FRATINIVERGANO
EUROPEAN LAWYERS
TRADE PERSPECTIVES©

Issue No. 7 of 8 April 2011

The EU may place a 'dirty fuel' label on oil extracted from the Canadian oil sands

The dispute between the EU and Canada over the carbon intensity of greenhouse gas emissions from Canadian oil sands production (see a description of the oil sands in Trade Perspectives, Issue No. 9 of 7 May 2010) is continuing. EU Climate Action Commissioner Connie Hedegaard has moved closer to including an explicit reference to the carbon intensity of oil produced from the Canadian oil sands for the purposes of implementing Article 7(a)(1) of *Directive 2009/30/EC of the European Parliament and of the Council of 23 April 2009 as regards the specifications of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions* (hereinafter, the EU Fuel Quality Directive). The EU Fuel Quality Directive provides a framework for EU Member States to reduce the greenhouse gas emission levels of transportation fuels. In late March 2011, Ms. Hedegaard told members of the EU Parliament that she would soon submit for ratification by EU Member States a draft regulation that targets oil sands and shale oil as high-carbon fuels. Some environmentalists have described this as a 'dirty fuel' label.

The EU has reportedly instructed its fuel suppliers to reduce the carbon footprint of fuels by 6% over the next decade. The EU Commission is in the process of determining certain greenhouse gas emission 'default values' which will be associated with each type of fuel in order to help fuel suppliers determine the least carbon-intensive imports. The EU Commission has apparently made a preliminary proposal that oil from the oil sands be ascribed a greenhouse gas value of 107 grams per megajoule of fuel. This greenhouse gas value would be much higher than the average crude oil greenhouse gas value of 87.1 grams per megajoule of fuel. Canada has responded by lobbying the EU Commission and EU Member States to avoid creating a separate default value for fuel derived from the oil sands. According to a recent report by the EU Commission, the production and use of crude oil derived from Canada's oil sands produces 23% more greenhouse gas emissions than the total 'lifecycle' emissions from conventional oil. However, the Canadian Association of Petroleum Producers has disputed the findings of this study, stating that the oil sands' emissions are 5% - 15% higher than those of the average barrel of oil consumed in North America. The Association has suggested that the overall emissions of the oil sands are comparable to those of heavy oil from Nigeria, Venezuela and Mexico.

To the extent that the EU's proposed fuel quality standards could result in discriminatory treatment and create import barriers for oil extracted from the Canadian oil sands, a new trade dispute could potentially emerge between the EU and Canada. Ms. Hedegaard has reportedly stated that the EU Commission would ensure that its clean fuel regulations do not specifically target the Canadian oil sands. This would apparently be done by targeting all fuels from unconventional sources, including oil sands, oil shale, liquids from coal, and liquids from natural gas. However, such differentiation might still trigger the launch a WTO complaint.

An EU regulation targeting oil sands and shale oil as high-carbon fuels would most likely constitute a technical barrier to trade within the meaning of Annex 1:1 of the WTO's Agreement on Technical Barriers to Trade (hereinafter, TBT Agreement). WTO Members are allowed to draw up technical regulations in order to protect the environment. However, Article 2.1 of the TBT Agreement provides that such technical regulations cannot result in discriminatory treatment *vis-à-vis* the like product of national origin or originating in any other country. Central to this discussion concerning likeness is the oil production process of (primarily) Canada that could lead the EU to grant a different, discriminatory treatment to Canadian oil as compared, for example, to oil produced in conventional ways by other WTO Members (or by the EU itself). WTO/GATT rules allow such different treatment only if the process and production method (or PPM) affects the physical characteristics of the final product, so that the oil produced in such manner is not 'like' the oil produced in other conventional ways. In addition, Article 2.2 of the TBT Agreement requires that technical regulations not result in unnecessary barriers to trade. By creating a trade barrier for oil generated from oil sands and other unconventional sources on the basis of their (comparatively-speaking) more polluting production process, such standards may lead to a *de facto* EU ban for this particular type of oil, contrary also to Article XI of the GATT.

Some sources have indicated that Canadian officials are so concerned over the potential targeting of the oil sands by the EU Fuel Quality Directive that they have threatened to terminate negotiations for an EU – Canada FTA, known as the Comprehensive Economic and Trade Agreement (hereinafter, CETA). However, Canada's Minister of International Trade, Peter Van Loan, recently denied this claim, stating that the EU and Canada are working to resolve this issue outside of the CETA negotiating framework. The commercial stakes are quite high for Canada: after Saudi Arabia, the oil sands represent the second-largest proven oil reserves in the world, and attracted an estimated 10.5 billion CAD in investment in 2010. Although Canada does not currently export oil to Europe, the Canadian oil industry fears that an EU 'dirty fuel' label on oil exports from Canada's oil sands could encourage similar regulations in several US States (see Trade Perspectives, Issues No. 22 of 27 November 2009 and No. 9 of 7 May 2010) and other countries. Parties with an interest in the global oil industry or EU – Canada commercial relations should follow the developments in this story closely.

Conciliation on novel foods regulation fails, impeding the adoption of new EU rules for the approval of innovative foods

After more than three years of negotiations, the EU Parliament and the EU Council failed to reach an agreement in the conciliation procedure on a new novel foods regulation. Novel foods are foods and food ingredients that have not been used within the EU for human consumption to a significant degree (*i.e.*, foods or food ingredients derived from new production processes, or foods or food ingredients which have traditionally been consumed only outside the EU) before 15 May 1997. Regulation (EC) No. 258/97 of the EU Parliament and the EU Council lays out rules for the authorisation of novel foods and novel food ingredients. Around 50 novel foods have so far been approved for commercialisation in the EU. Authorisation has been refused for 3 novel food products.

In January 2008, the EU Commission adopted a legislative proposal to amend the current novel foods regulation with the aim of allowing safe and innovative foods to reach the EU market faster, and to encourage the development of new types of foods and food production techniques. In order to simplify and speed up the authorisation process for novel foods, the regulation would establish a centralised authorisation procedure whereby the European Food Safety Authority (EFSA) would be responsible for carrying out the risk assessment for

a novel food application and, if judged safe, the EU Commission would then propose its authorisation (see Trade Perspective Issues No. 13 of 2 July 2009 and No. 16 of 10 September 2010).

The EU Council and EU Parliament did not reach a compromise on a contentious side issue: the question of whether meat products from the offspring of cloned animals should be subject to the novel foods authorisation process. Currently, there are no EU rules specifically allowing or banning meat from cloned animals and their offspring. The EU Commission and EU Council wished to regulate these products under the novel foods rules, while the EU Parliament wanted these products to be dealt with separately from the novel foods authorisation procedure.

A compromise which met consumer concerns about marketing and information on foods from cloned animals and their offspring, and which could have been implemented in practice, could not be reached. The EU Parliament did not compromise on its request for mandatory labelling for food derived from offspring of cloned animals (originally the EU Parliament had requested a complete ban). The EU Council also stated that the '*solution must also comply with the international trade rules that the EU, with the EU Parliament's consent, has signed - the Council does not want to provoke a trade conflict*'. The EU Commission and EU Council have argued that such mandatory labelling is technically not feasible, as it would require strict traceability systems for, *e.g.*, beef, which trading partners like Brazil and the US do not have in place. This is where the EU Council fears a trade conflict. If the EU's trading partners do not have traceability systems in place, then an accurate labelling system would not be feasible, and products could not accordingly be placed on the EU market. This could force some of the EU's trading partners to launch formal disputes at the WTO.

The trade rules that the EU Council appears to have in mind in this context are those of the TBT Agreement which deals, *inter alia,* with the food labelling provisions that are not related to safety. In particular, Article 2(2) of the TBT Agreement seems relevant: *'Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment'*. Although there are opinions of the European Food Safety Authority that suggest that there are no safety issues with products from cloned animals and their offspring, uncertainties remain. In fact, arguably the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter, SPS Agreement) would likely also provide the basis for scrutiny of any future EU regulation, in as much as EU rules may have an effect on trade.

In this case, the non-adoption of labelling rules for products of the offspring of cloned animals has, in a pre-emptive manner, avoided a possible trade war. However, the failed adoption of a new regulatory framework on novel foods stands out as the collateral victim of this institutional tug of war.

What are the consequences of the failure of conciliation talks between the EU Parliament and the EU Council? Regulation (EC) No. 258/97 on novel foods remains in force. Foods are considered 'novel' if they are derived from new technological processes or if they have no significant history of consumption in the EU. The rules require authorisation for the marketing of food from cloned animals, but not of food from its offspring or descendants (as these are not derived from new technological processes). In relation to nanotechnology in food production, the failure to reach an agreement on the new rules means that there will continue to be no special measures (*i.e.*, definitions, safety requirements and labelling rules, regarding nanomaterials in food).

Furthermore, by failing to adopt a novel foods regulation, the EU has not introduced a centralised novel foods authorisation procedure, which could speed up approval for innovative foods and traditional foods from third countries. Developing countries may be particularly disappointed by this latter aspect. For instance, Colombia, in a communication of 4 November 2008 to the WTO Committee on Technical Barriers to Trade on specific trade concerns relating to access of foods to the EU market, asked the EU *'to ensure that the regulation (which Colombia hopes will shortly be adopted) take full account of the specificity of a traditional product from a third country which it classifies as a novel food. Colombia insists that the procedure for placing a traditional product from a third country on the European market should be streamlined and accelerated, whatever the formula chosen by the Parliament and the European Council.'* It seems that in not adopting a new approval system for novel foods (in particular, but not only, for traditional foods from third countries), developing countries such as Colombia might argue that the EU has maintained a barrier to trade.

The EU has also arguably maintained a barrier to innovation. According to the CIAA, the EU Confederation of Food and Drink Industries, the current novel foods framework creates bottlenecks regarding innovation, reducing investment in research and development by food and drink manufacturers and slowing the speed with which novel foods can be placed on the market. The CIAA notes that the new regulation would have accelerated and centralised the authorisation process, and would have introduced a definition for engineered nanomaterials, providing manufacturers with greater legal certainty.

The legislative procedure on novel foods will now start anew with a revised EU Commission proposal. It remains to be seen how the matter of clones will be dealt with or whether there will be a separate legislative proposal on clones so that the novel foods regulation can be adopted smoothly. In the meantime, food innovators and traders of traditional food from third countries (falling under the EU definition of novel foods) must work under the approval system of the old novel foods regulation.

The WTO Committee on Sanitary and Phytosanitary Measures recommends five actions regarding private sector standards for food safety and animal and plant health

At its meeting on 30-31 March 2011, the WTO Committee on Sanitary and Phytosanitary Measures (hereinafter, SPS Committee) adopted a new report that outlines five actions that WTO Members might take to deal with private sector standards for food and animal and plant health. The core task of the SPS Committee is to monitor how the SPS Agreement is being implemented. In particular, the SPS Committee assesses whether certain WTO Members' SPS measures are based on science or international standards, and whether these SPS measures are narrowly targeted, or are instead applied in an overly-broad manner.

Since 2008, thirty WTO Members, including the EU, have discussed private sector SPS standards within the framework of an *ad hoc* working group. The members of this working group have discussed both the benefits and drawbacks of private sector standards in food safety and animal and plant health. The benefits of private sector standards include the following: they provide consumer brands with a better reputation and help suppliers gain access to markets and credit; they promote SPS best practices; and they address emerging SPS risks in a rapid manner, helping to facilitate the eventual adoption of international SPS standards.

However, WTO Members have also raised concerns about the use of private sector standards in food safety and animal and plant health. The major concerns about private sector standards include the following: they are not always based on scientific data; they may deviate from international standards or official government requirements; there is a large number of them, and they are not harmonised; they are often set up without consultations with suppliers or systems for appealing; they may impose disproportionate burdens on producers and exporters located in developing countries (*i.e.* it may be costly for suppliers to comply with them and seek certification of their products and this cost may be increased when there are different requirements for certification in different markets) or third party certification can only be obtained at developed-world prices; and private sector SPS standards are often process-oriented rather than outcome-oriented, overlooking the principle that equivalent food safety and animal and plant health outcomes achieved by different means should be recognised.

In light of these issues, the SPS Committee agreed on five actions in relation to private sector SPS standards: 1) develop a working definition of private sector standards related to SPS; 2) promote regular dialogue between the SPS Committee and the three internationally recognised standards-setting organisations: the WHO-FAO Codex Alimentarius Commission on food safety; the World Organisation for Animal Health; and the International Plant Protection Convention; 3) have the WTO Secretariat inform the SPS Committee of relevant developments in other WTO councils and committees; 4) have WTO Members assist domestic private sector bodies that are dealing with SPS standards in order to help these private sector bodies understand the issues raised within the SPS Committee, and appreciate the importance of the international standards of the WHO-FAO Codex Alimentarius Commission, World Organisation for Animal Health, and the International Plant Protection Convention; and 5) have the SPS Committee explore the possibility of cooperation with the three internationally recognised standards-setting organisations in order to disseminate information that underlines the importance of international SPS standards. WTO Members disagreed about whether the SPS Committee should currently include in its agenda an initiative whereby WTO Members would exchange information on private sector standards, and promote greater understanding on how these relate to international and government standards.

The work of the SPS Committee on private sector SPS standards has raised several legal issues. Given that the SPS Agreement deals primarily with governmental SPS measures, some WTO Members have questioned whether the SPS Committee even has a mandate to discuss private sector standards. Others have also questioned the degree to which the SPS Agreement applies to private sector actors. Article 13 of the SPS Agreement states that '*Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement'.* However, the SPS Agreement does not state how WTO Members should carry out this mandate. It could be argued that only private entities which have been entrusted by governments with the performance of certain tasks, or which otherwise have a special legal status, fall under the definition of non-governmental entity under the SPS Agreement. However, it could alternatively be argued that the notion of '*non-governmental entity*' under the SPS Agreement is broader, and also includes private bodies which have not been entrusted by governments with delegated authority, but which nevertheless '*operate within the territories of a WTO Member*'. Even if non-governmental entities are not directly addressed by the provisions of the SPS Agreement, given the wording of Article 13 of the SPS Agreement, WTO Members appear to have a responsibility to ensure that the activities of non-governmental entities comply with the SPS Agreement.

The increase in commercial interest in private sector SPS standards – whether related to, *e.g.*, animal welfare, or consumer food safety, *etc*, – is a phenomenon that largely post-dates

the negotiation of the SPS Agreement during the Uruguay Round. The proliferation of private sector SPS standards has been boosted by an increase in market dominance by large distribution chains, which are particularly sensitive to consumer preferences. The possible use of the SPS Agreement to assist in the development of private sector SPS standards was not envisioned by the drafters of the SPS Agreement. This may help to explain why the SPS Committee has made extensive efforts to 'fill in the gap' by promoting the horizontal dissemination of information on SPS standards-setting between private sector bodies and WTO Member States. Moving forward, navigating the legal complexities of private sector SPS standards is likely to become an increasingly salient commercial issue for exporters and importers in both developed and developing countries.

Recently Adopted EU Legislation

Market Access

- *Commission Implementing Decision of 4 April 2011 implementing Council Directive 97/78/EC as regards transhipment at the border inspection post of introduction of consignments of products intended for import into the Union or for third countries (notified under document C(2011) 2067)*

- *Commission Implementing Regulation (EU) No 302/2011 of 28 March 2011 opening an exceptional import tariff quota for certain quantities of sugar in the 2010/11 marketing year*

- *Commission Implementing Regulation (EU) No 295/2011 of 24 March 2011 amending the representative prices and additional import duties for certain products in the sugar sector fixed by Regulation (EU) No 867/2010 for the 2010/11 marketing year*

- *Commission Implementing Regulation (EU) No 292/2011 of 23 March 2011 fixing allocation coefficient, rejecting further applications and closing the period for submitting applications for available quantities of out-of-quota isoglucose to be sold on the Union market at reduced surplus levy*

- *Commission Implementing Regulation (EU) No 293/2011 of 23 March 2011 fixing allocation coefficient, rejecting further applications and closing the period for submitting applications for available quantities of out-of-quota sugar to be sold on the Union market at reduced surplus levy*

- *Commission Implementing Regulation (EU) No 297/2011 of 25 March 2011 imposing special conditions governing the import of feed and food originating in or consigned from Japan following the accident at the Fukushima nuclear power station*

- *Commission Decision of 24 March 2011 on the allocation of quantities of controlled substances allowed to be imported or produced for laboratory and analytical uses in the Union in 2011 under Regulation (EC) No 1005/2009 of the European Parliament and of the Council on substances that deplete the ozone layer (notified under document C(2011) 1819)*

- *Commission Decision of 24 March 2011 on the allocation of import quotas for controlled substances, and the quantities that may be released for free*

circulation in the Union, under Regulation (EC) No 1005/2009 of the European Parliament and of the Council, for the period 1 January to 31 December 2011(notified under document C(2011) 1820)

- *Regulation (EU) No 306/2011 of the European Parliament and of the Council of 9 March 2011 repealing Council Regulation (EC) No 1964/2005 on the tariff rates for bananas*

- *Council Decision of 7 March 2011 on the conclusion of a Geneva Agreement on Trade in Bananas between the European Union and Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru and Venezuela and of an Agreement on Trade in Bananas between the European Union and the United States of America*

- *Council Decision of 28 February 2011 on the conclusion of a Voluntary Partnership Agreement between the European Union and the Republic of Cameroon on forest law enforcement, governance and trade in timber and derived products to the European Union (FLEGT)*

- *Council Decision of 28 February 2011 on the conclusion of a Voluntary Partnership Agreement between the European Union and the Republic of the Congo on forest law enforcement, governance and trade in timber and derived products to the European Union (FLEGT)*

- *Council Decision of 27 September 2010 on the signing of a Voluntary Partnership Agreement between the European Union and the Republic of Cameroon on forest law enforcement, governance and trade in timber and derived products to the European Union (FLEGT)*

Trade Remedies

- *Notice of initiation regarding a partial reopening of the anti-dumping investigation concerning imports of certain compressors originating in the People's Republic of China*

- *Council Implementing Regulation (EU) No 287/2011 of 21 March 2011 imposing a definitive anti-dumping duty on imports of tungsten carbide, tungsten carbide simply mixed with metallic powder and fused tungsten carbide originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EC) No 1225/2009*

Customs Law

- *Commission Implementing Regulation (EU) No 311/2011 of 31 March 2011 replacing Annex I to Council Regulation (EC) No 673/2005 establishing additional customs duties on imports of certain products originating in the United States of America*

- *Commission Regulation (EU) No 312/2011 of 30 March 2011 concerning the classification of certain goods in the Combined Nomenclature ("ultrasonic transmitters")*

- *Commission Regulation (EU) No 313/2011 of 30 March 2011 concerning the classification of certain goods in the Combined Nomenclature ("television stands")*

- *Commission Regulation (EU) No 314/2011 of 30 March 2011 concerning the classification of certain goods in the Combined Nomenclature ("infrared thermal cameras")*

- *Commission Regulation (EU) No 315/2011 of 30 March 2011 concerning the classification of certain goods in the Combined Nomenclature ("vibrating platforms")*

- *Commission Regulation (EU) No 316/2011 of 30 March 2011 concerning the classification of certain goods in the Combined Nomenclature ("multipurpose vehicles")*

Food and Agricultural Law

- *Commission Decision of 1 April 2011 amending Annexes II to IV to Council Directive 2009/158/EC on animal health conditions governing intra-Community trade in, and imports from third countries of, poultry and hatching eggs (notified under document C(2011) 2068)*

- *Decision No 1/2011 of the Joint Committee on Agriculture set up by the Agreement between the European Community and the Swiss Confederation on trade in agricultural products of 31 March 2011 concerning the amendment of Annex 3 to the Agreement between the European Community and the Swiss Confederation on trade in agricultural products*

Eugenia Laurenza, Ignacio Carreño, Nicholas Richards-Bentley and Paolo R. Vergano contributed to this issue.