi erőforrások minisztere 71/2013 (XI.20.) EMMI rendelete az élelmiszerekben lévő transz-zsírsavak megengedhető legnagyobb mennyiségéről, a transz-zsírsav tartalmú élelmiszerek forgalmazásának feltételeiről és hatósági ellenőrzéséről, valamint a lakosság transz-zsírsav bevitelének nyomon követésére vonatkozó szabályokról*) was published. It is due to enter into effect 90 days after publication (*i.e.*, on 18 February 2014). According to § 3(1) of Decree 71/2013, it is forbidden to place food products on the market if the amount of trans fats exceeds 2g for every 100g of the total fat content of food products provided or sold to end-consumers. For processed food products consisting of multiple ingredients, Decree 71/2013 establishes that the prohibition

in § 3(1) does not apply if: (a) the total fat content of the food product is lower than 20% (in this case, the amount of trans fats may not exceed 4g for every 100g of the total fat content of said food product); or (b) the total fat content of the food product is lower than 3% (in this case, the amount of trans fats may not exceed 10g for every 100g of the total fat content of said food product). The provision in Decree 71/2013 that this prohibition not apply, if the total fat content of the food product is lower than 20% or if the total fat content of the food product is lower than 3%, is mirrored from § 2(2) of the Austrian Decree. Finally, on 24 October 2013, a draft law adding provisions on trans fatty acids to the law of 24 January 1977 on the protection of the health of consumers regarding food and other products and to the Royal Decree of 8 January 1992 on nutrition labelling of foodstuffs (*Proposition de loi ajoutant des dispositions relatives aux acides gras trans à la loi du 24 janvier 1977 relative à la protection de la santé des consommateurs en ce qui concerne les denrées alimentaires et les autres produits et à l'arrêté royal du 8 janvier 1992 concernant l'étiquetage nutritionnel des denrées alimentaires*) was deposited before the Belgian Senate and transmitted on 7 November 2013 to the Senate's Social Affairs Committee. In relevant part, the draft proposes that foodstuffs' content of trans fatty acids be limited to 2g per 100g of oil or fat content. The draft law also suggests that the foodstuffs' trans fats content be clearly indicated in the label.

The approaches of the US FDA and of the individual EU Member States indicated above are quite different. If the FDA's preliminary determination is finalised, then PHOs would become food additives subject to premarket approval by the FDA. Foods containing unapproved food additives are considered adulterated under US law, meaning that they cannot be legally sold. Under Sections 201(s) and 409 of the FDC Act, any substance that is added intentionally to food is a food additive that is subject to premarket review and approval by FDA, unless the substance is generally recognised, among qualified experts, as having been adequately shown to be safe under the conditions of its intended use.

The prohibition of placing food products on the market when the amount of trans fats exceeds 2g for every 100g of the total fat content appears to have become the standard in the legislation of certain EU Member States. However, there are differences in the individual EU Member States' laws. The obligation on food manufacturers and distributors (of imported food) to keep records, including the trans fat content of raw materials containing trans fats, in particular, oils, fats and fat emulsions, which have been used as ingredients when producing food to be provided or sold to end consumers or used during the manufacturing process, appears to be an element of novelty in the Hungarian Decree 71/2013 and it should be analysed whether this record-keeping obligation is too burdensome for manufacturers and distributors. Also, the new labelling provisions in the proposed Belgian law are not the standard in the other EU States, which have legislated on trans fats. The current situation, where some of the smaller EU Member States are adopting national measures with slightly different requirements, may lead to a fragmentation of the EU's internal market and to (*de facto*, if not *de jure*) trade barriers. On request by the EU Commission, the European Food Safety Authority has already produced a scientific opinion in 2010 on trans fats. It concluded that the intake of trans fatty acid should be as low as possible. The question is whether the EU Commission will be acting by introducing a harmonised restriction of industrial trans fats or at least strict labelling rules.

The 2g threshold of trans fat in total fat in EU Member States legislation is less strict than the removal of the GRAS status in the US, which leads to '*zero tolerance'* of trans fats. Should the FDA remove the GRAS status from trans fats, manufacturers would be forced into reformulation of their products with other fats and oils. It has been reported that the US plan to ban PHOs in processed foods could lead to a decrease of soy oil usage of at least 15%. Comments and scientific data in relation to the notice to remove the GRAS status for PHOs can be submitted to the FDA until 7 January 2014, although it is possible that this timeframe might be extended. Ultimately, there could also be an impact on the Transatlantic Trade and Investment Partnership (TTIP), a trade agreement that is presently being negotiated

between the EU and the US. Reports suggest that the US and EU are considering comprehensive regulatory equivalence, which could have a huge effect on food regulation and could include parties harmonising their standards to each other. Interested and affected constituencies should be involved throughout the relevant regulatory and negotiating processes so as to ensure that their positions and legitimate concerns are duly taken into account.

Recent activity in the US Senate regarding currency manipulation regulations, a frequently discussed issue in the WTO, may negatively affect China's interest in the TPP

Recent reports indicate that China is taking an active interest in the Trans-Pacific Partnership (hereinafter, TPP) free trade agreement, which is currently being negotiated by 12 countries. In particular, sources suggest that China may be inching closer to requesting its participation in TPP negotiations. However, concern regarding the effect of currency imbalances on international trade has resurfaced in the US Senate and could disrupt China's potential inclusion in the TPP.

The TPP expands and amends the Trans-Pacific Strategic Economic Partnership Agreement (hereinafter, P4) signed by Brunei Darussalam, Chile, New Zealand and Singapore in 2005. In addition to the original P4 members, the TPP currently includes Australia, Canada, Japan, Malaysia, Mexico, Peru, the US and Vietnam. Recent reports indicate that Taiwan is also considering joining the TPP. The TPP has been referred to as a '*high-standard*' trade agreement that will encompass a comprehensive range of areas. To date, China and the Republic of Korea have been the notable countries absent from negotiations, given their growing economic and trade roles in the Pacific region.

Recently, a group of 60 US Senators wrote a letter addressed to the Secretary of the US Department of Treasury (hereinafter, the US Treasury), Jack Lew, and United States Trade Representative, Ambassador Michael Froman. In the letter, the senators refer to foreign currency manipulation as the '*one of the 21 century's most serious trade problems*', and asked for Secretary Lew and Ambassador Froman to '*include strong and enforceable foreign currency manipulation disciplines*' in the TPP and all future free trade agreements. However, when international trade issues relating to currency imbalances have surfaced in the past, China has been a vocal opponent of any new regulations. If Secretary Lew and Ambassador Froman act on the Senators' request, the eventual proposed provisions may conflict with China's interests towards possible TPP inclusion.

In the past, Brazil and the US have arguably been the most progressive countries with regard to countering foreign currency manipulation. In order for the US Government to take action against a foreign currency manipulator, the US Treasury must first make that determination in its annual report pursuant to the *Omnibus Trade and Competitiveness Act of 1988 (H.R. 3)*. According to Sections 3004 and 3005 thereof, titled '*International Negotiations on Exchange Rate and Economic Policies*' and '*Reporting Requirements*', respectively, the US Treasury must consult with the International Monetary Fund (hereinafter, IMF) and determine whether foreign countries are preventing effective balance of payments adjustments or gaining unfair competitive advantages in international trade and, if so, initiate negotiations with the countries in question. Although US officials have expressed concern about China's currency policies in recent years, the US Treasury has not named it, or any other country, as a currency manipulator since July 1994. The US has also come close to passing legislation that would allow the US Department of Commerce to impose countervailing duties on countries that boost exports by artificially devaluing their currency (for discussion of a past example, see Trade Perspectives, Issue No. 18 of 8

October 2010). Most recently, a group of 22 US Senators launched the '*Manufacturing Jobs for America Initiative*', including the '*Currency Exchange Rate Oversight Reform Act of 2013 (S. 1114)*', which provides for the identification of misaligned foreign currencies and requires action to correct the misalignment.

In the international context, there has been recurring debate as to whether currency manipulation, or its effects, can be challenged at the WTO, and whether the WTO is even an appropriate international body to regulate currency manipulation. On 13 April 2011, Brazil submitted a document titled '*The Relationship Between Exchange Rates and International Trade*' to the WTO Working Group on Trade, Debt and Finance (hereinafter, WGTDF). The submission proposed a two-pillar work programme consisting of an economic approach based on academic research and concrete experience in pillar one, and an institutional approach in pillar two. During subsequent WGTDF meetings, numerous countries raised concerns with respect to the attempts to address currency valuation issues within the context of the WTO, given the numerous factors that may cause currency volatility or misalignment and the conflicting conclusions of relevant research on the matter (see Trade Perspectives, Issue No. 17 of 23 September 2011). In one WGTDF meeting, China suggested that this issue falls outside the scope of the WTO and referenced the previous US Senate's '*Currency Exchange Rate Oversight Reform Act of 2011*', which it felt was a clear violation of WTO rules. If the US were to pass and enforce an updated version of that act, it may have trouble justifying the WTO consistency of any eventual countervailing duties if they were challenged by a WTO Member.

Proponents of using WTO provisions as support against currency manipulation have relied on Articles II, XV, and XXIII of the GATT, the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures (hereinafter, the SCM Agreement). GATT Article XXIII:1(b) claims are referred to as '*non-violation*' complaints and, in part, apply when a WTO Member is directly or indirectly nullified or impaired of a benefit accruing to it under the GATT as the result of another party's measure, whether or not that measure conflicts with a GATT provision. In some situations, economists believe that currency undervaluation may make exports cheaper while increasing the cost of imports. Thus, a '*non-violation*' currency manipulation claim could be coupled with the expected benefits accruing from GATT Article II's tariff concessions, as an undervalued currency in a country of importation could nullify or impair the exporting country's expected benefits from previous tariff negotiations. A claim relying on Article XV:4 of the GATT would have to show that a party, by '*exchange action*' '*frustrated the intent of the provisions of GATT*' or, by '*trade action*', '*frustrated the provisions of the Articles of Agreement of the [IMF]*'. Success under this provision may be difficult for three reasons. First, the text of Article XV:4 has yet to be interpreted by a WTO panel, and it is uncertain how a panel would define '*exchange action*' and '*frustrates*', as well as how it would approach addressing the '*intent of the provisions of GATT*'. Second, a responding party could invoke an exception under Article XV:9 of the GATT regarding '*exchange controls*' or '*exchange restrictions*'. Third, there are questions regarding the relationship between the IMF and the WTO. Some commentators suggest that the GATT may not cover exchange rate policies because at the time it was drafted the Bretton Woods par-value system was in place and currency matters were under the authority of the IMF. Additionally, it is unclear whether the IMF must take affirmative action before a WTO panel may find that a measure '*frustrates … by trade action, the intent of the provisions of the Articles of Agreement of the IMF*' within the meaning of GATT Article XV:4.

One reason why it may be difficult to use the Anti-Dumping Agreement or the SCM Agreement to contest a measure that allegedly manipulates foreign currency is that such a strategy could present practical issues. For instance, both agreements require a complaining party to show that the products at issue are '*like*' within the meaning of Article 2 of the Anti-Dumping Agreement or Article 6 of the SCM Agreement, respectively. These requisite elements highlight the limited effect that a successful claim under either agreement may

have. To contrast, exchange rate policies generally have a broader effect. Thus, in order to effectively attack an alleged currency manipulating measure, complaining parties may need to initiate numerous complaints against a wide range of products. Within the SCM Agreement, the limited scope of an SCM Agreement claim is also evidenced by the '*specificity*' requirement found in Article 2. In this regard, a complaint against a subsidy, as well as the imposition of countervailing duties, must show that the subsidy is specific to an enterprise or group of enterprises or industries. The Article 2 specificity requirement is automatically satisfied if the subsidy is '*contingent, in law or in fact … upon export performance*'. Further guidance is provided by a footnote to Article 3, which explains that text to mean a subsidy must be '*tied to actual or anticipated exportation or export earnings*', but that it is not enough if a subsidy is simply granted to enterprises which export. Disputes under the Anti-Dumping Agreement or the SCM Agreement would likely be very fact-intensive, but even if they were successful, such actions may not fully alleviate the effects of the currency manipulation.

Generally, perhaps as a result of these difficulties, WTO Members appear to have accepted that the current WTO provisions are not sufficient to address the issue of currency manipulation. This may be one motivation underlying the recent letter from US Senators to Secretary Lew and Ambassador Froman. There are a number of potential future developments that may be of interest to various businesses, organisations or governments. For example, if the US TPP negotiators, led by Ambassador Froman, were to follow the request of the US Senators it may affect China's interest in the TPP. On a broader scale, given the potential inability for the WTO to address the topic, interested parties should monitor whether a trend develops of countries negotiating for the inclusion of currency manipulation provisions in bilateral and regional trade agreements.

Recently Adopted EU Legislation

Trade Remedies

- *Commission Regulation (EU) No. 1205/2013 of 26 November 2013 imposing a provisional anti-dumping duty on imports of solar glass from the People's Republic of China*

- *Commission Regulation (EU) No. 1198/2013 of 25 November 2013 terminating the anti-subsidy proceeding concerning imports of biodiesel originating in Argentina and Indonesia and repealing Regulation (EU) No. 330/2013 making such imports subject to registration*

- *Council Implementing Regulation (EU) No. 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia*

Food and Agricultural Law

- *Commission Delegated Regulation (EU) No. 1155/2013 of 21 August 2013 amending Regulation (EU) No. 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers as regards information on the absence or reduced presence of gluten in food*

Other

- *Notice concerning the provisional application of Part IV (trade matters) of the Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other (Guatemala)*

Ignacio Carreño, Eugenia Laurenza, Anna Martelloni, Sergii Melnyk, Blanca Salas, Bruno G. Simões and Paolo R. Vergano contributed to this issue.