

Parmesan cheese and Parma ham on the menu of EU-Canada trade talks?

The latest round of negotiations for a Comprehensive Economic and Trade Agreement (hereinafter, CETA) which were launched at the Canada-EU Summit on 6 May 2009 in Prague, Czech Republic, took place in mid July in Brussels. Issues relating to intellectual property rights, *inter alia*, geographical indications for foodstuffs and the protection for industrial designs covering the European fashion industry appear to be priorities for the EU negotiators, while the Canadian government faces opposition to the demands relating to IP rights from the domestic industry.

After agreeing to work together to 'define the scope of a deepened economic agreement and to establish the critical points for its successful conclusion', a Joint Canada-EU Scoping Group was established in 2009 which engaged in substantive discussions on the subjects relevant to any future deepened economic agreement. In relation to 'Intellectual Property, including Geographical Indications', the Scoping Group recognised that the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter, TRIPS) sets only minimum levels of protection for intellectual property rights, which should be substantially improved in any EU-Canada agreement on all categories of IP rights where a need for increased protection and/or enforcement is identified. Furthermore, any agreement should establish and/or maintain very high standards of protection and enforcement of IP rights. The Scoping Group was further of the opinion that intellectual property provisions in any future agreement should cover, *inter alia*, broad protection of geographical indications.

A product's quality, reputation or other characteristics can be determined by where it comes from. Geographical indications are place names (in some countries also words associated with a place) used to identify products that come from these places and have these characteristics (for example, 'Champagne' or 'Roquefort'). Protection required under the TRIPS Agreement is defined in two provisions. Article 22 defines a standard level of protection for all products, stating that geographical indications have to be protected in order to avoid misleading the public and to prevent unfair competition. Article 23 provides a higher or enhanced level of protection for geographical indications for wines and spirits. Subject to a number of exceptions, they have to be protected even if misuse would not cause the public to be misled.

However, a number of WTO Members, including the EU, do not consider the protection of geographical indications under the TRIPS Agreement as sufficient. Under the Doha mandate, two contentious issues are debated, both related to the higher level of protection: creating a multilateral register for wines and spirits; and extending the higher level of protection already applying to wines and spirits to other foodstuffs.

Further to the Doha negotiations, the EU is trying to enhance the protection of geographical indications in bilateral free trade agreements, such as in the recent EU-Korea FTA, signed on 15 October 2009, and now in the CETA negotiations with Canada. In relation to trade in wine and spirit drinks, the EU and Canada already concluded on 16 September 2003 an agreement in which was agreed to end the 'generic' classification in Canada of 21 European wine names in three phases, the last by 31 December 2013 for Chablis, Champagne, Port/Porto and Sherry.

Three EU schemes known as PDO (protected designation of origin), PGI (protected geographical indication) and TSG (traditional speciality guaranteed) promote and protect names of quality

agricultural products and foodstuffs. PDO covers agricultural products and foodstuffs which are produced, processed and prepared in a given geographical area using recognised know-how. PGI covers agricultural products and foodstuffs closely linked to the geographical area. TSG highlights traditional character, either in the composition or means of production.

Protection of geographical indications under EU law collides with the fact that for many consumers the specific term protected under the various schemes has ceased to be associated with a particular geographic region and is instead viewed as a generic term for a particular type of product, or in the case of Parma ham in Canada, even has protection as a trademark.

In addition to the CETA negotiations, Canada and the EU seem to further disagree on intellectual property rights in the negotiations of the Anti-Counterfeiting Trade Agreement (ACTA). ACTA is a proposed plurilateral agreement (currently negotiated by Australia, Canada, the EU, Japan, Mexico, Morocco, New Zealand, the Republic of Korea, Singapore, Switzerland and the US) for establishing international standards on intellectual property rights enforcement (see Trade Perspectives, Issue No. 9 of 7 May 2010). ACTA would establish a new international legal framework that countries can join on a voluntary basis and would create its own governing body outside existing international institutions such as the WTO, the World Intellectual Property Organization (WIPO) or the United Nations. The negotiating parties appear to basically agree on a single enforcement mechanism between them which would improve their success in combating illegal trade; however they seem to disagree on what specific intellectual property rights should be covered by ACTA. While it appears that most of the negotiating parties, including Canada, only want to protect copyright and trademarks, the EU would like to establish stricter enforcement measures (including criminal and civil penalties) to protect designs and geographical indications.

According to EU figures, Canada is currently the EU's 11th most important trading partner, accounting for 1.7% of the EU's total external trade. The EU is Canada's second most important trading partner, after the US, with a 10% share of its total external trade. The value of bilateral trade in goods rose to EUR 49.9 billion in 2008. It appears that the EU and Canadian negotiators will have to 'munch' on cheese and ham to find solutions to the various IP issues on the table. The next round of CETA negotiations is scheduled in Ottawa next October.

Ukraine requests WTO consultations against Armenia's measures affecting the importation and internal sale of cigarettes and alcoholic beverages

On 20 July 2010, Ukraine requested WTO consultations with Armenia concerning the latter's tax regime imposed on imported cigarettes and alcoholic beverages. Ukraine's request for consultations targets the measures included in the Armenian 'Law on presumptive tax for tobacco products' and the 'Law on excise tax'. The former piece of legislation imposes a flat tax on imported tobacco products. In particular, as of 24 March 2000, the tax is allegedly fixed at 6,500 Armenian drams (hereinafter, AMD) per 1,000 imported cigarettes, whereas for domestic cigarettes, the rate is set at 4,750 AMD. Ukraine also argues that, pursuant to the measures at stake, Armenia appears to collect customs duties on imported cigarettes of up to 24%, even though the bound duty rate is of 15%. In addition, according to Ukraine the 'Law on excise tax' of 7 July 2000 applies an excise tax on imported alcoholic beverages at rates which are substantially higher than those applied to domestic like or directly competitive or substitutable products.

Ukraine challenged such measures on the basis of Article II:1 and paragraphs 1, 2 and 4 of Article III of the GATT, the provision 1.2 of the Protocol on the Accession of the Republic of Armenia to the WTO (hereinafter, Armenia's Accession Protocol) and paragraphs 53, 70 and 72 of the Report of the Working Party on the Accession of the Republic of Armenia to the WTO (hereinafter, Working Party Report).

According to its request for consultations, Ukraine claims, *inter alia*, that, through the imposition of higher tax rates on imported cigarettes and alcoholic beverages, as compared to those applying to

domestic products, Armenia is violating its WTO national treatment obligations, as provided in Article III of the GATT. Article III:1 of the GATT contains the general principle that internal taxation (Article III:2) and regulation (Article III:4) cannot be applied to imported or domestic products so as to afford protection to domestic products.

In particular, Article III:2 provides that products from the territory of one WTO Member imported into the territory of another WTO Member cannot be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products (Article III:2 of the GATT, first sentence). To support its claim under this provision, Ukraine must show that the taxed imported and domestic distilled spirits are 'like products'. Previous WTO case law indicates that the likeness of the products will be determined by a number of factors such as the product's end-uses in a given market, the tariff classification of the product, consumers' tastes and habits and the product's properties, nature and quality. Ukraine also needs to argue that the taxes applied on the imported products are 'in excess of' those applied by Armenia to the domestic variant. In *Japan – Alcoholic beverages*, the Appellate Body established that even the smallest amount of excess of internal taxes or charges is against the WTO rules. The second sentence of Article III:2 of the GATT provides that dissimilar taxation imposed on directly competitive or substitutable imports (a category that is broader than 'like products') cannot be applied in a way that affords protection to domestic production. This claim requires an analysis of (i) whether the imported and domestic distilled spirits are 'directly competitive or substitutable products' which are in competition with each other; (ii) whether such products are 'not similarly taxed'; and (iii) whether the dissimilar taxation of such products is applied 'as to afford protection to domestic production'.

Ukraine further alleges that Armenia is acting in violation of the terms and conditions of its accession to the WTO. *Inter alia*, Ukraine argues that Armenia is violating paragraph 70 of the Working Party Report, according to which Armenia committed to enact legislation to equalise the level of excise tax applied to all distilled beverages (*inter alia*, vodka, cognac, liquor) and to other alcoholic beverages (*inter alia*, champagne, sparkling wines, wines) before its accession to the WTO. Armenia acceded to the WTO on 5 February 2003.

According to its request for consultations, Ukraine has tried to resolve the matter through bilateral contacts, but no mutually satisfactory solution was reached between the two parties. It is the first time since its accession on 16 May 2008 that Ukraine initiates a WTO dispute. Armenia has 10 days to respond to Ukraine's request. Should Armenia not respond within the mentioned time frame, Ukraine will be entitled to request the establishment of a WTO panel.

Producers and traders of alcoholic beverages and/or cigarettes with an interest in the Armenian or in other markets, where similar trade policies are being enforced and result in alleged discrimination *vis-à-vis* imported products, should closely monitor the development of the case and its aftermath. Similar measures affecting taxation of imported alcoholic beverages imposed by the Philippines are currently being assessed by a WTO panel (*i.e.*, *Philippines – Taxes on distilled spirits*) pursuant to two complaints brought by the EU and the US.

The panel report on the apple dispute between Australia and New Zealand will be released soon

Reports say that the WTO panel's deliberation on the '*Australia - Measures Affecting the Importation of Apples from New Zealand*' dispute is soon to be made public. The same sources suggest that the panel's report rejects the Australian ban as incompatible with the country's obligations under the WTO Agreement on Sanitary and Phytosanitary Measures (hereinafter, the SPS Agreement).

Since the discovery of a number of diseases affecting apples in New Zealand in 1921, Australia has been impeding the access of apples originating from there to its market. From 1986 onwards,

New Zealand has been actively arguing that there is no scientific evidence to support the Australian measures, as it is not proven that the diseases can be transmitted through traded apples. New Zealand's latest request for free access to the Australian market was made in November 2006, but once more proved to be unsuccessful, as the import risk analysis that was conducted by the Australian risk assessment body (*i.e.*, Biosecurity Australia) and was subsequently endorsed by the risk management body (*i.e.*, the Australian Director of Animal and Plant Quarantine) suggested that the importation of apples from New Zealand should only be allowed upon the fulfilment of a number of stringent phytosanitary conditions (*inter alia*, inspection of all host trees in export orchards after leaf fall in order to ensure freedom from the European canker disease and use of disinfection treatments in the packing houses) in order for the accompanying risks to be reduced to the minimum possible extent. Following the continuation of the impediments in its apple trade with Australia due to the imposition of such strict phytosanitary conditions, New Zealand decided to take the matter to the WTO, arguing the inconsistency of the phytosanitary conditions specified in the Australian import risk analysis with various provisions of the SPS Agreement. Consultations between the parties were held on 4 October 2007 and a panel was established on 21 January 2008.

In the context of the dispute, the panel has to adjudicate on several case-specific points, *i.e.*, on whether Australia's measures are based on a proper scientific risk assessment; on the appropriateness of the scientific evidence that Australia has chosen to estimate in the assessment of the risk; on whether the adoption of the contested measures demonstrates consistency in Australia's policies; on the existence of any less trade-restrictive measures that can lead to the same level of protection sought by Australia; and, finally, on whether Australia considerably delayed to provide its import risk analysis. Furthermore, a reading of the parties' submissions to the dispute indicates that the panel will also have to clarify what falls under the definition of SPS measures and what is the exact relationship of Articles 2.2 and 5.1 of the SPS Agreement, *i.e.*, whether the two Articles establish separate legal obligations, or compliance with Article 5.1 SPS indicates compliance with Article 2.2 SPS, too. In particular, pursuant to Article 2.2 SPS, WTO Members are to ensure that SPS measures are applied only to the extent necessary to protect human, animal or plant life or health and are based on science. On the other hand, Article 5.1 SPS requires WTO Members to ensure that their adopted SPS measures are based on a risk assessment, which takes into account risk assessment techniques developed by the relevant international organisations.

The leaked information, suggesting that the panel report will reject the WTO-compatibility of the Australian measures, has caused the reaction of Australian domestic producers, who have indicated that they will oppose such a ruling, insisting on the superior quality of their products and continuing to project fears that allowing imports for Australia would open the path for the transmission of diseases to their cultivations, too. Several sources find that the domestic pressure will inevitably lead to an appeal against, at least, some of the panel's conclusions.

In addition, the decision of Australia on 30 June 2010, after conducting an import risk analysis, to allow imports of apples from China in its market aggravates the situation even more, as it indicates that the domestic Australian industry will sustain greater pressure. It is expected that Australian domestic producers will face increasing incoming competition in the near future both from New Zealand and China (indicatively, allowing the importation of apples from China is expected to create losses of almost 30 million Australian dollars to domestic producers). To counter this development, Australian domestic producers may well concentrate their efforts on accentuating the superior quality of their products; *inter alia*, with the help of the national regulatory environment, *e.g.*, through the institution of appropriate, WTO-compatible labelling schemes.

Recently Adopted EU Legislation

- *Commission Regulation (EU) No. 680/2010 of 29 July 2010 amending Regulation (EC) No. 1580/2007 as regards the trigger levels for additional duties on apples*

- *Commission Regulation (EU) No. 675/2010 of 28 July 2010 entering a name in the register of traditional specialities guaranteed (Traditionally Farmed Gloucestershire Old Spots Pork (TSG))*
- *Commission Regulation (EU) No. 634/2010 of 19 July 2010 entering a name in the register of protected designations of origin and protected geographical indications (Ricotta di Bufala Campana (PDO))*
- *Commission Regulation (EU) No. 635/2010 of 19 July 2010 opening the procedure for the allocation of export licences for cheese to be exported to the United States of America in 2011 under certain GATT quotas*
- *Commission Regulation (EU) No. 638/2010 of 19 July 2010 on the issue of import licences for applications submitted in the first seven days of July 2010 under the tariff quota for high-quality beef administered by Regulation (EC) No. 620/2009*
- *Regulation (EU) No. 640/2010 of the European Parliament and of the Council of 7 July 2010 establishing a catch documentation programme for bluefin tuna *Thunnus thynnus* and amending Council Regulation (EC) No. 1984/2003*
- *Council Regulation (EU) No. 621/2010 of 3 June 2010 concerning the allocation of the fishing opportunities under the Fisheries Partnership Agreement between the European Union and Solomon Islands*

Dear readers, please note that Trade Perspectives will take an editorial break during the month of August and will be published again as of 10 September 2010.

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