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Another WTO panel report in the *US – Tuna II (Mexico)* saga appears to bring this dispute closer to an end

On 26 October 2017, two WTO dispute settlement compliance Panels, one requested by the US and the other by Mexico, published their Report in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (hereinafter, US – Tuna II (Mexico)) *Recourse to Article 21.5 of the DSU by the United States* and *Second Recourse to Article 21.5 of the DSU by Mexico*. The Report finally found the US to be complying with prior decisions. While still subject to a likely appeal by Mexico, almost exactly nine years after the first request for consultations in this second '*dolphin-safe*' labelling case for tuna, the dispute might finally come to an end. The case of '*dolphin-safe*' tuna requirements covers key areas of interest with respect to international standards and labelling. At the same time, it has brought important clarifications of certain procedural aspects and the entire case history underlines the effectiveness and relevance of the WTO dispute settlement mechanism.

Mexico and the US have been disputing issues relating to '*dolphin-safe*' tuna requirements for more than 25 years. The related dispute (*i.e.*, *US – Tuna I (Mexico)*) under the General Agreement on Tariffs and Trade 1947 (*i.e.*, the panel process under the GATT 1947 that applied prior to the establishment of the WTO) was initiated in February 1991, with the Panel Report issued in September 1991. The Panel concluded that the US prohibition violated the GATT because it was based on the domestic production process of tuna in Mexico, rather than on the quality of the content of the product (*i.e.*, the '*process versus product*' distinction).

On 24 October 2008, Mexico filed a request for WTO consultations in what would become known as the *US – Tuna II (Mexico)* dispute. Mexico brought claims against three US measures: 1) Provisions in the US Dolphin Protection Consumer Information Act; 2) US labelling standards for '*dolphin-safe*' tuna, in particular tuna that is harvested in the Eastern Tropical Pacific (hereinafter, ETP); and 3) A relevant US Circuit Court of Appeals ruling (Earth Island Institute v. Hogarth) holding that '*dolphin-safe*' labels cannot be used on tuna products if, *inter alia*, the tuna was harvested in the ETP by a vessel using purse-seine nets and that no certification, proving that no dolphins were killed or seriously injured during fishing activities, was provided. Essentially, the US measures intended to address the issue that, in the ETP, schools of yellowfin tuna often swim beneath schools of dolphins and when tuna is harvested with purse-seine nets, dolphins may be trapped in the nets and often die, unless they are released.

On 9 March 2009, Mexico requested the establishment of a WTO panel, which was eventually established by the WTO Dispute Settlement Body (hereinafter, DSB) on 20 March

2009 (see *Trade Perspectives*, Issue No. 5 of 13 March 2009) and its Report was circulated on 15 September 2011. In its Report, published on 16 May 2012, the Appellate Body agreed with the Panel (see *Trade Perspectives*, Issue No. 10 of 18 May 2012), finding in favour of Mexico that the US measures constituted technical regulations under the WTO Agreement on Technical Barriers to Trade (hereinafter, TBT Agreement) and that the US '*dolphin-safe*' labelling scheme accorded treatment less favourable to (*i.e.*, discriminated against) Mexico under Article 2.1 of the TBT Agreement. The Appellate Body held that the measure was too focused on purse-seine nets and the ETP region, while not taking into account the risks of other tuna fishing methods and other geographical regions. The Appellate Body also reversed a Panel decision under Article 2.2 of the TBT Agreement, finding instead that the standard under the Agreement on the International Dolphin Conservation Program (AIDCP) did not qualify as a relevant international standard under the TBT Agreement, because the AIDCP was not open to all relevant bodies of all WTO Members.

Since the original Report of the Appellate Body of May 2012, the US has repeatedly tried to bring its measures into compliance. In July 2013, the US published its amended measure, in order to comply with the findings of the Appellate Body. The US maintained that it had followed exactly the approach suggested in the Report. In particular, it adapted the measure and introduced, as a general practice, the certification by the vessel's captain in the case of non-ETP Tuna.

However, shortly thereafter (on 14 November 2013), Mexico requested compliance proceedings under Article 21.5 of the WTO Understanding on Dispute Settlement (hereinafter, DSU), arguing that the new US rule did not bring the system into compliance with the recommendations of the DSB. The Panel Report was circulated on 14 April 2015 and, on 20 November 2015, the Appellate Body circulated its Report under Article 21.5 of the DSU, finding that the US had failed to bring its measures into compliance with its previous recommendations and that the labelling regime for tuna products was still inconsistent with Article 2.1 of the TBT Agreement and Article I:1 and III:4 of the GATT (see *Trade Perspectives*, Issue No. 21 of 20 November 2015). The Appellate Body noted that the compliance Panel had not made a comparative assessment of the different risks to dolphins in different situations, based on the relevant scientific evidence. Still, the Appellate Body found that the US measure continued to violate Article 2.1 of the TBT Agreement, because of concerns that the captains were not qualified for the certification activities, that record-keeping and verification formalities were much less burdensome or strict in the case of non-ETP tuna, and, finally, that there was "*a lack of even-handedness*" in the treatment of certain other situations.

Considering that the US was found non-compliant, in March 2016 Mexico requested that the DSB authorise it to suspend concessions or other obligations amounting to USD 472.3 million per year, but the matter was referred to arbitration under Article 22.6 of the DSU. On 25 April 2017, the WTO DSB published the Report by the appointed arbitrator, deciding on the level of retaliation that Mexico could request for approval *(*see *Trade Perspectives,* Issue No. 9 of 5 May 2017*)*. Mexico has not yet acted on this authorisation. Should the October 2017 findings become definite (in case the Parties do not appeal the Reports or in case the Appellate Body confirms the findings), Mexico's request to suspend concessions would have to be abandoned.

After the 2015 decision on compliance, the US further adapted its labelling scheme: By the interim final rule of 22 March 2016, the US: 1) Introduced a training course for the captains that would be doing certification in non-ETP waters; 2) Amended and clarified certain aspects of the record-keeping and verification requirements in the case of non-ETP tuna; 3) Established a single criterion for the exercise of regulatory discretion in order to defeat the presumption of lower risk to dolphins. Again, the US followed-up on the aspects that the Appellate Body had criticised and address each of the remaining concerns.

Aiming at achieving the verification of compliance with the original findings and considering Mexico's quest for the suspension of concessions, on 11 April 2016, the US itself requested the establishment of a compliance Panel under Article 21.5 of the DSU, as it considered that the *interim* final rule brought the '*dolphin-safe*' labelling measure into compliance with the TBT Agreement and the GATT 1994. On 13 May 2016, Mexico also requested consultations pursuant to Article 21.5 of the DSU, in connection with certain aspects of the *interim* final rule and, on 9 June 2016, it requested the establishment of a second compliance Panel. Mexico considered that the US had still not brought the '*dolphin-safe*' labelling provisions into compliance with the DSB's recommendations and rulings, and that the 2016 measure was inconsistent with Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994, and could not be justified under Article XX of the GATT 1994. The Panels addressed both requests in one Report, published on 26 October 2017.

The Panels defined their task as the assessment of whether the interim final rule was "*calibrated to the differences in the overall risks to dolphins arising from the use of different tuna fishing methods in different areas of the ocean*". In particular, the Panels assessed whether the eligibility criteria, the certification requirements, the tracking and verification requirements, and the determination provisions (*i.e.*, provisions, which allow for additional certification and tracking and verification requirements to be imposed in respect of tuna caught outside the ETP under certain circumstances) were calibrated to the differences in the overall risks to dolphins. The Panels made extensive factual findings on the risks posed to dolphins by different tuna fishing methods in different parts of the ocean, something that the Appellate Body had criticised the first compliance Panel for not doing. On the basis of these factual findings, the Panels concluded that the different elements of the 2016 measure were calibrated to the differences in the overall risk profiles of the respective fishing methods. On this basis, the Panels came to the conclusion that the *interim* final rule, as a whole, was calibrated. Hence, the Panels found that the distinctions made by the *interim* final rule between setting on dolphins with purse-seine nets and other tuna fishing methods, were exclusively due to legitimate regulatory distinctions. Consequently, the Panels found that the measure accords to Mexican tuna products treatment no less favourable than that accorded to like products from the US and other countries, and was therefore consistent with the requirements set forth in Article 2.1 of the TBT Agreement and that justified under Article XX of the GATT 1994.

The first takeaway of this WTO compliance Panel Report concerns the overall efficiency and relevance of the WTO dispute settlement mechanism. The various proceedings with respect to the *US – Tuna II (Mexico)* dispute clearly indicate how the WTO DSB can assist WTO Members to bring other WTO Members' policies into compliance with the relevant WTO rules. The persistence by Mexico in continuing to bring the original measure and its amended versions to WTO DSB scrutiny have over time led the US to adopt a measure that has now been judged to withstand WTO judicial review. The US continuously adapted its system, several times directly following the respective approach suggested by the WTO Appellate Body in its Reports. At the same time, it shows that, even if a WTO Member closely follows the Appellate Body Reports and adapts its legislation accordingly, it may still be considered non-compliant with the findings and be required to further adapt its rules.

Secondly, from a procedural point of view, it is noteworthy that the recent compliance Panels Report takes a clear stance on the issue of *res judicata* (*i.e.*, a matter that has been adjudicated by a competent body and therefore may not be pursued further by the same parties). As in previous instances of this dispute, Mexico had, in its request, made reference to matters already decided or elements, which concerned previously uncontested elements of the original measure. This time, the Report clearly refused to look into those claims. Rather, the Report provides extensive analysis of the different kinds of risks pertaining to different fishing methods and the calibration of the scheme to these differences. This assessment by the Panels shows that, even at this stage of the dispute settlement proceedings, WTO Panels will conduct meticulous fact finding to determine the compliance of a WTO Member's policy with the relevant WTO rules.

Mexico has already indicated that it would appeal the new ruling, adding another layer to this dispute. While Article 21.5 of the DSU does not expressly provide for the possibility to appeal the report of a compliance Panel, WTO practice shows that such an appeal is possible and rather frequent, as was already the case in the first compliance proceedings of this case. Still, it appears unlikely that such appeal could be successful, considering that the Report largely provides for detailed fact finding and assessment by the Panels. The Appellate Body tends to reverse findings of fact only in very obvious cases of a Panel's failure to make an objective assessment. While this longstanding dispute shows how long WTO dispute settlement proceedings can span out, it also demonstrates the strengths of the system. Despite Mexico's intention to appeal this decision, after nearly ten years of WTO dispute settlement proceedings, the dispute over the US's dolphin safe labelling scheme can likely soon be considered to be resolved. Countries and affected stakeholders should carefully analyse this report, as well as the preceding proceedings.

Illegal, unreported and unregulated fishing in South East Asia and the need for concerted and coordinated efforts – Viet Nam receives a '*yellow card*', while Thailand prepares for an EU delegation

On 23 October 2017, the European Commission (hereinafter, Commission) continued its global fight against illegal, unreported and unregulated (hereinafter, IUU) fishing by issuing a warning (*i.e.*, a '*yellow card*') to Viet Nam over the risk of being identified as a non-cooperating country. At the same time, Thailand is preparing for the visit of an EU delegation in November 2017. After having received a '*yellow card*' in April 2015, the EU delegation will now inspect Thailand's new traceability system. These recent developments underline the clear need for a coordinated regional approach to combat IUU fishing within the context of the Association of Southeast Asian Nations (hereinafter, ASEAN). Resolving this issue once and for all across ASEAN would greatly benefit all ASEAN Member States and it would bring a much desired degree of uniform approach by the EU between and among ASEAN Member States.

IUU fishing refers to fishing that: 1) Is illegal (*i.e.* lacks authorisation, violates national laws or international obligations or does not comply with conservation and management measures); 2) Is unreported (*i.e.* it is not properly reported under international, regional or national laws and regulations); and 3) Is unregulated (it is performed by vessels with no national flag or that jeopardise fish stocks). According to the Commission, between 11 and 26 million metric tonnes of fish are caught illegally each year around the world (*i.e.*, about 15% of global catches). The Commission bases its decisions on the EU's IUU Regulation, which entered into force in 2010, and on additional instruments adopted in November 2013 (see *Trade Perspective*, Issue No. 23 of 13 December 2013). The EU is the biggest fish importer in the world and the IUU Regulation is its key instrument in the fight against illegal fishing. It aims at ensuring that only those fishery products certified as legal access the EU market.

The EU's framework to fight IUU fishing requires the flag State of the fishing vessel to certify the origin and legality of fishery products in order to trace the fishery products. If a country is unable to comply, the Commission will first attempt to assist and improve the legal framework of said country via its '*card system*'. The first issuance by the Commission (*i.e.*, the issuance of a '*yellow card*') pre-identifies the country as non-cooperative and opens a six-month formal dialogue to assist the country to improve its system. After a six-month formal dialogue, the Commission evaluates the country's situation and either lifts the pre-identified status (*i.e.*, issues a '*green card*') or formally identifies the country as being non-cooperative (*i.e.*, issues a '*red card*'). A '*red card*' results in the imposition of a ban of all fishery products imported directly or indirectly from the country listed as non-cooperative (see *Trade Perspectives*,

Issue No. 16 of 11 September 2015). In practice, the Commission appears willing to extend the six month time period if efforts are progressing in the right direction. Notably, Thailand had received a '*yellow card*' in April 2015 and, after more than two years, the Commission has not yet elevated the matter and issued a '*red card*'.

In May 2017, a delegation from the Commission's Directorate General for Maritime Affairs and Fisheries visited Viet Nam to inspect its compliance with the EU's IUU fishing framework. Subsequently, the Commission requested Viet Nam to follow five recommendations before 30 September 2017: 1) Strengthening of the relevant institutions; 2) Managing fishing vessels (*i.e.*, maintaining records of vessels authorised to fish and record vessels engaged in IUU fishing); 3) Refining the system of monitoring fishing vessels at sea and ports; 4) Certifying the origin of fisheries materials; and 5) Preventing and ending illegal fishing in overseas waters (*e.g.*, in Indonesian waters). On 23 October 2017, the Commission issued a press release following the issuance of a '*yellow card*' to Viet Nam and stated that its decision highlights that Viet Nam was not doing enough to fight illegal fishing. The Commission had identified a number of shortcomings, such as a lack of an effective sanctioning system to discourage IUU fishing activities, a lack of action to address illegal fishing activities conducted by Vietnamese vessels in waters of neighbouring countries, and a poor system to control landings of fish that is processed locally before it is exported to international markets. The Commissioner for the Environment, Maritime Affairs and Fisheries, Karmenu Vella, stated that the decision to issue a '*yellow card*' to Viet Nam demonstrated the EU's firm commitment to continue fighting illegal fishing globally. He also expressed that illegal fishing activities by Vietnamese vessels were causing an impact on the marine ecosystem in the Pacific and, therefore, invited the Vietnamese authorities to take measures. The Commission proposed an action plan to Viet Nam to support the country in addressing the identified shortcomings.

In response to the '*yellow card*', the Viet Nam Association of Seafood Exporters and Producers (hereinafter, VASEP) proposed urgent measures to avoid the subsequent issuance of a '*red card*'. The VASEP and the Ministry of Agriculture and Rural Development (hereinafter, MARD) of Viet Nam submitted a document to the National Assembly asking it to re-examine the draft revised Law on Fisheries, and to make amendments, if necessary, before approval in order to ensure that the recommendations of the EU and other experts were considered. The VASEP also proposed the establishment of an IUU fishing working team chaired by a MARD official and involving representatives of various ministries and associations. Moreover, VASEP proposed that a Vietnamese delegation, led by Minister Nguyen Xuan Cuong, work with EU representatives in Brussels on IUU fishing issues during November 2017. Finally, VASEP suggested the organisation of a conference on "*IUU fishing, the 'yellow card' and the establishment of a six-month plan*", inviting representatives of the Vietnamese Government and the relevant business sectors. At this stage, the Commission's decision does not imply the adoption of any measure negatively affecting trade vis-à-vis Viet Nam. Viet Nam can now take measures to rectify the situation within a '*reasonable timeframe*'. In April 2018, the EU is scheduled to re-evaluate Viet Nam's efforts and improvements on compliance with the EU's IUU fishing framework. In case of an improved situation, Viet Nam would be granted another six-months by virtue of the '*yellow card*' status. An EU delegation would then again visit Viet Nam and conduct another evaluation. If improvements on compliance with the EU's IUU fishing framework were to have continued, Viet Nam could then be granted a '*green card*'. In case the situation had not improved, it could mean the issuance of a '*red card*', which means that Viet Nam fishery products would be banned from the EU market.

In parallel, Thailand is preparing to welcome an EU delegation during the month of November 2017. For the first time, the EU delegation will inspect Thailand's new traceability

system on fishery products. In 2015, Thailand had received a '*yellow card*' from the Commission due to its inadequate legal framework on fisheries and poor monitoring, traceability and control systems. Thailand has taken numerous steps in its commitment to fight IUU fishing and to comply with EU recommendations. In 2015, Thailand's Department of Fisheries introduced the new Fisheries Act, which seeks to ensure the sustainability of marine resources and that all fishing activities in Thailand meet global standards. Furthermore, in May 2016, the Thai Command Centre for Combating Illegal Fishing established three working committees to, *inter alia*, address the general public's complaints regarding local fishing, commercial fishing and legal implications. However, after two years and several audits by the EU, Thailand has reportedly not yet been able to provide an effective traceability system. The traceability system is a key aspect and a big concern for the EU because the majority of fishery products from Thailand do not contain information identifying which fishing vessel or which equipment were used. The complexity of Thailand's marine ecological systems and the variety of fishing equipment used have so far prevented the traceability system to achieve complete accuracy. Thailand's Department of Fisheries stated that the Government was making progress in ensuring compliance with the EU's IUU fishing framework. In the past two years, local authorities in Thailand have been trying to achieve that commercial ports, fishing vessels and processing plants provide detailed information of their catches and operations by registering with an online database. After this month's inspection of the progress of Thailand's traceability system, the Commission will decide by March 2018 whether or not Thailand has achieved sufficient progress. Should that not be the case, Thailand risks receiving a '*red card*'.

Thailand and Viet Nam are Members of ASEAN and all ten ASEAN Member States (*i.e.*, Lao PDR, Malaysia, Indonesia, Viet Nam, Thailand, Cambodia, Philippines, Singapore, Myanmar and Brunei) are estimated to account for one fifth of global marine fish production. Six of the ten ASEAN Member States are among the world's top fifteen fish producers. Indonesia is the second largest producer of fishery products in the world, followed by Viet Nam in eighth place, and Myanmar in ninth place. Regarding exports, Viet Nam is the fourth biggest exporter in the world, followed by Thailand in sixth place and Indonesia in tenth place. Over the past fifteen years, ASEAN fish production has more than doubled and is four times stronger than poultry and twenty times bigger than cattle production. Additionally, the ASEAN region has transitioned from small-scale capture fisheries, sold locally or at the regional level, to a mix of small-scale and large-scale export-oriented fishery industry. Fish production in the ASEAN region will continue to grow and is likely to amount to a quarter of the global fish production by 2030. Thereby, ASEAN is at the forefront of the global efforts to meet the expanding demand for seafood. However, as shown above, ASEAN Member States and ASEAN as a whole, continue to face a number of challenges. The neighbouring territorial waters and fishing grounds in the ASEAN region too often appear to allow fishing vessels from one country to fish illegally in the territorial waters of another country. Illegal cross-border fishing is an important maritime security issue and something that must and can only be tackled regionally. A more cooperative approach is necessary and ASEAN Member States should intensify the work on a common system to address IUU fishing. Bilaterally, this is already happening, but in piecemeal fashion. For instance, in August 2017, the Philippines and Malaysia agreed on a partnership programme to address cross-border issues, including increased intelligence cooperation to address cross-border criminal activities, such as the unauthorised activities of non-Malaysian fishermen in Malaysian waters. Such cooperation should be elevated to the regional ASEAN level.

ASEAN has been taking some initial steps to increase its contribution to the fight on IUU fishing. This includes its cooperation with the intergovernmental Southeast Asian Fisheries Development Center (SEAFDEC) on a series of measures, to be applied by all ASEAN Member States spelled out in the *Joint ASEAN-SEAFDEC Declaration on Regional*

Cooperation for IUU Fishing and Enhancing the Competitiveness of ASEAN Fish and Fishery Products of August 2016. The joint declaration recognises the relevance of addressing IUU fishing in the region and that regional cooperation is needed. Furthermore, it aims at increasing ASEAN's fish and seafood product competitiveness in compliance with international standards and regulations to ensure sustainable food security of the region. The declaration addresses a certain number of important areas of cooperation, such as: 1) Monitoring, control and surveillance programmes; 2) Traceability of fish and fishery products from capture fisheries through the implementation of the "*ASEAN Guidelines for Preventing the Entry of Fish and Fishery Products from IUU Fishing Activities into the Supply Chain*," and the "*ASEAN Catch Documentation Scheme for Marine Capture Fisheries*", 3) The promotion of the implementation of port State measures through enhanced inter-agencies and regional cooperation to prevent the landing of fish and fishery products from IUU fishing activities from all foreign fishing vessels; and 4) Collective efforts in developing preventive and supportive measures to strengthen the rehabilitation of resources and the recovery of fish stocks to mitigate the impacts of IUU fishing.

Working towards a regional IUU fishing policy and better cooperation among ASEAN Member States would significantly benefit all ASEAN Member States and their trade with the EU and other trading partners. It would also contribute to greater sustainability of the ASEAN fishery industry, reducing anticompetitive actions and minimising market access obstacles. The warning issued by the Commission to Viet Nam and the proposed action plan can be seen as an opportunity for Viet Nam to improve its fishery policies and put in place an action plan to improve traceability of its fishery products. Thailand now has the chance to show its improvements to the EU delegation. These recent developments underline once again the strong need for a concerted regional effort to combat IUU fishing in the interconnected waters of the ASEAN Member States. ASEAN Member States should act together instead of risking considerable effects on trade should any '*red card*' be issued by the EU.

Defining '*vegan*' and '*vegetarian*' food in the EU and '*consumer preference claims*' at the international level

On 24 October 2017, the European Commission (hereinafter, Commission) announced that, in 2019, it will begin the drafting process for an implementing act to *Regulation (EU) No. 1169/2011 on the provision of food information to consumers* (hereinafter, FIR), establishing legal definitions of the terms '*vegetarian*' and '*vegan*' food. The Commission made the announcement in its Regulatory Fitness and Performance Programme (hereinafter, REFIT) Scoreboard Summary, published as part of the ongoing REFIT programme, which aims at making EU regulation and policy-making more efficient and cost-effective, while providing an opportunity for stakeholders to submit suggestions.

The number of vegans, vegetarians and people turning to more plant-based lifestyles is steadily increasing. Food producers, food trading companies and caterers have responded by bringing an increasing amount of vegetarian and vegan products on the market. Currently, there are no legal definitions of '*vegan*' and '*vegetarian*' food in EU law. Why are such definitions needed, when one can always look carefully at the ingredients list of the products? Because reading the list of ingredients can be an arduous and confusing task, there is not always clear information about the (plant or animal) origin of each item, and there are ingredients that may not appear on the list. Given the growing offer and the lack of clear regulation, many manufacturers have created their own logos and labels to indicate that their products are vegan or vegetarian. It is unclear, however, what precisely the terms '*vegan*' and '*vegetarian*' stand for. In addition, calls have been made to restrict the naming and marketing of plant-based meat substitutes (see *Trade Perspectives*, Issue No. 2 of 27 January 2017). This has led to confusion on the part of producers and traders, as well as on the part of consumers.

The absence of legally binding definitions of the terms '*vegan*' and '*vegetarian*' food had already been identified as a problem by the EU legislator. Looking at the legislative history of the FIR, the *European Parliament Legislative Resolution of 16 June 2010, on the proposal for a Regulation on the provision of food information to consumers,* included definitions of the terms '*vegan*' and '*vegetarian*'. It stated that the term '*vegetarian*' must not be applied to "*foods that are, or are made from or with the aid of, products derived from animals that have died, have been slaughtered, or animals that die as a result of being eaten*". Furthermore, the term '*vegan*' must not be applied to "*foods that are, or are made from or with the aid of, animals or animal products, including products from living animals*". However, in finalising the FIR, no agreement on those definitions was ever reached. It is noteworthy that Article 36(3)(b) of the FIR expressly gives the Commission the power to adopt an implementing act on how to provide information on the suitability of foods to vegetarians or vegans (which is typically given on a voluntary basis), so as to ensure that this information is not misleading, ambiguous or confusing for the consumer. The FIR does not provide for a date by which the Commission must adopt such implementing act and the Commission has not yet done so. In response to the inaction by the Commission, there have been efforts at the EU Member States' level. In Germany, the Consumer Protection Ministers of the 16 German Federal States adopted in 2016 a decision on binding definitions of the terms '*vegan*' and '*vegetarian*' (see *Trade Perspectives*, Issue No. 13 of 1 July 2016).

The European Vegetarian Union (hereinafter, EVU), an association of 39 national vegetarian and vegan organisations from 25 European countries, which represents approximately 30 million vegetarians and vegans all over Europe, is the organisation backing the '*V-Label*', a voluntary certified labelling scheme, categorising products as '*vegan*' and '*vegetarian*'. The label consists of a '*V*' sign in a circle with an additional category description. The EVU has been working with FoodDrinkEurope (FDE), the association that represents the interests of European food and drink manufacturers, on draft definitions of the terms '*vegan*' and '*vegetarian*' for further discussion at the EU level. On 7 June 2017, the EVU submitted an opinion to the Commission's REFIT platform. The definitions referred to in that opinion are the ones established in Germany, which according to the EVU fully implement the requirements of the FIR.

According to this definition, '*vegan*' foods may not be of animal origin and: 1) no ingredients (including additives, carriers, flavourings and enzymes), or 2) no processing aids or 3) no substances of animal origin, which are not food additives (but are used in the same way and with the same purpose as processing aids), may be used or added, in either processed or unprocessed form, at any stage of their production and processing. '*Vegetarian*' foods must meet the requirements for vegan foods with the difference that, in their production, the following may be added or used: milk, colostrum, eggs, honey, beeswax, propolis (*i.e.*, a resinous mixture that honey bees collect from tree buds, or other botanical sources) and wool grease (including lanolin derived from the wool of living sheep) or their components or derivatives. The labelling as '*vegan*' or '*vegetarian*' does not preclude unintended labelling of products that do not comply with the relevant requirements of vegan or vegetarian food, if and to the extent that this is technically unavoidable at all stages of production, processing and distribution, in spite of appropriate arrangements under good manufacturing practices.

The definitions put forward by the EVU (and established in Germany) not only include the substances contained in the final product, but also those used at all production steps. In particular, the concept of '*food*' of *Regulation (EC) No. 178/2002 laying down the general principles and requirements of food law*, the concept of '*ingredient*' of Article 2(2)(f) of the FIR as well as the definitions of processing aids according to Article 3(2)(b) of *Regulation (EC) No. 1333/2008 on food additives* and so-called '*quasi-processing aids*' according to Article 20(1)(d) of the FIR (which do not need to be listed in the ingredient list) appear to have been integrated. Substances used in the production of foodstuffs, which must not be specified on the ingredient list, including, *inter alia*, processing aids such as animal gelatine, which may be used to clarify fruit juices like apple juice or wine, are relevant for categorising a food as

vegetarian. Another example is that of enzymes of animal origin, which are used as a flour treatment agent. Therefore, as the use of processing aids cannot always be analytically detected in final products, monitoring depends on appropriate supporting documents.

Arguably, the definitions adopted in Germany and put forward by the EVU leave some margin of interpretation. As plants before harvesting do not fall under the definition of food, agricultural production methods would, therefore, fall outside of the scope of the definition of '*vegan*' foods. The question arises as to whether, for example, animal fertilisers should be regarded in a broader sense as processing aids, because they are '*used*' in the production process. If so, animal fertilised crops would not be '*vegan*' according to this definition. Considering the growing proportion of vegans, vegetarians and flexitarians (*i.e.*, persons that have a primarily vegetarian diet, but occasionally eat meat or fish) in the population, and the increasing market relevance of vegan and vegetarian products, a legally binding definition for the terms '*vegan*' and '*vegetarian*' appears essential for purposes of guaranteeing informed choices by consumers. The food industry has developed a range of products, which are offered as vegan, vegetarian or under similar terms, such as '*plant-based*' or '*animal products-free*'. Differences in the interpretations on the conditions for the use of such product descriptions may impede the free movement of these products within the Internal Market and result in a situation in which the same high level of information is not guaranteed in all EU Member States. It appears that, in order to provide clarity and to avoid confusion among consumers, conditions for the use of the designations '*vegan*' and '*vegetarian*' of products are indeed needed.

When looking at the issue of defining terms like '*vegan*' and '*vegetarian*', it is interesting to look at the international context. At the *Codex Alimentarius* level, between 1997-2000, proposals were presented for definitions of '*vegan*', '*ovo-lacto vegetarian*' and '*lacto vegetarian*', for possible inclusion in either the *General Codex Standard for the Labelling of Prepackaged Foods* (CODEX STAN 1-1985), or, as conditional claims, in the *General Codex Guidelines on Claims* (CAC/GL 1-1979). In 2000, the Codex Committee on Food Labelling (hereinafter, CCFL) agreed to discontinue work on *Proposed Draft Guidelines for the Use of the Term 'vegetarian'* as the differences in the definition and understanding of the term from country to country were too wide to allow for the development of guidelines at the international level, and it was not possible to establish a common definition. Therefore, the matter is increasingly addressed at the national level. For example, according to the *Food Safety and Standards Authority of India (FSS) Packaging and Labelling Regulation 2011*, pre-packaged food must carry a mandatory declaration on whether the food is vegetarian or not (non-vegetarian food is defined as "*an article of food which contains whole or part of any animal including birds, fresh water or marine animals or eggs or products of any animal origin, but excluding milk or milk products, as an ingredient*"). Vegetarian food must bear a symbol consisting of green colour-filled circle inside a square with a green outline prominently displayed on the package. For non-vegetarian food, the symbol is brown.

There are also recent international developments on a related issue. At the 44th Session of the CCFL in Asunción, Paraguay, on 16 to 20 October 2017, delegates discussed a discussion paper on so-called '*consumer preference claims*' (document number CX/FL 17/44/8): "*Consumer preference means that the consumer likes one kind of product or production method over others which are available in the market due to one or more certain characteristic(s) presented in a way to make it preferable to consumers. Food package information and marketing approaches have extensive effects on consumer beliefs, preferences, and choices. Such food consumer preference claims most of the time involve higher cost compared to competitive products*". The discussion paper went on to state that, in addition to mandatory information, food business operators use a number of marketing terms and claims, listed in the document, such as '*natural*', '*pure*', '*no preservatives added*', '*vegan*', and '*vegetarian*'. Some of these claims relate to national practices, and the perception of such terms by consumers who live in the respective country is shaped by, *inter alia*, socio-economic, environmental and other legitimate factors. The discussion paper aims at amending the current *Codex General Guidelines on Claims* with the objective to: 1)

Develop a definition of consumer preference (including the issue of type of ingredients used, production methods used, extraneous values of the foods, etc.); 2) Restrict any consumer preference claim to "*positive unequivocal objective evidences*" (involving accredited conformity assessment activities and reports of validated tests methods); and 3) Recall the basic principles already included in the *Codex Guidelines on Claims* and the *Codex General Standard on Labelling of Prepackaged Foods*, that any consumer preference claim "*should not be described or presented in a manner that is false, misleading or deceptive or likely to create erroneous impression regarding its character in any respect and should be justifiable*".

International standardisation of more general '*consumer preference claims*' could provide a framework and guidance to national authorities to address the plethora of certain claims appearing on food labels around the world. Without being specifically defined, such claims refer to certain properties, benefits, ethical, environmental or personal beliefs, which are claimed to be respected by such foods. A similar framework could address trends such as animal welfare labelling, environmental impacts or footprints (*e.g.*, water used or carbon dioxide emissions per kilogram of produced foods), and '*negative*' claims that deceptively promote certain products by implying that whatever is used as an ingredient is better, healthier or environmentally greener than what is not used, such as '*palm oil-free*' claims (see *Trade Perspectives*, Issue No. 4 of 15 January 2015). It may also be a new attempt for *Codex* to address the issue of religious-belief based food labelling (*e.g.*, halal, kosher, etc.) and may revive the issue of the labelling of food ingredients obtained from, or with the help of, genetically modified plants or animals and cloned organisms.

Stakeholders in the food sector are advised to carefully monitor developments on the definition of '*vegan*' and '*vegetarian*' food, particularly the forthcoming Commission implementing act of the FIR, and to take action to ensure that their legitimate interests are voiced and represented within all relevant *fora*, within the EU, the *Codex*, the WTO TBT Committee, and in all other instances where opportunities are given to comment, also on future *Codex* work on consumer preference claims.

Recently Adopted EU Legislation

Market Access

- *Commission Implementing Regulation (EU) 2017/2058 of 10 November 2017 amending Implementing Regulation (EU) 2016/6 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*

Trade Remedies

- *Commission Implementing Regulation (EU) 2017/2093 of 15 November 2017 terminating the investigation concerning possible circumvention of the anti-dumping measures imposed by Council Implementing Regulation (EU) No 1331/2011 on imports of certain seamless pipes and tubes of stainless steel originating in the People's Republic of China by imports consigned from India, whether declared as originating in India or not, and terminating the registration of such imports imposed by Commission Implementing Regulation (EU) 2017/272*

- *Commission Implementing Regulation (EU) 2017/1997 of 7 November 2017 amending Implementing Regulations (EU) 2016/184 and (EU) 2016/185 extending the definitive countervailing and anti-dumping duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China to imports of*

crystalline silicon photovoltaic modules and key components (i.e. cells) consigned from Malaysia and Taiwan, whether declared as originating in Malaysia and in Taiwan or not

- *Commission Implementing Regulation (EU) 2017/1993 of 6 November 2017 imposing a definitive anti-dumping duty on imports of certain open mesh fabrics of glass fibres originating in the People's Republic of China as extended to imports of certain open mesh fabrics of glass fibres consigned from India, Indonesia, Malaysia, Taiwan and Thailand, whether declared as originating in these countries or not, following an expiry review pursuant to Article 11(2) of the Regulation (EU) 2016/1036 of the European Parliament and of the Council*

- *Commission Implementing Regulation (EU) 2017/1994 of 6 November 2017 initiating a review of Implementing Regulations (EU) 2016/184 and (EU) 2016/185 extending the definitive countervailing and anti-dumping duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China to imports of crystalline silicon photovoltaic modules and key components (i.e. cells) consigned from Malaysia and Taiwan, whether declared as originating in Malaysia and in Taiwan or not) for the purposes of determining the possibility of granting an exemption from those measures to one Malaysian exporting producer, repealing the anti-dumping duty with regard to imports from that exporting producer and making imports from that exporting producer subject to registration*

Food and Agriculture Law

- *Commission Implementing Regulation (EU) 2017/2091 of 14 November 2017 concerning the non-renewal of approval of the active substance iprodione, in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market, and amending Commission Implementing Regulation (EU) No 540/2011*

- *Commission Implementing Regulation (EU) 2017/2090 of 14 November 2017 concerning the approval of beer as a basic substance in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market, and amending the Annex to Commission Implementing Regulation (EU) No 540/2011*

- *Commission Implementing Regulation (EU) 2017/2069 of 13 November 2017 amending Implementing Regulation (EU) No 540/2011 as regards the extension of the approval periods of the active substances flonicamid (IKI-220), metalaxyl, penoxsulam and proquinazid*

- *Commission Implementing Regulation (EU) 2017/2068 of 13 November 2017 concerning the non-approval of potassium sorbate as a basic substance in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market*

- *Commission Implementing Regulation (EU) 2017/2067 of 13 November 2017 concerning the non-approval of paprika extract (capsanthin, capsorubin E 160 c) as a basic substance in accordance with Regulation (EC) No 1107/2009 of*

the European Parliament and of the Council concerning the placing of plant protection products on the market

- *Commission Implementing Regulation (EU) 2017/2066 of 13 November 2017 concerning the approval of mustard seeds powder as a basic substance in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market, and amending the Annex to Commission Implementing Regulation (EU) No 540/2011*

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