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In this edition of *Trade Perspectives*©, we are hosting an article written by Mr. Corey L. Norton of Trade Pacific Law in Washington, D.C., a fellow trade lawyer with whom we often cooperate on EU-US trade matters and within the Inter-Pacific Bar Association (IPBA).

Going forward, we look forward to hosting other articles by fellow lawyers, academics, in-house counsels, government officials and others readers of *Trade Perspectives*©, so as to further enrich our debates and provide different perspectives on international trade developments.

New US Forced Labour Import Ban

The United States (hereinafter, US) has introduced a new import prohibition against goods made with forced labour, and compliance with this trade regime will be difficult even for companies trying to do the right thing. Upstream suppliers in numerous industries continue to be plagued by forced labour, and US industries seeking to eliminate foreign competition will likely exploit that fact. In addition, US Customs can now prohibit imports on a minimal suggestion of forced labour, and overseas companies are not guaranteed an opportunity to defend themselves before a ban goes into effect. Failure to assemble adequate evidence in advance for each US import, in order to rebut even a tenuous forced labour allegation, can abruptly prohibit sales to US customers.

Challenges in disproving an allegation include confronting assumptions that companies may have about their ability to trace their supply chains. Even if companies have implemented traceability procedures for certain purposes, such as food safety or product recalls, they often do not have adequate evidence to disprove a forced labour allegation. This evidence must show the chain of custody throughout a supply chain and that labour conditions at each stage are appropriate. Exporters can seldom link each supply chain stage for each shipment quickly, if at all. This must be remedied immediately, in order for companies in vulnerable industries and regions to secure their continued US market access.

It should be noted that the US Tariff Act of 1930 did prohibit imports of goods that were manufactured using forced labour, but only if the domestic industry could produce enough of the good to satisfy domestic demand. Advocates tried for years to repeal this so-called

'*consumptive demand*' exception, but they were successful only last year when President Obama signed a law repealing the exception. US law now requires US Customs to ban imports when there is some reasonable indication that the imported goods were manufactured using forced labour, regardless of US domestic production capacity. In addition, in line with the Trump Administration's rhetoric of ridding foreign competition that is unfair to Americans, US Customs is likely to vigorously enforce the import ban on products associated with forced labour.

In particular, if the US Customs Commissioner finds that "*information available reasonably but not conclusively*" (emphasis added) indicates the imported goods were manufactured using forced labour, port Directors of Customs will prohibit all future imports from entering the US until Customs is satisfied that the forced labour issue has been resolved. Also, importers and their suppliers are not guaranteed an opportunity to defend themselves, or even to be informed of an allegation, until their goods are blocked at the border.

Given the low standard of evidence required to impose an import ban, and the absence of transparency or due process, exporters from countries known to have forced labour issues need to be ready to prove the absence of forced labour in their supply chains immediately upon receiving notice that goods have been denied entry into the US.

Companies in labour-intensive industries, and in regions with widespread poverty or significant presence of migrant workers, typically know that forced labour is a supply chain risk and have started taking action. Clear corporate policies against forced labour, however, do not mean that controls are in place on a shipment-by-shipment basis. Companies in at-risk industries and regions need to urgently test their supply chains and fix any gaps, as well as have dedicated dossiers ready to defend themselves when and if formal accusations are lodged with US Customs.

The most thorough way for businesses to proceed is to ensure that they can prove for each material used in a product, on a shipment-by-shipment basis, the chain of custody backwards from the time of importation to the material's origin. By doing so, businesses will be able to identify the supply chains used in an import, which then allows for identification of the specific dates and locations where labour occurred and the specific workers involved at each step. For the labour involved at each step of the supply chain, documentation must be maintained, so as to show that the labour conditions were appropriate. The nature of this documentation might vary depending upon the type of labour involved, but the basic nature of the documentation will address whether workers were recruited appropriately, are working voluntarily, are free to end their employment when they choose, etc.

US Customs will issue new regulations and guidance implementing the new regime of forced labour import prohibition. One would hope that those regulations will provide greater transparency and the opportunity for companies to cooperate with US Customs and avoid unexpected border delays or rejections. In anticipation of that eventuality, industries need to develop their own best practices proving the absence of forced labour. They should also encourage US Customs to adopt those regulations and guidelines.

Exporters to the US first need to prove that their house is in order. This requires on-going testing of supply chain traceability and evidence showing that labour conditions are appropriate. At the same time, exporters to the US might find that the law provides a tool to reduce unfair competition. Although a sensitive topic for many reasons, industry might find a competitive edge by denouncing offenders to US Customs and having their products blocked at importation.

A draft feasibility study signals actions that the EU may take to address deforestation outside its borders, while proposed rules on accounting for the climate impact of forests within its border remain contentious

A June 2017 draft of a *Feasibility Study on options to step up EU Action against Deforestation* (hereinafter, the Draft Study), which was tendered by the European Commission (hereinafter, Commission) in December 2015, signals upcoming steps that the EU may take in order to address deforestation, at least to the extent that it occurs outside the EU. Within the EU, the Commission's proposal for Land-Use, Land-Use Change and Forestry (hereinafter, LULUCF) has been debated publicly in recently published expert opinions.

The Draft Study assesses a number of potential interventions that the EU could take in order to address the continued loss of forests and forest ecosystems services, particularly through commodity-driven, legal or illegal deforestation and forest degradation in the tropics. The forest risk commodities (hereinafter, FRCs) considered for the Draft Study include: (1) meat/beef; (2) maize/corn; (3) soy; (4) cocoa; (5) palm oil; (6) coffee; (7) rubber; (8) timber; (9) pulpwood; (10) wood pellets; (11) bio-ethanol feedstock; and (12) bio-diesel feedstock. In the section of the Draft Study introducing the possible interventions examined, it is notable that it is stated that, "*possible interventions should not discriminate against commodities produced in third countries*". There, the Draft Study also recognises that, "*[i]n producer countries, [small- to medium-sized enterprises] also play an important role, and furthermore, smallholders are confronted with particular challenges regarding their ability (in e.g. technical, skills and finance terms) to move towards more sustainable production*". As the title suggests, the Draft Study is not yet complete. Accordingly, four sections of the Draft Study are still forthcoming, including sections titled "*Defining the options*", "*Assessing the options*", "*The impacts*" and "*Comparing the options- to be done briefly*".

The Draft Study identifies a total of 17 possible interventions, organised as supply-side, demand-side, and investment and finance actions, which could serve as contents of an EU initiative against deforestation. On the supply side, the Draft Study identifies three interventions, including the need for technical assistance projects to impart best practices on smallholder producers in risk geographies (*i.e.*, Asia, Africa and South America), technical assistance to improve governance, monitoring and law enforcement and prepare for REDD+ (*i.e.*, the name of a project that stands, in part, for Reducing Emission from Deforestation and forest Degradation in developing countries) and FLEGT (*i.e.*, an EU Facility that stands for Forest Law Enforcement, Governance and Trade) participation, as well as the adoption of partnership agreements for FRCs. Said interventions would be intended to address low productivity and profitability, low resource efficiency, weak governance and law enforcement, and insecure tenure. On the demand side, the Draft Study identifies twelve interventions, including, *inter alia*, due diligence regulation for FRCs, lower import duties for sustainably produced commodities, a consumer information campaign, the incubation of new certification schemes, the promotion of trade in legal and sustainable FRCs through free trade agreements, and sustainability criteria for bioenergy feedstocks. Said interventions are intended, in part, to address a lack of public policies promoting sustainably or legally produced commodities, a lack of consumer awareness of FRC related issues, a lack of incentives for private sector sources of legal/sustainable FRCs, and consumption levels of FRCs. On the investment and finance side, the Draft Study identifies two interventions, including sustainable financing mechanisms and mandatory disclosure of information on deforestation proofing of financial investments linked to production or processing of FRCs. Said interventions are intended to address insufficient finance for investment in sustainable agriculture and inadequate controls on flows of finance and investment from the EU, respectively.

Of the 17 possible interventions presented in the Draft Study, three are particularly interesting for third country producers of FRCs, given their high visibility nature in recent years. Namely: 1) lower import duties for sustainably produced commodities; 2) incubating new certification schemes *via* partnerships with industry and NGOs; and 3) sustainability criteria for bioenergy feedstocks. In regards to lowering import duties for sustainably produced commodities, this issue is tangentially related to efforts being made at the plurilateral level, where 18 WTO Members continue negotiating an Environmental Goods Agreement, as well as directly related at the unilateral level within the EU, where, for example, a recent "*European Parliament Resolution on palm oil and deforestation of rainforests*" calls, in relevant part, on the Commission to initiate a reform of the Harmonised System Nomenclature of the World Customs Organisation (hereinafter, WCO), so as to distinguish between certified sustainable and unsustainable palm oil. According to the Draft Study, in the past, the EU maintained a preferential rate for sustainably produced timber, but no one ever applied for the benefit. Accordingly, the Draft Study states that this could indicate that the costs of compliance were relatively high compared to the marginal decrease in tariffs. However, given the increased compliance with external sustainability criteria, this factor may not be as relevant in current FRC industries. The Draft Study also recognises that the possible introduction of a principle of differentiation between products on the basis of their means of production is a highly controversial issue within the WTO framework. The Draft Study continues by stating that WTO rules would require the establishment of objective criteria (rather than, for example, applying the sustainability criteria of the Roundtable on Sustainable Palm Oil to all palm oil imports), but the Draft Study does not recognise that such efforts would also need to be addressed within the context of the WCO.

The possible choice of lowering import duties for sustainably produced commodities may also be directly related to two of the other potential interventions. In order to apply lower tariffs to sustainable goods, sustainability criteria would need to be agreed upon, with the related certification schemes approved, both of which are only partially addressed in the Draft Study. In regards to the incubation of new certification schemes, the Draft Study focuses on three FRCs, for which certification levels are very low: beef, maize and natural rubber. However, it is important to note that the Resolution of the European Parliament referenced above also calls on the EU to introduce minimum sustainability criteria for an industry that is already subject to a plethora of different sustainability schemes: palm oil. As the Draft Study arguably recognises, the incubation of certification schemes for products that are already subject to numerous schemes may be unnecessary, and even inappropriate. With regards to the sustainability criteria for bioenergy feedstocks, the Draft Study recognises that the EU already applies sustainability criteria for the use of feedstocks for, respectively, biofuels for transport and biomass for heat and power. However, given that there are already processes underway to address this issue, namely the reform of the EU's Renewable Energy Directive, the Draft Study does not explore this possible intervention in detail. Due to its status as a draft, the document does not appear to reach conclusions with respect to the effectiveness or feasibility of the various possible interventions. Instead, each intervention is briefly introduced and examined. Future drafts of the study will likely address the interventions in more detail, and, therefore, interested stakeholders should monitor developments on this issue.

As the EU continues to explore possible initiatives to address deforestation abroad, a recent proposal by the Commission on LULUCF, which would have impacts within the EU, has been the subject of significant debate. On 15 June 2017, EURACTIV published competing op-eds, one co-signed by 40 environmental scientists and the other representing the forest fibre and paper industry. Essentially, the issue is the question of how the EU should account for the climate impact of forests. The Commission's LULUCF proposal uses a Forestry Reference Level (*i.e.*, baseline) that is based on the level of forest resources used from 1990 to 2009. Industry representatives argue that using such a baseline creates a disincentive for the industry to plant new forests because they are effectively capped at the amount of forest that

can be harvested. As a result, they expect that forest growth in the EU will be halted, and the long-term effect will be fewer trees that act as carbon sinks in the future. On the other hand, a group of 40 environmental scientists argue that allowing industry to increase harvesting up to the full forest growth increment without penalty, as proposed by some EU Member States, would create a reduction in the forest sink that would lead to more CO2 in the atmosphere – effectively the equivalent of a net increase in EU emissions.

It appears that the debates in the EU will continue, and avenues will be explored, on how to address deforestation, sustainability and climate change both domestically and abroad. With respect to the EU Action Plan on Deforestation, which is expected to be based on the Draft Study, reports indicate that the Commission intends to release it at the end of 2017. In the coming year, the various deforestation-related matters appear to be converging, and affected stakeholders must take part in the discussions where possible. It is imperative that dialogues are opened with domestic and foreign government officials. With respect to the Draft Study, at least, it appears at present to be relatively balanced, considering in large part the effects of any policy changes on third countries, but a cautious approach should be undertaken as developments continue. Whatever the way forward, it is critical that the policy choices and the measures adopted by the EU be non-discriminatory; based on verifiable scientific justification; not unilaterally imposed, but ideally negotiated and defined within multilateral, plurilateral or bilateral contexts; the least trade-restrictive possible measures; and balanced vis-à-vis the measures that the EU adopts internally. All relevant stakeholders must remain vigilant and pro-actively involved in the discussions that will shape future EU environmental policies and trade in FRCs.

Court of Justice of the European Union: Purely plant-based products cannot be marketed as '*milk*', '*butter*' or '*cheese*'

On 14 June 2017, the Court of Justice of the European Union (hereinafter, CJEU) handed down its judgment in Case C-422/16 *Verband Sozialer Wettbewerb* v *TofuTown* (hereinafter, TofuTown). The CJEU held that purely plant-based products such as tofu or soya cannot, in principle, be marketed with designations such as '*milk*', '*cream*', '*butter*', '*cheese*' or '*yoghurt*', which, under EU law, are reserved for animal products. The same applies even if those designations are accompanied by clarifying or descriptive terms indicating the plant origin of the product concerned and/or that it does not contain animal products.

The German company *TofuTown* produces and distributes vegetarian and vegan foods. In particular, it promotes and distributes purely plant-based products under the designations '*Soyatoo Tofu butter*', '*Plant cheese*', '*Veggie Cheese*', '*Cream*' and other similar designations. The Verband Sozialer Wettbewerb (hereinafter, VSW), a German association, whose responsibilities include combatting unfair competition, brought an action against *TofuTown* for a prohibitory injunction before the Landgericht (Regional Court) in Trier, Germany. VSW took the view that promoting those products infringes the EU legislation on designations for milk and milk products. *TofuTown* considered that its advertising does not infringe the relevant legislation, arguing that the way in which consumers understand those designations has changed considerably in recent years. Moreover, *TofuTown* does not use designations such as '*butter*', or '*cream*' on their own, but always in association with words referring to the plant origin of the products concerned, such as '*tofu butter*' or '*rice spray cream*'. In the context of this litigation, the Landgericht in Trier requested the CJEU to issue a preliminary ruling on the interpretation of the relevant EU legislation.

In its judgment, the CJEU observes that, in principle, for the purposes of the marketing and advertising in question, the relevant legislation reserves the term '*milk*' only for milk of animal origin. In addition, except where expressly provided, such legislation reserves designations

like '*cream*', '*butter*', '*cheese*' and '*yoghurt*' solely for products derived from milk. The CJEU interpreted the term '*milk*' and the respective terms for milk products very narrowly.

In fact, Annex VII, Part III, point 1 of *Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products* (Single CMO Regulation) defines '*milk*' as "*exclusively the normal mammary secretion obtained from one or more milkings without either addition thereto or extraction therefrom*". The following designations of milk products (listed in Annex VII, Part III, point 2, second subparagraph (a) of Regulation (EU) No 1308/2013) may be used at all stages of marketing only for products derived from milk: whey, cream, butter, buttermilk, butteroil, caseins, anhydrous milk fat (AMF), cheese, yogurt, kephir, koumiss, viili/fil, smetana, fil; rjaženka, and rūgušpiens. A list of exceptions to the principle that the descriptions of milk and milk products may not be used for milk products other than those in such Annex is contained in *Commission Decision 2010/791/EU of 20 December 2010 listing the products referred to in the second subparagraph of point III(1) of Annex XII to Council Regulation (EC) No 1234/2007* (the previous Single CMO Regulation). The EU Member States had to notify to the Commission the indicative lists of the products, which they deemed meeting, within their own territories, the criteria for the abovementioned exception.

In its judgment, the CJEU mentioned, as an example of such products notified to the Commission, the product traditionally designated '*crème de riz*' in French. Other examples are cocoa butter or almond milk in various languages. The number of such exceptions notified to the Commission varies significantly on the basis of the language: for example, there are 21 designations in German, only one in Spanish and none in Bulgarian or Czech.

The CJEU concludes in *TofuTown* that the designations used by the German company cannot be legally used to designate a purely plant-based product, unless that product is mentioned on the list of exceptions, which is not the case for soya or tofu. The CJEU goes on to state that the addition of descriptive or clarifying additions indicating the plant origin of the product concerned, such as those used by *TofuTown*, has no influence on that prohibition. The CJEU held that this interpretation of the relevant legislation does not conflict with the principle of proportionality or the principle of equal treatment. As far as the principle of proportionality is concerned, the CJEU observes, in particular, that the addition of descriptive or explanatory terms cannot completely exclude the likelihood of confusion on the part of consumers. As regards the principle of equal treatment, the CJEU finds that *TofuTown* cannot rely on the principle of unfair treatment by asserting that the producers of vegetarian or vegan substitutes for meat or fish are not subject to restrictions comparable to those to which producers of vegetarian or vegan substitutes for milk or milk products are subject. The CJEU held that each sector of the common organisation of markets for agricultural products, established by *Regulation (EU) No 1308/2013,* embodies features specific to it and, as a result, a comparison of the technical rules and procedures adopted in order to regulate the various sectors of the market cannot constitute a valid basis for the purpose of proving discrimination between dissimilar products, which are subject to different rules.

In fact, for meat products, with a few exceptions, there are no legal names, similar to those for milk products. Part 1 of Annex VII to of *Regulation (EU) No. 1308/2013* contains only general sales descriptions for meat of bovine animals (like '*veal*' in English), but currently no different language versions of meat products like sausage, *prosciutto* or *Schnitzel*. Such a list of reserved terms for meat products in the EU's different languages could be drafted in an amendment to *Regulation (EU) No. 1308/2013* and the use of terms like *prosciutto* or *Schnitzel* could be banned for products that are not meat-based. However, there are no signs that the Commission appears poised to introduce such reserved terms for meat products. Whether a product name may be misleading must, therefore, be established on a case-by-case basis, taking into consideration all relevant elements, including labelling, advertising and packaging. The German term *Schnitzel* appears to imply that it is a meat

product. A similar reasoning may apply to the names *prosciutto* and *bresaola*. For the term *Wurst* (*i.e.*, sausage), the situation is clearer. From the wording, *Wurst* (or sausage) could be used for meat replacement products in the form of an elongated roll (see for more detail, *Trade Perspectives*, Issue No. 2 of 27 January 2017).

The issue of plant-based meat substitutes is closely related to the matter of defining vegetarian and vegan food. *Regulation (EU) No 1169/2011 on the provision of food information to consumers* (hereinafter, FIR) expressly gives the Commission the power to adopt an implementing act on how to provide information on the suitability of foods for vegetarians or vegans, which is typically given on a voluntary basis, so as to ensure that this information is not misleading, ambiguous or confusing for the consumer. The FIR does not provide for a date by which the Commission must adopt such implementing act and the Commission has not yet done so. In response to the inaction by the Commission, there have been efforts at the EU Member States' level. In Germany, the Consumer Protection Ministers and Senators of the 16 German Federal States recently adopted a decision on binding definitions of the terms '*vegan*' and '*vegetarian*' (see *Trade Perspectives*, Issue No. 13 of 1 July 2016). On 7 June 2017, the REFIT (*i.e.*, the Commission's Regulatory Fitness and Performance programme) Platform, bringing together the Commission, national authorities and other stakeholders in regular meetings to improve existing EU legislation, issued an opinion on the submission made by the European Vegetarian Union (EVU) on the need to define the terms '*vegan*' and '*vegetarian*'. In its opinion, the REFIT Platform recommends that the Commission rapidly fulfil its obligation to adopt an implementing act on the criteria for voluntary food information related to the suitability of a food for vegetarians or vegans, so as to avoid diverging national developments and a distortion of the EU market.

The EU trade association Copa and Cogeca, representing livestock farmers and their cooperatives, welcomed in a statement the CJEU's ruling to stop food companies selling products labelled '*soya milk*' or '*tofu butter*' from being labelled as '*milk*' or '*butter*'. According to Copa and Cogeca, the main aim is to provide consumers with information about their food and to make sales descriptions more transparent in order to avoid misleading practices, namely by using names for products that do not come from animals. Copa and Cogeca notes that the issue is not about having plant-based, innovative products on the market, it is about ensuring that consumers are not misled or confused vis-a-vis the differences with livestock produce, which has different nutritional benefits. The European Dairy Association reportedly said that, even when explaining the difference on the packaging, those plant-based products should not be allowed to misuse dairy terms for marketing their products. In opposition, the European Vegetarian Union (EVU) reportedly argued that the CJEU's interpretation of the terms in *Regulation (EU) No. 1308/2013* contradicts consumer perception and everyday language, since plant-based alternatives to milk products have been on the market for many years. Since many of these products have been developed and produced specifically to resemble the originals, the EVU alleges that they should be allowed to be marketed under similar sales denominations.

It appears clear from the judgment of the CJEU that EU law does not allow (with few exceptions) the use of terms like '*milk*', '*cheese*' or '*butter*' for purely plant-based products. The Landgericht in Trier still needs to give a judgment in the main proceedings. It must be noted that the CJEU's judgment cannot be applied for plant-based meat alternatives, since most relevant denominations are not protected legal names. The applicable provisions appear to provide, however, sufficient legal basis to protect consumers from being misled by the denominations of plant-based meat alternatives, if those are also denominated '*vegan*' or '*vegetarian*'. EU Member States have the primary responsibility to enforce, monitor and verify that the relevant requirements of food law are fulfilled by food business operators at all stages of production, processing and distribution. For the sake of clarity, the terms '*vegan*' and '*vegetarian*' should be defined at the EU level as urgently requested by the REFIT platform. The next steps taken in the EU and its Member States, on the labelling of products

as suitable for vegans and vegetarians (in particular, an eventual legislative proposal put forward by the Commission), should be monitored and all relevant stakeholders should be prepared to participate in shaping upcoming EU legislation by interacting with relevant EU Institutions, trade associations and other affected stakeholders. Where warranted, operators should also consider triggering domestic administrative procedures against anti-competitive, deceptive or misleading advertisements before the competent EU national authorities, or even challenging these practices before judicial authorities, as done by the VSW against *TofuTown*.

Recently Adopted EU Legislation

Trade Remedies

- *Commission Implementing Regulation (EU) 2017/1159 of 29 June 2017 amending Council Implementing Regulation (EU) No 1105/2010 and Commission Implementing Regulation (EU) 2017/325 as regards the definition of the product scope of the current anti-dumping measures concerning imports of high tenacity yarns of polyesters originating in the People's Republic of China, and providing for the possibility of repayment or remission of duties in certain cases*

- *Commission Implementing Regulation (EU) 2017/1146 of 28 June 2017 re-imposing a definitive anti-dumping duty on imports of threaded tube or pipe cast fittings, of malleable cast iron, originating in the People's Republic of China, manufactured by Jinan Meide Castings Co., Ltd*

- *Commission Implementing Regulation (EU) 2017/1141 of 27 June 2017 imposing a definitive countervailing duty on imports of certain stainless steel bars and rods originating in India following an expiry review under Article 18 of Regulation (EU) 2016/1037 of the European Parliament and the Council*

Customs Law

- *Commission Implementing Regulation (EU) 2017/1156 of 27 June 2017 amending Regulation (EC) No 1385/2007 laying down detailed rules for the application of Council Regulation (EC) No 774/94 as regards opening and providing for the administration of certain Community tariff quotas for poultrymeat*

- *Council Regulation (EU) 2017/1133 of 20 June 2017 amending Regulation (EU) No 1388/2013 opening and providing for the management of autonomous tariff quotas of the Union for certain agricultural and industrial products*

- *Council Regulation (EU) 2017/1134 of 20 June 2017 amending Regulation (EU) No 1387/2013 suspending the autonomous Common Customs Tariff duties on certain agricultural and industrial products*

Food and Agricultural Law

- *Commission Implementing Regulation (EU) 2017/1136 of 14 June 2017 approving non-minor amendments to the specification for a name entered in the*

register of protected designations of origin and protected geographical indications (Emmental de Savoie (PGI))

Other

- *Council Decision (CFSP) 2017/1148 of 28 June 2017 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine*

Ignacio Carreño, Tobias Dolle, Lourdes Medina Perez, Corey L. Norton, Bruno G. Simões and Paolo R. Vergano contributed to this issue.