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Japan requests WTO consultations with Brazil on certain measures concerning taxation and charges

On 2 July 2015, Japan requested WTO consultations with Brazil in relation to certain taxes and charges in the automotive and '*information and communication technology*' (hereinafter, ICT) sectors. Japan asserts that Brazil has violated provisions in various WTO agreements, including the General Agreement on Tariffs and Trade 1994 (hereinafter, GATT), the Agreement on Subsidies and Countervailing Measures (hereinafter, SCM Agreement) and the Agreement on Trade-Related Investment Measures (hereinafter, TRIMs Agreement). In doing so, Japan is essentially initiating a parallel dispute to the currently pending case on *Brazil – Certain Measures Concerning Taxation and Charges (Complainant: European Union)*, to which it is also a third-party participant.

In its request, Japan first takes issue with tax advantages related to the automotive sector in Brazil. In September 2011, Brazil raised its *Imposto sobre Productos Industrializados* (translated as the *Tax on Industrial Products*, and hereinafter referred to as IPI) applicable to automobiles by 30 percentage points. Then, in 2012, Brazil passed *Lei No. 12,715 de 17 Setembro de 2012*, which instituted, *inter alia*, the *Programa de Incentivo à Inovação Tecnológica e Adensamento da Cadeia Produtiva de Veículos Automotores* (translated as the *Incentive Programme for the Technological Innovation and Densification of the Automotive Supply Chain*, and hereinafter referred to as *Inovar-Auto*). The *Inovar-Auto* programme provides tax credits of up to 30 percentage points for accredited automobile manufacturers. Accreditation under the *Inovar-Auto* programme is granted, under certain conditions, to companies that manufacture automobiles in Brazil, obtain official approval from the relevant Brazilian authorities for their plans to invest in production facilities or industrial projects in Brazil or for companies that market automobiles in Brazil without manufacturing activities. In addition, depending on the type of accreditation, companies must satisfy a set of requirements, including certain domestic production requirements (in the case of companies that manufacture automobiles in Brazil), domestic research and development spending requirements, domestic engineering spending requirements and/or domestic regulatory requirements.

Japan also takes issue with Brazil's measures relating to ICT, automation and related goods, including the: (1) *Lei de Informatica* (translated as, and hereinafter, the *Informatics Law*) and its implementing measures; (2) *Programa de Incentivos ao Setor de Semicondutores* (translated as the *Programme of Incentives for the Semiconductors Sector* and hereinafter

referred to as PADIS); (3) *Programa de Apoio ao Desenvolvimento Tecnológico da Indústria de Equipamentos para TV Digital* (translated as the *Programme of Support to the Technological Developments of the Digital TV Equipment Industry* and hereinafter referred to as PATVD); and (4) *Inclusão Digital* (translated as, and hereinafter, *Digital Inclusion*). Many of the tax advantages complained against by Japan relate, again, to the more general IPI policy in Brazil. According to Japan, the *Informatics Law* is a tax reduction or exemption programme (with respect to the IPI), which, similarly to the *Inovar-Auto* programme, requires users to be accredited. Here, accreditation requires businesses to demonstrate that they produce in Brazil in accordance with "*Basic Production Processes*" that require components produced in Brazil. The PADIS and PATVD tax and duty exemption programmes also require users to be accredited. In this regard, businesses must perform certain production and development activities in Brazil. As seen under the *Informatics Law*, the *Digital Inclusion* programme also requires compliance with *"Basic Production Processes*" if businesses want to receive certain tax exemptions on sales.

Japan first complained about the measures at issue at a WTO Committee on Market Access meeting in 2011, where it expressed, together with South Korea, concerns regarding a Brazilian decree that raised the IPI tax rate by 30 percentage points (see Trade Perspectives, Issue No. 19 of 21 October 2012). Japan again raised concerns, along with the EU, in relation to the Brazilian measures during a WTO Council for the Trade in Goods meeting in November 2012 (see Trade Perspectives, Issue No. 22 of 30 November 2012). However, the EU was the first to initiate a dispute, requesting WTO consultations with Brazil on the relevant measures in December 2013 (see Trade Perspectives, Issue No. 2 of 24 January 2014 and Issue No. 21 of 14 November 2014). The EU's dispute with Brazil, to which Japan is a third-party participant, is currently pending before the WTO, where a panel was composed in March 2015. The only discernible substantive differences between the EU's request for the establishment of a WTO panel and Japan's request for WTO consultations are that Japan has updated the list of relevant Brazilian laws, and added claims under Article I:1 and Article II:1(b) of the GATT with respect to the ICT measures at issue.

In particular, Japan claims that both the *Inovar-Auto* programme and the ICT measures are inconsistent with the MFN principle found in Article I:1 of the GATT, insofar as the programmes appear to provide tax advantages to goods originating in certain countries (including Mercosur and non-Mercosur countries), while failing to extend those advantages to other WTO Members. Japan alone argues that the ICT measures are inconsistent with Article II:1(b) of the GATT, which prohibits WTO Members from levying customs duties in excess of those in their Schedule of Concessions, including '*other duties or charges*'. In addition, according to the EU and Japan, the *Inovar-Auto* programme and the ICT measures appear to breach Article III of the GATT, concerning the National Treatment principle, inasmuch as, *inter alia*, the programmes subject imported goods to internal taxes or other internal charges in excess of those applied to domestic products and discriminate against imported goods *vis-à-vis* their internal sale and distribution. The EU and Japan also cite Article 3.1(b) of the SCM Agreement, which prohibits subsidies contingent upon the use of domestic over imported goods. Lastly, according to the EU and Japan, the measures may also violate Articles 2.1 and 2.2 of the TRIMs Agreement, in conjunction with the Illustrative List provided in the Annex to the TRIMs Agreement, which prohibit the use of domestic content requirements.

Japan's initiation of a dispute against Brazil on measures and claims that are, for the most part, already at issue in a pending dispute may shed light on what it considers to be potential outcomes of the EU's pending dispute against Brazil. If a WTO Member is found to maintain measures that are inconsistent with WTO law, the WTO Dispute Settlement Body (*i.e.*, DSB) may request said WTO Member to bring the measures at issue into conformity with the relevant rules. However, if the WTO Member in question chooses not to amend its domestic legislation, additional proceedings may take place and the WTO Member which brought the complaint may be awarded the right to retaliate. Japan may be interested in securing a right to

retaliate separate from that of the EU, should Brazil lose its dispute against the EU and still not amend its domestic legislation. In addition, the EU and Brazil could reach a mutually agreed solution, from which Japan may not, in its view, sufficiently benefit. This could also have prompted Japan to start its own dispute.

Given the potential effect on the international automotive industry, interested parties should continue to monitor the dispute, as well as the parallel dispute initiated by the EU. At present, three major automotive manufacturers from Europe have already chosen to build or begin the process of building automotive production facilities in Brazil since the *Inovar-Auto* programme commenced.

Import restrictions in the US affecting fresh lemons from Argentina may be settled at the WTO

Recent reports suggest that negotiations are ongoing between Argentina and the US in order to remove the import restrictions that appear to be in place in the US against fresh lemons from Argentina. In fact, Argentina's Foreign Minister has reportedly indicated that WTO action may be triggered if the two trading partners are unable to amicably resolve the present situation.

Argentina and the US have long discussed issues connected to bilateral trade in fresh lemons. Negotiations in the 1990s reached a turning point when the two trading partners agreed on specific measures for the mitigation of citrus canker (*i.e.*, a disease affecting citrus species that causes lesions on the leaves and fruits of citrus trees) and other diseases in Argentina. In August 2000, following that agreement, the US Department of Agriculture's Animal and Plant Health Inspection Service (hereinafter, APHIS) issued a decision granting market access to citrus from Argentina. However, in September 2001, the US suspended imports from the North-West region of Argentina (in particular, the provinces of Catamarca, Jujuy, Salta and Tucumán, where most lemons are produced) as a result of an administrative review decision by the US District Court, Eastern District of California, in *Harlan Land Company v. United States Department of Agriculture*. The dispute was triggered by the US Citrus Science Council on behalf of US citrus growers in California and Arizona (where the US lemon industry concentrates), which claimed that, in opening the US market to Argentinian lemons, APHIS failed to exercise due caution against citrus disease invasion in the country. The court agreed with the US growers and determined that the decision by APHIS was "*arbitrary and capricious because it is based on a faulty risk assessment*". Therefore, Argentinian lemon producers were once again deprived of the possibility to export to the US.

In subsequent years, the citrus canker disease spread to Florida (which, according to Argentina, voided the US restrictions of their rationale) and, in 2005, Argentina requested that imports of fresh lemons into the US be approved. However, APHIS required evidence that the citrus producing areas in Argentina were free from citrus variegated chlorosis (*i.e.*, a different disease also affecting citrus trees and fruits). Although Argentina deemed this requirement disproportionate and unjustified (inasmuch as no other import market has a similar requirement in place), it agreed to conduct the relevant study. Yet, the US authorities considered that the results submitted by Argentina were incomplete and, in July 2012, in the context of the WTO Committee on Sanitary and Phytosanitary Measures (*i.e.*, SPS Committee), the US indicated that it was still evaluating certain aspects of the evidence.

Possibly due to the lack of concrete action from the US authorities, in September 2012 Argentina formally requested WTO consultations with the US. Argentina submitted that the US maintained an import prohibition affecting fresh lemons from the North-West region of Argentina, which was not scientifically justified, disproportionate and discriminatory, in a WTO-inconsistent manner. In addition, Argentina challenged the undue delays of the US authorities

in approving the procedures for the import of fresh lemons. In December 2012, Argentina requested that a panel be established, although this was deferred.

In particular, Argentina claimed that, in relevant part, the US restrictions are contrary to the SPS Agreement, including to the obligation in Article 2.2 that SPS measures be only applied to the extent necessary, that they be based on scientific principles and that they not be maintained without sufficient scientific evidence. Argentina also argued that the US measures are discriminatory (*vis-à-vis* US domestic lemons and lemons from third countries) in violation of Article 2.3 of the SPS Agreement, and that they are not based on international standards and lack scientific justification, inconsistently with Article 3.1 and 3.3 of the SPS Agreement. In addition, Argentina submitted that the US failed to base its restrictions on an appropriate risk assessment, contrary to several paragraphs of Article 5 of the SPS Agreement, including that such measures are more trade-restrictive than necessary, which is against Article 5.6. Argentina considered that the US measures also violated the GATT, to the extent that they were discriminatory and amounted to a prohibited import ban.

The US restrictions allegedly sought to protect the US citrus-producing areas from certain diseases. In this respect, an important aspect that could have been raised by Argentina in its dispute concerns the US obligations regarding '*regionalisation*'. '*Regionalisation*' is referred to in Article 6 of the SPS Agreement, which establishes that SPS measures be adapted to the characteristics of the area on the basis of a number of factors (see Trade Perspectives Issue No. 3 of 7 February 2014). In cases where plant health is at stake, '*regionalisation*' translates into the establishment of '*protected zones*'. Although they are typically established in the exporting country, Article 6 of the SPS Agreement arguably admits that '*protected zones*' be established in the importing country, so that affected products could still enter non-protected zones. The establishment of '*protected zones*' in the citrus-producing areas of the US could allow for less trade-restrictive measures *vis-à-vis* imports from Argentina, including limiting the import prohibition to certain US territories (for a similar argument made in the context of trade frictions between the EU and South Africa, see Trade Perspectives Issue No. 5 of 7 March 2014).

On the other hand, should the US consider that there is no risk for its citrus producing areas, it should act accordingly under the SPS Agreement. Irrespective of whether the recent statements by Argentina's Foreign Minister anticipate WTO action or not, concerned operators in Argentina and the US are advised to fluently communicate with their authorities, in order to ensure that their legitimate commercial interests are duly represented in all relevant instances.

EU General Court upholds list of '*function health claims*' – Fate of '*botanical health claims*' still uncertain

On 12 June 2015, the EU General Court (hereinafter, the Court) dismissed an action for annulment of *Commission Regulation (EU) No. 432/2012 establishing a list of permitted health claims made on foods, other than those referring to the reduction of disease risk and to children's development and health* (hereinafter, Regulation (EU) No. 432/2012), and of an alleged decision of the EU Commission adopting a list of '*on-hold*' health claims. The UK Health Food Manufacturers Association, a Dutch association and three manufacturers of food supplements (supported by an Italian association and an Italian manufacturer) lodged the action against the EU Commission in 2012 (case T-296/12). The case focused on the procedural aspects of adopting the list of '*function health claims*' in Regulation (EU) No. 432/2012, while an important aspect behind the scenes is the assessment of the '*botanical health claims*', which have been on hold for several years due to questions about the type of science necessary to prove efficacy. However, in case T-296/12, the Court did not enter into the discussion on what science is needed to assess botanical health claims.

On 16 May 2012, pursuant to Article 13(3) of *Regulation (EC) No. 1924/2006 of the European Parliament and of the Council on nutrition and health claims made on foods* (hereinafter, the NHCR), the EU Commission adopted Regulation (EU) No. 432/2012. In that regulation, it authorised a partial list of 222 '*function health claims*' (or Article 13 claims, *i.e.*, health claims describing or referring to (a) the role of a nutrient or other substance in growth, development and the functions of the body, or (b) psychological and behavioural functions; or (c) slimming or weight-control) for which the European Food Safety Authority (hereinafter, EFSA) had essentially concluded that a cause and effect relationship had been established between a food category, a food or one of its constituents, and the claimed effect. On the same date, the EU Commission identified a list of more than 2,000 claims in respect of which EFSA had not completed its evaluation or the EU Commission itself had not yet completed its consideration, and published that list on its webpage. According to the EU Commission, those health claims, which concerned, *inter alia*, the effects of plant or herbal substances, commonly known as '*botanical substances*', remained on hold and therefore could continue to be used in accordance with the transitional scheme provided for in Articles 28(5) and 28(6) of the NHCR.

In its judgment, the Court held that Articles 13(1) to 13(3) of the NHCR must be interpreted as containing an obligation for the EU Commission only to attain a result, namely that of adopting, after consulting the EFSA, the list of permitted claims on the basis of the national lists provided by the EU Member States. The Court found that there is nothing in the wording of that NHCR article, or in the recitals in the preamble to that regulation, which suggests that the EU legislature sought to deprive the EU Commission of its discretionary power to establish that list on a gradual basis and, in particular, to add to that list as and when technical evaluations have been completed by the EFSA and verify itself the conditions established in the NHCR. On the contrary, in so far as Articles 13(1) to 13(3) of the NHCR do not set out the detailed rules in accordance with which the EU Commission is required to fulfil its task, that provision leaves it to the discretion of that institution to define, in accordance with the principles laid down in the NHCR and in EU law, the speed at which the list of permitted claims are to be adopted. The Court pointed out, in that regard, that, according to settled case-law, if the EU Commission is to be able to pursue effectively the objective assigned to it, while accounting for the complex technical assessments that it must undertake, as was the case in this instance, it must be recognised as enjoying a broad discretion.

The Court also found that the EU Commission was legitimately able to consider that the decision to split the authorisation procedure for health claims, and to postpone the evaluation of some of those claims, was necessary so as to better attain the various objectives of the NHCR, in light of, *inter alia*, the particular difficulties that arose during that procedure. This meant that the EU Commission was forced to adopt an alternative approach, which was intended, in particular, to strike a balance between the objectives of providing clarity on the market and the protection of consumers. In that regard, the Court pointed out that a decision to wait for the completion of the assessment of all health claims provided by EU Member States before adopting the list of permitted claims would have created an even longer delay in the attainment of the objectives of the NHCR.

In relation to the complaint that the decision to split the authorisation procedure into several stages infringes the principle of good administration, the Court pointed out that the right to good administration, as it results from Article 41 of the Charter of Fundamental Rights of the European Union, does not cover the process of enacting measures of general application. Furthermore, the Court held that the decision to adopt the list of permitted claims in several stages was taken by the EU Commission in a transparent manner, in particular as towards producers in the sector. The Court also found that the EU Commission set out in a clear manner the reasoning behind its decision to adopt the list of permitted claims in stages, thereby enabling interested parties to understand the justification for that decision and the consequences thereof.

The Court rejected the application for annulment of the list of claims on hold as inadmissible as the list of claims on hold does not constitute a challengeable act. The Court argued that the adoption of a list, the sole purpose of which is to compile a register of the health claims that are still being evaluated and in respect of which the EU Commission has not made a final decision, constitutes merely an *interim* measure whose purpose is to determine which health claims are, and which are not, to be included on the list of permitted claims. It is that latter list that constitutes the final decision. Of note is that another action for annulment of Regulation (EU) No. 432/2012, brought on 25 July 2012 by a German manufacturer of food supplements and dietetic foods and a German association against the EU Commission and EFSA, in case T-334/12, was dismissed as inadmissible in its entirety.

While Regulation (EU) No. 432/2012 establishing a list of function health claims remains in force, the major issue (*i.e.*, what to do with the botanical health claims) remains. These claims have been '*on hold*' (in a transitional period with no defined endpoint) for three years and the EU Commission has to take the difficult decision of what exactly to do with them. The NHCR was intended to include botanical health claims, although it became apparent that there was an overlap with the existing framework for traditional herbal medicines. This presents both regulators and food marketers with a problem. Under *Directive 2004/24/EC of the European Parliament and of the Council amending, as regards traditional herbal medicinal products, Directive 2001/83/EC on the Community code relating to medicinal products for human use*, companies are not required to prove efficacy. Any pharmacological effect is considered plausible based on traditional use only (traditional use is defined as at least 30 years of medical use, at least 15 of which must be within the EU). Any medicine must, of course, undergo a strict pre-market authorisation procedure that includes a stringent safety assessment. However, once registered, these herbal medicines must detail information on their intended therapeutic use. Examples include lemon balm leaf, valerian root, passion flower herb - registered in the UK with the traditional use '*for the temporary relief of mild anxiety, to aid sleep and for mild digestive complaints, such as bloating and flatulence*'.

Under the NHCR, in order to market the same mixture of herbs as a food supplement and to make a health claim such as '*lemon balm and valerian root relief mild anxiety and aid to sleep*', the food business operator would need to submit a comprehensive health claims dossier to EFSA for assessment. When EFSA published the first health claim opinions for botanicals, it became apparent that the burden of proof, required to substantiate these claims, was very high, to the point that all of the botanical claims subject to this initial assessment were rejected. This is when the EU Commission drafted a discussion paper, in which it suggested two options. The first was to maintain the *status quo* and continue assessing the botanical claims with the existing framework. The most likely outcome of this will be that all (or nearly all) of the submitted claims will be rejected. In the second option, the EU Commission suggested that the peculiarities of the '*botanical case*' be taken into consideration and that EFSA should modify or waive the requirements for proof of the health claims in the same way that clinical efficacy is waived in the case of traditional herbal medicinal products. This may allow making claims for these botanical products, with a lower burden of proof than that required currently.

This would, however, create a two-tier regulatory system, where the strict standard applies to most health claims, and a simplified procedure based on traditional use that applies to botanicals. Although such a model may serve to '*unblock*' the botanicals claims, there is reportedly a problem with such an approach. Once a certain model is accepted, for limiting the use of botanical foodstuffs in or as foods, it cannot be excluded that this model will be applied to other foodstuffs such as vitamins, minerals and other physiologically active substances.

Manufacturers of foodstuffs or food supplements containing botanical substances and making health claims and any other food business operators should closely monitor the next steps taken in the EU on health claims, and, in particular, for botanicals (in particular, how to treat

'*botanical*' science in a claims-making context). Operators should be prepared to participate in shaping upcoming EU legislation by interacting with EU Institutions, relevant trade associations and affected stakeholders.

Recently Adopted EU Legislation

Market Access

- *Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part*

- *Decision No. 1/2014 of the EU-Colombia-Peru Trade Committee of 16 May 2014 Adoption of the Rules of Procedure of the Trade Committee referred to in point (j) of Article 13(1) of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2015/1045]*

- *Decision No. 2/2014 of the EU-Colombia-Peru Trade Committee of 16 May 2014 Adoption of the Rules of Procedure and Code of Conduct for arbitrators referred to in point (h) of Article 13(1) and Article 315 of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2015/1046]*

- *Decision No. 3/2014 of the EU-Colombia-Peru Trade Committee of 16 May 2014 Establishment of the lists of arbitrators referred to in Article 304(1) and (4) of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2015/1047]*

- *Decision No. 4/2014 of the EU-Colombia-Peru Trade Committee of 16 May 2014 Adoption of the Rules of Procedure for the Group of Experts in Trade and Sustainable Development referred to in Article 284(6) of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2015/1048]*

- *Decision No. 5/2014 of the EU-Colombia-Peru Trade Committee of 16 May 2014 Establishment of a Group of Experts on issues covered by the Title on Trade and Sustainable Development, referred to in Article 284(3) of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2015/1049]*

Trade Remedies

- *Commission Implementing Regulation (EU) 2015/1081 of 3 July 2015 imposing a provisional anti-dumping duty on imports of certain aluminium foils originating in Russia*

- *Commission Implementing Regulation (EU) 2015/1019 of 29 June 2015 amending Council Implementing Regulation (EU) No. 1106/2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain stainless steel wires originating in India, amending Council Implementing Regulation (EU) No. 861/2013 imposing a definitive countervailing duty and collecting definitively the provisional duty*

imposed on imports of certain stainless steel wires originating in India and repealing Commission Implementing Regulation (EU) 2015/49

Food and Agricultural Law

- *Commission Regulation (EU) 2015/1052 of 1 July 2015 refusing to authorise certain health claims made on foods and referring to the reduction of disease risk*

- *Commission Regulation (EU) 2015/1041 of 30 June 2015 refusing to authorise certain health claims made on foods, other than those referring to the reduction of disease risk and to children's development and health*

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