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The EU Council has authorised EU-wide investment protection negotiations with Canada, India and Singapore

On 12 September 2011, the EU Council authorised the EU Commission to begin negotiations for EU-wide investment protection chapters as part of the EU's ongoing FTA negotiations with Canada, India and Singapore. The text of the three identical negotiating mandates approved by the EU Council contains general language designed to protect investor rights and reflect the provisions of the existing bilateral investment treaties (hereinafter, BITs) already signed by EU Member States with third countries.

The recent authorisation by the EU Council emerges in the wider context of the changes to the EU's investment regime caused by the entry into force of the Treaty of Lisbon on 1 December 2009, which amended the EU's two most important treaties. Article 207 of the Treaty on the Functioning of the EU (hereinafter, the TFEU) now explicitly establishes foreign direct investment as an exclusive EU competence. One challenge associated with this reform has been how to grandfather the approximately 1,200 BITs signed by EU Member States with third countries, now rendered technically illegal since the assumption by the EU of exclusive competency (for more background on this issue, see Trade Perspectives, Issues No. 14 of 16 July 2010 and No. 10 of 20 May 2011). A second challenge for the EU has been to develop an EU-wide investment policy that further liberalises the internal EU investment environment, while concurrently ensuring advantageous conditions for EU investments abroad. The investment protection negotiating mandate approved by the EU Council for the FTA negotiations with Canada, India and Singapore appears to be a step towards addressing this second challenge.

The text of the negotiating mandate is consistent with the intentions of the EU Commission, outlined in the Commission's 7 July 2010 Communication on a comprehensive EU international investment policy, in that the mandate does not represent a model EU BIT with a standard text. Instead, the mandate is customised for three third-country investment partners, outlining a general objective of seeking '*the highest possible level of legal protection and certainty for European investors in Canada/India/Singapore*'. The scope of investment protection will be quite wide, covering a '*broad range of investors and their investments, intellectual property rights included, whether the investment is made before or after the entry into force of the agreement*.' Before the entry into force of the TFEU, the standard practice was for only the pre-establishment phase and market access aspects of investments to be dealt with at the EU level. The explicitly broad scope of the mandate illustrates how EU competencies now extend well beyond these previous boundaries.

In some respects, the negotiating mandate appears to create stronger standards of investor protection than those contained in some pre-existing BITs between EU Member States and third countries. This appears to be the case for the national treatment provisions of the new mandate. For instance, Article III:4 of the Czech Republic-Canada BIT states that '*[e]ach*

Contracting Party shall, to the extent possible and in accordance with its laws and regulations, grant to investments or returns of investors of the other Contracting Party a treatment no less favourable than that which it grants, in like circumstances, to investments or returns of its own investors'. EU Member States reportedly opposed the EU Commission's proposal that national treatment should apply for foreign investors '*in like circumstances*' to domestic investors, due to a concern that such a qualification could be included in all future EU-wide investment agreements. The negotiating mandate has responded to this apparent concern by specifying that negotiations shall aim at including '*unqualified national treatment*'. The practical implication for the investment chapters of eventual EU FTAs with Canada, India and Singapore is that national treatment protection may not be able to be qualified in any way, such as according to certain economic sectors or the size of corporations. The negotiating mandate further states that the FTA negotiations shall '*aim to include*' certain standards of investor treatment and rules, including, *inter alia*, '*fair and equitable treatment*', and '*full protection and security of investors and investments*'. Historically, BITs between EU Member States and third countries typically provided for '*fair and equitable treatment*', and occasionally incorporated the stronger standard of '*full protection and security*' of investors and investments. The language of the negotiating mandate thus makes clear that the EU seeks to maintain or enhance this historical level of investor protection.

From a commercial perspective, some EU businesses may have a particular interest in the EU's new negotiating mandate for investment protection providing adequate coverage for EU Member States and resident companies which currently lack BIT protection. For instance, Denmark presently has fewer than 50 BITs with third countries, while Germany has signed over 120 BITs with third countries. By securing new EU-wide investment protection in FTAs and stand-alone investment treaties, the EU's new investment competencies may help to gradually bridge this disparity. The EU's negotiating mandate for investment protection chapters may also help to successfully complete the EU's FTA negotiations with Canada, India and Singapore, important trading partners with which the EU's trade in goods alone totalled 157.2 billion EUR in 2010.

WTO Members voice concerns about Brazil's new tax regime on automobiles

Japan and South Korea raised concerns regarding Brazil's treatment of foreign carmakers at a recent meeting of the WTO Committee on Market Access. The matter, not appearing on the circulated agenda, and raised by the two Asian countries under the '*other business*' section, relates to a recent increase of manufacturing taxes, which affect predominantly foreign car manufacturers and their Brazilian partners which do not carry out major manufacturing processes within Brazil. Though no formal WTO dispute has yet been filed on the matter, Japanese and South Korean trade officials have reportedly stated that the expressed tension should be taken as warning of a potential WTO complaint.

The disputed measures were implemented by Brazil in Decree 7.567, published in *Diário Oficial da União* on 16 September 2011 and declared effective as of that date. The Decree horizontally increased the rate of the so-called '*IPI tax*' – an excise tax, levied on the sales of cars in Brazil. The tax has been increased by 30 percentage points: tax rates previously ranging between 7% and 25% have now been increased to rates between 37% and 55%. However, the decree provides for an exemption from the increased rate in case the manufacturer meets a number of requirements. To obtain a tax reduction, manufacturers must meet a 65% regional content requirement, invest in innovation and R&D activities in Brazil amounting to at least 0.5% of the manufacturer's total gross revenue, or accomplish 80% of the manufacturer's major production processes on the territory of Brazil. Special rules apply to the Members of Mercosur and any countries which have automotive treaties with Brazil. According to Brazil's Finance Minister, the Decree is designed to stimulate national production and to guarantee investment.

The first challenge brought by a Brazilian importer against the increased auto tax has been already resolved by the Brazilian courts. Venki Motors, which imports vehicles manufactured by the Chinese auto manufacturer Chery, was exempted from the new tax rates for a period of 90 days by the First Federal Court of Vitoria. The court has concluded that, under Article 150 of the Federal Constitution of Brazil, a tax of this kind could not be imposed sooner than 90 days after the publication of the Decree. Reportedly, separate actions against the new Decree have also been brought by the Attorney General of the National Treasury in Rio and the Attorney of the Treasury in Espirito Santo.

Besides the internal constitutional questions, the new Decree raises issues regarding its compatibility with WTO rules. Japan has complained that the Decree allegedly violates Article III of the General Agreement on Tariffs and Trade (hereinafter, the GATT) by granting more favourable tax terms for domestic producers compared to foreign companies. In addition to the evident national treatment implications, the new regulation could also breach a number of provisions of other WTO agreements. The tax exemption of car manufacturers meeting the regional input requirements may amount to a subsidy in the form of government revenue not collected within the terms of Article 1.1(a)(1)(ii) of the Agreement on Subsidies and Countervailing Duties (hereinafter, the ASCM). Article 3.2 of the ASCM expressly prohibits subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods. Furthermore, the exemption granted as a result of domestic production of the major car inputs resembles a classical value-added requirement, which may be found to be a violation of Article 2.1 (and Article 1(a) of the annexed Illustrative List) of the Agreement on Trade-related Investment Measures (hereinafter, the TRIMs). In *Indonesia – Autos*, the Panel declared that '*lower duty rates are clearly an 'advantage' within the meaning of the chapeau of the Illustrative List*' to the TRIMs. Even if domestic labour could count for a substantive part of the production activities performed on the territory of Brazil, the proposed level of local value-addition (*i.e.*, 80%) is undoubtedly very high. Should it be impossible to meet this requirement with the use of domestic labour only, following the reasoning of the Appellate Body in *Canada – Autos*, the use of domestic over imported products may be found to be a condition of eligibility for the tax exemption, thus making the Decree TRIMs-incompatible. Finally, special rules applied to members of Mercosur and parties to automotive treaties with Brazil may raise further non-discrimination concerns under Article I of the GATT.

The wide protest against the new tax regime both in the WTO and before the domestic courts of Brazil demonstrates the significant business implications of the Decree. Brazil has been reported to be the world's fourth largest car market, with sales of approximately 3.5 million vehicles last year. The new tax regime appears to promote local production to the potential detriment of world-wide car manufacturers basing their production chains in multiple jurisdictions. According to statements by the Ministry of Trade, Brazil remains rather flexible in shaping the measure, ready to negotiate preferential terms with individual manufacturers moving onshore to find reliable local suppliers. This opportunity to get additional preferences should not be overlooked by businesses in the short term. The new tax regime is officially valid until the end of 2012, and it is highly unlikely that the WTO dispute settlement mechanism will be able to render a final definitive ruling before that time. However, a WTO dispute settlement case could be a preventive tool against any further application of Brazil's measure.

France bans Bisphenol A in all food packaging material as of 2014 further to an EU-wide ban on infant feeding bottles containing Bisphenol A

The French Parliament (Assemblée nationale) adopted on 12 October 2011 a law banning Bisphenol A (hereinafter, BPA) in all food containers as of 1 January 2014. The law modifies Law No. 2010-729 of 30 June 2010, which suspended the marketing of infant feeding bottles produced using BPA. In the debate in the French Parliament, an amendment was adopted to the original proposal of 28 September 2011 establishing that for products intended for children under 3 years of age, the ban is already effective as of 2013. The law also provides that during the phasing-out period any food packaging containing BPA must be labelled with a health warning advising pregnant women and children under 3 years of age against its use due to the presence of BPA. The law was adopted in response to reports published on 27 September 2011 by the French Agency for Food, Environmental and Occupational Health Safety (hereinafter, ANSES), which deemed it necessary to replace BPA with other packaging material. The reports conclude that there are detrimental health effects that have been proven in animals and are suspected in humans, even at low levels of exposure, and that these effects may also depend greatly on individuals being exposed during different phases of their development, which means that it may be possible to identify categories of people who are particularly vulnerable to BPA.

BPA is used as a monomer in the manufacture of polycarbonate plastics. Polycarbonate plastics are used, *inter alia*, in the manufacture of infant feeding bottles and epoxy linings of food and beverage cans. When heated under certain conditions, small amounts of BPA can potentially leach out from food containers into foods and beverages and be ingested. According to scientific research, children's ability to eliminate BPA is in the process of building up during their first six months of life. Their exposure to the substance is thus the highest during this period, especially if infant formula administered through such baby bottles is their only source of nutrition.

Other calls to ban certain chemicals, including BPA, which may disrupt the functioning of human and animal endocrine systems, have been made in recent years. On 29 March 2010, the Danish Government decided to apply the safeguard measures provided for in Article 18 of *Regulation (EC) No. 1935/2004 on materials and articles intended to come into contact with food* and to temporarily ban the use of BPA for the manufacture of plastic materials in contact with food intended for children of up to 3 years of age. After the EU Commission asked the European Food Safety Authority (hereinafter, the EFSA) to assess the grounds on which Denmark banned BPA, in September 2010 the EFSA concluded that BPA is safe up to a maximum daily intake of 0.05 mg per kilo of bodyweight, and that the exposure of all groups of the population is below this limit. However, the EFSA's panel raised some questions with respect to the possible impact of BPA on infants, in particular, and concluded that this aspect requires further attention until more robust data on the areas of uncertainty becomes available.

An EU-wide suspension of the manufacture of infant feeding bottles with BPA was adopted by *Commission Directive 2011/8/EU of 28 January 2011 amending Directive 2002/72/EC relating to plastic materials and articles intended to come into contact with foodstuffs as regards the restriction of use of BPA in plastic infant feeding bottles.* It entered into force on 1 March 2011. As of 1 June 2011, the ban was extended to the placing on the market and the import into the EU of baby bottles containing BPA. Directive 2002/72/EC has been replaced in the meantime by *Regulation (EU) No. 10/2011 on plastic materials and articles intended to come into contact with food*. The preamble of Directive 2011/8/EU states that the restrictions on BPA are being imposed based on the precautionary principle set out in Article 7 of *Regulation (EC) No. 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing*

the European Food Safety Authority, which allows the provisional adoption of measures on the basis of available pertinent information pending an additional evaluation of risk. The preamble of Directive 2011/8/EU further states that even where the risk, notably to human health, has not yet been fully demonstrated, it is appropriate to reduce infants' exposure to BPA as much as reasonably achievable, until further scientific data is available to clarify the toxicological relevance of some observed effects of BPA.

The new French law goes much further than the harmonised EU legislation. BPA will, after a phasing-out period, be banned in all food contact materials, not only in infant feeding bottles. For food containers intended for children under 3 years of age, the ban is effective as of 2013, and for all other containers as from 2014. The law could violate the EU's rules on the free movement of goods, which basically state that a product that is legal in one EU Member State can be legally marketed in another EU Member State. There are limits, though. Under Article 36 of the TFEU, free movement of goods rules (*i.e.*, the provisions of Articles 34 and 35) '*shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of the protection of health and life of humans*'. The French measure at stake is a precautionary measure. In case of scientific uncertainty as to the existence of a risk to human health, under settled case law of the European Court of Justice, an EU Member State may invoke the precautionary principle in order to adopt protective measures, in spite of the fact that a proper risk assessment showing conclusive scientific evidence cannot be conducted. Such measures cannot, however, be based on a purely hypothetical approach founded on mere hypotheses and may be adopted only if the risk, although the reality and the extent thereof have not been fully demonstrated by conclusive scientific evidence, appears to be properly backed up by the scientific studies available at the time the measure is taken (*i.e.*, a risk assessment '*as complete as possible in the particular circumstances of an individual case*'). Here it would need to be analysed whether the French law, adopted in view of the ANSES studies, passes this test.

The tight deadlines in the French law put pressure on the food industry to find suitable (and safe) replacements for BPA. BPA is used in a range of packaging applications, not only plastic bottles. There appear to be few safe and effective alternatives to the use of BPA in epoxy linings of food and beverage cans. A ban on BPA in all food packaging materials may thus cause consumers to be exposed to health risks from food-borne diseases, like salmonella, that can spread from canned food in the absence of protective linings.

At the international level, on 1 October 2011, a prohibition on the manufacture, sale, and distribution of infant food containers containing BPA and any reusable food or beverage container containing BPA became effective in the US State of Connecticut, allowing the sale of existing inventory of infant food containers that contain BPA until 1 October 2012. However, a ban of BPA in all food containers has not been adopted.

The French precautionary measure has the potential to disrupt the internal EU food packaging market. EU Institutions, and particularly EFSA's scientific work thus far, have not supported the French move to ban BPA in all packaging materials. The EU Commission has requested EFSA to review two reports on BPA following the recent publications by ANSES. EFSA informed on 19 October 2011 that the final outcome of this work will be provided by the end of November 2011. ANSES seems to be working with industry players to find BPA substitutes and, according to the new law, is due to submit a report on BPA alternatives by 31 October 2012.

Proposed amendments to the EU regime on bovine identification and voluntary labelling are notified to the WTO

On 17 October 2011, the EU notified the WTO of its *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 1760/2000 as regards electronic identification of bovine animals and deleting the provisions on voluntary beef labelling* (hereinafter, the Proposal). In the EU's view, such changes will significantly reduce administrative barriers and simplify procedures. The major amendments introduced by the Proposal are the new electronic system of animal traceability and the complete elimination of the current rules on voluntary beef labelling, with the provisions on compulsory labelling of the origin of beef maintained. The Proposal was notified to the WTO under Article 2.9.2 of the Agreement on Technical Barriers to Trade (hereinafter, the TBT Agreement). According to the EU, there is no relevant international standard that the EU could rely on for this matter. The new regulation is expected to be adopted in 2012.

The current EU regime for the identification of bovine animals and labelling of beef products was established in 2000 in the *Regulation of the European Parliament and of the Council No. 1760/2000 of the European Parliament and of the Council of 17 July 2000 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products* (hereinafter, the Regulation). In substance, it covered two separate subjects: the identification and registration of bovine animals and labelling of beef. As to the first subject, the Regulation secured traceability of cattle through the compulsory two ear tags, a holding register for each undertaking involved in beef production (*e.g.*, farms, markets, slaughterhouses), and the individual passport of each animal reflecting all its movements, which is synchronised with a centralised computer database. These requirements were criticised by some businesses as being out-dated. The Proposal aims at reducing administrative paper-work through the use of the latest technological developments. It provides EU farmers with the opportunity to voluntarily implement the so-called '*bovine electronic identification*' (hereinafter, the EID), now harmonised in all EU Member States. The Proposal does not prescribe the application of particular means of identification. However, it permits bovine animals to be identified not only through two conventional ear tags, but as well through one ear tag and one electronic identifier (*e.g.*, bolus, injectable transponder, or electronic ear tag). According to the EU Commission, the EID may bring considerable savings and reduction of administrative burdens for farmers who adopt it. However, to avoid prejudice to farmers not currently implementing the EID, it is suggested as a voluntary alternative to the conventional tracing methods. Nonetheless, the EU Member States are set free to impose the EID as mandatory in their national territories.

The second subject addressed in the Regulation is the labelling of beef and beef products. Currently, the Regulation requires that any additional labelling information be subject to a formal approval procedure: a wide variety of information such as the manner of production, breed, sex of animal, age at slaughter, date of slaughter, quality assured, period of maturation, taste, tenderness and organic nature of beef is subject to this requirement. The Regulation has been widely condemned for being excessive and applied differently across the EU Member States. The Proposal provides for the deletion of Articles 16, 17 and 18 of the Regulation, dealing with voluntary labelling. Thus, with the enactment of the Proposal, no notification requirements with regard to the use of additional voluntary labelling indications shall be preserved in the EU.

Serious WTO implications for all voluntary labelling schemes have been introduced by the recent *US – Tuna (Mexico) II* Panel Report (see Trade Perspectives, Issue No. 23 of 23 September 2011). In the Report, not appealed by the Parties so far, the Panel reached a rather debatable conclusion. In the Panel's view, voluntary labelling schemes prescribing in a binding manner the conditions for the use of certain terms on labels, on the basis of

compliance or absence of compliance with specific identified conditions, may be considered to be technical regulations subject to the disciplines of Article 2 of the TBT Agreement. This finding was not supported unanimously within the Panel: one of the panellists provided a separate opinion advocating the opposite conclusion. If not reversed by the Appellate Body or not appealed, this finding may have far-reaching implications for all voluntary labelling schemes, including those currently being implemented in the EU. To the extent that the voluntary labelling scheme of beef products, as set out in Article 16 of the Regulation, provides for the compulsory approval of the specifications of the label by the competent local authorities and is supported by enforcement remedies, it could arguably be considered to fall within the interpretation of mandatory technical regulation in the '*negative*' form. Thus, the abolition of the beef labelling voluntary scheme would appear to preventively address such WTO concerns.

According to the WTO notification, all interested parties are invited to provide their respective comments regarding the Proposal within 90 days from the date of notification. The Proposal clearly makes an attempt at adapting the Regulation to modern technological realities. The EU Commission has chosen a flexible approach towards the EID, leaving it voluntary in nature. Therefore, interested parties should be particularly attentive to the initiatives of the EU Member States, which could make the EID compulsory within their own individual jurisdictions. Though the EID in the bovine sector has spread substantially, under certain circumstances, like in the case of small farms or animals having infrequent contacts with their farmers, the cost of mandatory EID enactment may be significant. Further development of the EID is expected, specifically in the sheep and goat sectors, in which the EID could make individual identification and traceability feasible and effective. As to the abolition of additional requirements on current '*voluntary labelling*' information, the move of the EU Commission is warmly welcomed by the business community and by most experts, who have suggested repealing these provisions for several years. This Proposal has significant implications for commercial parties in that it may eliminate certain administrative barriers and simplify the process of placing additional information on the labels of beef and beef products.

Recently Adopted EU Legislation

Market Access

- *Commission Implementing Regulation (EU) No. 1053/2011 of 20 October 2011 on the issue of import licences and the allocation of import rights for applications lodged during the first seven days of October 2011 under the tariff quotas opened by Regulation (EC) No. 616/2007 for poultrymeat*

- *Commission Implementing Regulation (EU) No. 1054/2011 of 20 October 2011 on the issue of import licences for applications submitted in the first seven days of October 2011 under the tariff quota for high-quality beef administered by Regulation (EC) No. 620/2009*

- *Commission Implementing Regulation (EU) No. 1047/2011 of 19 October 2011 on the issue of licences for the import of garlic in the subperiod from 1 December 2011 to 29 February 2012*

- *Commission Implementing Regulation (EU) No. 1005/2011 of 11 October 2011 establishing the allocation coefficient to be applied to applications for export licences for cheese to be exported to the United States of America in 2012 under certain GATT quotas*

- *Regulation (EU) No. 1007/2011 of the European Parliament and of the Council of 27 September 2011 on textile fibre names and related labelling and marking of the fibre composition of textile products and repealing Council Directive 73/44/EEC and Directives 96/73/EC and 2008/121/EC of the European Parliament and of the Council*

Trade Remedies

- *Commission Regulation (EU) No. 1043/2011 of 19 October 2011 imposing a provisional anti-dumping duty on imports of oxalic acid originating in India and the People's Republic of China*

- *Council Implementing Regulation (EU) No. 1008/2011 of 10 October 2011 imposing a definitive anti-dumping duty on imports of hand pallet trucks and their essential parts originating in the People's Republic of China as extended to imports of hand pallet trucks and their essential parts consigned from Thailand, whether declared as originating in Thailand or not, following an expiry review pursuant to Article 11(2) of Regulation (EC) No. 1225/2009*

- *Notice of initiation of a partial interim review of the anti-dumping measures applicable to imports of certain seamless pipes and tubes of iron or steel originating in Russia*

Food and Agricultural Law

- *Commission Recommendation of 18 October 2011 on the definition of nanomaterial*

- *Commission Implementing Decision of 13 October 2011 amending Annex I to Decision 2004/211/EC as regards the entry for Mexico in the list of third countries and parts thereof from which the introduction into the Union of live equidae and semen, ova and embryos of the equine species are authorised (notified under document C(2011) 7168)*

- *Commission Implementing Regulation (EU) No. 1004/2011 of 11 October 2011 amending the representative prices and additional import duties for certain products in the sugar sector fixed by Implementing Regulation (EU) No. 971/2011 for the 2011/12 marketing year*

- *Commission Implementing Regulation (EU) No. 996/2011 of 7 October 2011 amending Regulations (EC) No. 657/2008, (EC) No. 1276/2008 and Implementing Regulation (EU) No. 543/2011 as regards the notification obligations within the common organisation of agricultural markets*

- *Commission Implementing Regulation (EU) No. 998/2011 of 7 October 2011 amending the representative prices and additional import duties for certain products in the sugar sector fixed by Implementing Regulation (EU) No. 971/2011 for the 2011/12 marketing year*

Trade-Related Intellectual Property Rights

- *Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights*

Other

- *Commission Implementing Decision of 4 October 2011 on the European register of authorised types of railway vehicles (notified under document C(2011) 6974)*
- *Council Decision of 12 September 2011 on the signing, on behalf of the European Union, and provisional application of the amended Constitution and Rules of Procedure of the International Rubber Study Group*
- *Council Decision of 16 June 2011 on the signing, on behalf of the Union, and provisional application of the Agreement between the European Union and the Government of the Republic of Indonesia on certain aspects of air services*

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