FRATINIVERGANO
EUROPEAN LAWYERS
TRADE PERSPECTIVES©

Issue No. 11 of 31 May 2019

The Court of Justice of the EU considers the EU's Investment Court System in the EU-Canada trade agreement to be compatible with EU law

On 30 April 2019, the Court of Justice of the European Union (hereinafter, CJEU) issued its *Opinion 1/17* on the compatibility of the mechanism for the resolution of disputes between investors and States contained in the Comprehensive Economic and Trade Agreement (hereinafter, CETA) between the EU and Canada. On 7 September 2017, Belgium had requested such an opinion on the basis of considerations that relevant provisions of the CETA were inconsistent with the autonomy of the EU legal order, as well as certain provisions of the Charter of Fundamental Rights of the EU (hereinafter, the Charter).

In general terms, the EU's Investment Court System (hereinafter, ICS) is the institutionalisation and modernisation of the existing investor-to-State dispute settlement mechanism. Traditionally, bilateral investment agreements provide for an investor-to-State dispute settlement (hereinafter, ISDS) system that allow investors to bring disputes alleging a breach of one of the investment protection obligations under the respective agreement. Investment protection disciplines aim at providing investors with additional safeguards regarding the host State. However, such mechanisms have been strongly criticised, in particular by certain non-governmental organisations (hereinafter, NGOs), on the basis of an alleged lack of transparency of the ISDS proceedings, and the alleged interference by foreign investors in legitimate decisions of sovereign States. To address these concerns, in November 2015, the EU announced a revised approach to ISDS, namely the pursuit of a multilateral Investment Court, for which negotiations are ongoing within a Working Group of the United Nations Commission on International Trade Law (UNCITRAL), and the introduction of revised rules on investment protection in the EU's trade and investment agreements with third countries. The CETA is the first EU trade agreement that provides for revised disciplines on ISDS.

The CETA was signed on 30 October 2006. As the CETA is qualified as a '*mixed*' agreement, both the EU, as well as all EU Member States, have to ratify it. The parts falling under EU competence have been provisionally applied since 21 September 2017, while the parts also falling under EU Member States' competence do not yet apply. The CETA will only enter into force once all EU Member States have ratified it. So far, only 13 EU Member States have ratified the CETA, or are at an advanced stage of ratification (*i.e.,* Austria, Croatia, Czech Republic, Denmark, Estonia, Finland, Latvia, Lithuania, Malta, Portugal, Spain, Sweden, and the UK). Belgium and other EU Member States made the opinion of the CJEU conditional for their ratification of the CETA.

Opinion 1/17 now provides for additional legal certainty, which should allow those EU Member States that had put the ratification of the CETA on hold, pending the Court's Opinion, to ratify it. In fact, a few weeks after the CJEU's decision, on 23 May 2019, Austria ratified the CETA. *Opinion 1/17* will also allow the EU to continue pursuing the inclusion of the ICS disciplines as the EU's standard approach in its future investment protection agreements. Already on the basis of the earlier *Opinion 2/15*, which concerned the division of competences between the EU and its Member States in the context of the EU-Singapore Free Trade Agreement (see *Trade Perspectives,* Issue No. 10 of 19 May 2017), the EU had decided to refine its approach to trade and investment negotiations. The EU decided to split up its comprehensive trade and investment agreements, which the EU had pursued under the extended competences of the Lisbon Treaty, into separate agreements on trade and investment, respectively (see *Trade Perspectives*, Issue No. 15 of 28 July 2017).

Section F of Chapter VIII of the CETA on the '*Resolution of investment disputes between investors and States*' establishes a permanent court consisting of a Tribunal and an Appellate Tribunal. Previously, ISDS rules provided for *ad hoc* panels of one or several arbitrator/s nominated by the parties. The permanent Tribunal will be composed of fifteen members nominated by the EU and Canada for five-year terms. The tribunals are to decide on the cases in a transparent manner by opening up hearings to the public and allowing interested parties, such as NGOs, workers' unions or citizens' representatives, to intervene in the course of the proceedings. Importantly, the ICS also provides for an Appellate Tribunal, which, according to Article 8.28(2) of the CETA can decide to uphold, modify or reverse the award issued by the Tribunal be based on: "*a) Errors in the application or interpretation of applicable law*"; "*b) Manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law*"; or "*c) The grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b)*". Like the Tribunal, the Appellate Tribunal will be composed of fifteen members that are nominated by the CETA Joint Committee. A case would then be heard by three randomly appointed Members of the Appellate Tribunal.

Belgium's legal concerns, as to the compatibility of the ICS mechanism, were essentially threefold. Firstly, Belgium sought clarification regarding the establishment of the ICS as such and whether it could affect the autonomy of the EU legal order. In this respect, Belgium recalled that, in its earlier *Opinion 2/13*, the CJEU had affirmed the exclusive jurisdiction of the CJEU with respect to the interpretation of EU law. Belgium also referred to the CJEU's *Opinion 1/09*, in which the CJEU held that there was an incompatibility with the autonomy of the EU legal order where agreements establishing international tribunals could be called upon "*to interpret and apply not only the provisions of that agreement, but also provisions of primary and secondary EU law, general principles of EU law or fundamental rights of EU law*". Belgium's concern was that the jurisdiction of the CETA investment protection tribunals is not sufficiently delineated and might encroach on issues falling under the exclusive jurisdiction of the CJEU. In this regard, the CJEU recalled that an international agreement, which provides for the establishment of a court that is "*responsible for the interpretation of its provisions and whose decisions are binding on the European Union, is, in principle, compatible with EU law*". The CJEU then held that "*the power of interpretation and application conferred on that Tribunal is confined to the provisions of the CETA*" and, therefore, the investment tribunals do not have jurisdiction to interpret and apply rules of EU law other than the provisions of the CETA. The CJEU concluded that Section F of the CETA does not "*adversely affect the autonomy of the EU legal order*".

Secondly, Belgium asked the CJEU to clarify whether the ICS was compatible with the general principle of equal treatment and the requirement of effectiveness. Belgium referred to the fact that a Canadian investor might bring a dispute before the ICS Tribunal against the EU or an EU Member State, whereas EU investors investing within the EU may not do so. Belgium noted that this inequality of treatment in accessing the courts could be incompatible with Article 20 of the Charter, which provides that "*everyone is equal before the law*", and with Paragraph 2 of Article 21 of the Charter, which prohibits discrimination on grounds of nationality. The CJEU noted that the situation of Canadian investors investing in the EU was not the same as that of EU investors investing in the EU. Therefore, Canadian investors, as foreigners in the EU, are

to have a specific legal remedy, which will not be equally available to EU investors within the EU. On the other hand, EU investors in Canada will be in a situation comparable to Canadian investors in the EU and be entitled to a comparable legal remedy. As a result, the CJEU considered the CETA's ICS provisions in this respect consistent with the principle of equal treatment as established in the Charter.

Thirdly, Belgium requested the CJEU's Opinion on the compatibility of the ICS with the right of access to an independent tribunal, as provided for in Article 47 of the Charter. Belgium was concerned that the fees and expenses of the investment proceedings under the CETA might complicate access for small and medium size enterprises (hereinafter, SMEs). The CJEU recalled that the Commission and the Council had committed to implement rules aimed at reducing the financial burden on parties with limited resources to ensure the accessibility of the ICS for SMEs. Belgium also argued that the remuneration of the Tribunal members might not guarantee their independence and impartiality, since the remuneration was left to a great extent to the discretion of the CETA Joint Committee. Belgium claimed that this discretion would be inconsistent with the requirement of Article 6 of the Charter on the statute for judges, requiring that the remuneration of judges be fixed "*so as to shield them from pressures aimed at influencing their decisions*". The CJEU highlighted that the "*possibility that power of the CETA Joint Committee with respect to remuneration may not be immediately exercised does not entail that the remuneration of those Members may initially be indeterminate*". The CJEU noted that the provisions concerning the remuneration of judges were intended to evolve and are supposed to permit the gradual establishment of a tribunal composed of members who will be employed full-time, which could not "*be perceived as constituting a threat to the independence of those Tribunals*". Therefore, the CJEU concluded that, overall, the CETA contains sufficient safeguards to ensure the independence of the members of the ICS tribunals.

The long-awaited *Opinion 1/17* should now enable the EU to continue pursuing its new approach to investor-to-State dispute settlement. The European Commissioner for Trade Cecilia Malmström stated that the CJEU's Opinion confirmed that *"citizens can have full confidence in the Commission's new approach to investment protection"* and that the ICS *"guarantees that this is done fairly, effectively and transparently*". *The CJEU's position in Opinion 1/17* also means that the provisions on investment protection and the introduction of the ICS to other investment agreements already concluded, such as the EU-Viet Nam and the EU-Singapore investment agreements, would not require any changes.

The opinion by the CJEU is an important step forward for EU trade and investment policy and brings much needed clarity. Finally, the path has been cleared to ratify the CETA and for it to fully enter into force, three years after it has been signed. Additionally, the CJEU's Opinion will clear the path for other negotiated investment protection agreements to move forward and be ratified. Investors in the EU and Canada, as well as in other countries that have concluded or are in the process of negotiating investment agreements with the EU, should properly assess their rights under the new ICS in order to take advantage of the respective investment protection instruments, as soon as they become available.

The European Commission launches the process to determine the future of the EU's Generalised Scheme of Preferences

Interested parties have time until the 10th of June 2019 to provide the European Commission (hereinafter, Commission) with feedback regarding the Commission's *Roadmap* or *Inception Impact Assessment* to allow the future Commission, which will take office in the autumn of this year, to decide on the future of the EU's Generalised Scheme of Preferences (hereinafter, GSP). The current iteration of the GSP will expire on 31 December 2023 and, over the next three years, the Commission will debate and refine its approach towards providing trade preferences to developing countries. The Inception Impact Assessment notes options ranging from the discontinuation of the GSP to a significant overhaul of the relevant rules. In any case,

a large number of businesses and beneficiary countries will be affected by the eventual decision of the future Commission.

The EU's GSP scheme is a system of unilateral trade concessions that reduces or eliminates tariffs on a wide range of exports from developing and least-developed countries (hereinafter LDCs). With the GSP, the EU intends to increase export revenues in those countries in order to reduce poverty and promote sustainable development and good governance. The GSP is limited in scope and focuses solely on granting tariff preferences for trade in goods and does not apply to services or other areas of trade. The EU's GSP has been in place since 1971, although it has been periodically subject to reviews and reforms of varying depth and scope. On 25 October 2012, the EU adopted its most recent iteration of the GSP scheme through *Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preferences* (hereinafter, GSP Regulation), which has applied since 1 January 2014. The architecture of the scheme has undergone significant changes over time. In its current form, the EU's GSP scheme foresees three types of preferential arrangements: 1) The standard GSP (for developing countries matching certain eligibility criteria); 2) A special incentive arrangement for sustainable development and good governance, known as '*GSP+*'; and 3) A special arrangement for LDCs, known as the *Everything But Arms* (EBA) arrangement because it grants full duty-free and quota-free access to the EU Single Market for all products, except arms and armaments.

In 2012, the current iteration of the GSP was significantly reformed (see *Trade Perspectives*, Issue No. 21 of 16 November 2012). The reform included: 1) An extension of the expiration period from three to ten years for the GSP and GSP+ schemes, and no expiration for the EBA scheme; 2) The number of beneficiary countries was reduced from 177 to 88 countries, in accordance with the graduation criteria; 3) A tariff rate differentiation between sensitive and non-sensitive products was incorporated in the method for calculating tariff rates; 4) The set of criteria for the removal of beneficiary countries, and for the removal of certain product sections for a given beneficiary country, were expanded; 5) The product coverage, increasing preference margins for the products included (mainly raw materials), was slightly expanded; 6) Further incentives were introduced for countries to join the GSP+; and 7) The GSP+ monitoring measures, to ensure compliance with international conventions, were enhanced. Hence, the most recent reform of the EU's GSP scheme significantly reformed a number of key elements.

Important indications regarding the potential areas of amending the GSP Regulation and the EU's overall approach can be found in the 2018 '*Mid-Term Evaluation of the EU's Generalised Scheme of Preferences (GSP)*' that external consultants had prepared for the Commission. In general terms, the Mid-Term Evaluation determined that the current GSP Regulation is meeting its objectives of poverty eradication by expanding exports from countries most in need, the promotion of sustainable development and good governance, and ensuring better safeguards for the EU's financial and economic interest. However, the Mid-Term Evaluation already identified a number of areas in which the efficiency and effectiveness of the existing GSP scheme could be improved. The Inception Impact Assessment notes that any revised scheme would aim at addressing these issues and take into account the following conclusions of the Mid-Term Evaluation: 1) The GSP "*provides insufficient support and incentives to have a significant impact on export diversification*"; 2) The GSP's "*contribution to sustainable development and good governance is weaker than intended*"; and 3) The GSP's "*ability to safeguard for the EU's financial and economic interests is weaker than intended*".

The Inception Impact Assessment lays out four distinct policy options, two of which have yet to be further defined. More specifically, the Inception Impact Assessment lists the following four options: 1) The continuation of the current GSP; 2) The discontinuation of the GSP; 3) The improvement of the current GSP through minor amendments; and 4) The expansion of the GSP scheme requiring more significant changes. With respect to option three, the Inception Impact Assessment notes that the Mid-Term Evaluation, as well as input received from stakeholders, indicated that, overall, the GSP is effective and that most recommendations contained in the Mid-Term Evaluation, such as "*a limited expansion of product coverage,*

updating the list of international conventions, the role of civil society in beneficiary countries in relation to implementation of the international conventions, a review of thresholds for product graduation, a review of the safeguard mechanisms, examining the relationship and coherence between GSP and EU Free Trade Agreements and Economic Partnership Agreements", would not require significant changes to the current GSP scheme. With respect to option four, the Mid-Term Evaluation also noted the possibility of more extensive changes to the approach, such as the "*review the relevance of the different GSP programmes, more significant expansion of product coverage, introducing positive conditionality related to ratification of international conventions, expanding product graduation to other GSP programmes*". However, with respect to these recommendations, the Inception Impact Assessment underlines that their potential impact and feasibility would need "*to be carefully assessed*".

Indeed, according to the Inception Impact Assessment, the Commission would task external consultants with conducting an impact assessment to "*look at the potential economic, social and environmental impacts of this initiative as well as of its potential impacts on fundamental rights*". The Impact Assessment will be informed by: 1) The GSP Midterm Evaluation; 2) The Commission's biennial reports to the European Parliament and to the Council of the EU on the implementation of GSP; 3) An European Parliament Research Service assessment of the implementation of the current GSP Regulation; 4) Trade statistics from Eurostat; 5) Qualitative and quantitative development data on the beneficiary countries (provided by the World Trade Organization, the World Bank, and the Organisation for Economic Co-operation and Development); and 6) The Impact Assessment that fed into the current GSP Regulation. The consultants will also be tasked to assess additional quantitative and qualitative data, as well as to organise stakeholders consultations. The Impact Assessment is to be conducted between quarter three of 2019 and quarter three of 2020. Notably, as part of the Impact Assessment, a twelve-week open public consultation is supposed to be carried out and civil society dialogues will be organised in Brussels, as well as in the GSP beneficiary countries.

As a date of indicative planning, the Inception Impact Assessment states "*Quarter 2 of 2022*" for a new Regulation of the European Parliament and of the Council to be adopted, which would follow the EU's ordinary legislative procedure, meaning that the European Parliament and the Council of the EU will have to find agreement on a draft. In fact, by clearly noting in the Inception Impact Assessment that this legislative initiative would aim at addressing the shortcomings identified in the Mid-Term Evaluation, the Commission already hints at the fact that it has already ruled out options one and two, the continuation of the current GSP or its discontinuation. The question, therefore, will be, how extensive the reform of the EU's GSP will be. It does appear likely that this important tool of EU trade and development policy will remain a cornerstone of the EU's future policy. Apart from the preferential market access, the GSP schemes also open the door to structured dialogue and consultations, as the recent examples concerning Cambodia and Myanmar demonstrate (see *Trade Perspectives*, Issue No. 22 of 30 November 2018).

So far, the Commission has published feedback from three stakeholders on the consultation website. Interested stakeholders should make use of the remaining time until 10 June 2019 to lodge initial comments on the EU's GSP. The decision on the future of the EU's GSP, whatever it will be, might have important implications for businesses in the beneficiary countries, in the EU, and more in general for global trade flows. Interested parties should, therefore, properly assess the current GSP and identify elements that should be changed, abolished, or preserved, sharing their views in the current consultation or during the forthcoming impact assessment.

European Commission to decide on France's ban of the food additive titanium dioxide (E171)

In April 2019, France notified the European Commission (hereinafter, Commission) that, for one year starting on 1 January 2020, it would be placing a temporary ban on foods containing

the food additive titanium dioxide. France bases the ban on an opinion published by the French Agency for Food, Environmental and Occupational Health and Safety (*Agence nationale de sécurité sanitaire de l'alimentation, de l'environnement et du travail*, hereinafter, ANSES), which recommended reducing the exposure of workers, consumers and the environment to titanium dioxide.

Titanium dioxide is the naturally occurring oxide of titanium, with the chemical formula TiO_2. TiO_2 is listed as a food colourant E171 in part B of Annex II (*i.e.*, the *Union list of food additives approved for use in foods and conditions of use*) of *Regulation (EC) No 1333/2008 on food additives*. In addition, *Commission Regulation (EU) No 231/2012 laying down specifications for food additives listed in Annexes II and III to Regulation (EC) No 1333/2008* provides for technical specifications for E171. The colourant has no nutritional value, and is predominantly used in confectioneries, such as candy covered chocolates, in sweets, chewing gum, bakery products and sauces, to give a white, opaque or cloudy effect. The use of titanium dioxide (or E171) must be indicated on the products' ingredient list. It is also used in sunblock because it reflects UV light, as well as in toothpastes and medicines.

In 2017, the French Agricultural Research Institute (*Institut national de la recherche agronomique*, hereinafter, INRA) published a study on the food additive E171, which highlighted the development of pre-tumorous damage in the colon of rats fed with TiO_2 nanoparticles. ANSES confirmed that the INRA study highlighted previously unassessed carcinogenic impacts of nanoparticles of TiO_2 and recommended additional research. ANSES stressed that no acceptable daily intake could be established for titanium dioxide due to a lack of data that the marketers and producers of this additive should have provided. ANSES also proposed that the European Chemicals Agency classify TiO_2 as a probable carcinogen when inhaled.

Already in April 2018, while discussing France's Agricultural Bill, there had been discussions in the French Parliament to ban the import and marketing of food products containing the food additive TiO_2, but ultimately a ban was not included in the final bill. However, the deliberations raised public awareness on the issue and French consumer groups and non-governmental organisations (hereinafter, NGOs) have been demanding a ban ever since. In February 2019, ANSES was tasked by the French Government to review the most recent studies on the oral toxicology of E171 and to update its recommendations. ANSES published its opinion on 12 April 2019, in which it concluded that it did not have enough information to question the concerns raised by the INRA regarding the safety of E171, but it reiterated its general recommendations on nanomaterials, aimed primarily at limiting the exposure of workers, consumers and the environment to such products. The French Government concluded that the ANSES opinion left uncertainty about the safe consumption of TiO_2 and issued a decree on 17 April 2019 (*i.e.*, *Arrêté du 17 avril 2019 portant suspension de la mise sur le marché des denrées contenant l'additif E 171-dioxyde de titane - TiO2*), suspending sales in France of any food product containing TiO_2, at least for the period from 1 January 2020 to 31 December 2020. The legal basis for the ban is Article L. 521-17 of the French Consumer Code (*i.e.*, *Code de la Consommation*), which provides that, in case of serious or immediate danger, the manufacture, import, export and placing on the market of a product may be suspended for a period not exceeding one year, and could be extended for additional periods, each of which are not to exceed one year.

France bases this measure on the general safeguard provision of Article 54 of *Regulation (EC) No 178/2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety* (hereinafter, General Food Law Regulation or GFL). Emergency (or safeguard) measures for food and feed of EU origin, or imported from a third country, should in principle be taken by the Commission under Article 53 of the GFL. Where an EU Member State officially informs the Commission of the need to take emergency measures, and where the Commission has not acted in accordance with Article 53 of the GFL, the EU Member State may adopt *interim* protective measures according to Article 54 of the GFL on "*other emergency measures*".

According to Article 54 of the GFL, the Commission then decides on "*the extension, amendment or abrogation of the national interim protective measures*".

On 15 February 2019, the French Government submitted a note to the Commission informing it of the need to take emergency measures. Article 54(2) of the GFL provides that, within ten working days, the Commission must put the matter before the EU's Standing Committee on Plants, Animals, Food and Feed (hereinafter, SCoPAFF). The respective EU Member State (*i.e.*, France, in the case at stake) may maintain its national *interim* protective measures until EU measures have been adopted. Ahead of the SCoPAFF's meeting to discuss the French measure, the Commission requested an opinion from the European Food Safety Authority (hereinafter, EFSA). At the SCoPAFF's meeting on 13 May 2019, representatives of the EU Member States and the Commission had an exchange of views on the emergency measure regarding titanium dioxide, when used as a food additive (E171), for which ANSES and EFSA were invited to present their findings. ANSES concluded that the new findings do not eliminate the uncertainties regarding the safety of E171 as a food additive and recommended that it be precisely characterised in physicochemical terms and that new data be generated to allow reaching a conclusion on the various effects observed, in particular on genotoxicity, carcinogenicity and reproductive toxicity. Furthermore, ANSES recommended a reassessment of the conditions for the authorisation of E171 with respect to the technological needs and benefits for consumers. EFSA reported that it considers that the ANSES opinion does not identify any major new findings that would overrule the conclusions made in the previous two scientific opinions on the safety of E171 issued in 2016 and 2018. EFSA upheld its previous view that E171 does not raise safety concerns. According to EFSA, the ANSES opinion reiterates the previously identified uncertainties and data gaps, which are currently being addressed in the context of the follow-up activities originating from the previous EFSA evaluations and their recommendations. The Commission noted that it would appropriately follow-up on any new recommendation made by EFSA on E171, as it has done in the past. Once EFSA issues its opinion on the physicochemical characteristics of E171, the Commission would work on reviewing its specifications in *Regulation (EU) No 231/2012*. The Commission explained that the input provided by EFSA and the EU Member States would feed into the reflection concerning the further handling of the French notification by the Commission.

The Commission must now decide on "*the extension, amendment or abrogation of the national interim protective measures*". Article 53(1) of the GFL defines, as requirements for an emergency measure, that it must be evident that food or feed originating in the EU or imported from a third country is *"likely to constitute a risk to human health, animal health or the environment, and that such risk cannot be contained satisfactorily by means of measures taken by the Member State(s) concerned*". In the case C-111/16, the Court of Justice of the EU (CJEU) held that the conditions set out in Article 54(1) of the GFL, including the adoption of emergency measures, must be interpreted in light of, *inter alia*, the precautionary principle. Therefore, emergency measures under the GFL can be construed on the basis of the precautionary principle established in Article 7 of the GFL, which provides that "*where, following an assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure the high level of health protection chosen in the EU may be adopted, pending further scientific information for a more comprehensive risk assessment*".

A comparable case concerning the application of Article 54 of the GFL concerns the exposure to risk related to Transmissible Spongiform Encephalopathies (hereinafter, TSEs) from milk and milk products derived from small ruminants. In 2008, EFSA concluded that the use of milk and milk products from a flock with classical scrapie may carry an exposure risk of TSE for humans and animals. The then French Food Safety Agency (AFSSA) reached basically the same conclusion as EFSA, but went further recommending that the marketing of milk and milk products from affected herds be prohibited. France adopted an emergency measure under Article 54 of the GFL. In that case, the Commission judged the risk as low and acceptable, thereby claiming that France had gone beyond what is necessary to avoid serious risks to human health, even taking into account the precautionary principle. The Commission adopted *Decision 2009/726/EC concerning interim protection measures taken by France as regards*

the introduction onto its territory of milk and milk products coming from a holding where a classical scrapie case is confirmed. France brought an action for annulment of that decision, which ended with a rejection. France appealed and, on 11 July 2013, the CJEU dismissed the appeal (C-601/11 P).

Commercially, the French ban on titanium dioxide (E171) means that, for example, US confectioneries (USD 2.3 million in imports in 2018) and pastries (USD 3.6 million in imports in 2018) exported to France will have to be TiO_2-free by 2020. According to USDA's Foreign Agricultural Service, large companies such as *Mars Wrigley Confectionery France*, the French confectionary subsidiary of *Mars Inc.*, confirmed that they would be ready to phase out the use of TiO_2 in their products by 2020. For instance, the company is reportedly investing close to USD 100 million to phase out TiO_2 and upgrade production in the French factory that produces the majority of M&Ms for the EU market. The French ban does not apply to non-food products, such as medicines, cosmetics, and toothpastes. However, NGOs have already initiated campaigns against the use of nanomaterials, including TiO_2, in such products. A recently published list claims that more than two thirds of toothpaste used in France contain TiO_2.

In a related matter, the US has challenged the EU proposals to label TiO_2 and cobalt, used in non-food products, as carcinogens. In its scientific opinion of 14 September 2017 on the substance titanium dioxide, the European Chemicals Agency's Committee for Risk Assessment (RAC) proposed to classify these substances as "*carcinogen category 2 by inhalation*". A communication issued by the US to the WTO Committee on Technical Barriers to Trade, dated 21 March 2019, raised concerns that the new labelling requirement could represent a non-tariff barrier. The US said that the new rules set out in *Draft Commission Regulation amending, for the purposes of its adaptation to technical and scientific progress, Regulation (EC) No 1272/2008 of the European Parliament and of the Council on classification, labelling and packaging of substances and mixtures and correcting Commission Regulation (EU) 2018/669* (known as the CLP Regulation) could be "*unnecessarily disruptive to billions of dollars in US-EU trade*". The US expressed concerns that the EU's process to reclassify and label these two substances had not been transparent in terms of when potential regulatory actions are notified to the WTO and providing time for meaningful consideration of comments by WTO Members. The US is particularly concerned that a number of products that contain TiO_2, including paints, cosmetics, and plastics, would have to be reformulated or be labelled as containing a carcinogen.

The Commission is soon to decide on the French ban of TiO_2, extending, amending or abrogating France's national *interim* protective measure. Interested stakeholders are advised to carefully monitor developments on titanium dioxide in the EU and to seek adequate legal advice to take action and ensure that their legitimate interests are properly voiced and represented within all relevant *fora*, including the EU and the WTO.

Recently Adopted EU Legislation

Food and Agricultural Law

- *Commission Implementing Regulation (EU) 2019/890 of 27 May 2019 imposing special conditions governing the import of groundnuts from Gambia and Sudan and amending Regulation (EC) No 669/2009 and Implementing Regulation (EU) No 884/2014*

- *Commission Regulation (EU) 2019/891 of 28 May 2019 amending Annexes I and II to Regulation (EC) No 1333/2008 of the European Parliament and of the Council as regards the functional class of 'stabilisers' and the use of ferrous lactate (E 585) on the mushroom Albatrellus ovinus as a food ingredient in Swedish liver pâtés*

- *Council Decision (EU) 2019/848 of 17 May 2019 on the conclusion on behalf of the European Union of the International Agreement on Olive Oil and Table Olives, 2015*

- *Commission Implementing Regulation (EU) 2019/842 of 22 May 2019 amending Regulation (EC) No 1484/95 as regards fixing representative prices in the poultrymeat and egg sectors and for egg albumin*

Other

- *Council Decision (EU) 2019/845 of 17 May 2019 on the position to be taken on behalf of the European Union, within the Working Group on Geographical Indications established by the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, as regards the adoption of its rules of procedure*

Ignacio Carreño, Rudy Cohen-Zardi, Tobias Dolle, Lourdes Medina Perez and Paolo R. Vergano contributed to this issue.

Follow us on twitter @FratiniVergano

To subscribe to or unsubscribe from *Trade Perspectives*©, please click here.