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The Environmental Goods Agreement negotiations continue to progress despite the lack of participation by key countries

During the week of 16 March 2015, representatives from the 17 WTO Members that are currently taking part in the negotiations for an Environmental Goods Agreement (hereinafter, EGA), gathered in Geneva to participate in the fifth round of negotiations. These negotiations are directed to the conclusion of a new plurilateral agreement aimed at promoting green growth and sustainable development by liberalising trade in environmental goods.

EGA negotiations intend to build on the efforts made in the context of the Asia-Pacific Economic Cooperation (hereinafter, APEC), where, already back in 2012, its 21 Member Economies agreed on a list of 54 environmental goods for which they would reduce import tariffs to 5 percent *ad valorem* or less by 2015. The APEC list focusses on machinery and electronic products used for environmental protection (such as parts and components of various 'green' manufacturing items, products related to waste processing or disposal, and instruments for testing and analysing samples) and is based on 6-digit level HS codes (see Trade Perspectives Issue No. 14 of 11 July 2014). Apart from its limited coverage, the APEC list appears to be of limited accuracy, to the extent that it includes machinery and high-tech goods that, although designed for environment-friendly uses, may not necessarily be the result of an environment-friendly production process. In order to ensure that the list of covered products under the EGA does not suffer from the same shortcomings as the APEC list, it appears necessary that additional criteria (possibly relating to the very products' sustainability) be established.

The EGA will apply on a most-favoured nation (*i.e.*, MFN) basis, meaning that all WTO Members (including those which did not participate to the negotiating process) will benefit from the agreed tariff reductions once a 'critical mass' of WTO Members has agreed to participate. Negotiations were triggered in July 2014 by 14 WTO Members (*i.e.*, Australia, Canada, China, Chinese Taipei, Costa Rica, the EU, Hong Kong China, Japan, New Zealand, Norway, Republic of Korea, Singapore, Switzerland and the US). As of March 2015, 3 more WTO Members (*i.e.*, Iceland, Israel and Turkey) have joined the negotiations, and are, therefore, in a position to drive the process.

The fifth negotiating round reportedly concluded with a compilation of the proposals put forward by most EGA participants on the products that should benefit from duty-relief. In total, countries have proposed that the EGA cover around 600 tariff lines, divided into a number of

categories (relating to, *inter alia*, air pollution control, waste management, environmental remediation and clean-up, noise and vibration abatement, cleaner renewable energy, energy efficiency and environment monitoring assessment). In practice, these categories include goods as diverse as bicycles, windmills, solar panels, LED monitors, hydro-electric generating equipment, isolation material, water treatment chemicals, and advanced products for waste management and air pollution mitigation. Against this background, it is, at the very least, surprising that the proposed goods do not include goods that are 'green' by definition, such as commodities (e.g., palm oil, soybeans, sugarcane and rapeseed) that are available in nature and which can be used, *inter alia*, for renewable energy production (such as biofuels, which provide for substantial emission reductions when compared to fossil fuels).

Reportedly, forthcoming EGA negotiating rounds will focus on product-by-product discussions aimed at streamlining proposals and examining each proposed good's environmental justification. Despite the lack of further indications on how discussions will be conducted, it appears that there may be margin to discuss the coverage of goods on the basis of the sustainability of their production processes. In fact, sources suggest that negotiators have already started to evaluate products according to a so-called '*environmental credibility criterion*'. Although no details have been provided on the parameters of this (or any other) criterion, it appears that certain sustainably-produced commodities, which are not included in the list, could theoretically be covered by the EGA. Should the EGA's scope of application be defined according to the products' sustainability, 'green' commodities such as palm oil, soybeans, sugar, etc., could be covered. However, to the extent that WTO Members with a genuine interest on the relevant commodities (*i.e.*, Argentina, Brazil, Indonesia, Malaysia, etc.) have not yet formally requested to participate in the negotiations, the aforementioned commodities are unlikely to be included in the EGA's coverage.

Participating to the EGA negotiations would allow these countries to drive the liberalisation process and have goods of their interest covered by the EGA's advantageous provisions. In doing so, countries should consider setting-up a globally recognised sustainability standard for the production of the relevant commodities, in order to ensure that EGA's main objective of promoting green growth and sustainable development is met. Apart from presenting to the eyes of the world irrefutable proof of the sustainability and environment-friendliness of these commodities, a certification scheme would effectively drive the transition to sustainable production of these goods, inasmuch as the tariff benefits stemming from the EGA would only apply to covered commodities produced and certified according to the sustainability standard. Such scheme would also likely facilitate and encourage the diffusion of sustainable production practices, while reducing or eliminating trade barriers. The tariff preference would not only play an economic and fiscal role, but would also pursue environmental sustainability irrespective of the degree of development and industrialisation of countries. As things stand, it appears that it is mainly developed and industrialised countries that negotiate the EGA and promote their high tech and industrial 'green' products.

Governments with an interest in the aforementioned natural 'green' commodities may have not yet joined the EGA negotiations because of legitimate concerns towards the liberalisation of a large number of goods. However, experience shows that, in the context of liberalisation processes like the one envisaged by the EGA, advantages effectively arise from the broader implications (in this case, the setting-up of a global sustainability standard) while being in a position (as a negotiating party) to drive the whole process from within. It is, therefore, in the best interest of countries that produce natural 'green' goods likely to qualify as such under the EGA, to join the negotiations at a sufficiently early stage, when they can still table their proposals on which goods should be included. Businesses are the actors that stand to benefit the most from their governments' decisions to join the EGA negotiations. For this reason, they should be driving the decision-making process within their countries and take a pro-active stand before it is too late or too costly to join the negotiations.

Trade facilitation developments to take place at the multilateral and regional levels by the end of 2015

Trade facilitation has received increased attention in recent years, at both the multilateral and regional levels, as the focus of international trade has shifted from tariff rates to non-tariff measures. On 24 March 2015, Members of the WTO reported that efforts are now underway to formally accept the Agreement on Trade Facilitation (hereinafter, TFA), which could enter into force as soon as December 2015, at the WTO's 10th Ministerial Conference in Nairobi, Kenya. The benefits of increased trade facilitation are likely to have a more significant impact on developing countries. This is especially so with respect to countries in Southeast Asia, where Member States of the Association of Southeast Asian Nations (hereinafter, ASEAN) aim at implementing an ASEAN Economic Community (hereinafter, AEC) by the end of 2015.

Within the context of the WTO, the concept of '*trade facilitation*' traditionally falls within Articles V, VIII and X of the General Agreement on Tariffs and Trade (hereinafter, GATT). Article V of the GATT requires WTO Members to allow freedom of transit for goods, vessels and other means of transit. This article is meant to limit regulatory obstacles, costs and discrimination during passage across a country and requires Members to allow traders to use the most convenient routes for international transit. Article VIII of the GATT requires that any fees and charges associated to importation or exportation be approximate to the services rendered. This article also concerns formalities relating to importation and exportation, inasmuch as it provides that WTO Members shall not impose harsh penalties for minor or easily rectifiable regulatory or procedural mistakes related to customs. Lastly, Article X ensures the publication of trade-related documents, including judicial decisions, administrative decisions and trade agreements.

In 2004, formal multilateral negotiations on trade facilitation were launched as part of a Doha Development Agenda work programme, which called for an agreement to improve and clarify Articles V, VIII and X of the GATT "*with a view to further expediting the movement, release and clearance of goods, including goods in transit*". On 7 December 2013, at the Ninth WTO Ministerial Conference in Bali, Indonesia, WTO Members agreed by consensus on a new package of trade agreements, which are referred to as the '*Bali Package*'. Adoption of the TFA was expected to occur by July 2014, but India and a small group of countries threatened to block its final adoption in order to achieve a permanent solution with respect to certain food stock and security issues. As a result, progress was not made until 27 November 2014, when WTO Members adopted a decision to fully integrate the TFA into the WTO framework. However, the TFA will not enter into force until two-thirds of the 160 WTO Members have ratified the agreement. Most recently, at a meeting of the WTO's Preparatory Committee on Trade Facilitation on 24 March 2015, more than a dozen WTO Members confirmed that domestic ratification processes with respect to the TFA were taking place (in addition to the four WTO Members that have already secured domestic acceptance of the TFA: Hong Kong, Singapore, the United States and Mauritius).

One region that in recent times has shown increasing interest in trade facilitation is ASEAN. On 1 March 2015, the economic Ministers of ASEAN Member States (hereinafter, AMSs) agreed that, as the region prepares to implement the AEC by the end of 2015, it should focus on the improvement of trade facilitation. Singapore is the only AMS to report on any progress with respect to the domestic implementation status of their TFA obligations (*i.e.*, Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Thailand and Viet Nam did not report on their implementation status at the most recent WTO Committee meeting), but ASEAN does have varying programmes, obligations and initiatives relating to trade facilitation. According to the ASEAN Economic Blueprint, adopted by AMSs in 2007, AMSs intend to implement the AEC by the end of 2015. This means, as stated in the ASEAN Economic Blueprint, that AMSs aim to "*transform ASEAN into a region with free movement of*

goods, services, investment, skilled labour, and freer flow of capital". The Blueprint also expressly identifies trade facilitation in its paragraph 16, and lists a number of actions that AMSs ought to collectively take. Significant progress regarding the achievement of AEC initiatives has come from the ASEAN Trade in Goods Agreement (hereinafter, ATIGA), which entered into force on 17 May 2010. Article 45 of the ATIGA obliges AMSs to develop and implement a comprehensive ASEAN Trade Facilitation Work Programme, which itself was actually adopted in August of 2008.

The key principles of trade facilitation outlined in the ATIGA include: transparency; communications and consultations with the business and trading community; simplification, practicability and efficiency of rules; non-discrimination; consistency and predictability; harmonisation, standardisation and recognition; modernisation and use of new technology; due process; and co-operation between and among AMSs. In regards to trade facilitation, insofar as it is defined within the context of the WTO, the ATIGA, in Article 7, also references Article VIII of the GATT, and, in Article 12, directly incorporates by reference Article X of the GATT.

Timely and effective implementation of the principles of trade facilitation mandated either under the ATIGA or the WTO (*i.e.*, GATT and TFA) would have a tremendous impact on the effectiveness of the AEC. AMSs have made substantial progress with respect to the plan outlined in the ASEAN Economic Blueprint, but much remains to be done. In some areas, such as the development of the ASEAN Customs Transit System (known as ACTS, which is currently in the pilot stage) or the conceptualisation and operationalisation of the ASEAN Trade Repository (ATR) based on a network of AMSs' National Trade Repositories (NTRs), progress is being assisted by Dialogue Partners' technical assistance programmes, such as the European Union's ARISE programme. Faster transit and customs clearance, as well as greater regulatory transparency, are fundamental drivers of trade facilitation and regional economic integration. Full and effective implementation of all ATIGA and TFA commitments by AMSs will require time, political will, human/financial resources and technical assistance, but stands to transform ASEAN into an even more attractive investment destination, sustainably develop its economy through regional integration, and enable it to compete with other key regions and markets in Asia and around the world.

WHO Interim Report on Ending Childhood Obesity calls for taxes and marketing restrictions to tackle child obesity

In March 2015, the World Health Organisation (hereinafter, WHO) released an Interim Report through its Commission on Ending Childhood Obesity, which calls for taxation and restricted marketing of '*unhealthy*' foods and drinks to children, in order to help cut childhood obesity. The purview of '*unhealthy*' foods includes foods that are high in saturated fats, *trans* fats and salt, as well as sugar-sweetened non-alcoholic beverages and energy-dense, nutrient-poor foods. The WHO Report outlines potential policy options that governments could consider through fiscal policies (such as taxes to reduce the intake of '*unhealthy*' foods and sugar-sweetened non-alcoholic beverages), the increased intake of healthy foods, and the promotion of physical activity in children and adolescents. The WHO Report further indicates that governments could also take action to implement restrictions on the marketing of '*unhealthy*' foods to children and adolescents.

According to the WHO Report, addressing childhood obesity requires attention to both developmental (*i.e.*, life-course) and environmental considerations. With respect to the latter, important factors include exposure to inappropriate infant and young child feeding, and the influence of the marketing of '*unhealthy*' foods directly to children. The WHO considers that no single intervention can halt the rise of the growing obesity epidemic. Therefore, actions that address both the so-called '*obesogenic*' environment and developmental factors are required.

Looking at fats, the WHO singles out as ‘*unhealthy*’ foods that are high in *trans* fats and saturated fats. *Trans* fats (e.g., partially hydrogenated vegetable oil) are fats that have been processed to make them artificially hard and are known to increase levels of the ‘*bad*’ low-density lipoprotein (LDL) cholesterol and to reduce levels of ‘*good*’ high-density lipoprotein (HDL) cholesterol. The majority of *trans* fats can be found in industrial food products, such as ready meals, biscuits, potato chips, ready-made sauces or margarines. Scientists associate the consumption of *trans* fats with the increase of obesity, diabetes and cardiovascular diseases. Saturated fats are essentially fat molecules that have no double bonds between carbon molecules because they are saturated with hydrogen molecules. Saturated fats are typically solid at room temperature. Saturated fats increase ‘*bad*’ LDL cholesterol.

In its policy recommendation, the WHO refers to the implementation of restrictions on the marketing of ‘*unhealthy*’ foods. The EU Commission’s White Paper of 30 May 2007 on a Strategy for Europe on Nutrition, Overweight and Obesity-related health issues noted that nutrition labelling is one important method of informing consumers about the composition of foods and of helping them to make informed choices. The White Paper highlighted certain nutritional elements of importance to public health, such as saturated fats, sugars or sodium. Therefore, it considered it appropriate that the requirements on the mandatory provision of nutrition information should take into account such elements. In fact, the White Paper notes that the food industry (from producers to retailers) could reformulate foods in terms of salt, fats, particularly saturated and *trans* fats, and sugars, and consider ways to promote consumer acceptance of reformulated products.

The EU, in its rules on nutrition labelling established in *Regulation (EU) No. 1169/2011 of the European Parliament and of the Council* (known as the Food Information Regulation or FIR) puts an emphasis on saturated fats, while in US-type ‘*nutrition facts*’, both *trans* fats and saturated are highlighted. Article 30 of the FIR establishes the mandatory content of the nutrition labelling declaration as of 13 December 2016 (currently, the nutrition declaration is provided on a voluntary basis), which includes: (a) energy value; and (b) the amounts of fat, saturates, carbohydrate, sugars, protein and salt. No indication of *trans* fats is required. However, the content of the mandatory nutrition declaration may be supplemented with an indication of the amounts of, *inter alia*, monounsaturates and polyunsaturates. The FIR’s predecessor on nutrition labelling, *Council Directive 90/496/EEC of 24 September 1990 on nutrition labelling for foodstuffs*, already singled-out saturated fats.

Since 2006, with a different approach than the EU, the US ‘*nutrition facts*’ require, in addition to saturated fats, also the indication of *trans* fats. To date, EU legislation does not require a specific reference to *trans* fats in the nutrition label, neither does it regulate the content of *trans* fats in foodstuffs. The FIR requires that the expression ‘*fully hydrogenated*’ or ‘*partly hydrogenated*’, as appropriate, must accompany the indication of hydrogenated fats and oils in the lists of ingredients. However, with regard to *trans* fats, the FIR called on the EU Commission to prepare, by 13 December 2014, a report on the presence of *trans* fats in foods and in the overall diet of the population. This report could provide for legislative proposals, but has not yet been published. The delay is due to the decision to conduct a consultation with the Advisory Group on the Food Chain and Animal and Plant Health (which ensures that the EU Commission’s policies on food and feed safety take account of the opinions and needs of consumers, farmers, the food industry and retailers) and the fact that, with the newly-elected EU Commission, new procedures are in place. Indicatively, it is foreseen that the report will be finalised towards the end of the first semester of 2015. Individual European countries (*i.e.*, Austria, Denmark, Hungary, Iceland, Norway and Switzerland) have set limits that virtually ban *trans* fats from food products, but consumption appears to remain high where no policies are in place. If *trans* fats were to be similarly ‘*banned*’ at the EU level, the indication of *trans* fats in nutrition labelling would be redundant.

In the context of some vegetable oils being rich in saturated fats, on 19 December 2014, the EU Commission received a question for written answer from some Italian Members of the EU Parliament. The question, *inter alia*, references the FIR (which requires that lists of ingredients on food products mention specific vegetable oils) and asks whether, in addition to said Regulation, and given that vegetable fats (including olive oil) are regarded as a major cause of childhood obesity, the EU Commission considers that it should take further action to raise awareness by means of food labelling. The answer to the Parliamentary Question, given by the Commissioner of Environment, Maritime Affairs and Fisheries, on behalf of the EU Commission, on 4 March 2015, states, however, that it does not consider that any vegetable fat is, on its own, a major cause of childhood obesity. The EU Commission acknowledges that quantity, not type, of vegetable fats consumed is the determinative health factor.

Because of their complex nature, the WHO has made few recommendations as to the category of fat that should be consumed. The WHO suggests that we replace some saturated fats with unsaturated fats (particularly monounsaturates, which can lower 'bad' LDL cholesterol), and recommends that consumers avoid *trans* fats. However, it does not recommend banning specific types of vegetable oils. *Inter alia*, the often-criticised palm oil plays an important role in replacing *trans* fats, as the different natural oils and fats (or fractions) that it contains can be either solid or liquid at room temperature. Palm oil contains all three main types of fat: 49% saturates (mainly palmitic acid), 37% monounsaturates (mainly omega-9 oleic acid) and 9% polyunsaturates (mainly omega-6 linoleic acid). Other vegetable oils that are high in monounsaturates include olive and rapeseed oils. Maize, sesame, soy, and sunflower oils are higher in polyunsaturates. Most nutritionists believe that more monounsaturates should be consumed.

In its policy recommendations, the WHO also refers to the implementation of taxes on 'unhealthy' foods. A large number of so-called 'sin taxes' has been tabled, discussed and, in some instances, implemented in individual EU Member States. By way of example, in January 2011, Finland introduced a tax on candies, chocolate, cocoa-based products and ice cream. In September of the same year, Hungary introduced a similar scheme on products considered excessively salty, sweet or with high caffeine content, affecting mainly pre-packaged foodstuffs such as confectionery, salted snacks and condiments, *inter alia*. Between October 2011 and January 2013 (when it was repealed), Denmark applied a tax on meat, dairy products, oils and other foods containing more than 2.3% of saturated fat. The market distortive effects of such policies have been so controversial on the internal market that, for example, the EU Commission has gone as far as recently opening a state aid investigation on the Danish tax (see Trade Perspectives Issue No. 4 of 20 February 2015). Discussions on similar measures have taken place in other EU Member States. In particular, France considered an additional excise tax (which became known as the 'Nutella tax') of EUR 300 per tonne of palm, copra (*i.e.*, coconut) and palm kernel oil for use in human food.

Obesity prevention and the promotion of healthy dietary habits are legitimate objectives that governments are entitled to pursue through a range of policy instruments. However, these policies must not target only specific food products and must not become disguised restrictions to international trade. In particular, these schemes must not constitute obstacles to the free movement of goods within the EU's internal market and must not amount to discriminatory taxation. In addition, they must comply with the WTO legal framework, which also prohibits discriminatory taxation and requires that measures do not result in restrictions on the importation of goods. Therefore, EU authorities at the national and EU level must ensure that 'sin taxes' or other similar policies are not *de facto* or *de jure* discriminatory and targeted to specific products in a way that is contrary to EU and WTO law.

The WHO Interim Report is open for comments until June 2015. Interested parties should consider commenting on the Report, eventually on the notion of the so-called 'unhealthy' foods, so as to ensure that their legitimate interests are safeguarded. The next steps taken in

the EU on *trans* fats and other '*unhealthy*' foods should also be monitored and stakeholders should be prepared to participate in shaping potentially upcoming EU legislation by interacting with EU Institutions, third country Governments, relevant trade associations and affected stakeholders.

Recently Adopted EU Legislation

Trade Remedies

- *Commission Implementing Regulation (EU) 2015/519 of 26 March 2015 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China, as extended to imports of certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not, following an expiry review pursuant to Article 11(2) of Regulation (EC) No. 1225/2009*
- *Commission Implementing Regulation (EU) 2015/501 of 24 March 2015 imposing a provisional anti-dumping duty on imports of stainless steel cold-rolled flat products originating in the People's Republic of China and Taiwan*
- *Regulation (EU) 2015/476 of the European Parliament and of the Council of 11 March 2015 on the measures that the Union may take following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters*
- *Regulation (EU) 2015/477 of the European Parliament and of the Council of 11 March 2015 on measures that the Union may take in relation to the combined effect of anti-dumping or anti-subsidy measures with safeguard measures*

Customs Law

- *Regulation (EU) 2015/478 of the European Parliament and of the Council of 11 March 2015 on common rules for imports*
- *Regulation (EU) 2015/479 of the European Parliament and of the Council of 11 March 2015 on common rules for exports*

Food and Agricultural Law

- *Commission Regulation (EU) 2015/539 of 31 March 2015 authorising a health claim made on foods, other than those referring to the reduction of disease risk and to children's development and health and amending Regulation (EU) No. 432/2012*
- *Commission Implementing Regulation (EU) 2015/517 of 26 March 2015 amending Regulation (EC) No. 595/2004 laying down detailed rules for applying Council Regulation (EC) No. 1788/2003 establishing a levy in the milk and milk products sector*

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