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Specific trade concern raised before the WTO Committee on Technical Barriers to Trade regarding the US Environmental Protection Agency's Renewable Fuel Standard

At a recent meeting of the WTO Committee on Technical Barriers to Trade (hereinafter, TBT), Indonesia reportedly reiterated a '*specific trade concern*' regarding the definition of '*renewable*' within the meaning of the United States' Renewable Fuel Standard (hereinafter, RFS), administered by the US Environment Protection Agency (hereinafter, EPA). Indonesia and the US appear to be working together to resolve Indonesia's concerns, but if the US continues to consider palm-oil-based biofuel as non-renewable for purposes of the RFS, it may invite a WTO dispute.

The RFS, originally created under the Energy Policy Act of 2005, is a US programme that requires renewable fuel to be blended into transportation fuels (*i.e.*, motor-vehicle fuels and fuels for non-road, locomotive, and marine engines) in increasing amounts each year. That act mandated blending requirements until 2012, increasing from 4 billion gallons in 2006 to 7.5 billion gallons in 2012. In 2007, the Energy Independence and Security Act amended the original act by raising the blending obligations from 2008 through 2012, while also extending the RFS through 2022. The current RFS requires use of 36 billion gallons of renewable fuel per year by 2022. The RFS blending obligations include requirements for the use of biofuel correlating to greenhouse gas (GHG) emissions when compared to traditional fossil fuels. In particular, the RFS requires that biofuels represent a 20% GHG emission reduction over their lifecycle that includes consideration of indirect land-use change associated with the production of the biofuel's feedstock. In 2011, the EPA published its findings regarding the GHG lifecycle emission savings from various biofuels, including palm oil, which did not satisfy the 20% GHG emission reduction threshold. Indonesia, a major producer and exporter of palm oil, was thus disadvantaged relative to countries who have interests in biofuels produced from other sources.

At the TBT Committee meeting in October 2013, Indonesia reportedly argued that the GHG emission savings threshold and the methodology for its calculation were arbitrary. Indonesia recognised that the WTO TBT Agreement requires WTO Members to base domestic standards on their international counterparts, but also that no comparative international agreement currently covers renewable biofuel standards. Even so, Indonesia emphasised that the TBT Agreement still mandates the use of minimally trade-restrictive regulations. Indonesia went on to review their interactions with the EPA, noting that it submitted results of

its own lifecycle GHG emission savings regarding palm-oil-based biofuels in March 2012, which indicated savings above the 20% RFS threshold. In part, it appears that the raising of a '*specific trade concern*' before the TBT Committee may have been due to an unsatisfactory response by the EPA. Indonesia reportedly invited and then hosted EPA officials in Indonesia in October 2012, but the trip and associated consultations between the parties have yet to result in a response from the US on the status of palm-oil-based biofuels under the RFS.

At the October 2013 TBT Committee meeting, the US official stated that the US had not been informed of the '*specific trade concern*' prior to the meeting and that the US would respond at the subsequent meeting. Accordingly, at the most recent TBT Committee meeting in March 2014, Indonesia reiterated its '*specific trade concern*' regarding the RFS standard. The US responded by saying that it was currently undertaking a peer-review process, which would take several months, and that it would then make the results public. Interestingly, the US official emphasised that the EPA's evaluation of palm-oil-based biofuels will not affect exports of palm oil products to the US, regardless of whether they are intended for use in food, biofuel or any other industry. Instead, the official stated that the evaluation would only have an impact on the recognition as '*renewable*' of certain biofuels under the RFS. The US official's statement may have been disingenuous or, at the very least, it appears that the official may not have fully accounted for the impact that the RFS programme has on the biofuel market as a whole.

The concerns raised regarding the RFS programme in the US are comparable to concerns raised against the Renewable Energy Directive (hereinafter, RED) in the EU (*Directive 2009/28/EC of the European Parliament and of the Council on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC*). Having been raised in past TBT Committee meetings, a '*specific trade concern*' regarding the RED was also reiterated by Indonesia during the October 2013 meeting. Under the RED, the operative term at issue is '*sustainable*' rather than '*renewable*', but the effects are similar. Indonesia and Malaysia have voiced concerns regarding the threshold GHG reductions assessed for qualification as '*sustainable*' with regard to palm-oil-based biofuel, while Argentina has actively fought against the default 31% GHG reduction value given to soybean biodiesel, which was 4% under the required 35% GHG reduction threshold mandated by the RED. On 15 May 2013, Argentina requested WTO consultations with the EU on this issue, which eventually took place in late June 2013. Argentina has maintained that the 35% threshold of GHG emissions is arbitrary, and appears neither to be scientifically justified nor to be based on a recognised international norm or standard.

Similar claims to those made in Argentina's request for consultations are likely to resurface if Indonesia chooses to initiate a WTO dispute against the US RFS programme. For example, Article III:4 of the General Agreement on Tariffs and Trade and Article 2.1 of the TBT Agreement require non-discriminatory treatment between '*like*' products. Determination of the appropriate standard regarding '*likeness*' under WTO law is in itself a debated topic, but the traditional approach includes consideration of: (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' perceptions and behaviour in respect of the products; and (iv) the tariff classification of the products. Additionally, insomuch as Article 2.1 of the TBT Agreement is concerned, in *US – Clove Cigarettes*, the Appellate Body found that the determination of '*likeness*' using the traditional factors listed above is also a determination of the competitive relationship between the products. When applied to biofuels, it is questionable whether the emissions produced during the lifecycle and beyond are an issue that should be considered at all when assessing '*likeness*', to the extent that they do not appear to have an impact on any of the factors listed above. Another provision to consider is Article 2.2 of the TBT Agreement, which prohibits measures that appear to be more trade-restrictive than necessary to fulfil a legitimate objective. If

challenged, an analysis of the legitimacy of the environmental objectives associated to the RFS would likely fall in favour of the US, but whether or not the threshold used was more '*trade-restrictive*' than '*necessary*' would be a focus of the dispute and Indonesia would have strong arguments to sustain its complaint with.

Stakeholders should continue to monitor the situation, in particular the US' reconsideration of the renewability of palm-oil-based biofuels. Parties with interests in the Indonesian palm oil industry should even consider encouraging the Indonesian Government to increase its pressure on the US. If the US findings were to prove unfavourable to Indonesia, it should already be prepared to move forward with a formal WTO dispute.

The panel reports on the WTO disputes *China – Rare Earths* have been published

On 26 March 2014, the panel reports on the WTO disputes *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* (hereinafter, *China – Rare Earths*) were published. The relevant disputes initiated in March 2012, when the US, the EU and Japan filed virtually identical requests for WTO consultations with China, alleging that WTO-inconsistent export duties and export quotas on various forms of rare earths, tungsten and molybdenum were in place in China. The complainants also challenged several aspects of the administration and allocation of the export quotas (see Trade Perspectives, Issue No. 6 of 23 March 2012). The panel reports have been published in the form of a single document, although specific sections (notably, concerning conclusions and recommendations) are tailored for each complainant individually.

Rare earths are a group of 17 chemical elements, including dysprosium, scandium and lutetium. They were originally described as '*rare*' because their chemical structure was poorly understood and they were difficult to extract from the rocks in which they were found. Together with tungsten and molybdenum, rare earth elements are used in the manufacturing processes of high-tech electronics, military hardware, and of green energy products, including hybrid cars. Reportedly, China produces over 90% of these elements. In their requests for the establishment of a panel, the US, the EU and Japan claimed, in relevant part, that: (i) China's export duties were inconsistent with paragraph 11.3 of Part I of China's Accession Protocol to the WTO; (ii) China's export quotas were in violation of Article XI:1 of the GATT and paragraph 1.2 of Part I of the Chinese Accession Protocol; and (iii) the administration and allocation of China's export quotas breached China's '*trading rights commitments*', as incorporated in paragraphs 5.1 and 1.2 of Part I of the Accession Protocol. In turn, China claimed that its measures are aimed at addressing scarcity of resources and protecting the environment, in a manner that were covered by the '*General Exceptions*' clause embodied under Article XX of the GATT.

With respect to China's export duties, the Panel recalled that, as confirmed by the Appellate Body in the *China – Raw Materials* case, paragraph 11.3 of Part I of China's WTO Accession Protocol requires China to "*eliminate all taxes and charges applied to exports*" unless expressly provided for in Annex 6 of its Accession Protocol, or if such taxes and charges are applied in accordance with Article VIII of the GATT. The Accession Protocol (which, as per its paragraph 1.2, constitutes an integral part of the WTO Agreement) includes, in Annex 6, a list of 84 products that China can subject to export duties, as well as the corresponding maximum level of such duties. In addition, in the Note to Annex 6, China confirmed that it would not increase the applied rates, except under exceptional circumstances, in which case China would previously consult with the affected WTO Member. To the extent that China imposed export duties on a number of rare earths, tungsten and molybdenum products not included in Annex 6 of its Accession Protocol (and that Article VIII of the GATT does not

concern export duties), the Panel found that China was in breach of paragraph 11.3 of Part I of the Accession Protocol.

To China's defensive argument that its exports duties were justified by Article XX(b) of the GATT, because they were "*necessary to protect human, animal or plant life or health*", the Panel replied, recalling the findings of the Panel and the Appellate Body in *China – Raw Materials*, that nothing in China's Accession Protocol allows the country to deviate from its obligations under paragraph 11.3 on the basis of Article XX of the GATT. Interestingly, one panelist in *China – Rare Earths* disagreed with this view and affirmed that, to the extent that paragraph 11.3 of China's Accession Protocol has become an integral part of the GATT (as the GATT applies between China and the rest of WTO Membership), Article XX of the GATT could potentially justify a violation of paragraph 11.3 of Part I of China's Accession Protocol. In any event, the members of the Panel agreed that China had not proved that its export duties were justified under Article XX(b) of the GATT.

Moving on, it was undisputed that China's export quotas on rare earths, tungsten and molybdenum were, as pointed out by the complainants, contrary to Article XI:1 of the GATT and paragraph 1.2 of China's Accession Protocol (whereby China commits to abide by WTO rules when implementing non-automatic export licensing and export restrictions). However, China claimed that these measures were covered by Article XX(g) of the GATT, since they "*relate to the conservation of exhaustible natural resources*", are "*made effective in conjunction with restrictions on domestic production or consumption*", and comply with the requirements of the *chapeau* of Article XX (*i.e*., that the measures not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction to international trade). Nonetheless, the Panel rejected China's defence on grounds that China (which, as the party invoking the exception, bore the burden of proving that the measure was justified) had failed to demonstrate that its export quotas were duly justified by Article XX(g) of the GATT.

Lastly, the complainants' alleged that China imposed certain eligibility criteria with which exporters must comply in order to be allocated part of the quota to export rare earths and molybdenum, which breached China's '*trading right commitments*', as envisaged in the relevant paragraphs of its Accession Protocol. In particular, the complainants considered that the requirements to demonstrate export performance and prior export experience, as well as to meet a minimum capital threshold, were contrary to China's obligation to accord the right to export goods to all foreign entities and to all enterprises in China. In this respect, China maintained that, far from limiting any trading rights, the eligibility criteria were an integral part of its export quota system. Therefore, and consistently with its position that the export quotas were justified under Article XX(g) of the GATT, China claimed that requirements linked to the administration of such quotas were justified under the same provision.

The Panel disagreed and established that export quotas and eligibility requirements amounted to different breaches of different commitments and, therefore, that they needed to be separately justified. Having already made its findings in relation to China's export quota system, the Panel proceeded to examine whether the eligibility criteria were provisionally justified under paragraph (g) and, afterwards, justified under the *chapeau* of Article XX of the GATT. Although China had not provided specific arguments explaining why the eligibility criteria were justified under Article XX(g) of the GATT (since it considered that the requirements were an intrinsic part of the export quota system), the Panel considered that the rationale of the eligibility criteria provided by China (notably, aimed at ensuring that exporters have the necessary commercial expertise and to ensure exporters' financial soundness) did not qualify as "*conservation-related concerns*" in the sense of paragraph (g) of Article XX of the GATT. In sum, the Panel found that, although Article XX was theoretically available to justify China's requirements, in the case at hand China had failed to make a

prima facie case that the violations of its '*trading rights commitments*' were justified pursuant to Article XX(g) of the GATT.

According to the WTO Dispute Settlement Understanding, parties have 60 days to file an appeal. Given the systemic implications contained in the panel reports, notably concerning the availability of Article XX of the GATT to justify deviation from several provisions of China's WTO Accession Protocol, it would not be surprising if the Appellate Body were asked to re-examine certain aspects of the case. In addition, the qualification in *China – Rare Earths* of export restrictions as WTO-inconsistent may also serve as a warning to other WTO Members engaging in similar practices.

Stricter health warnings on caffeine content in energy drinks

Regulation (EU) No. 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers (hereinafter FIR) introduces changes to existing legislation on food labelling. The FIR establishes not only new rules, such as the mandatory nutrition information on processed foods (as of 13 December 2016); the mandatory origin labelling of unprocessed meat from pigs, sheep, goats and poultry (as of 1 April 2015, according to *Implementing Regulation (EU) No. 1337/2013*) and the mandatory declaration of the vegetable origin of vegetable oils in the list of ingredients (as of 13 December 2014), it also provides for stricter health warnings in relation to the caffeine content in energy drinks.

The FIR repeals and consolidates a wealth of EU food labelling acts, including, *inter alia*, *Commission Directive 87/250/EEC on the indication of alcoholic strength by volume in the labelling of alcoholic beverages for sale to the ultimate consumer*, *Council Directive 90/496/EEC on nutrition labelling for foodstuffs*, *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* (hereinafter, Directive 2000/13/EC), and *Commission Directive 2002/67/EC on the labelling of foodstuffs containing quinine, and of foodstuffs containing caffeine* (hereinafter Directive 2002/67/EC).

One of the acts repealed by the FIR is Directive 2002/67/EC. Caffeine and quinine are considered ingredients or substances that may adversely affect some people. Quinine and caffeine are used in the production or preparation of certain foodstuffs, either as flavourings or, in the case of caffeine, as an ingredient. For most consumers, the consumption of these substances in moderation is unlikely to present any health risks. According to the opinion of 21 January 1999 of the Scientific Committee for Food (hereinafter, the SCF), the predecessor of the European Food Safety Authority (hereinafter, EFSA), on caffeine and other substances used as ingredients in energy drinks, there is no objection from the point of view of toxicology to the continued use of quinine at a certain maximum level in bitter drinks. However, the SCF concluded that consumption of quinine may be counter-indicated for certain people for medical reasons, or because they are hypersensitive to the substance. As far as caffeine is concerned, the SCF concluded that, for adults, apart from pregnant women, the contribution of energy drinks to the total consumption of caffeine did not appear to be a cause for concern, assuming that energy drinks replace other sources of caffeine. However, for children, an increase in the daily intake of caffeine to a certain level of consumption per day may bring about temporary changes in behaviour, such as increased excitability, irritability, nervousness or anxiety. In addition, for pregnant women, the SCF's view was that moderation of caffeine intake is advisable.

The general labelling Directive 2000/13/EC did not initially provide for compulsory and specific mention of the individual names of flavourings in the list of ingredients. Quinine or caffeine, used as flavouring, might as a result not be listed by name in the ingredients.

Moreover, even where caffeine is mentioned as such in the list of ingredients, there was no requirement to indicate whether the level was high. For these reasons, Directive 2002/67/EC established labelling rules to give the consumer clear information on the presence of quinine or caffeine in a foodstuff and, in the case of caffeine, to provide a warning message and an indication of the amount of caffeine, where this is in excess of a specific level, in beverages that do not naturally contain caffeine. Therefore, by derogation from Directive 2000/13/EC, quinine and/or caffeine used as flavouring in the production or preparation of a foodstuff must be mentioned by name in the list of ingredients immediately after the term '*flavouring*'. Where a beverage contains caffeine, from whatever source, in a proportion in excess of 150 mg/l, the message '*high caffeine content*' must appear on the label in the same field of vision as the name under which the product is sold. This message must be followed by the caffeine content expressed in mg/100 ml. The substance taurine added as flavouring, but not as an ingredient, does not need to be specified in the list of ingredients if its presence is not highlighted in some form. Taurine may fall under the generic term '*flavourings*'.

In the proposal for the FIR of 30 January 2008, the EU Commission maintained the '*high caffeine content*' warning message and added a compulsory message '*added caffeine*' for other foods, where caffeine is added with a nutritional or physiological purpose. In the recommendation for second reading of 6 June 2011 on the Council position at first reading with a view to the adoption of the FIR, the EU Parliament proposed two different warning messages: '*High caffeine content. Not recommended for children or pregnant or breast-feeding women*' and '*Do not mix with alcohol*' in the same field of vision as the name of the beverage, followed by a reference in brackets to the caffeine content expressed in mg per 100 ml. For other foods, where caffeine is added with a nutritional or physiological purpose, the EU Parliament proposed '*contains caffeine'* instead of *'added caffeine*'. It also introduced a further warning message (*i.e.*, '*Not recommended for children or pregnant women*') in the same field of vision as the name of the product, followed by a reference in brackets to the caffeine content expressed in mg per 100 g/ml. The EU Parliament justified it in that the word '*contains*' would technically be better in order to prevent legislative loopholes. For example, guarana is an additive, which has a natural high caffeine content and would not have to be labelled if the word '*added*' is used. In the final compromise reached between the EU Parliament and the EU Council, there was no agreement on the additional warning message '*Do not mix with alcohol*' in the same field of vision as the name of the beverage with a high caffeine content. Although some consumers do mix non-alcoholic energy drinks with alcoholic beverages, it has been argued that this has happened for decades with colas, ginger ale, tonic water, soda water and all kinds of fruit juices so that the EU Parliament's proposal in relation to the alcohol warning message was rejected by the EU Council.

However, the warning message '*High caffeine content. Not recommended for children or pregnant or breast-feeding women*' in the same field of vision as the name of the beverage, followed by a reference in brackets to the caffeine content expressed in mg per 100 ml, is compulsory on energy drinks as of 13 December 2014. The energy drinks manufacturers have already started adapting their labelling to the new rules. Increasing consumption of energy drinks implies a higher exposure to caffeine, taurine and D-glucurono-y-lactone. The study commissioned by the EFSA on '*Gathering consumption data on specific consumer groups of energy drinks*' of 7 February 2013 found that higher exposure to such active substances by children and young adults was identified as a potential emerging risk and that indeed available information suggests that energy drinks consumption is becoming increasingly widespread among young people, especially in relation with mass-entertainment and sport practice. As this industry is rapidly growing, other substances with a physiological purpose, which are added to drinks, may come under the scrutiny of the EU regulator. Manufacturers of such drinks are advised to monitor safety assessments by EFSA and EU Member States' authorities and regulatory developments in this sector and ensure regulatory compliance. This task is becoming increasingly difficult, particularly in light of the many new botanical substances or extracts used, and calls for expert advice being sought.

Recently Adopted EU Legislation

Trade Remedies

- *Council Implementing Regulation (EU) No. 307/2014 of 24 March 2014 amending Implementing Regulation (EU) No. 875/2013 imposing a definitive anti-dumping duty on imports of certain prepared or preserved sweetcorn in kernels originating in Thailand following an interim review pursuant of Article 11(3) of Regulation (EC) No. 1225/2009*

Customs Law

- *Commission Implementing Regulation (EU) No. 303/2014 of 25 March 2014 amending Council Regulation (EC) No. 673/2005 establishing additional customs duties on imports of certain products originating in the United States of America*

Food and Agricultural Law

- *Commission Implementing Regulation (EU) No. 323/2014 of 28 March 2014 amending Annexes I and II 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 Decision of 27 March 2014 as regards an EU financial contribution towards a coordinated control plan with a view to establishing the prevalence of fraudulent practices in the marketing of certain foods*

- *Commission Implementing Decision of 27 March 2014 concerning animal health control measures relating to African swine fever in certain Member States (notified under document C(2014) 1979)*

Other

- *Council Implementing Decision of 24 March 2014 establishing a list of non-cooperating third countries in fighting IUU fishing pursuant to Regulation (EC) No. 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing*

- *Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC*

- *Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC*

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