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Australia, Brazil and Guatemala request WTO dispute settlement consultations regarding certain measures on sugar and sugarcane by India

On 27 February, 1 March and 15 March 2019, respectively, Brazil (DS579), Australia (DS580) and Guatemala (DS581) submitted three individual requests for consultations with India regarding certain measures concerning sugar and sugarcane within the World Trade Organization's (hereinafter, WTO) dispute settlement mechanism. The complainants argue that certain measures by India, namely the subsidies accorded to sugar producers, as well as the export subsidies, are inconsistent with India's obligations under the WTO Agreement on Agriculture (hereinafter, AoA), the WTO Agreement on Subsidies and Countervailing Measures (hereinafter, SCM), and the General Agreement on Tariffs and Trade (hereinafter, GATT) 1994. Other WTO Members, such as the EU, Costa Rica, Russia and Thailand already requested to join the consultations.

Over the past several years, the Government of India has been implementing a multitude of support polices for sugar and sugarcane, which, according to India's trading partners, led to unfavourable conditions on the international sugar market. The most recent measures entered into force in February 2019, while further measures date back to 2018. India is the world's second largest sugar producer after Brazil and the world's largest sugar consumer. Measures at the State- and Federal-level strongly regulate the market and, over the past two years, sugar production in India has increased considerably. During the 2018/2019 agricultural year (*i.e.*, from October 2018 to September 2019), India is expected to produce around 31.5 million metric tonnes of sugar, slightly below the amount of 32.5 million metric tonnes produced during the 2017/2018 agricultural year. As sugar consumption in India is calculated at around 25 million metric tonnes per year, a significant sugar surplus has been building up and prices have decreased. The Government of India, therefore, passed a series of measures to require sugar millers to export the surplus and to provide additional financial support to those involved in the sugar industry.

In March 2018, India's Ministry of Food and Consumer Affairs authorised the export of two million metric tonnes of sugar under a Minimum Indicative Export Quota (hereinafter, MIEQ) scheme. India implements the MIEQ with the sugar industry in view of the inventory levels and in order to facilitate achievement of financial liquidity. Under the MIEQ, India's sugar mills must export an allocated amount of sugar by the end of each agricultural season. On 24 October 2018, the Government of India announced that, during the 2018/2019 agricultural year, the MIEQ would see a significant increase from 2 million metric tonnes to 5 million metric tonnes of sugar. Additionally, the Government of India announced a sugarcane production subsidy of USD 1.90 per metric tonne, along with a three-tiered transportation subsidy to be paid to sugar

millers. The latter policy compensates the expenses of millers for internal transport, freight, handling and other charges to undertake the shipments. On 14 December 2018, in view of the ongoing crushing season in India and of concerns over a slow pace of sugar exports, the Government of India directed mills to export their fixed quota and even threatened to take action against sugar mills that were not to comply with the MIEQ. Finally, on 15 February 2019, the Government of India announced an increase of the minimum selling price (hereinafter, MSP) for sugar from INR 29 (*i.e.*, EUR 0.38) per kg to INR 31 (*i.e.*, EUR 0.40) per kg. The Government of India stated that the "*move to increase the minimum selling price of sugar will augur well for the mills and is expected to increase their operating profit margins by 6%*".

The various support policies for sugar and sugarcane have already been a topic of debate within the WTO Committee on Agriculture (hereinafter, CoA). At the most recent meeting of the CoA on 26 and 27 February 2019, Australia had raised a question concerning India's MSP for sugar, the level of buffer stocks, as well as the issue of transport cost reimbursements. In the context of the previous meeting of the CoA on 26 and 27 November 2018, the EU had submitted a question to India regarding the extension of the export deadline under the MIEQ to December 2018. Additionally, the EU pointed out that, in July 2018, the Prime Minister of India, Narendra Modi, had announced an increase of the MSP for sugarcane for the 2018/2019 agricultural year to INR 27,5 (*i.e.*, EUR 0,35) per kg, noting that the cost of production amounted to INR 15,5 (*i.e.*, EUR 0,20) per kg. Finally, the EU asked India to clarify whether such policy measure was within its "*de minimis*" (*i.e.*, minimal amounts of domestic support that are allowed even though they distort trade) entitlement. While India provided the EU with some of the requested data, it did not specifically reply to the EU's questions. Brazil supported the EU questions and asked India "*to clarify the way the* [MIEQ] *programme worked as in its view it appeared to be an export subsidy*". Brazil also noted that India's subsidy policies would benefit sugar producers, although they are granted to sugar processors. Therefore, Brazil requested India to notify its policies to the WTO. Russia referred to the above-mentioned increase, of September 2018, in sugar export subsidies and the increase in subsidies for the transportation of sugar. A multitude of other WTO Members (*e.g.*, Australia, Canada, Colombia, and Thailand) also raised concerns regarding certain elements of India's policies.

The Government of India denied that it is providing any subsidy to sugar exports, noting that the Government had only "*announced providing assistance to sugar mills during 2018-19 at Rs. 1000/tonne for the mills located within 100 km from the ports, Rs. 2500/tonne for the mills located beyond 100 km from the ports in the coastal states and Rs. 3000/tonne for mills located in other than coastal states or actual expenditure, whichever is lower*". Furthermore, the Government of India stated that the measure aimed at supporting sugar mills in covering expenses related to transport freight within India, as well as to the handling and other charges of the products, which were allowed for developing countries under the WTO's AoA. India further noted that its sugar policies were a domestic issue and that they "*had not distorted international sugar trade*". India explained that the measures had been taken to mitigate the concerns related to unpaid sugar cane dues of farmers, as well as to mitigate the liquidity crisis affecting sugar mills in India, due to a discrepancy between market prices and the minimum selling price. With respect to the MIEQ, India only noted that around 0.62 million metric tonnes of sugar had been exported under the MIEQ, with an estimated value of around USD 203 million, and that no subsidy had been provided to sugar exports under the MIEQ.

India's sugar policies have come under increased scrutiny by third countries and are now subject to three WTO complaints by Australia, Brazil, and Guatemala. At the end of February and during March 2019, Australia, Brazil, and Guatemala submitted three individual requests for consultations with India within the WTO's dispute settlement regarding its measures concerning sugar and sugarcane. Australia, Brazil, and Guatemala claim that a number of legislative instruments, measures and programmes adopted by India's Governments at the Federal and at the State-level with respect to domestic support measures for sugar and sugarcane, as well as with respect to export subsidies pertaining to sugar and sugarcane, are inconsistent with India's WTO obligations. In simple terms, the complainants claim that India provided its local producers of sugar and sugarcane with domestic support and export subsidies inconsistent with its reduction commitment levels regulated by WTO rules.

The three complainants all state that India's domestic support measures are to be considered inconsistent with the AoA because "*they provide domestic support for sugarcane in excess of India's de minimis entitlement of 10% of the value of production"*. Under the AoA, WTO Members agreed to reduce their level of support, expressed as their '*aggregate measurement of support*' (hereinafter, AMS). Article 6.3 of the AoA provides that WTO Members may not provide domestic support in excess of their AMS reduction commitments (*i.e*., domestic support measures in favour of agricultural producers) as set out in Part IV of their respective Schedule for Goods. The AoA allows for certain flexibilities and exempts from the AMS reduction commitments certain categories of domestic agricultural support measures, which do not provide price support to agricultural producers. These exemptions are referred to as the so-called '*green box*' (*i.e.*, "*domestic support measures for which exemption from the reduction commitments is claimed shall meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production*") and '*blue box*' (*i.e.*, subsidies that are tied to programmes that limit production). In this regard, all complainants argue that India did not schedule a domestic support reduction commitment level in Section I of Part IV of its Schedule XII, and that the amount of support to agricultural producers was in excess of its product-specific *de minimis* level of 10% for sugarcane, violating Articles 3.2, 6.3 and 7.2(b) of the AoA.

With respect to export subsidies on agricultural products, the AoA allows certain export subsidies if they are specified in Section II of Part IV of a Member's Schedule for Goods. However, on the basis of Article 9.1 of the AoA, the export subsidies are subject to reduction commitments inscribed in the respective WTO Member's Schedule. Consequently, pursuant to Article 8 of the AoA, WTO Members may not provide listed export subsidies in excess of the levels specified in their Schedule for Goods. In this regard, Australia, Brazil and Guatemala consider that India did not schedule "*export subsidy reduction commitments under Section II of Part IV of its Schedule XII pertaining to sugar or sugarcane, which would permit it to use export subsidies*". Therefore, the complainants consider that India is not entitled to provide such export subsidies. The complainants conclude with the allegation that, by providing export subsidies not scheduled in India's Schedule for Goods, India also violated Articles 3.3, 9.1 and 10.1 of the AoA, relating to export subsidies.

Australia and Guatemala also argue that India's measures are inconsistent with Article 3 of the SCM Agreement because India's measures are to be considered prohibited subsidies under Article 25 of the SCM Agreement concerning the notification of subsidies, because India has "*failed to notify its subsidies for sugarcane and sugar*". Furthermore, Australia and Guatemala consider India's sugar measures to be inconsistent with the GATT. In this regard, Australia argues that India has "*acted inconsistently with Article XVI of the* [GATT 1994] *because India has granted and maintained subsidies, including price support, which operate directly or indirectly to increase exports of sugar from India, and India has not complied with the requirement to notify the Member States in writing*". Article XVI of the GATT provides that any WTO Member that maintains a subsidy, "*which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory*", must notify such measure to the WTO.

So far, no official position by the Government of India appears to have been made public regarding the requests for consultations. However, at the meeting of the CoA in November 2018, India denied that the market price support provided for sugarcane, in the form of remunerative prices, is a domestic support. India also maintained that it has notified market price support for all crops "*where government agencies had made procurement on their applied administered price*". India emphasised that various measures had been taken in order to address concerns related to unpaid sugarcane dues of farmers and the liquidity crisis affecting sugar mills. Most importantly, India reiterated that the methodology used was consistent with its WTO obligations under the AoA.

Australia, one of the world's main sugar exporters, and Brazil, the world's largest sugar exporter and sugar producer, stated in many occasions that India's subsidies have led to an

increase of the international sugar surplus and to a decrease in world sugar prices. India is the world's second largest sugar producer and any development regarding India's sugar policies is poised to have a significant impact on the world sugar market. The request for consultations by Australia, Brazil, and Guatemala formally initiated WTO dispute settlement proceedings. Consultations allow the parties to discuss the issue and to seek a mutually-agreeable solution. The parties to the respective disputes have 60 days to resolve the dispute, after which, if a solution to the dispute is not achieved, a dispute settlement panel may be requested. In view of the repeated discussions within the WTO's CoA, the complaints do not come as a surprise. The global sugar market is under intense pressure and India's increasing exports are significantly contributing to a global sugar surplus and decreased prices. All interested stakeholders should closely monitor any development on this matter and engage with their respective Governments, as the proceedings will likely move to the Panel-phase in the coming months.

The European Parliament adopts Single-Use Plastics Directive

On 27 March 2019, the European Parliament voted, with 560 MEPs in favour, 35 against and 28 abstaining, on the proposal for a *Directive of the European Parliament and of the Council on the reduction of the impact of certain plastic products on the environment* (hereinafter, Single-Use Plastics Directive). The Single-Use Plastics Directive, which was proposed by the European Commission (hereinafter, Commission) in May 2018, aims at tackling marine litter coming from the ten single-use plastic products most often found on European beaches, as well as abandoned fishing gear and oxo-degradable plastics (*i.e.*, plastic that degrades due to oxidative and cell-mediated phenomena). At the same time, it appears that in certain EU Member States, measures are adopted extending the list of the restricted products. The measure will have significant consequences for EU businesses and importers of such products.

The Single-Use Plastics Directive is part of the EU Plastics Strategy, a comprehensive strategy adopting a material-specific lifecycle approach with the vision and objective to make all plastic products placed on the EU market as reusable or recyclable by 2030 (see *Trade Perspectives*, Issue No. 1 of 11 January 2019). The Single-Use Plastics Directive is also supposed to stimulate the production and use of sustainable alternatives that avoid marine litter. Following the recent approval by the European Parliament, the Council of the EU will finalise the formal adoption of the Single-Use Plastics Directive. This endorsement will be followed by the publication of the text in the Official Journal of the EU. The Directive will enter into force 20 days after its publication in the EU's Official Journal.

According to the Commission's proposal for the Single-Use Plastics Directive, the "*high functionality and relatively low cost of plastic means that this material has become increasingly ubiquitous in everyday life*". While plastic plays a useful role in the economy and provides essential applications in many sectors, its "*growing use in short-lived applications, which are not designed for re-use or cost-effective recycling means that related production and consumption patterns have become increasingly inefficient and linear*", according to the Commission's proposal. Therefore, in the context of the EU's Circular Economy Action Plan laid down in the Communication of the Commission of 2 December 2015 entitled "*Closing the loop – An EU action plan for the Circular Economy*", the Commission concluded in its Communication of 16 January 2018, entitled "*A European Strategy for Plastics in a Circular Economy*", that the steady increase in plastic waste generation and the leakage of plastic waste into the environment, in particular into the marine environment, must be addressed in order to achieve a circular life cycle for plastics.

The Single-Use Plastics Directive provides, in particular, for the following measures: 1) Article 5 prohibits by 2021 the placing on the EU market of the single-use plastic products for which alternatives exist on the market and which are listed in Part B of the Annex to the Directive (*i.e.*, cotton bud sticks, cutlery, plates, straws, stirrers, sticks for balloons, as well as cups, food and beverage containers made of expanded polystyrene), as well as all products made of oxo-

degradable plastic; 2) Article 6 provides for measures to reduce the consumption of food containers and beverage cups made of plastic, as well as specific marking and labelling requirements for certain products. In particular, by 2025, EU Member States are required to ensure that single-use plastic products, listed in Part C of the Annex to the Directive, which have caps and lids made of plastic, may be placed on the EU market only if the caps and lids remain attached to the containers during the products' intended use stage; and 3) Article 7 provides for marking requirements. In particular, EU Member States are required to ensure, by 2021, that each single-use plastic product listed in Part D of the Annex to the Directive (*i.e.*, sanitary towels (pads), tampons and tampon applicators; wet wipes, *i.e.* pre-wetted personal care and domestic wipes; tobacco products with filters and filters marketed for use in combination with tobacco products; as well as cups for beverages), when placed on the EU market, bear a conspicuous, clearly legible and indelible marking on its packaging or on the product itself informing consumers of the following: a) appropriate waste management options for the product or waste disposal means to be avoided for that product, in line with the waste hierarchy; and b) the presence of plastics in the product and the resulting negative impact of littering or other inappropriate means of waste disposal of the product on the environment.

Furthermore, the Single-Use Plastics Directive provides for the following measures: 1) Article 8 provides for extended producer responsibility schemes covering the cost to clean-up litter, such as: a) the costs of the awareness raising measures regarding those products; b) the costs of waste collection for those products that are discarded in public collection systems, including the infrastructure and its operation, and the subsequent transport and treatment of that waste; and c) the costs of cleaning up litter resulting from those products and the subsequent transport and treatment of that litter. These costs apply to products such as food containers, packets and wrappers, beverage containers, cups for beverages, including their covers and lids; lightweight plastic carrier bags, as well as tobacco products with filters and filters marketed for use in combination with tobacco products and fishing gear; and 2) Article 9 foresees a 90% separate collection target for plastic bottles by 2029, following a 77% target by 2025 and the introduction of design requirements to connect caps to bottles, as well as a target to incorporate 25% of recycled plastic in PET bottles from 2025 and 30% in all plastic bottles from 2030.

Article 14 of the Single-Use Plastics Directive concerns penalties. EU Member States will be required to lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to the Directive and must take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.

The new rules on single-use plastics have been established in a Directive. In accordance with Article 288 of the Treaty on the Functioning of the European Union (TFEU), to exercise the EU's competences, the EU Institutions with legislative responsibilities adopt regulations, directives, decisions, recommendations and opinions. Contrary to EU Regulations, which are binding in their entirety and directly applicable in all EU Member States, EU Directives are not directly applicable and must be transposed by EU Member States' into their national legislation. According to Article 17 of the Single-Use Plastics Directive, by sometime in 2021 (the exact date is still to be determined, as it will be two years after the date of entry into force of the Directive), EU Member States shall be required to notify the Commission of those implementing measures, as well as of any subsequent amendment affecting them. As regards the substantive EU Member State transposition measure, a directive is binding, as to the result to be achieved, upon each EU Member State to which it is addressed, but leaves to the national authorities the choice of form and methods.

EU Member States may, depending on their national level of decentralisation and competences, choose to implement EU Directives with regional measures. Regarding its waste legislation, a pertinent example for this is Belgium. Belgium notified to the Commission nine regional measures by the Walloon, Flanders and Brussels regions transposing *Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives.* Spain, for example, transposed *Directive 2008/98/*EC only by one measure, the *Law 22/2011 on waste and contaminated soils* (*i.e.*, *Ley 22/2011, de 28 de julio, de residuos y suelos contaminados*, in Spanish). However, as regards the transposition

of the EU's Single-Use Plastics Directive, in particular its scope, recent developments in at least two Spanish Autonomous Communities (*i.e.*, *Comunidades Autonomas*) are of note, inasmuch as they appear to already anticipate the entry into force of parts of the EU's Single-Use Plastics Directive. On 29 January 2019, the Parliament of the Balearic Islands, an autonomous region of the Spanish State, adopted a *Law of residues and contaminated waste of the Balearic Islands* (*i.e.*, *Llei de residus i sols contaminants de les Illes Balear*, in Catalan). Article 23 of that Law addresses the regulation of single-use products from 1 January 2021 and provides, *inter alia*, that: 1) "*In the Balearic Islands, only drinking straws, sticks for the ears and sticks for candies may be distributed, marketed and used, when they are made of compostable materials*". 2) "*Disposable capsules of coffee, infusions, broths and others used in coffee makers, put up for sale in the Balearic Islands, must be manufactured using compostable materials or easily recyclable, organically or mechanically*". Additionally, in its *Resolution 166/XII of 14 November 2018 on the limitation of single-use plastic utensils* (*i.e.*, *Resolució sobre la limitació d'estris de plàstic d'un sol ús*, in Catalan), the Parliament of Catalonia urged the Government of Catalonia to include, in the future law on waste and resources, measures and deadlines, in accordance with EU directives, aimed at, *inter alia*, 1) "*Prohibiting, as from 2021, as the corresponding EU Directive will establish, the sale of disposable coffee capsules manufactured with non-recyclable materials*"; and 2) "*Allowing, as from 2021, as will establish the corresponding EU Directive, only the marketing of straws for drinks, sticks for the ears and sticks for candies made of compostable materials*".

Different from the Balearic Islands' measure and from the measure that the Government of Catalonia has been urged to adopt, the list of banned and restricted items listed in the EU's Single-Use Plastics Directive does not include, *inter alia*, sticks for candies and disposable coffee capsules. Is an EU Member State, or even one of its regions, allowed to ban single-use products, which do not figure on the, arguably, closed list established in the Single-Use Plastics Directive? In this regard, the explanatory *memorandum* of the Single-Use Plastics Directive's proposal states the following: "*There is a risk of market fragmentation when Member States take measures in an uncoordinated manner, differing in scope, focus and ambition level. Current actions target various plastic products and adopt different approaches (such as Italy's ban on plastic cotton buds, French rules restricting the marketing of single-use plastic glasses and plates unless they comply with specific biodegradability criteria). This could lead to a variety of restrictions of market access among the Member States, barriers to the free movement of goods and to the level playing field between producers in different countries, jeopardizing the efficient attainment of the objective of reducing marine litter, which has broader impacts at EU and international level. For this reason, it is necessary to establish a harmonised legislative framework setting common objectives and measures at EU level to prevent and reduce marine litter so that Member State measures are focused to specific single use plastic products and fishing gear containing plastic. The type of measures to be used, while based on a common assessment, is differentiated according to the type of plastic item, taking into account the added value of potential EU action and complementarity with the action undertaken by EU Member States*".

Arguably, this means that EU Member States, or their regions, may not introduce stricter measures at national or regional level. If considered an implementation of the Single-Use Plastics Directive, the Balearic and Catalan measures may constitute, if adopted, a case of over-implementation of the Directive, which may be interpreted as contrary to EU law. Spain's Federal Government appears to be competent for environmental matters, in particular the transposition of the EU waste legislation. The Balearic Islands refer to Spain's national waste law, but state that the Law on Waste and Contaminated Soils of the Balearic Islands aims to be a law for the sustainable management of waste, as well as a legal tool to switch towards the new European, and global, paradigm of the circular economy: "*A specific norm is needed, adapted to the peculiarities of the Balearic archipelago, to face the existing challenges, not only in waste, but also in contaminated soils*". Therefore, in addition to the question of over-implementation, there appears to be an issue of competence. When transposing EU Directives, there is always a risk for EU Member States to either under- or over-implement EU provisions. The latter risk, also known as '*gold-plating*', describes the situation when implementation goes beyond the minimum necessary to comply with a Directive, such as when

the national legislation extends the scope or adds in some way to the substantive requirement. '*Gold-plating*' refers to obligations that go beyond EU requirements: an excess of norms, guidelines and procedures accumulated at national, regional and local levels interfering with the expected policy goals.

The increased regulatory activity in EU Member States and in the EU on plastics, littering and waste, should be monitored and stakeholders should be prepared to participate in shaping policies by interacting with relevant EU and EU Member State institutions and other affected stakeholders. As the Directive specifically aims at achieving harmonised rules for specific products, the transposition of the EU's Single-Use Plastics Directive by EU Member States should closely respect the relevant rules, which already impose significant changes to businesses and traders.

An overview on Front-of-Pack nutrition labelling – recent developments in India, Sri Lanka, and Uruguay underline the increasing need for global harmonisation

Joining other markets worldwide, various countries in Latin America and Asia are introducing new Front-of-Pack (hereinafter, FoP) nutrition labelling systems. On 21 March 2019, Uruguay's Ministry of Public Health published its *Manual for the application of Decree No. 272/018 on FoP labelling* (*i.e.*, *Manual para la aplicación del Decreto Nº 272/018 sobre rotulado frontal de alimentos,* in Spanish). The related labels are black and white octagons that state '*excess in …*', followed by the corresponding nutrient. In the Asian region alone, India and Sri Lanka are implementing so-called '*traffic light*' nutrition labelling schemes. The World Health Organization's (hereinafter, WHO) report '*Time to deliver*' of 1 June 2018 (hereinafter, the Report) recommends, *inter alia*, the reformulation of food products and the implementation of FoP labelling. The *Codex Alimentarius* Commission agreed, in July 2018, to develop guidance on providing simplified FoP nutrition information to consumers so as to enable them to identify healthier food choices, while avoiding unnecessary obstacles to food trade.

FoP nutrition labelling has become increasingly relevant for regulators and industries alike and the implementation of such labels is always a topic of concern. The FoP nutrition labelling systems introduced in Latin America and Asia typically follow two main models: 1) Colour codes like in Europe (*inter alia*, '*traffic lights*'); and 2) Octangular black '*STOP*' signs, which were first introduced by Chile in 2015. On 1 June 2018, the WHO's Independent High-level Commission on Non-Communicable Diseases (hereinafter, NCDs) published its report listing a series of recommendations. This Report is intended to advise the WHO Director-General, but is also addressed at the Heads of State and Government and to policy makers across all Government sectors, as well as other stakeholders. The Report recognises, *inter alia*, that for the reformulation of food products and the implementation of FoP labelling, regulatory capacity along with multisectoral actions, involving relevant ministries and civil society, is needed (see *Trade Perspectives*, Issue No. 15 of 27 July 2018).

Uruguay's Manual for the application of FoP nutrition labelling has the objective of establishing a guideline for the proper implementation by the competent authorities of *Decree No. 272/018 of the Presidency of the Republic establishing FoP nutrition labelling of pre-packaged foods, whose final composition exceeds certain values of sodium, sugars, fats or saturated fats* (adopted on 30 August 2018), as well as to provide technical guidance to companies producing and importing packaged foods. The Decree entered into force on 30 August 2018, but manufacturers and importers have 18 months to adapt to the new rules. Prior to Uruguay, a number of Latin American countries had already taken measures to reduce the intake of salt, fats and sugar with the purpose of reducing obesity or improving their citizens' nutrition. In 2013, Ecuador introduced a *Sanitary Labelling Regulation for processed food* (*i.e.*, *Reglamento Sanitario de Etiquetado de Alimentos Procesados para el Consumo Humano*). Article 12 of the Regulation provides that, in addition to the nutritional information, a graphic system must be placed on processed food products with colour bars placed horizontally. These

colours would be red, yellow and green depending on the concentration of the nutritional components (*i.e.*, total fats, sugars, salt).

The red bar is assigned to the high content of a component and carries the phrase '*High In ...*', the yellow bar is assigned to the medium content of a component and carries the phrase '*Medium In ...*', and the green bar is assigned to the low content of a component and carries the phrase '*Low In ...*'. Compared to the '*STOP*' signs, later implemented by other countries, Ecuador's scheme appears to be a less aggressive '*traffic light*' labelling system. In 2015, the Government of Chile adopted *Decree No. 13 of 16 April 2015* (hereinafter, Decree 13/2015) amending Chile's Food Health Regulation (*i.e.*, *Reglamento sanitario de los alimentos*). Decree 13/2015 requires warning messages in the shape of a black octagon with the form of a '*STOP*' sign to be placed on the FoP with the text '*High in…*', when food products exceed certain levels of energy, sodium, sugars or saturated fats (see *Trade Perspectives*, Issue No. 16 of 11 September 2015). Peru and Uruguay followed with their own '*STOP*' sign warning labels, while heated discussions on implementing FoP schemes are ongoing in Brazil, Argentina and Paraguay (see *Trade Perspectives*, Issue No. 16 of 7 September 2018). Since 16 June 2018, food manufacturers operating in Peru and importers have had to include warning labels on the packaging of and adverts for products with high levels of salt, sugar and fats. On 16 June 2018, the Peruvian Government published, through a Decree (*i.e.*, *Decreto Supremo Nº 017-2017-SA*), its Advertising Warnings Manual (*i.e.*, *Manual de Advertencias Publicitarias*), constituting the final stage in the application of the *Law of Promotion of Healthy Nutrition for Boys, Girls and Teenagers* (*i.e.*, *Ley Nº 30021 de promoción de la alimentación saludable para niños, niñas y adolescentes*). According to the Decree, by 16 June 2019, businesses will have to comply with the new warning labels.

In Asia, Sri Lanka will implement a '*traffic light*' colour coding system for packaged foods, with red indicating high content, orange indicating moderate content, and green denoting a '*healthy*' amount of salt, sugar, and fat. Reportedly, according to Sri Lanka's Ministry of Health, these new regulations will come into force on 1 June 2019. Food products that contain more than 22g of sugar per 100g will have to bear a red label, foods containing 8g to 22g sugar per 100g an amber label, and foods with less than 8g may bear a green label. Salt content of more than 1.25g per 100g will be labelled in red, from 0.25g to 1.25g marked in amber, and of less than 0.25g, it will be marked green. As for the fat content, foods containing more than 17.5g fat per 100g will be given a red label, foods containing 3g to 17.3g an amber label, and foods with less than 3g a green label. A number of food products are reportedly exempt from the new FoP nutrition labelling provisions, including any primary agricultural products (including cereals, vegetables, fruits, oil, salt, sugar, meat, fish and milk), spices and flavourings sold in separate packaging, and single ingredient products, such as packaged/bottled drinking water, tea and coffee. A previous draft of the FoP nutrition regulations, published in 2018, reportedly also included the terms '*High Sugar*', '*High Salt*' or '*High Fat*' to be included on the label. This appears to have been removed in the final regulations. Sri Lanka had previously introduced a '*traffic light*' labelling system for soft drinks in 2016, where beverages with more than 11g of sugar per 100ml were marked red, those with between 2g to 11g were marked amber, and the ones with below 2g of sugar were marked green.

In India, the Food Safety and Standards Authority of India's (FSSAI) draft on *Food Safety and Standards (Labelling and Display) Regulations*, including '*traffic light*' nutrition labelling rules, will reportedly soon be released for public consultation. The current draft is still at the stakeholder consultation phase. An expert panel had been set up in August 2018 to review the proposed new food labelling rules, including plans for red labels to be added to products that are high in fat, sugar and salt (HFSS). Such labels shall be red if the energy values from sugar are over 10% of the total energy from 100g/100ml of the product, energy from trans fats is over 1% of the total, and the total fat or sodium content exceeds specified threshold values. The red labelling would be applied in the current nutritional information panels of the food product. These would comprise caloric, fat, trans fat, total sugar and salt content, as well as the per-serve percentage contributions to the Recommended Dietary Allowances (RDA).

The question arises whether the different measures imposing FoP nutrition labels, including warning messages on food, comply with international trade law. With respect to these measures, the different Governments are required to comply with the transparency obligation set out in Article 2.9 of the WTO Agreement on Technical Barriers to Trade (hereinafter, TBT Agreement) by notifying them to the WTO. Arguably, the different FoP nutrition labelling schemes present the characteristics of a technical regulation, as defined in Article 1 of Annex 1 to the TBT Agreement, which states that a technical regulation is a document that lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. According to Article 2.2 of the TBT Agreement, WTO Members must ensure that technical regulations do not create unnecessary obstacles to international trade. For this purpose, technical regulations must not be more trade-restrictive than necessary to fulfil a legitimate objective. It would have to be determined if the different measures' objectives could be addressed and achieved by more effective and less trade-restrictive public policies. Other less trade-restrictive information measures (such as launching campaigns to encourage the population to eat healthily and promoting physical activity programmes or consistent '*traffic light*' labels) also appear to be available for consideration.

Article 2.4 of the TBT Agreement provides that technical regulations must be based on the relevant international standards. Section 5 of the *Codex Alimentarius Guidelines on Nutrition Labelling* (CAC/GL2-1985) recommends, in relation to supplementary nutrition information, that it should intend to increase consumers' understanding of the nutritional value of their food and that it should assist in interpreting the nutrient declaration. Section 3.5 of the *Codex Guidelines on Nutrition Labelling*, concerning '*tolerances and compliance*', may also be relevant. It does not establish nutrient thresholds for the nutrients targeted by the different measures. In spite of the evidence of a positive association between the intake of certain nutrients and the risk of developing a disease or disorder, there is no scientific evidence suggesting that there is an identifiable threshold above which such risk exists. On this basis, considering that they set such specific nutrient thresholds, the measures would arguably contradict Section 3.5 of the *Codex Guidelines on Nutrition Labelling*.

Additionally, the manner through which the measures pursue their legitimate public *heath* objective appears to be incompatible with the list of prohibited claims under section 3 of the *Codex General Guidelines on Claims* (CAC/GL 1-1979). For instance, Section 3.5 of these guidelines prohibits "*claims which could give rise to doubt about the safety of similar food or which could arouse or exploit fear in the consumer*". '*High in*' or even '*Excess in*' warnings, such as those in Chile's, Peru's and Uruguay's legislation, should be avoided, as they are not foreseen by the applicable *Codex Guidelines on Nutrition Labelling*, and they risk demonising some foods whose moderate consumption can be part of a healthy diet. It must be noted that, arguably, a number of red '*traffic lights*' on the FoP of a product could act as sort of '*non-beneficial*' nutrition claim, inasmuch as the whole group of red traffic lights could be interpreted as a claim that this product is nutritionally disadvantageous. Looking at Europe, in 2013, the European Commission considered the UK's '*traffic light*' nutrition labelling scheme as voluntary nutritional information and not as a '*non-beneficial*' nutrition claim. Other EU Member States, like Belgium, France, and Spain are implementing yet another colour coding scheme, the '*Nutri-Score*' (see *Trade Perspectives*, Issue No. 16 of 7 September 2018).

One of the main issues regarding FoP nutrition labelling is the lack of global consistency, despite high-level WHO recommendations and *Codex Guidelines*. In October 2017, the *Codex Alimentarius Committee on Food Labelling* noted that there was a need for international guidelines on best practices for FoP labelling, which would provide clear and transparent scientific guidance to governments. It also noted that new work on FoP labelling would help in harmonising FoP labelling and should provide a definition for FoP labelling and fundamental principles for monitoring and assessing the effectiveness of such schemes. Such definition should be scientifically substantiated, voluntary, and exclusively applicable to processed foods (possibly with a number of exceptions). Furthermore, FoP labelling should provide consumers with accurate and transparent nutrition information to help them make informed decisions (see *Trade Perspectives*, Issue No. 20 of 3 November 2017). At the 41st Session of the *Codex*

Alimentarius Commission in July 2018, the *Codex Alimentarius* Commission agreed to undertake new work to develop guidance on providing simplified FoP nutrition information to consumers, so as to enable them to identify healthier food choices, while avoiding creating unnecessary obstacles to food trade.

With the global trend of FoP nutrition labelling schemes, it is very important that a certain degree of consistency or harmonisation be maintained (or achieved) in order to ensure that: 1) Consumers are not misled; 2) Such labelling systems do not distort or restrict trade, particularly in protectionist fashion; and 3) It does not distort competition. Stakeholders in the agri-food sector in Asia and Latin America, as well as trading partners around the world, should monitor developments on FoP nutrition labelling and take action to ensure that their legitimate interests are voiced and represented within all relevant *fora*, including the WTO.

Recently Adopted EU Legislation

Food and Agricultural Law

- *Council Regulation (EU) 2019/529 of 28 March 2019 amending Regulation (EU) 2019/124 as regards certain fishing opportunities*

- *Commission Implementing Regulation (EU) 2019/531 of 27 March 2019 amending Regulation (EC) No 1484/95 as regards fixing representative prices in the poultrymeat and egg sectors and for egg albumin*

- *Commission Implementing Regulation (EU) 2019/533 of 28 March 2019 concerning a coordinated multiannual control programme of the Union for 2020, 2021 and 2022 to ensure compliance with maximum residue levels of pesticides and to assess the consumer exposure to pesticide residues in and on food of plant and animal origin*

- *Commission Implementing Directive (EU) 2019/523 of 21 March 2019 amending Annexes I to V to Council Directive 2000/29/EC on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community*

- *Commission Implementing Regulation (EU) 2019/506 of 26 March 2019 authorising the placing on the market of D-ribose as a novel food under Regulation (EU) 2015/2283 of the European Parliament and of the Council, and amending Commission Implementing Regulation (EU) 2017/2470*

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