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The EU calls for enhanced cooperation with ASEAN on sustainable production of key commodities

On 18 May 2015, the EU Commission adopted a Communication addressed to the EU Parliament and the EU Council titled '*The EU and ASEAN: a partnership with a strategic purpose*'. The Communication puts forwards specific ideas and initiatives aimed at providing a more consistent framework for sectoral cooperation between the EU and the Association of Southeast Asian Nations (hereinafter, ASEAN, the Member States of which include Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam).

The EU and ASEAN are important trading partners. While ASEAN is the EU's third largest trading partner (after the US and China), the EU is ASEAN's second trading partner (after China). With a view to enhance their bilateral trade relations, the EU and ASEAN launched negotiations for a regional Free Trade Agreement (hereinafter, FTA) in May 2007. However, after eight rounds of negotiations, in May 2009 the two partners agreed to put the discussions on hold, due to the complexity and sensitivity of regional (*i.e.*, '*block-to-block*') trade negotiations. Instead, the EU decided to pursue the conclusion of bilateral FTAs with individual ASEAN Member States, with a view to eventually use these agreements as '*stepping stones*' for a regional EU-ASEAN FTA (see Trade Perspectives, Issue No. 9 of 4 May 2012). Thus far, the EU has concluded an FTA with Singapore, and is currently conducting negotiations with Malaysia, Thailand and Vietnam.

In relevant part, the Communication notes that, despite their significant differences in terms of economic development and the nature of their political systems, the EU and ASEAN share a strong commitment to, *inter alia*, regional integration and sustainable development. The Communication clarifies that this commitment focusses, *inter alia*, on the elimination of barriers and the establishment of a regulatory framework that promotes trade, investment and business between the two regions, as well as on a shared engagement to a '*Greener partnership for a sustainable future*'. In this regard, the Communication acknowledges that the ASEAN region is endowed with rich natural resources that sustain a broad range of economic activities and livelihoods. However, it also notes that the region faces a number of challenges derived from increased pressure on such resources. The Communication notes that, in recent years, the EU has adopted a number of schemes to promote sustainability in the ASEAN region, including the Forest Law Enforcement Governance and Trade (*i.e.*, FLEGT) Action

Plan, aimed at improving forest governance and promoting trade in sustainably and legally harvested timber products; and the efforts to fight illegal, unreported and unregulated (*i.e*., IUU) fishing.

In addition, the Communication puts forward specific initiatives to be jointly implemented by the EU and ASEAN in the area of sustainability, such as strengthening the collaboration on climate change, providing enhanced support to environment protection and promoting sustainable production of key commodities, such as palm oil, rubber and coffee. With the EU calling for initiatives of this type, it is clear that concerned industries in the EU and ASEAN enjoy now a renewed *momentum* to effectively engage in the relevant *fora*. In fact, a number of initiatives are presently ongoing, both at the multilateral (or plurilateral) level, as well as on a bilateral basis, which provide unique opportunities that operators and Governments, with an interest in specific commodities, should promptly seize.

For instance, a number of WTO Members is currently engaged in negotiations for an Environmental Goods Agreement (hereinafter, EGA), *i.e.*, a new agreement aimed at promoting green growth and sustainable development by liberalising trade in environmental goods. Negotiations are presently being conducted by 17 WTO Members (*i.e.*, Australia, Canada, China, Chinese Taipei, Costa Rica, the EU, Hong Kong China, Iceland, Israel, Japan, New Zealand, Norway, Republic of Korea, Singapore, Switzerland, Turkey and the US). Although the EGA will apply on a most-favoured nation (*i.e.*, MFN) basis (meaning that all WTO Members will benefit from the agreed tariff reductions), participating to the negotiating process allows WTO Members to drive the liberalisation process, including to decide which products will be covered by EGA's advantageous provisions.

Thus far, EGA's proposed coverage focuses primarily on high-tech industrial products such as devices for air pollution control, waste management, cleaner renewable energy and noise abatement. It is rather surprising that the proposed goods do not include goods that are '*green*' by definition, such as commodities (*e.g.*, palm oil, soybeans, sugarcane and rapeseed) that are available in nature and which can be used, *inter alia*, for renewable energy production and for a multitude of other industrial and commercial applications. The only way to ensure that these goods be covered by EGA is if the concerned Governments (*i.e*., Argentina, Brazil, Indonesia, Malaysia, etc.) were to table their proposals in the context of their participation in the negotiations (see Trade Perspectives, Issue No. 7 of 2 April 2015).

In doing so, proposing countries should consider setting-up globally recognised sustainability standards for the production of the relevant commodities, ideally to be first based on regionally agreed criteria (*e.g.*, in the context of ASEAN) and driven by the producing countries themselves in cooperation with leading trading partners (*e.g.*, the EU, the US, etc.). Such schemes would facilitate and reward the diffusion of sustainable production practices, inasmuch as the tariff benefits stemming from the EGA would only apply to covered commodities produced and certified according to the internationally-agreed sustainability standards. At the same time, this approach would reduce or eliminate barriers to trade affecting commodities and their applications, which are almost always based on unsubstantiated claims (*e.g.*, in the case of palm oil, sustainability-related accusations against palm oil used as a biofuel feedstock and as a food product). Overall, EGA's tariff preferences would not only play a fiscal role, but would (perhaps, more importantly) also pursue environmental sustainability irrespective of the degree of development and industrialisation of producing countries.

At the bilateral level, the EU's Communication appears to pave the way for ASEAN Member States to secure, in the context of their bilateral FTAs with the EU, specific schemes concerning sustainable production of key commodities. By way of example, FTAs could include dedicated chapters on key commodities, addressing, in relevant part, trade obstacles hindering access of such goods to the EU's market. These chapters should also provide for

product-specific certification schemes for the sustainable production of commodities (*i.e*., palm oil, rubber, etc.) in the sense of the scheme outlined above, ideally centred on regionally-agreed criteria or on schemes that are already in place at the national level. The relevant provisions would effectively tackle, from an overarching perspective, measures in place in the EU and/or its Member States, which are allegedly based on sustainability concerns, but that unduly affect key commodities produced in ASEAN.

There is significant potential in improving the trade relations between the EU and ASEAN (both as a region and between their Member States individually) that remains unexplored. Bilateral trade in goods and services between the EU and ASEAN (which reached a value of EUR 238 billion in 2013) translates, especially in ASEAN, in increased employment rates and important development opportunities that, nonetheless, could be further seized. Implementation of the appropriate mechanisms to further liberalise trade and secure sustainable growth will also have an impact on the broader perspective (*i.e.*, endorsement by WTO Members of the relevant sustainability standards for commodity production will result in the recognition that, at least where produced according to specific criteria, commodities that are often indiscriminately demonised, such as palm oil, can be considered as '*green*' when certified as sustainable under internationally-approved schemes). In this context, concerned operators with an interest in EU-ASEAN trade should closely coordinate and maintain fluent communications with the relevant authorities, in order to ensure that their commercial interests are duly taken into account.

The WTO Appellate Body in large part upholds the findings and conclusions of a compliance panel that the US country of origin labelling requirements for meat products are inconsistent with WTO law

On 18 May 2015, the WTO Appellate Body issued its Report in *United States – Certain Country of Origin Labelling (Cool) Requirements* (hereinafter, *US – COOL*) regarding compliance with previous recommendations made by the WTO Dispute Settlement Body (hereinafter, DSB) in relation to US COOL measures for meat. For the most part, the Appellate Body upheld the previous findings and conclusions of the compliance panel.

The *US – COOL* dispute has been ongoing for over seven years, although its origins can be traced back even further. In 2003, the US Department of Agriculture (hereinafter, USDA) postponed the implementation of mandatory COOL requirements, except for fish and seafood. In August 2007, the USDA opened a comment period for a Proposed Rule on COOL for beef, lamb, pork, perishable agricultural commodities, and peanuts. The US COOL measure defines the '*origin*' of meat by way of a series of stages in the life of the relevant livestock and country or countries at which said stages occur. In order to comply with the COOL measure, meat producers are required to monitor and segregate different cattle and hogs on the basis of the origins, for purposes of classifying the meat into 5 specific categories. Those categories include whether cuts of meat are: (i) from animals born, raised and slaughtered in the US; (ii) from animals born and/or raised in a foreign country, and/or raised and slaughtered in the US; (iii) from animals born and raised in a foreign country, and slaughtered in the US; (iv) the product of a foreign country; and (v) ground meat.

As a result, on 1 December 2008 and 17 December 2008, Canada and Mexico, respectively, filed requests for WTO consultations with the US regarding its COOL requirements for meat. The consultations appeared to be successful, as the US replaced its '*Interim Final Rule'* with an amended '*Final Rule on Mandatory Country of Origin Labelling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts'* (published on 15 January 2009 as 74 Fed. Reg. 2658, Parts 60 and 65, see Trade Perspectives Issue No. 10 of 22 May 2009). However, Canada and Mexico did not find the amendments sufficient and eventually both countries filed requests for the establishments

of panels. The WTO DSB established a single panel for the disputes, pursuant to its rules of procedures, and the panel issued its report on 18 November 2011. In relevant part, the panel found that the US COOL measure was a WTO-inconsistent technical regulation within the meaning of the WTO Agreement on Technical Barriers to Trade (hereinafter, TBT Agreement). In particular, the panel found that the COOL measure accorded treatment less favourable to imported Canadian cattle and hogs and Mexican cattle than that accorded to American cattle and hogs, and thus violated Article 2.1 of the TBT Agreement. Moreover, the panel found that the COOL measure violated Article 2.2 of the TBT Agreement because it did not fulfil its legitimate objective of providing consumers with information on origin. The WTO Appellate Body later upheld, for different reasons, the panel's finding regarding Article 2.1 of the TBT Agreement, but reversed its finding regarding Article 2.2 of the TBT Agreement. In the Appellate Body's view, the panel erred by requiring that there to be a minimum level of fulfilment of the legitimate objective of the measure. Instead, the Appellate Body found that only some level of contribution towards the legitimate objective of a measure is necessary.

The most recent Appellate Body Report, issued on 18 May 2015, concerns the findings and conclusions of the compliance panel with regards to the challenges by Canada and Mexico that the US failed to implement the DSB recommendations in *US – COOL*. In response to the Appellate Body Report, and subsequent recommendations by the WTO DSB, on 23 May 2013 the USDA issued an amended COOL measure that, in part, increased the level of precision of the information given to consumers. The WTO compliance panel found that the amended measure increased the COOL measure's detrimental impact on the competitive opportunities of imported livestock. The compliance panel also concluded that Canada and Mexico were unable to make *prima facie* cases that the amended COOL measure violated Article 2.2 of the TBT Agreement. On review, the Appellate Body upheld all of the findings and conclusions of the compliance panel, except those relating to Canada and Mexico's failure to make *prima facie* cases regarding Article 2.2 of the TBT Agreement. Accordingly, the Appellate Body again recommended that the DSB request for the US to bring its COOL measure into compliance with the GATT 1994 and the TBT Agreement. The US appears to be willing to comply, given the potential for retaliatory action by Canada and Mexico if the COOL measure is not amended. The day after the issuance of the Appellate Body Report, Representative Kenneth Michael Conaway, Chair of the US House of Representatives Committee on Agriculture, introduced H.R.2393, which would repeal country of origin labelling requirements with respect to beef, pork, and chicken, and for other purposes.

The dispute, which appears to have finally reached its conclusion, will have a significant effect on potential approaches of various governments on the implementation of labelling rules. Some critics in the US claimed that the outcome of the dispute generally disallows country of origin labelling, a product feature that consumers appear to desire and appreciate. However, such a view oversimplifies the findings and conclusions. After the initial dispute, the USDA appears to have amended the COOL measure in order to further strengthen the fulfilment of its legitimate objective by increasing the precision of information provided to consumers. Such an approach was flawed, as shown by the eventual result of the compliance dispute, because it ignored the issue of trade-restrictiveness. The core consideration, when developing or reviewing country of origin labelling, should be on the burden that such measures create on businesses, in particular foreign enterprises. For example, the EU Commission recently released the findings of two reports that evaluated the additional costs associated to various labelling options for milk and dairy products, as well as meat products such as horse, rabbit and game, unprocessed foods, single ingredient products and ingredients that make up more than half of a product. The results indicate that costs could rise 45 percent for milk and dairy producers, and that small to medium sized enterprises in the EU would be unfairly affected by these administrative costs. Costs may be even higher for foreign enterprises and, as was the case in *US – COOL*, accord treatment less favourable to imported products. Businesses that are negatively affected by labelling requirements should consider seeking a review of the restrictiveness of such measures in light of the findings and conclusions in *US – COOL*.

Discussions on EU novel foods regulation – a new failure would have an impact on insect-based food

On 12 May 2015, another round of discussions on new EU rules for novel foods took place between the Latvian EU presidency and representatives of the EU Parliament and the EU Commission. Reportedly, the EU Parliament's negotiators have tabled what they described as their '*final offer*' on the EU's proposed novel foods regulation, warning that they will not compromise any further with EU Member States. Two of the most challenging elements of the discussions that remain to be addressed are the reference to animal cloning and the choice of the type of secondary decisions to authorise novel foods. The EU Parliament wants to safeguard its right to scrutinise the adoption of new novel foods. However, the Council refuses to back down over the issue of implementing acts. Failure to agree on a new novel foods regulation could stifle innovation in the EU by not establishing a clear, harmonised legal framework for, *e.g.*, edible insects or insect-based products in the EU.

The rules under discussion are aimed at making the authorisation procedure of novel foods (fully centralised at the EU level) simpler, clearer and more efficient, while enabling safe and innovative food to be placed on the EU market faster without compromising a high level of public health. The new draft rules are also expected to facilitate the access to the EU market for traditional foods from third countries having a history of safe food use.

Authorisation and use of novel foods have been harmonised in the EU since 1997 when *Regulation (EC) No 258/97 on novel food and novel food ingredients* (hereinafter, the Novel Foods Regulation) was adopted. Novel food is food that was not consumed to a significant degree in the EU prior to 15 May 1997 and that falls under one of the four categories listed in the Regulation (*i.e.*, foods and food ingredients (i) with a new or intentionally modified primary molecular structure; (ii) consisting of or isolated from micro-organisms, fungi or algae; (iii) consisting of or isolated from plants and food ingredients isolated from animals; and (iv) to which has been applied a production process not currently used). In 2008, the EU Commission presented a proposal to amend the Novel Food Regulation. However, in 2011, the co-legislative procedure discussions provoked a debate around the issue of animal cloning and no agreement was reached between the EU Parliament and the Council for a new novel foods regulation (for more background see: Trade Perspectives, Issue No. 5 of 10 March 2011 and Issue No. 10 of 20 May 2011). As a result, the EU Commission was asked to prepare a separate legislative proposal on animal cloning in food production. On 18 December 2013, the Commission drew up a new proposal for the revision of the Novel Foods Regulation (see: Trade Perspectives Issue No. 4 of 21 February 2014).

The text proposed by the EU Commission stated that the existing categories of novel food laid down in Article 1 of the Novel Foods Regulation should be clarified and updated by replacing the existing four categories with a reference to the general definition of food provided for in Article 2 of *Regulation (EC) No 178/2002 on the general food law* and explicitly stating in Article 1(2) that the Regulation shall not apply to food falling within the scope of (future) Council Directive on the placing on the market of food from animal clones. Novel foods are defined in the Commission proposal more broadly as "*all food that was not used for human consumption to a significant degree within the EU before 15 May 1997*". A number of examples are listed after the words "*and includes in particular*".

In its Report on the proposal for a regulation of the European Parliament and of the Council on novel foods of 1 December 2014, the EU Parliament's Committee on the Environment, Public Health and Food Safety proposed to delete the reference to animal clones and defined novel food as "*any food that was not used for human consumption to a significant degree within the Union before 15 May 1997 irrespective of the date of accession of the various Member States*

to the EU" and added that it must fall under at least one of a number of categories. Said categories include food derived from cloned animals or their descendants; food containing, consisting of, or obtained from cellular or tissue cultures; and food consisting of, isolated from or produced from animals or their parts, including whole animals, such as insects, except for food from animals obtained by traditional breeding practices and having a history of safe food use within the EU market.

Insects and insect-based food are usually considered a novel food in the EU. Under the Novel Foods Regulation, a risk assessment must be undertaken for all novel foods or novel food ingredients and an authorisation may be granted by the EU Commission before they are allowed to be placed on the market. This authorisation concerns the conditions of use, the designation of the novel food or novel food ingredient and the specific labelling requirements.

Currently, there is legal uncertainty as to whether whole insects or preparations thereof fall within the scope of the Novel Foods Regulation. In principle, the Novel Foods Regulation is designed to apply to all new foods before they are introduced into the EU, and this would include foods obtained from insects that have not been previously used as food sources in Europe. However, due to an apparent oversight in the wording, the scope of the Novel Foods Regulation currently covers foods '*obtained from animals*', but it does not mention '*entire*' animals, such as larvae and insects. In fact, Article 1(2)(e) of the Novel Foods Regulation refers to the category of '*food ingredients isolated from animals*'. As stated above, the new proposal defines novel food more broadly as "*all food that was not used for human consumption to a significant degree within the EU before 15 May 1997*" and lists a number of examples after the words "*and includes in particular*" without any specific reference to animals or animal products. According to this draft, all species and forms of insects would be considered '*novel foods*', unless it can be shown that they were consumed to a significant extent by humans in the EU before 15 May 1997. Also the EU Parliament's opinion, which includes "*food isolated from or produced from animals or their parts, including whole animals, such as insects*" clarifies that such food is novel. However, as seen above, there are a number of matters, including the reference to cloning, the definition of novel foods and the EU Parliament's right to scrutinise the adoption of new novel foods, which need to be resolved by the co-legislators, the European Parliament and the Council.

While awaiting harmonisation of EU legislation on novel foods, trade in some insects is tolerated in Belgium. This does, however, not apply to ingredients that were isolated or extracted from insects, such as protein isolates. A Circular of 21 May 2014 addresses the breeding and marketing of insects and insect-based food for human consumption. The Netherlands appear to take a similar approach to entomophagy. On the other hand, in a statement issued on 22 December 2014, Luxembourg's food safety authority announced that the sale of edible insects is prohibited without specific approval of the Commission. In its statement, Luxembourg refers to surveys undertaken in 2010 and 2011, which concluded that insects had not been historically consumed in the EU and were, therefore, subject to novel foods approval (for more background see: TradePerspectives, Issue No. 3 of 6 February 2015).

Third country producers, suppliers and sellers of insects intended for human consumption may soon be able to take advantage of EU rules for '*traditional foods*' from third countries. The Commission's proposal on novel foods provides for a simplified authorisation procedure for traditional foods from a third country, derived from primary production and with a history of safe food use in a third country. History of safe food use in a third country means that the safety of the food in question has been confirmed with compositional data and from experience of continued use for at least 25 years in the customary diet of a large part of the population of a third country. However, in its report of 1 December 2015, the EU Parliament also stressed the importance of the '*precautionary principle*', whereby foods must be proven safe before they can be authorised for consumption in the EU market. As for traditional food

imported from third countries, legislators called for clear guidance from the European Food Safety Authority on the data needed to prove a '*history of safe use*'. Further data requirements on traditional foods from third countries could become a new stumbling block for access of such food to the EU.

The apparent current loophole in the EU Novel Foods Regulation and different interpretations by EU Member States have left manufacturers of insect-based food without legal certainty. This applies in particular to insect-based proteins. The adoption of a new novel foods regulation, which would establish a clear framework for edible insects and insect-based food appears (again) to be in danger as the co-legislators, the EU Parliament and the Council do not appear to be able to resolve certain matters in the proposed novel foods regulation, which are not related to edible insects and insect-based food. The indicative plenary sitting date for the first reading in the EU Parliament has been forecasted for 5 October 2015. The reference to animal cloning and the parliamentary oversight over the approval of novel foods appear to be the two issues that still have to be settled before the EU Parliament can support a first-reading deal.

Further efforts should be made in order to adopt the new novel foods regulation and to eliminate legal uncertainties and establish a proper EU regulatory framework at a time when human consumption of insects and insect-based products looks poised to become more popular, either because of trend or necessity. The next steps taken in the EU on novel foods should be closely monitored and operators should be prepared to participate in shaping upcoming EU legislation by interacting with EU Institutions, third country Governments, relevant trade associations and affected stakeholders.

Recently Adopted EU Legislation

Trade Remedies

- *Commission Implementing Regulation (EU) 2015/832 of 28 May 2015 initiating an investigation concerning the possible circumvention of countervailing measures imposed by Council Implementing Regulation (EU) No. 1239/2013 on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China by imports of crystalline silicon photovoltaic modules and key components (i.e. cells) consigned from Malaysia and Taiwan, whether declared as originating in Malaysia and Taiwan or not, and making such imports subject to registration*

- *Commission Implementing Regulation (EU) 2015/833 of 28 May 2015 initiating an investigation concerning the possible circumvention of anti-dumping measures imposed by Council Implementing Regulation (EU) No. 1238/2013 on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China by imports of crystalline silicon photovoltaic modules and key components (i.e. cells) consigned from Malaysia and Taiwan, whether declared as originating in Malaysia and Taiwan or not, and making such imports subject to registration*

- *Commission Implementing Regulation (EU) 2015/831 of 28 May 2015 updating the list of parties exempted from the extended anti-dumping duty on certain bicycle parts originating in the People's Republic of China pursuant to Regulation (EC) No. 88/97 following the screening initiated by Commission Notice 2014/C 299/08*

- *Commission Implementing Regulation (EU) 2015/782 of 19 May 2015 amending Council Implementing Regulation (EU) No. 917/2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of ceramic tiles originating in the People's Republic of China, by adding a company to the list of producers from the People's Republic of China listed in Annex I*

- *Commission Implementing Regulation (EU) 2015/787 of 19 May 2015 imposing a provisional anti-dumping duty on imports of acesulfame potassium originating in the People's Republic of China as well as acesulfame potassium originating in the People's Republic of China contained in certain preparations and/or mixtures*

- *Commission Implementing Regulation (EU) 2015/776 of 18 May 2015 extending the definitive anti-dumping duty imposed by Council Regulation (EU) No. 502/2013 on imports of bicycles originating in the People's Republic of China to imports of bicycles consigned from Cambodia, Pakistan and the Philippines, whether declared as originating in Cambodia, Pakistan and the Philippines or not*

Customs Law

- *Regulation (EU) 2015/755 of the European Parliament and of the Council of 29 April 2015 on common rules for imports from certain third countries*

Food and Agricultural Law

- *Regulation (EU) 2015/754 of the European Parliament and of the Council of 29 April 2015 opening and providing for the administration of certain Union tariff quotas for high-quality beef, and for pigmeat, poultrymeat, wheat and meslin, and brans, sharps and other residues*

- *Regulation (EU) 2015/753 of the European Parliament and of the Council of 29 April 2015 on the import into the Union of agricultural products originating in Turkey*

- *Regulation (EU) 2015/756 of the European Parliament and of the Council of 29 April 2015 suspending certain concessions relating to the import into the Union of agricultural products originating in Turkey*

Other

- *Commission Decision (EU) 2015/801 of 20 May 2015 on reference document on best environmental management practice, sector environmental performance indicators and benchmarks of excellence for the retail trade sector under Regulation (EC) No. 1221/2009 of the European Parliament and of the Council on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS) (notified under document C(2015) 3234)*

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