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The WTO circulated the panel report in *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*

On 27 November 2015, the WTO circulated the panel report in *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear* (hereinafter, *Colombia – Textiles*). The panel ruled in favour of Panama, finding that Colombia applied tariff duties on certain textiles, apparel and footwear in excess of the maximum duties it agreed to under its WTO commitments.

Panama initiated the dispute on 18 June 2013, when it requested WTO consultations with Colombia in regards to compound tariffs (*i.e.*, a tariff that combines the use of an *ad valorem* duty and a specific duty) that Colombia imposed on the importation of textiles, apparel and footwear from Panama. The measure at issue is a Colombian Presidential Decree of 23 January 2013, which Colombia contended as being aimed at enforcing an anti-money laundering provision in its criminal code. In customs terms, an *ad valorem* duty is levied as a percentage of the value of the goods in question, whereas a specific duty is defined on a per unit basis (*e.g.*, per kilogram or per unit of product). The measure at issue includes two different compound tariffs. The first consists of a 10% *ad valorem* import duty on the value of the goods, plus a USD 5 per gross kilogram specific duty on the same goods. The goods subject to this tariff are found in Chapters 61, 62 and 63 of Harmonised Tariff Schedule (hereinafter, HS), as well as tariff line 6406 (*i.e.*, articles of apparel and clothing accessories, knitted or crocheted, articles of apparel and clothing accessories not knitted or crocheted, other made up textile articles, sets, worn clothing and worn textile articles, rags, and parts of footwear, including uppers whether or not attached to soles other than outer soles, removable insoles, heel cushions and similar articles, gaiters, leggings and similar articles, and parts thereof). The second compound tariff consists of a 10% *ad valorem* import duty on the value of the goods, plus a USD 5 specific duty per pair of shoes. This tariff applies to Chapter 64 of the HS (*i.e.*, footwear, gaiters and the like, parts of such articles), minus goods classified under tariff line 6406. The measure foresees a number of exemptions, including, *inter alia*: imports from countries with international trade agreements with Colombia under certain conditions; imports serving as production inputs; and imports relating to the improvement of local developments entering certain parts of Colombia. Consultations between Colombia and Panama took place on 24 July 2013, but failed to reach a mutually agreed solution to the dispute. On 19 August 2013, Panama requested the establishment of a WTO panel. The panel was established on 25 September 2013 and composed on 15 January 2014.

In its request for the establishment of a WTO panel, Panama focused its arguments on, in relevant part, Article II of the General Agreement on Tariffs and Trade 1994 (hereinafter, GATT). Under Article II:1(a) of the GATT, WTO Members must accord to the commerce from other WTO Members treatment no less favourable than that provided for in their Schedule on Concessions of Goods (hereinafter, Goods Schedule). According to Article II:1(b) of the GATT, items in a WTO Member's Goods Schedule must, upon importation, be subject to the terms, conditions or qualifications set forth in such Goods Schedule, and be exempt from ordinary customs duties in excess of those set forth and provided therein. Article II:1(b) of the GATT also requires that such products not be subject to any other duties or charges in excess imposed on the date the agreement was adopted. The tariff rates described in a Goods Schedule include the '*bound*' rate, which acts as a ceiling for how much a WTO Member can impose in duties, as well as an '*applied*' rate, which, as the name suggests, represents the actual tariff duty applied to imported goods. Panama claimed that the compound tariffs at issue resulted in tariff duties in excess of those listed in Colombia's Goods Schedule (*i.e.*, *ad valorem* bound tariff rates of 35% and 40% depending on the products found in Chapters 61, 62, 63 and 64 of the HS) and were, therefore, inconsistent with Colombia's obligations under Article II:1(a)-(b) of the GATT. Colombia argued that the imports affected by the compound tariffs constituted "*illicit trade*" because said imports were entering Colombia at artificially low prices as part of money laundering schemes. In Colombia's view, Article II of the GATT does not apply to illicit trade and, therefore, Panama's claims should be rejected. Moreover, Colombia argued that, if the compound tariffs were inconsistent with Article II of the GATT, they were nonetheless justified under Article XX(a) and (d) of the GATT, as necessary to protect public morals or necessary to secure compliance with Colombia's laws (*e.g.*, relating to anti-money laundering), respectively.

The WTO circulated the panel report on 27 November 2015, finding in favour of Panama. The panel chose not to directly address whether Article II of the GATT applies to "*illicit trade*", in part because Colombia's measure applies to all imports of the products at issue, without a specific finding that such imports are contributing to "*illicit trade*" or are being used for money laundering. The panel found that the Colombian measure was inconsistent with Article II:1(a) of the GATT because it accorded treatment less favourable than that provided in Colombia's Goods Schedule. The panel also found that Colombia violated Article II:1(b) of the GATT because its compound tariffs resulted in duties in excess of the bound tariff rates for certain products listed in Colombia's Goods Schedule. The panel rejected Colombia's defence under the general exceptions in Article XX of the GATT. With respect to the public morals exception under Article XX(a) of the GATT, the panel found that Colombia failed to demonstrate that the compound tariffs were either '*designed*' or '*necessary*' to fight money laundering. Similarly, the panel found that Colombia was unable to show that the measure was '*designed*' or '*necessary*' to secure compliance with Colombia's laws against money laundering and, therefore, Colombia was unable to rely on Article XX(d) of the GATT. Lastly, the panel found that, given the different exemptions to the application of the measure, the compound tariffs were applied in a manner that constituted arbitrary or unjustifiable discrimination, and thus the measure was not in line with the *chapeau* of Article XX.

According to the procedures of the WTO Dispute Settlement Body (hereinafter, DSB), Colombia and Panama may choose to appeal the report prior to its adoption by the WTO DSB, which is otherwise to occur by 26 January 2016 (*i.e.*, within 60 days of the circulation of the report). Colombia could also choose to accept the ruling, and amend the measure to bring it in line with the conclusions and recommendations of the panel. In this regard, Colombia could arguably revise the measure in a way that leaves the compound tariffs in place, but better-recognises the anti-money laundering objective sought. The panel (and Panama) recognised that problems relating to money laundering do fall within the scope of '*public morals*', and the issue, in this regard, was whether the measure at issue had a sufficient nexus to Article XX(a) of the GATT. Indeed, in *US – Gambling*, the panel accepted that, *inter alia*, money laundering and organised crime were issues that could be addressed through

measures justified under a '*public morals*' exception in the WTO General Agreements on Trade in Services, which is similar to that found in Article XX(a) of the GATT. In the dispute at hand, the panel accepted that combating money laundering is one of the policies designed to protect public morals in Colombia. However, as noted above, when the panel considered the design, architecture and revealing structure of the compound tariffs, it found that the Colombian measure was not designed to combat money laundering (*i.e.*, it did not have an anti-money laundering objective). *Inter alia*, the panel noted that the measure was not designed so to distinguish and determine whether the low prices in question included actual cases of undervaluation, or whether such undervaluation was in any way connected with money laundering. Accordingly, instead of fully repealing the measure at issue in the dispute, Colombia may be able to amend it in order to comply with the conclusions and recommendations of the panel. Stakeholders should continue to monitor the dispute and observe whether Colombia chooses to appeal the decision of the panel or amend its laws accordingly.

The EU will soon begin free trade agreement negotiations with Australia and the Philippines

The EU recently took substantial steps towards enhancing trade with the Asia-Pacific region. On 15 November 2015, Australia and the EU agreed to launch negotiations on a free trade agreement (hereinafter, FTA), and, the next day, the Council of the EU (hereinafter, the Council) authorised the EU Commission to begin FTA negotiations with the Philippines.

The authorisation to begin FTA negotiations with the Philippines occurred at the 16 November 2015 meeting of the Agriculture and Fisheries Council. The Council encouraged the EU Commission to take an "*ambitious*" approach. The eventual FTA will add to the growing list of so-called '*new generation agreements*' of the EU, insofar as it will likely cover areas beyond those traditionally covered by FTAs, including, *inter alia*, intellectual property rights, investment, government procurement and competition. With respect to ASEAN Member States (hereinafter, AMSs), such as the Philippines, the EU and ASEAN originally launched negotiations for a bi-regional FTA back in May 2007. However, after eight rounds of negotiations, in May 2009 the two partners agreed to put the discussions on hold, due to the complexity and sensitivity of '*block-to-block*' trade negotiations and other more political irritants. Instead, in December 2009, the Council decided to pursue negotiations with individual AMSs on a case-by-case basis. The strategic objective of a '*block-to-block*' agreement was nevertheless maintained, insomuch as the individual agreements are to be concluded with a view to eventually use these agreements as '*stepping stones*' for an EU-ASEAN FTA (see Trade Perspectives, Issue No. 9 of 4 May 2012). The EU has since concluded FTAs with Singapore and Viet Nam and negotiations with Malaysia and Thailand have been launched, but are *de facto* suspended.

A day prior to the authorisation from the Council to begin negotiations for an EU-Philippines FTA, Jean-Claude Juncker, President of the EU Commission, Donald Tusk, President of the European Council, and Malcolm Turnbull, Prime Minister of Australia, released a joint statement during the G20 Summit in Turkey that touched on a number of topics. The statement included the announcement of an agreement to commence work toward the launch of negotiations for an Australia-EU FTA. The announcement emphasised supporting sustainable growth and investment, opening up new commercial opportunities and promoting innovation and employment. The leaders also stated that they will "*aim to achieve a comprehensive and balanced outcome that liberalises trade, promotes productive investment flows and enhances the regulatory environment for business*". In terms of a timeframe for the anticipated FTA, the announcement indicated that negotiations "*should start as soon as possible*" and that the parties will take steps to seek the necessary negotiating mandates on

the basis of a successful '*scoping exercise*' (*i.e.*, an informal dialogue with the country concerned on the feasibility of a future negotiation).

In this regard, it is interesting to recall the substantial efforts taken by the EU in advance of, and during the, negotiation of an FTA. In relevant part, the EU Commission performs sustainability impact assessments on any such deal on the EU and on the other country. In the course of the negotiations, the EU Commission also typically releases '*non-papers*', position papers and negotiating texts, to be circulated informally among delegations, for discussion purposes, and/or to be made publicly available (as it is currently occurring with respect to, *e.g.*, the TTIP negotiations). Lastly, the EU Commission develops and tables template-chapters for various FTA chapters, which it tailors for use in specific FTAs. With respect to ASEAN, in 2009, the EU completed its Final Report on the Trade Sustainability Impact Assessment of the Free Trade Agreement between the EU and ASEAN (hereinafter, EU-ASEAN SIA). In June 2010, the EU also published the EU Commission services' position paper on the EU-ASEAN SIA, and since its decision to conduct the negotiations with individuals AMSs and not the ASEAN region as a whole, the EU Commission has added country-specific Annexes to said position paper, including, most recently, an Annex pertaining to Viet Nam (in May 2013). The EU-ASEAN SIA provides useful insight into the potential key sectors and issues that could be at issue in future FTAs with AMSs. The EU-ASEAN SIA focussed on six sectors, including cereals, grains, textile, clothing and footwear, motor vehicles and parts, financial services and fisheries. The EU-ASEAN SIA also looked more in depth at five horizontal issues, including customs and trade facilitation, intellectual property rights, investment conditions, competition policy and preferential rules of origin. In addition, it included two elaborate case studies addressing illegal logging and timber trade and the EU biofuels policy. With respect to the Philippines, the EU-ASEAN SIA stated that the Philippines stands to gain in a diverse number of sectors including the motor vehicles and parts and textiles, clothing and footwear. However, it also noted that an FTA with the EU would result in an economic decline in the Filipino sectors of cereals and grains (*e.g.*, rice), as well as well as in the gas sector. With respect to Australia, the EU has not yet completed or released any relevant impact assessments. However, statistics indicate that, in 2014, Australia was the 21st largest trade in goods partner of the EU, while the EU represented Australia's third largest trading partner. Traditionally, Australia's exports to the EU are largely fuels, mining products and agricultural products. Regarding the latter, some commentators note that the dairy and meat sectors will likely act as a powerful trade hurdle during the eventual negotiation of an Australia-EU FTA.

At the meeting of the Agriculture and Fisheries Council on 16 November 2015, the Council also reiterated that the EU will continue its efforts to launch free trade negotiations with other AMSs. In addition to FTAs with Malaysia and Thailand, the EU is currently negotiating an agreement with Myanmar that is limited to investment protection. It is likely that FTAs will soon be launched with other AMSs, including Indonesia, which is the largest economy in the ASEAN, representing 40% of the ASEAN's combined Gross Domestic Product. In regards to the FTA with Australia, some commentators were surprised that the EU did not first negotiate an FTA with New Zealand, given that it could be easier to negotiate an agreement with a smaller economy that has close trade ties to Australia. Nonetheless, it is important for countries with impending FTAs with the EU, whether it be Australia and the Philippines now, or Indonesia and New Zealand in the near future, to engage in preparations that are equally exhaustive as those implemented by the EU. In addition to the sustainability impact assessments, preparation in advance of FTA negotiations by the EU includes, *inter alia*, completion of the so-called '*scoping exercise*', meeting with industry stakeholders, and the holding of public consultations on the content and options for any FTA (including issue-specific public consultations during the negotiation process, such as the one held on Geographical Indications during the EU-Viet Nam FTA negotiation, which was published in EU Official Journal on 9 April 2015).

As such, potential EU FTA partners should complete careful economic and legal impact assessment studies, after having carefully studied the EU's negotiating approach, machinery and tactics, and after having defined a strategy that should include the tabling of dedicated chapters (*e.g.*, sanitary and phytosanitary measures, technical barriers to trade, etc.) to address specific problems that hamper market access to the EU. Stakeholders, including industry representatives and businesses, should play an active role and ensure that their interests are adequately considered during the negotiation process.

The EU Commission proposes guidelines for '*free-from*' claims on cosmetic products

In November 2015, the EU Commission proposed, according to sources, guidelines on '*free-from*' and '*hypoallergenic*' claims on cosmetic products. Different '*free-from*' claims (including '*preservative-free*', '*silicone-free*', '*fragrance-free*', '*parabens-free*' and '*palm oil-free*') appear to some extent on cosmetics and there is a need to assess whether such claims comply with EU law. '*Hypoallergenic claims*' (*i.e.*, claims related to the absence of allergens in cosmetic products) are also made on cosmetics.

In the meeting of the EU Commission's Working Group on Cosmetic Products on 23-24 October 2014, Germany submitted a proposal on the implementation of the common criteria for '*free-from*' claims on cosmetic products amending the guidelines to *Commission Regulation (EU) No. 655/2013 laying down common criteria for the justification of claims used in relation to cosmetic products* (hereinafter, Commission Regulation (EU) No. 655/2013). The Working Group on Cosmetic Products advises the EU Commission on issues related to cosmetic products and establishes a close cooperation and exchange of information between EU Member States, the EU Commission and stakeholders. Its tasks are, *inter alia*, to assist the EU Commission in the preparation of legislation, and, with respect to policy definition, to coordinate and exchange views with EU Member States. The Working Group on Cosmetic Products also provides expertise to the EU Commission when preparing implementing measures. According to the minutes of the meeting of 23-24 October 2014, the Working Group discussed the German proposal, which was very much welcomed by EU Member States. The draft Commission guidelines on '*free-from*' claims on cosmetic products appear to stem from this proposal, since experts were invited to send their comments by the end of November 2015.

Commission Regulation (EU) No. 655/2013 established harmonised common criteria in order to assess whether or not the use of a claim is justified. In particular, its Annex provides that claims on cosmetic products must conform to the following common criteria: 1) legal compliance; 2) truthfulness; 3) evidential support; 4) honesty; 5) fairness; and 6) informed decision-making. These common criteria are of equal importance and apply without prejudice to *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market*, to *Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising*, and to other applicable EU law.

The legal basis for Commission Regulation (EU) No. 655/2013 is Article 20 of *Regulation (EC) No. 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products* (hereinafter, Cosmetics Products Regulation, or CPR), which establishes general principles for product claims and that states, in particular, that in the labelling, making available on the market, and advertising of cosmetic products, text, names, trademarks, pictures and figurative or other signs must not be used to imply that these products have characteristics or functions that they do not have.

In relation to '*free-from*' claims, the following criteria set out in the Annex to Commission Regulation (EU) No. 655/2013 are, in particular, relevant. On '*honesty*', the Annex states that "*claims must not attribute to the product concerned specific (i.e. unique) characteristics if similar products possess the same characteristics*". In relation to '*fairness*', "*claims for cosmetic products must be objective and shall not denigrate the competitors, nor shall they denigrate ingredients legally used*".

The current *Guidelines to Commission Regulation (EU) No 655/2013* of July 2013 provide only little guidance on the use of '*free-from*' claims. For the '*honesty*' criterion, the guidelines give the example that "*Fine fragrances usually contain such a high amount of alcohol that the additional use of preservatives is not necessary. In this case, it would be dishonest to highlight in advertising the fact that a certain fine fragrance does not contain any preservatives*". For the criterion of '*truthfulness*', the current guidelines indicate that "*the claim 'silicone-free' must not be made if the product contains silicone*". However, on the '*fairness*' criterion, there is currently only the (a bit bold) example of a banned claim "*contrary to product X, this product does not contain ingredient Y which is known to be irritating*". There is no example for '*free-from*' claims for cosmetic products that denigrate competitors, or denigrate ingredients legally used.

The EU Commission's proposal of November 2015 appears to address this shortcoming. Reportedly, the draft guidelines provide the opportunity to claim '*ingredient X-free*', when the product does not contain this ingredient. The claim '*fragrance-free*' would be possible as long as the product does not contain fragrances or essential oils whose intrinsic function is that of perfuming. Hypoallergenic claims would be permitted once the responsible person for a cosmetic product can prove the absence of a potential allergen in the ingredients used, in particular by considering their classification and cosmetovigilance (*i.e.*, the ongoing and systematic monitoring of the safety of cosmetics in terms of human health). The claim '*preservatives-free*' would reportedly be permitted, according to the draft guidelines, as long as the product does not contain any preservatives allowed in cosmetic products and listed in Annex V of the CPR. However, according to the proposed draft guidelines, the use of a '*free-from*' claim against a group of ingredients, such as '*paraben-free*' would be banned because it is considered denigrating, as some parabens are authorised. Parabens are esters of 4-hydroxybenzoic acid and are used as preservatives in a wide range of cosmetic products. Based on the potential estrogenic effects of the parabens, certain parabens (*i.e.*, isopropyl-, isobutyl-, pheny-, benzyl-, and pentylparaben) are, in fact, listed as substances prohibited in cosmetic products in Annex II of the CPR. However, other parabens are currently authorised as preservatives in cosmetic products and are listed in Annex V of the CPR (4-hydroxybenzoic acid and its methyl- and ethyl- esters, and their salts, such as potassium ethyl-, potassium paraben, etc.; and butyl 4-hydroxybenzoate and its salts, such as butyl-, propylparaben, etc.).

Cosmetic products often contain palm oil or its derivatives (such as sodium lauryl sulphates, palmate, palmitate, palmitic and stearic acid). Arguably, a '*palm-oil*' free claim would be prohibited according to Commission Regulation (EU) No. 655/2013 since palm oil and its derivatives are not prohibited and such claim is unfair, not objective and denigrates ingredients legally used and denigrates competitors using palm oil.

In the food sector, '*palm oil-free*' campaigns appear to be, at best, deceptive or unsubstantiated generalisations and, at worst, fraudulent in nature and aimed at denigrating competing oils and/or promoting certain products by implying that whatever is used as an ingredient is better, healthier or environmentally greener than what is not used (see Trade Perspectives Issues No. 10 of 16 May 2014 and No. 23 of 12 December 2014). When made in a nutritional or environmental context, these claims are also, respectively, not permitted nutrition claims or misleading claims. In addition, when the list of ingredients does not contain palm oil, a '*palm oil-free*' claim, indicating that it is '*free-from*' it, is obvious, '*self-evident*' and '*flagrantly misleading*' according to Article 7(1)(c) of the FIR since the list of ingredients of foods must indicate the vegetal origin of the oil. The product is not '*special*' *vis-à-vis* other

products that contain vegetable oils other than palm oil and do not display such claim (see Trade Perspectives Issue No. 4 of 20 February 2015). The arguments stemming from EU legislation in the cosmetic sector that '*free-from*' claims must not denigrate legally used ingredients reinforces the arguments put forward in the food sector.

By 11 July 2016, the EU Commission must submit to the European Parliament and the Council a report regarding the use of claims on the basis of the common criteria adopted under Commission Regulation (EU) No. 655/2013. If the report concludes that claims used in relation to cosmetic products are not in conformity with the common criteria, the EU Commission must take appropriate measures to ensure compliance in cooperation with the EU Member States. Interested parties should continue to monitor developments in relation to claims on cosmetics and, in particular, on '*free-from*' claims.

Recently Adopted EU Legislation

Market Access

- *Council Decision (EU) 2015/2108 of 16 November 2015 establishing the position to be taken on behalf of the European Union within the Council for Trade in Services of the World Trade Organisation to notify the preferential treatment the Union intends to grant to services and service suppliers of least developed country Members, and to seek approval for preferential treatment going beyond market access*

- *Council Regulation (EU) 2015/2192 of 10 November 2015 on the allocation of the fishing opportunities under the Protocol setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Community and the Islamic Republic of Mauritania for a period of four years*

- *Council Decision (EU) 2015/2169 of 1 October 2015 on the conclusion of 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*

Trade Remedies

- *Commission Implementing Regulation (EU) 2015/2179 of 25 November 2015 initiating a review of Council Implementing Regulation (EU) No. 102/2012 imposing a definitive anti-dumping duty on imports of steel ropes and cables originating, inter alia, in the People's Republic of China, as extended to imports of steel ropes and cables consigned from the Republic of Korea, whether declared as originating in the Republic of Korea or not, for the purposes of determining the possibility of granting an exemption from those measures to one Korean exporter, repealing the anti-dumping duty with regard to imports from that exporter and making imports from that exporter subject to registration*

Customs Law

- *Commission Implementing Regulation (EU) 2015/2106 of 20 November 2015 laying down rules for the management and distribution of textile quotas established for the year 2016 under Regulation (EU) 2015/936 of the European Parliament and of the Council*

Food and Agricultural Law

- *Directive (EU) 2015/2203 of the European Parliament and of the Council of 25 November 2015 on the approximation of the laws of the Member States relating to caseins and caseinates intended for human consumption and repealing Council Directive 83/417/EEC*

Other

- *Council Decision (EU) 2015/2236 of 27 November 2015 establishing the position to be taken on behalf of the European Union within the Ministerial Conference of the World Trade Organisation as regards an extension of the moratorium on customs duties on electronic transmissions and the moratorium on non-violation and situation complaints*

- *Commission Implementing Decision (EU) 2015/2186 of 25 November 2015 establishing a format for the submission and making available of information on tobacco products (notified under document C(2015) 8162)*

- *Commission Implementing Decision (EU) 2015/2183 of 24 November 2015 establishing a common format for the notification of electronic cigarettes and refill containers (notified under document C(2015) 8087)*

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