FRATINIVERGANO
EUROPEAN LAWYERS
TRADE PERSPECTIVES©

Issue No. 18 of 9 October 2015

Ninth round of negotiations concluded on the Environmental Goods Agreement

During the week of 16 September 2015, delegates from 17 WTO Members met in Geneva for the ninth round of negotiations on the Environmental Goods Agreement (hereafter, EGA). Reportedly, the negotiating Parties continued to address product coverage for tariff reduction. However, arguably, more efforts are needed with respect to additional ways in which the agreement can ensure that only environmental goods benefit from its liberalisation, as well as alternative ways in which it can positively contribute to green growth and sustainable development.

The EGA is a plurilateral agreement that aims at removing barriers to trade in environmental, or '*green*', goods in a broader effort to protect the environment and mitigate climate change. In the long term, the EGA is envisaged as a '*living agreement*' that will expand to add new products in response to changes in technology and eventually address environmental services and non-tariff barriers (hereinafter, NTB) to trade. However, the EGA currently relates only to environmental goods. The EGA was originally launched by 14 WTO Members (*i.e.*, Australia, Canada, China, Costa Rica, the EU, Hong Kong, Japan, Korea, New Zealand, Norway, Singapore, Switzerland, Chinese Taipei and the US) in July 2014 (see Trade Perspectives Issue No. 14 of 11 July 2014). The negotiating Parties set out to build on a list of 54 environmental goods on which Member Economies of the Asia-Pacific Economic Cooperation (hereinafter, APEC) committed to reduce import tariffs in 2012. Over the course of numerous negotiating rounds, the EGA negotiating Parties established and reviewed environmental goods categories (*i.e.,* energy and resource efficiency, air pollution control, renewable energy equipment, solid and hazardous waste management, *etc*.), and nominated relevant products for inclusion in said categories. Three additional WTO Members (*i.e.*, Israel, Iceland and Turkey) joined the EGA during this period. In more recent rounds, negotiating Parties examined the list of goods nominated during the initial rounds in an attempt to reach a final agreement on which goods to include in the final list of products for tariff reduction. The EGA will apply in accordance to the Most-Favoured Nation (MFN) principle once a '*critical mass*' of WTO Members have agreed to participate. Historically, as in the context of the WTO Information Technology Agreement, the concept of '*critical mass*' is considered to be met when the participants of a plurilateral agreement account for approximately 90% of trade in the relevant products (*e.g.*, environmental goods), at which point the tariff reductions in the participant WTO Members go into effect for all WTO Members.

The most recent EGA negotiating round focussed on product-by-product discussions, as delegates worked to refine and secure the EGA product list outlined by the negotiations'

Chair, the Counsellor at the Australian mission to the WTO, in August 2015. The list included those products with the strongest environmental credibility that garnered negotiating Parties' consensus over the past year. In bilateral and plenary sessions, delegates analysed over 1000 products and examined over 450 possible tariff lines for inclusion. In particular, discussions were focussed on how to streamline '*ex-outs*'. '*Ex-outs*' are national tariff codes built off of more general descriptions of goods provided by the World Customs Organisation's Harmonised System (hereinafter, HS) tariff lines. They describe specific products or product groups that are particular to individual countries with a level of detail not captured by HS codes. The product list contained several similar and competing '*ex-outs*' for some products within a given tariff line, which delegates attempted to consolidate during September's negotiations. Discussions also addressed how to implement the APEC Environmental Goods List. The product list used during negotiations included and expanded on the APEC list, as originally planned. However, given that the APEC list contains its own '*ex-outs*', some of which do not cover products identified by other EGA negotiating Parties, but which fall within the broader associated HS code, the extent to which they are relevant for inclusion was up for debate. Moreover, some negotiating Parties were reportedly concerned with the full elimination of duties on the tariff lines identified in the APEC Environmental Goods List, arguing that lowering tariffs to zero was not the original objective. This perhaps implies a more fundamental disagreement between negotiating Parties over whether the "*global free trade in environmental goods*", which they pledged to in the original declaration, actually intended 0% tariff rates.

The debate over competing '*ex-outs*' suggests that negotiating Parties are approaching the task of finalising the environmental goods list with care, in order to ensure that said goods are indeed beneficial to the environment. Although the compiled list of EGA product nominations has not been officially released, in September an environmental organisation '*leaked*' a product nomination list from the EGA negotiations in April and questioned the '*greenness*' of approximately 100 goods on the list. Some sources say that these controversial nominations were since dropped from the negotiation chair's list. Nevertheless, this raises the question of whether additional or alternative approaches would be more effective in securing the EGA's overarching goal of combatting climate change. Though the nomination process and relevant criteria (if any) for product eligibility has remained opaque throughout the EGA talks, reports indicate that '*environmental credibility*' has been the key consideration in agreeing on which goods to include. Instead of, or in addition to, the use of '*ex-outs*', negotiating parties may want to consider relying on already-established certification schemes and oversight bodies, such as those used in the oilseeds sector. Such an approach could ensure that goods included in the provisional list that were criticised, such as biodiesel, are included if sourced sustainably. As a result, '*green*' commodities such as sustainable palm oil, soybeans, sugar, etc., could rightfully be covered by the agreement. Although it is unclear whether such goods will be included in the final version of the EGA, given that the negotiating Parties intend for the EGA to be a '*living agreement*', there may still be opportunities in the future for WTO Members with a genuine interest in the relevant commodities (*e.g.*, Argentina, Brazil, Indonesia, Malaysia, *etc*.) to influence the list of goods covered under the agreement.

Sources report that the talks were positive, but hard work remains to be done, especially around contentious product nominations and '*ex-out*' disagreements. Based on September's negotiating round, the Chair will circulate to negotiating Parties a revised product list, including the progress made on the '*ex-outs*', to be reviewed during the next round of talks, currently scheduled to begin on 29 October 2015. If said review were to prove successful, the Chair would then generate a final draft list of products, to be considered in a meeting scheduled to begin on 30 November 2015. Several EGA negotiating Parties have expressed the desire to finalise the product list in time for the WTO's Tenth Ministerial Conference in Nairobi, Kenya in December 2015. There is still much to be done in terms of EGA's scope, though, in addition to further discussions regarding how tariffs will be cut and how to incorporate the agreement into the WTO's architecture. EGA negotiating Parties remain open to other WTO Members joining

– something producers of naturally green goods should consider, given that the list of goods included in the EGA is intended to expand, as a '*living agreement*', in order to include additional green goods over time.

South Africa suspends exports of citrus to the EU

On 5 October 2015, the Committee of Professional Agricultural Organisations and the General Confederation of Agricultural Cooperatives (jointly, and hereinafter, referred to as COPA-COGECA) sent a letter to the EU Commission calling for additional measures to prevent the entry and spread of the citrus black spot (hereinafter, CBS) in the EU. Interestingly, the letter follows the voluntary partial suspension of citrus exports to the EU by the South African Department of Agriculture, Forestry and Fisheries (hereinafter, DAFF). The development highlights the potential WTO-inconsistency of the EU Commission's approach in addressing the entry and spread of CBS in the EU.

CBS is a plant disease caused by the fungus *Guignardia citricarpa Kiely* (renamed *Phyllosticta citricarpa (McAlpine) Van der Aa*), which affects citrus fruits. Harmless to humans, CBS damages fruits' appearance by causing spots on fruit leaves and blemishes in fruits, potentially reducing both quality and quantity of harvests. Although CBS disease is present in regions of Africa, Asia, Oceania and South America, it has never been detected in Europe. In the context of the EU's legal framework, *Guignardia citricarpa Kiely* (all strains pathogenic to Citrus) is classified as a harmful organism under *Council Directive 2000/29/EC of 8 May 2000 on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community* (hereinafter, Directive 2000/29), which, in relevant part, lays down requirements for the importation into the EU of plants and fruits susceptible of carrying this and other harmful organisms. Following the interception of 36 consignments of citrus fruit from South Africa that were infected with CBS in 2013, and an agreement reached on 28 November 2013 by EU Member States within the Standing Committee on Plant Health, the EU Commission adopted emergency measures against citrus from South Africa on 11 December 2013 through *Commission Implementing Decision of 11 December 2013 on measures to prevent the introduction into and the spread within the Union of Guignardia citricarpa Kiely (all strains pathogenic to Citrus), as regards South Africa* (see Trade Perspectives, Issue No. 1 of 10 January 2014).

On 2 July 2014, the EU Commission adopted a new set of requirements on imports of citrus fruits from South Africa, following the release of a "*Scientific Opinion on the risk of Phyllosticta citricarpa (Guignardia citricarpa) for the EU territory with identification and evaluation of risk reduction options*" by the European Food Safety Authority (hereinafter, EFSA) in January 2014. EFSA's Opinion concluded that a risk of CBS disease entering the EU was "*moderately likely*" for citrus fruits without leaves, and that the possibility of the establishment of CBS disease was also "*moderately likely*" (see Trade Perspectives, Issue No. 15 of 25 July 2014). The new requirements, which are contained in *Commission Implementing Decision of 2 July 2014 setting out measures in respect of certain citrus fruits originating in South Africa to prevent the introduction into and the spread within the Union of Phyllosticta citricarpa (McAlpine) Van der Aa*, in part include the use of an import certificate identifying the field from which the fruits originated, visual inspection of the consignment, and full traceability of the fruits. Under the EU's legal framework, South Africa is allowed 5 detections of CBS before the EU Commission may decide to prohibit the further importation of South African citrus fruits. In general, it appears as though the DAFF and the South African Citrus Growers' Association (hereinafter, CGA) have been more than cooperative with respect to the Decisions by the EU Commission. In September 2014, the DAFF, following a recommendation by the CGA, voluntarily suspended exports of citrus fruits to the EU, with the exception of mandarins, following the detection of CBS in a shipment of citrus fruits in July 2014. At a meeting on 12-13 February 2015, the EU's Standing Committee on Plant Health agreed to continue with the

current phytosanitary requirements under the Commission Implementing Decision of 2 July 2014 for the 2015 import season.

According to reports of the EU's Notification System for Plant Health Interceptions (*i.e.*, EUROPHYT), through September 2015, EU border controls intercepted 12 shipments of citrus fruits imported from South Africa this year, due to the detection of CBS. At a meeting on 28 August 2015, following data that CBS in citrus fruits from South Africa had been detected more than 5 times in 2015, the EU's Standing Committee on Plant Health chose not to introduce measures prohibiting the import of citrus from South Africa. Instead, on 17 September 2015, following the eighth detection of CBS in citrus fruits from South Africa by EUROPHYT, on the recommendation of the CGA, the DAFF voluntarily suspended the export of citrus fruit from South Africa to the EU, with the exception of soft citrus and Kumquats, as well as exports from the CBS-Free regions of the Western and Northern Capes. Traditionally, South Africa stops exporting citrus to the EU on October 15th of each year, when the EU's seasonal duties increase and the relevant tariffs become steeper. As a result, citrus producers in South Africa have voluntarily withheld approximately one month's worth of shipments to the EU during each of the last two seasons. Nonetheless, COPA-COGECA has repeatedly called for the EU Commission to tighten its control further, advocating for new legislation that would create an automatic ban once EUROPHYT intercepted a sixth shipment of citrus fruit from South Africa with CBS.

The call for additional restrictive measures highlights the potential WTO-inconsistency of the EU's measures. South Africa has raised the possibility of using said *forum*, where in October 2014 its Department of Trade and Industry announced that it would address its issues with the EU's approach in the context of the WTO. If the EU Commission were to introduce an automatic import prohibition on citrus fruit from South Africa following a sixth interception of CBS-infected consignments, South Africa could consider additional WTO claims. Questions could be raised as to whether such a measure would violate Articles 2.2 and 5.1 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter, SPS Agreement), which require the existence of a "*rational or objective relationship*" between the disputed SPS measure and the scientific evidence warranting the measure, and between the disputed SPS measure and the conclusions of a risk assessment. In addition, Articles 5.4 and 5.6 of the SPS Agreement require WTO Members to minimise trade restrictions by encouraging them to account for the objective of minimising negative trade effects and ensure that the measures adopted and maintained be not more trade restrictive than required to achieve the appropriate level of SPS protection, respectively. In this regard, an automatic prohibition on citrus fruit following the sixth detection of CBS may be more trade restrictive than required, insomuch as such a measure would fail to consider the context of the situation and prevent a case-by-case approach. For example, according to the CGA, during the 2015 season all of the interceptions of citrus fruit infected with CBS occurred in the north of Europe, and arguably did not present a reasonable risk to the citrus-producing regions in the south of Europe. Whereas the EU Commission's current approach allows for the Standing Committee on Plant Health to consider such contextual information, an automatic prohibition may introduce an unnecessary and inappropriate level of SPS protection, in violation of the SPS Agreement.

Another main issue relevant in the context of the WTO concerns the EU's unwillingness to accept proposals from South Africa to divide the EU into different zones that would allow the importation of citrus fruits to areas in the EU where the climate conditions are arguably not favourable to the establishment of the disease. Such an approach is arguably required, and often overlooked, under the concept of '*regionalisation*' (see Trade Perspectives, Issue No. 20 of 31 October 2014). The concept of '*regionalisation*' is tied to Articles 5.4 and 5.6 of the SPS Agreement, but it is expressly addressed in Article 6 of the SPS Agreement. Paragraph 1 of Article 6 of the SPS Agreement requires WTO Members to "*ensure that their [SPS] measures are adapted to the [SPS] characteristics of the area ... from which the product originated and*

to which the product is destined". Instead, WTO Members more commonly implement '*regionalisation*' in a manner that obliges the exporting country to maintain '*protected zones*' or '*compartments*', such as South Africa has willingly done in its Western and Northern Capes regions, where CBS is not present. Indeed, EFSA's Opinion in January 2014 considered the overlooked approach to '*regionalisation*', where it identified the demarcation of endangered and non-endangered areas in the EU as a highly effective possible option for the reduction of risk of entry, establishment and spread of CBS. Nonetheless, EFSA considered the option to be of low technical and economic feasibility "*because of the difficulties to establish and maintain the required control and monitoring systems, associated with the designation of protected zones with respect to CBS*", even though the EU already applies trade restrictions internally under the '*protected zones*' mechanism in Directive 2000/29/EC. As such, the EU already has a system in place that could be adapted for application to imports of CBS-infected citrus fruits.

Although the CGA and the DAFF have remained cooperative with respect to the EU's approach to addressing the entry and spread of CBS, if the EU Commission chooses to impose further restrictive measures, the South African Government may be forced to resort to more aggressive tactics in order to protect its citrus industry and maintain access to the EU market. Interested parties should continue to monitor developments, and be prepared for any issues that may arise during the 2016 season.

A revised EU Novel Foods Regulation and its impact on edible insects and insect-based food

On 27 October 2015, the plenary of the European Parliament is scheduled to vote on the proposal for a regulation of the European Parliament and of the Council on novel foods (hereinafter, the Novel Foods Proposal). Interinstitutional trilogue negotiations of the European Parliament, the EU Commission and the Council started in December 2014 and the Committee of Member States' Permanent Representatives approved the resulting compromise text on 10 June 2015 (hereinafter, the compromise text). The European Parliament's Committee on Environment, Public Health and Food Safety (ENVI Committee) approved the compromise text on 25 June 2015.

Novel foods are foods that were not consumed in the EU to a significant degree before May 1997, when *Regulation No. (EC) 258/97 on novel foods and novel food ingredients* (hereinafter, the Novel Foods Regulation) entered into force. This includes newly developed, innovative food, or food produced using new technologies and production processes, as well as food traditionally consumed outside of the EU. Currently, an application for the pre-market authorisation of a novel food is first considered by a food assessment body in an EU Member State. The principal aim of the Novel Foods Proposal is to increase the efficiency of the authorisation procedure. The proposed regulation establishes a centralised authorisation procedure, which will allow greater certainty to applicants seeking authorisation for a novel food and will simplify and reduce the considerable length (18 months instead of the current average of three years) of the authorisation procedure. EFSA will perform the risk assessment for a novel food application. Other changes to the Novel Foods Proposal concern the shift from applicant-based to generic authorisations, and a simplified procedure for traditional foods from third countries.

Disagreement concerning food derived from cloned animals led to the failure of the previous attempt to revise the Novel Foods Regulation in 2011. At that time, no agreement could be reached between the European Parliament and the EU Member States represented in the Council on any of the issues linked to animal cloning. A conciliation procedure failed in March 2011. Following that failure, on 18 December 2013, the EU Commission adopted a new proposal for a *Regulation of the European Parliament and of the Council on novel foods* and

two separate proposals on animal cloning (*i.e.*, a *Proposal for a Directive of the European Parliament and of the Council on the cloning of animals of the bovine, porcine, ovine, caprine and equine species kept and reproduced for farming purposes* and a proposal for a *Council Directive on the placing on the market of food from clones*, see TradePerspectives, Issue No. 4 of 21 February 2014). Until specific legislation on food from animal clones enters into force, according to the compromise text of the Novel Foods Proposal, food from animal clones temporarily rests within the scope of the Novel Foods Regulation as '*food from animals obtained by non-traditional breeding practices*'.

Under the compromise text of the Novel Foods Proposal, engineered nanomaterials (*i.e.*, essentially, materials intentionally engineered at the scale of atoms and molecules) require a novel food authorisation before being used in foodstuffs. Opinions on nanotechnology in the European Parliament are diverse. Some Members of the European Parliament (hereinafter, MEPs) argue that nanotechnology could deliver benefits such as reducing salt, fat and sugar in foods and that, in general, reformed novel foods legislation should accommodate innovative techniques to tackle food challenges in the world (such as better nutrition and longer shelf life). Against the argumentation that innovation in the food sector is needed, some other MEPs question the usefulness of nanotechnology in food. It has also been argued that there is no public support for the introduction of nanomaterials into foods and that there is no conclusive data on safety.

Less controversial in the Novel Foods Proposal are the simplified application and authorisation procedures. To remove barriers to trade caused by the lengthy authorisation process for traditional food from non-EU countries, the Novel Foods Proposal introduces a new assessment procedure for such foods that are new to the EU. If the history of safe use of the food in a non-EU country is demonstrated, and there are no safety objections from EU Member States or the EFSA, the food will be allowed for placement on the market on the basis of a notification from the food business operator in the non-EU country.

In addition, the regulation of '*novel*' nutrients and foods like insects, algae and fungi does not appear to be a stumbling block regarding the Novel Foods Proposal. Edible insects and insect-based food are well-known sources of proteins. They are usually considered a novel food in the EU, although the Novel Foods Regulation does not address this explicitly (see TradePerspectives, Issue No. 3 of 6 February 2015). There is, in fact, legal uncertainty as to whether whole insects or preparations thereof fall within the scope of the Novel Foods Regulation. In principle, the Novel Foods Regulation is designed to apply to all new foods before they are introduced into the EU, and including foods obtained from insects that have not been previously used as food sources in Europe. However, the scope of the Novel Foods Regulation currently only covers foods '*obtained from animals*', but it does not mention '*entire*' animals, such as larvae and insects. Article 1(2)(e) of the Novel Foods Regulation refers to the category of '*food ingredients isolated from animals*'. While awaiting the harmonisation of EU legislation on novel foods, trade in some edible insects is tolerated in Belgium. This does, however, not apply to ingredients that were isolated or extracted from insects, such as protein isolates. A Circular of 21 May 2014 addresses the breeding and marketing of edible insects and insect-based food for human consumption. The Netherlands appear to take a similar approach to insect-based food. On the other hand, Luxembourg's food safety authority considers the sale of edible insects to be prohibited without specific approval of the EU Commission. Luxembourg refers to surveys undertaken in 2010 and 2011, which concluded that insects had not been historically consumed in the EU and were, therefore, subject to novel foods approval. Finally, the UK Food Standards Agency (FSA) has opened a public consultation, which concluded in September 2015, and which asked UK food businesses that sell edible insects to submit relevant information regarding the history of human consumption of insects prior to 15 May 1997. The public consultation was carried out in preparation of a new EU Novel Foods Regulation, which may mean that some insects will need approval for sale as food.

The compromise text of the Novel Foods Proposal clarifies that it applies to the category of *"food consisting of, isolated from or produced from cell culture or tissue culture derived from animals, plants, micro-organisms, fungi or algae"*. A recital of the compromise text of the Novel Foods Proposal explicitly states that "*the categories should cover whole insects and their parts*". However, it is unclear what will happen to the insects and insect-based products that have been marketed legally in the EU for a number of years, but not before May 1997. Under the compromise text of the Novel Foods Proposal, they are now clearly novel foods. Arguably, a transitional provision of the compromise text of the Novel Foods Proposal applies, which provides that "*foods not falling within the scope of Regulation (EC) No 258/97, which are lawfully placed on the market at the date of application of this Regulation and which fall within the scope of this Regulation may continue to be placed on the market until a decision […] is taken following an application for authorisation of a novel food or a notification of a traditional food from a third country submitted by the date specified in the implementing rules adopted […], but no later than 24 month after the date of the application of this Regulation at the latest"*.

The simplified application and authorisation procedures for traditional food from non-EU countries in the Novel Foods Proposal may also be beneficial for the marketing of edible insects, where the history of safe food use in a third country can been demonstrated. Those foods should have been consumed for at least 25 years as a part of the customary diet of a significant number of people in at least one third country.

On 8 October 2015, EFSA published a scientific opinion in the form of a risk profile related to the production and consumption of insects as food and feed, which the EU Commission requested in May 2014 to help it develop policy in the areas of novel foods and animal feed to reflect the increasing interest in using insects as food and feed. EFSA notes that the use of insects as a source of food and feed potentially has important environmental, economic and food security benefits. Farming of insects can lead to lower emissions of greenhouse gases and ammonia than cattle or pigs and higher efficiency in converting feed to protein, the opinion states. While huge data gaps remain, EFSA concludes that the possible presence of biological and chemical hazards in food and feed products derived from insects depends on the production methods, what the insects are fed (substrate), the lifecycle stage at which the insects are harvested, the insect species and the methods used for further processing.

If the European Parliament's plenary approves the compromise text of the Novel Foods Proposal on 27 October 2015, the new Novel Foods Regulation will then be formally adopted by the Council without debate. There are still doubts about the safety and necessity of nanomaterials. Harmonised rules on novel foods would clarify issues surrounding edible insects or insect-based products as food, and also regarding traditional food from third countries. A '*novel*' failure to adopt a new legal framework on novel foods due to the absence of an agreement on nanotechnology and animal cloning would again prolong legal uncertainty for manufacturers of insect-based food and delay authorisation of traditional food from non-EU countries and other innovative foods.

Recently Adopted EU Legislation

Market Access

- *Commission Implementing Regulation (EU) 2015/1801 of 7 October 2015 operating deductions from fishing quotas available for certain stocks in 2015 on account of overfishing in the previous years*

- *Regulation (EU) 2015/1775 of the European Parliament and of the Council of 6 October 2015 amending Regulation (EC) No. 1007/2009 on trade in seal products and repealing Commission Regulation (EU) No. 737/2010*

Trade-Related Intellectual Property Rights

- *Commission Decision (EU) 2015/1753 of 30 September 2015 on confirming the participation of Italy in enhanced cooperation in the area of the creation of unitary patent protection*

Other

- *Decision (EU) 2015/1814 of the European Parliament and of the Council of 6 October 2015 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and amending Directive 2003/87/EC*

- *Council Decision (EU) 2015/1789 of 1 October 2015 on the position to be adopted, on behalf of the European Union, within the EEA Joint Committee concerning amendments to Annex II (Technical regulations, standards, testing and certification) and Annex XX (Environment) to the EEA Agreement (Fuel Quality Directive)*

- *Commission Implementing Decision (EU) 2015/1735 of 24 September 2015 on the precise position of the general warning and the information message on roll-your-own tobacco marketed in pouches*

- *Commission Delegated Regulation (EU) 2015/1778 of 25 June 2015 establishing fisheries conservation measures to protect reef zones in waters under the sovereignty of Denmark in the Baltic Sea and Kattegat*

Yasmin Butlin, Ignacio Carreño, Eugenia Laurenza, Anna Martelloni, Bruno G. Simões and Paolo R. Vergano contributed to this issue.