FRATINIVERGANO
EUROPEAN LAWYERS
TRADE PERSPECTIVES©

Issue No. 23 of 12 December 2014

Season's Greetings

2014 is drawing to a close and all of us in the Trade Group of *FratiniVergano* would like to wish you, your colleagues and families all the best for a peaceful holiday season and for a successful and healthy 2015. We hope that you have enjoyed *Trade Perspectives*© throughout this year and that you have always found it stimulating and timely. As usual, we have published a total of 23 issues and invested a great deal of time and energy in this undertaking. We have done it with the usual passion and drive. You can find all previous issues of *Trade Perspectives*© on our website (http://www.fratinivergano.eu/TradePerspectives.html).

For the year to come, we plan on continuing our editorial efforts and to entertain an even closer dialogue with our readers. *Trade Perspectives*© is now circulated to over 4,500 recipients worldwide and not a single week goes by without new readers asking to be added to our circulation list. This fills us with pride, but also with a deep sense of commitment and discipline towards our readers' expectations. Thank you for your interest in our publication and for helping us to make it a better and more useful tool of discussion. We look forward to continue hearing from you regularly and to another year of exciting trade developments.

Mandatory declaration of specific vegetable oils in food as of 13 December 2014

As of 13 December 2014, *Regulation (EU) No. 1169/2011 on the provision of food information to consumers* (hereinafter, FIR) will directly apply in EU Member States. The FIR brings EU rules on general and nutrition labelling together into a single regulation and consolidates existing labelling legislation. There are important changes in terms of the labelling of the different vegetable oils as ingredients in foodstuffs under the FIR. These new requirements, despite the additional labelling and operational costs that they entail (*i.e.*, the food industry often substitutes vegetable fats on the basis of factors such as supply availability, prices, recipes, *etc*.), have been embraced by food producers in line with the spirit of greater transparency and information to consumers that the FIR pursues.

It should be noted that the FIR was not adopted to target any particular vegetable oil, but it generally provides that the specific vegetable oil(s) used in any given product must be indicated on the labelling of the package. In simple terms, the FIR no longer allows that the group name '*vegetable oils*' be used for any vegetable oil without specifying the specific oil(s), which was still permitted according to Article 6 and Annex I of the FIR's predecessor, *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). Therefore, if a product contains, *e.g.*, palm oil, or sunflower oil, or both, while the indication in the list of ingredients that it contained '*vegetable oil*' was sufficient until 12 December 2014 under Directive 2000/13/EC, mention of the specific oil (or oils) is now required. The application of the new labelling regime was delayed until 13 December 2014 in order to allow time for producers to adjust their labels.

Certain vegetable oils, like soy or peanut oil, already needed to be declared separately under Directive 2000/13/EC, as they are allergens. Although the exception for vegetable oils was still included in the legislative proposal of 30 January 2008 for new food labelling rules, Members of the EU Parliament introduced, in an amendment to the proposal during the legislative procedure, the idea that the vegetable origin of the vegetable oils contained in foodstuffs should always be declared. On 1 February 2011, in the position of the Council at first reading, with a view to the adoption of the FIR in relation to oil/fat origin, the Council noted that more detailed information than the vegetal origin of the oil would represent further costs for food business operators and would not be justified considering the strengthening of the nutritional information and rejected the amendments presented by the EU Parliament. Despite the Council's opposition, the EU Parliament's view succeeded and the amendment was adopted.

The possibility for '*vegetable oils*', like palm oil and other vegetable oils, to be labelled under the neutral category name '*vegetable oil*' has, therefore, not been included in the FIR. Article 18 of the FIR provides that the list of ingredients shall include all the ingredients of the food, in descending order of weight. Specific provisions concerning the indication of ingredients are laid down in Annex VII, which sets out in No. 8 of part A that refined oils of vegetable origin may be grouped together in the list of ingredients under the designation '*vegetable oils*', immediately followed by a list of indications of the specific vegetable origin(s). Therefore, the specific '*vegetable origin*', be it coconut, sunflower, rapeseed, palm or any other vegetable oil, has to be indicated as of 13 December 2014 even if the designation '*vegetable oils*' is used.

It remains to be seen what impact the new labelling regime under the FIR might have on the current '*free-from*' campaigns, which are being increasingly waged against certain specific products, such as palm oil, for alleged nutritional and environmental reasons. These campaigns appear to be, at best, deceptive or unsubstantiated generalisations and, at worst, fraudulent in nature and aimed at denigrating competing oils and/or promoting certain products by implying that whatever is used as an ingredient is better, healthier or environmentally '*greener*' than what is not used. When made in a nutritional context, as most such claims are, these '*free-from*' labels are arguably not approved and, therefore, illegal nutrition claims under *Regulation (EC) No. 1924/2006 of the European Parliament and of the Council of on nutrition and health claims made on foods* (hereinafter, NHCR) and/or misleading and deceptive claims under the FIR and *Directive 2006/114/EC of the European Parliament and of the Council concerning misleading and comparative advertising*. Similarly, the environmental allegations are, in general, unsubstantiated and aimed at discouraging the use of the vegetable oil contained in a specific product as environmentally unsustainable.

By making it compulsory that the oil origin be specified (so that a consumer can make an informed choice in the selection of food products), a mere look at the list of ingredients will tell consumers whether a product contains a specific vegetable oil or not. '*Free-from*' campaigns directly on the products packaging should, therefore, be seen not only as illegal or deceptive (as argued above), but also unnecessary as of 13 December 2014, since any consumer will be able to tell what vegetable oil is present or not in any food product. There will be no need to use these dubious '*free-from*' campaigns in order to '*help*' consumers make informed choices. Food producers remain entitled to make positive claims about the presence of specific products on in their products, if they believe that such label has marketing value and will be appealing to consumers, but negative labels must be better regulated and not allowed, unless they are permitted nutrition claims under the NHCR.

The growing use of these damaging negative labels in countries like France and Belgium must be brought to an end. Authorities and commercial operators need to closely scrutinise the market and challenge these anti-competitive practices, when they contravene EU and Member States' laws. The expectation is that EU authorities and EU Member States, while they impose costly new rules on producers, also ensure that consumers are not misled by astute marketing techniques that have no informative agenda, but simply aim at denigrating certain vegetable oils in order to promote others or to convince consumers that what is '*free*' from a certain oil is a better product.

The EU Commission, the public and representatives of EU Member States continue to discuss the use of investor-to-state dispute settlement mechanisms

On 12 December 2014, the EU Commission's Transatlantic Trade and Investment Partnership (hereinafter, TTIP) Advisory Group met to discuss, *inter alia*, progress on the public consultation relating to the inclusion of investor-to-state dispute settlement (hereinafter, ISDS) provisions in the TTIP. In addition to questions raised by the public during the consultation process, the meeting came amidst criticism by representatives of certain EU Member States. Such discussions provide another opportunity to address the use of ISDS provisions in investment agreements and reaffirm their value.

Reports indicate that the EU Commission has suspended negotiations relating to ISDS in the TTIP, while it continues to examine the results of the public consultation, which was closed in July 2014. The inclusion of ISDS in investment agreements provides an alternative avenue for the enforcement of investment protections provided in said agreements, so as to ensure that governments comply with the obligations that they have undertaken. In particular, ISDS allows investors, whose investments have been undermined, to bring a claim against the authorities of the host country in front of an international tribunal, as opposed to state-to-state dispute settlement mechanisms, which may only be triggered by governments and do not provide for direct monetary compensation to affected investors. Following recent uses of ISDS provisions by private companies, criticism of the mechanism has increased. In response, the EU and other parties negotiating investment agreements have changed their approaches regarding provisions on ISDS. For example, the Comprehensive Economic and Trade Agreement (hereinafter, CETA) between the EU and Canada provides for precise definitions of the term '*fair and equitable treatment*' so as to achieve clarity and consistency in future disputes, as well as clarifications on what constitutes '*indirect expropriation*'. For arbitration proceedings, the CETA also addresses concerns of inconsistency and alleged arbitrator bias by including the opportunity to appeal initial decisions and increased conflict of interest provisions for arbitrators, respectively.

In an effort to increase transparency, the EU Commission, on 27 March 2014, launched its '*Public consultation on modalities for investment protection and ISDS in TTIP*' (see Trade Perspectives, Issue No. 3 of 7 February 2014). Although the final report of the (now closed) consultation has not yet been published, the EU Commission did publish a preliminary report (*i.e.*, a statistical overview), dated 17 July 2014. According to that report, the EU Commission received 149,399 online contributions, with 92% of the replies originating in the UK, Austria, Germany, France and Belgium. Over 99% of the replies came from individuals, most through coordinated campaigns, and only 0.5% of all the respondents indicated that they had an investment in the US. While the EU Commission examines the results of the public consultation, it has also been the recipient of direct criticisms by representatives of certain EU Member States. Recent comments to the French Senate by Matthias Fekl, France's Secretary of State for Foreign Trade, indicated that France does not support the inclusion of ISDS provisions in the TTIP. Germany has also appeared to waver regarding whether or not it will support a final TTIP text that includes ISDS, though at its most recent convention, Germany's Social Democrats party agreed to reject ISDS in the TTIP.

It appears as though one common criticism against the inclusion of ISDS in investment agreements is that such instrument may undermine countries' regulatory space, for example, in areas such as public health and safety. However, the inclusion of an ISDS mechanism in a (trade and) investment agreement would not, by itself, change or diminish a government's substantive regulatory space and sovereignty. ISDS simply serves as an additional tool that allows private investors to have a direct impact on the enforcement of already agreed upon trade obligations, so as to maintain consistency of the international regulatory framework and to legitimately address the impact that government measures may have on their investments. In this respect, the role of ISDS is to guarantee that there be good and responsible regulation. It is not to limit or compress the sovereign ability of governments to regulate their own jurisdictions, but rather to ensure that governments, which for instance may affect private investments or even expropriate private property (*i.e.*, intellectual property) in the process of pursuing legitimate policies and objectives, be held accountable for the effects of their actions and provide compensation to affected investors.

This principle is well accepted in the context of the WTO, where, through the WTO dispute settlement system, Members may be held accountable for the measures that they adopt and maintain. If challenged, such measures may give rise to compensation or retaliation where they are found to be inconsistent with WTO obligations and if they are not removed, which again is a prerogative of sovereign states. In the WTO context, of course, this process of legal review before an independent and neutral judge is available only to countries, not to private parties. Along the same lines, ISDS must be seen as an instrument to hold governments responsible for the economic costs borne by private operators by reason of governments' regulatory measures, which are found to violate the agreed level of protection. The legitimacy or proportionality of such measures may sometimes be questionable where the same country that has taken measures, for example, in the area of tobacco control, has reportedly questioned similar or identical measures that other countries have taken or are in the process of adopting in relation to alcoholic beverages or food products.

This debate reportedly took place in the most recent discussions within the TBT Committee at the WTO in Geneva. It is a legitimate debate and one that may occasionally end-up in WTO dispute settlement procedures. This must be seen as a healthy way to improve countries' regulations while minimizing the effects on trade. If this is deemed acceptable and even desirable at an intergovernmental level, it should also be seen as an asset and not a threat in an

ISDS context. ISDS, like the WTO dispute settlement mechanism, must be seen as an instrument to improve countries' legislative and regulatory activities, to ensure that countries are held accountable for the legitimate policies that they pursue and implement and, where such policies are found to undermine investments, that compensation be provided. It must not be viewed as an instrument to restrict countries' regulatory space and/or undermine their sovereignty.

Combating climate change? Do not forget environmental services

The third round of negotiations on the Environmental Goods Agreement (hereinafter, EGA) was completed during the first week of December in Geneva. EGA negotiations are directed at the conclusion of a new, plurilateral agreement aimed at promoting green growth and sustainable development by liberalising trade in environmental goods. EGA is thus considered as part of the efforts made by interested countries towards climate change mitigation, especially to the extent that it should foster trade in renewable and clean energy technologies. However, environmental services, which also stand to play an important role in facilitating the establishment and use of green technologies, have been left out of the negotiations of the EGA at this stage.

In fact, liberalisation of trade in environmental goods and services has already been discussed, without binding commitments, in several international *fora*. Within the framework of the WTO, environmental goods and services were singled out for further liberalisation in paragraph 31(iii) of the Doha Ministerial Declaration, which calls for "*the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services*" with a view to "*enhancing the mutual supportiveness of trade and environment*". Moreover, Asia Pacific Economic Cooperation (hereinafter, APEC) Members, agreed on a list of environmental goods with 54 products (hereinafter, APEC list) and committed to reduce the applied tariff rates on these products to 5% or less by the end of 2015. The APEC list, agreed in 2011, focussed on electronic and machinery products used for environmental protection. The list is based on 6-digit level HS codes (with limited accuracy) to ensure that all products are eventually used for environmental purposes. It should be noted, however, that environmentally friendly and sustainable commodities (such as palm oil and other vegetable oils used to produce biofuel) are currently still excluded from the APEC list. Considering its inaccuracy and limited coverage, the APEC list is clearly not sufficient to meet the global demands to promote utilisation of green goods and technologies.

Therefore, further liberalisation of trade in environmental goods is now being pursued through the EGA negotiations, launched in July 2014 by 14 WTO Members (see Trade Perspectives, Issue No. 14 of 11 July 2014). Although not all WTO Members participate in the negotiations, the current EGA participants already represent 86% of global trade in environmental goods. The list of relevant goods builds upon the APEC list and, to date, product categories of air pollution control, hazardous waste management, waste water management and water treatment, environmental remediation and clean-up, and noise and vibration abatement, have been discussed in the three rounds of negotiations (see Trade Perspectives, Issue No. 22 of 28 November 2014). According to relevant governmental sources from countries participating in the EGA negotiations, although current talks only cover tariff reduction, the possibility to discuss issues such as environmental services and non-tariff barriers is not precluded. Notably, in the *Council conclusions on the environmental goods initiative* to the EU Commission, dated on 8 May 2014, the Council *"emphasises the need to explore the ground for liberalisation of environmental services, including trade-related services, and to address non-tariff barriers to environmental goods and services."*

Environmental services are crucial to the development of green industries. Relevant environmental services are often supplied in conjunction with environmental goods and tend to represent the predominant share in green industries. According to estimates by the OECD, environmental services represent 65% of the total value of green industries. Studies also indicate that the global green goods and services sector is expected to be worth around USD 800 billion by the end of 2015. Environmental services associated to trade in environmental goods, such as maintenance and engineering services, are of vital importance to help countries build up the industry supply chain and achieve the environmental goals behind the purchase of environmental goods. In addition, it is noted that enhanced liberalisation in trade in environmental services would be particularly beneficial to developing countries in helping them obtain skills and tools to address key environmental challenges.

The current level of openness in the environmental services sector is insufficient to facilitate the booming of green industries. Liberalisation of environmental services is mainly conducted within the framework of the WTO General Agreement on Trade in Services (hereinafter, GATS), which, nonetheless, allows for varied levels of openness among WTO Members. For instance, some of the EGA participants do not have commitments in place to liberalise their environmental services sector. Another unresolved issue relates to the classification of environmental services in the GATS commitment schedules, which do not reflect the rapidly evolving structure of the environmental services industry. The current classification is based on the Note by the WTO Secretariat on Services Sectoral Classification List (as reflected in WTO document MTN.GNS/W/120) corresponding to the United Nations Provisional Central Product Classification. This classification list divides environmental services into sewage services, refuse disposal services, sanitation and similar services and others. WTO Members structure their own GATS schedules based on this list and make modifications to it. These sectors are the so-called "*end-of-pipe*" environmental services (*i.e.*, they control already-existing pollution), but do not properly recognise services to prevent or reduce environmental harm at a previous stage. Several proposals have been made to modify the classification of environmental services in the relevant WTO committees, but no consensus has been achieved. Moreover, current GATS commitments are made on the basis of a positive list approach, meaning that WTO Members are not obliged to liberalise the sectors not listed in their GATS commitment schedules (which therefore hinders further liberalisation of environmental services that have newly emerged on the market). Coupled with the fact that not all WTO Members have strong incentives to liberalise their environmental services sector, this makes the goal of further liberalising environmental services more difficult within the GATS framework.

Countries with strong intentions and agendas to promote green growth and sustainable development are aware of the importance of environmental services. Sources indicate that more WTO Members expressed their interest in joining the EGA negotiations, including Chile, which reportedly would like to join because of its specific interest in the environmental services dimension of the EGA. On the other hand, participants in the Trade in Services Agreement (hereinafter, TiSA), a plurilateral agreement negotiated among 23 WTO Members (*i.e.*, including all EGA participants, except China and Singapore) to liberalise trade in services (see Trade Perspectives, Issue No. 17 of 19 September 2014), have discussed environmental services as part of the TiSA in the 10th round of negotiations, held on 1-5 December 2014. The EU indicated that it would seek to end discrimination against foreign suppliers of environmental services in the TiSA negotiations as well. Business operators in relevant sectors are strongly recommended to closely monitor the development of the EGA and TiSA negotiations in relation to environmental services, considering the possibility that the conclusion of these agreements will likely lead to increased business opportunities overseas.

Recently Adopted EU Legislation

Trade Remedies

- *Commission Implementing Regulation (EU) No. 1283/2014 of 2 December 2014 imposing a definitive anti-dumping duty on imports of certain tube and pipe fittings, of iron or steel, originating in the Republic of Korea and Malaysia following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No. 1225/2009*

Customs Law

- *Amendment to the Customs Convention on the International Transport of Goods Under the Cover of TIR Carnets (TIR Convention, 1975)*

Food and Agricultural Law

- *Commission Regulation (EU) No. 1297/2014 of 5 December 2014 amending, for the purposes of its adaptation to technical and scientific progress, Regulation (EC) No. 1272/2008 of the European Parliament and of the Council on classification, labelling and packaging of substances and mixtures*

- *Commission Implementing Regulation (EU) No. 1295/2014 of 4 December 2014 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. 1278/2014 of 1 December 2014 amending Regulations (EC) No. 967/2006, (EC) No. 828/2009, (EC) No. 891/2009 and Implementing Regulation (EU) No. 75/2013*

- *Commission Implementing Regulation (EU) No. 1287/2014 of 28 November 2014 amending and correcting Regulation (EC) No. 1235/2008 laying down detailed rules for implementation of Council Regulation (EC) No. 834/2007 as regards the arrangements for imports of organic products from third countries*

Other

- *Commission Decision of 9 December 2014 establishing the ecological criteria for the award of the EU Ecolabel for rinse-off cosmetic products*

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