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The WTO's new *Trade Concerns Database*: A tool for enhanced transparency and a more proactive role for non-governmental actors

By Alejandro López Bo, Stella Nalwoga, and Paolo R. Vergano

On 10 September 2024, the World Trade Organization (hereinafter, WTO) launched its new *Trade Concerns Database* (hereinafter, the Database), a new platform that "*enhances transparency and public accessibility to information on trade concerns discussed in five different WTO bodies".* Trade concerns can be seen as the first step in raising a trade irritant and referring to the WTO an issue that affects the flow of trade between WTO Members, such as an aspect of a domestic regulation notified to the WTO, that is raised by a WTO Member within a relevant WTO committee or council. This is typically done with a view to obtaining information, clarification, and possible amendments to a controversial measure, and finding a mutually satisfactory solution to commercial disputes.

The database "*contains data on over 1,700 concerns relating to trade regulations addressing global public policy challenges*" and is intended to foster "*an equitable trading environment*" and to support "*efforts to resolve trade frictions*". The Database spotlights the role of the WTO in fostering structural dialogue and helping find common ground for trade differences, ideally resolving them before they escalate to formal trade disputes. The expectation is that the Database will prove beneficial for businesses by providing them with a tool to escalate trade irritants to the WTO through their governments and supporting their advocacy efforts. This article discusses the relevance of the Database and how businesses can take advantage of it.

The WTO framework

The WTO General Council, composed of representatives from all WTO Members, handles day-to-day operations and oversees various councils and committees responsible for specific trade areas. These include the Council for Trade in Goods, the Council for Trade in Services, and the Council for Trade-Related Intellectual Property Rights, as established by Article IV.5. of the WTO Agreement. The new Database includes trade concerns raised in the Council for Trade in Goods and four of its subsidiary committees, namely the Committee on Sanitary and Phytosanitary Measures (hereinafter, SPS Committee), the Committee on Technical Barriers to Trade (hereinafter, the TBT Committee), the Committee on Market Access (hereinafter, the Market Access Committee), and the Committee on Import Licensing (hereinafter, the Import Licensing Committee). The Council for Trade in Goods and its committees are tasked with

overseeing the functioning of all WTO multilateral agreements on trade in goods, listed under Annex 1 A of the WTO Agreement, such as the General Agreement on Tariffs and Trade (GATT), the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), the Agreement on Technical Barriers to Trade (TBT Agreement), and the Agreement on Import Licensing Procedures. Each of these committees is tasked with monitoring its homonymous agreement or, in the case of the Market Access Committee, the elements referenced by Decision WT/L/47 of the General Council of 17 February 1995, notably concessions relating to tariffs and non-tariff measures.

The duty to notify national regulations: An assurance of transparency

Under WTO rules, certain national and sub-national measures must be notified to the relevant committee or council before formal adoption. For example, Article 7 of the SPS Agreement on '*Transparency*' mandates that "*Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B*" to ensure transparency in SPS regulations. This includes the obligations to notify any proposed SPS measure in the absence of or in deviation from international standards, when any such measure "*may have a significant effect on trade of other Member*".

Although an urgent procedure is available, the regular procedure involves the WTO Member publishing a notice "*at an early stage*" of the legislative process "*when amendments can still be introduced and comments taken into account*", notifying other WTO Members through the WTO Secretariat, providing copies of the proposed regulation upon request, and allowing other WTO Members to submit written comments and to discuss the proposed measure. Similarly, in the case of the TBT Agreement, Article 2.9 mandates WTO Members to follow the same procedure when proposing a "*technical regulation*", in the absence of or in deviation from international standards, and if it may affect trade flows.

Raising trade concerns: A progressively codified practice

The practice of raising *Specific Trade Concerns* (hereinafter, STCs) typically follows the notification of measures and originally emerged as an informal practice in the GATT committees. It was then progressively codified, particularly in the SPS and the TBT Committees. The TBT Committee formally institutionalised the process through a decision under the fifth triennial review (G/TBT/26). In practice, once a notification is submitted to the WTO Secretariat, the Secretariat circulates it among all WTO Members. A WTO Member wishing to raise an STC within the TBT Committee must inform the Committee secretariat and the notifying WTO Member at least two weeks before the following meeting of the TBT Committee. The STC is then listed on the meeting's agenda. Informal bilateral discussions between WTO Members can occur before the meeting to resolve the issue without a formal STC having been filed. Should the issue not be addressed, delegates from both sides may present their statements during the meeting to, *inter alia*, seek clarification, claim alleged violations of WTO commitments or an unnecessary level of trade restrictiveness, or to defend the measure, respectively. Other WTO Members may support the STC, increasing pressure on the notifying Member and bringing about further transparency.

For example, on 6 February 2023, the EU had notified a draft regulation to amend EU labelling rules for wine products. The US raised an STC, supported by New Zealand, about the measure, and first presented its statements at the meeting of the TBT Committee of 13 to 15 March 2024, complaining that the EU's new wine labelling regulations, specifically the requirement for digital labels or QR codes, lacked a uniform format across EU Member States, which could be burdensome and costly for US exports. For this reason, the US requested, *inter alia*, "*that the EU approve a language-free modality for identifying QR codes that will be accepted by all member States*". The EU acknowledged the request, but stated that current EU rules did not allow for such approach. Discussions around this STC continued along the same lines during the most recent meeting of the TBT Committee from 5 to 7 June 2024 and

might continue to be raised until the STC is either withdrawn or the issue escalated to WTO dispute settlement.

The same system of raising and discussing trade concerns applies, with minor differences, to the other councils and committees. However, the current system for raising and discussing STCs within WTO councils and committees is primarily accessible only to WTO Members (*i.e.*, Government and their representatives), not directly to businesses, traders, or trade associations. While concerns are often prompted by companies and trade associations, they lack detailed and early access to information, as well as a direct participation in the process, significantly limiting their ability to actively monitor and raise trade barriers, or to support WTO Members in their activities.

Towards a better integration of businesses in trade differences' resolution?

In light of the limited access to the formal process for raising and discussing trade concerns, the new Database might become a powerful tool to increase transparency and to informally bring on board non-governmental actors affected by the measures subject to trade concerns. The enhanced transparency delivered by the Database and its user-friendly features (showing the ID of the trade concern and redirecting the user to the transcriptions of the respective committee or council discussions) will enable businesses to identify potential issues and advocate for their interests, thereby engaging more proactively with relevant Governments regarding the WTO processes and contributing to resolving trade frictions before they need to be elevated to formal trade disputes. Finally, the Database also further empower policymakers and legislators by providing them with a valuable tool for more informed and efficient analysis and decision-making.

For any additional information or legal advice on this matter, please contact Paolo R. Vergano

Politics, policy, and trade law: The European Commission's 4th Report on the implementation and enforcement of EU trade agreements

By Stella Nalwoga, Tobias Dolle, and Paolo R. Vergano

On 3 October 2024, the European Commission (hereinafter, Commission) published its *Report on the implementation and enforcement of EU trade policy* (hereinafter, Report), accompanied by a *Commission Staff Working Document* providing additional information on 39 of the EU's major preferential trade agreements (hereinafter, PTAs). The Report and the Commission Staff Working Document detail the main developments with respect to the EU's PTAs, describe the impacts of removing trade barriers and resolving disputes using the EU's enhanced autonomous enforcement instruments, and highlight efforts to promote the benefits of the EU's PTAs to stakeholders. This article provides an overview of the Report and reviews trade irritants that have been successfully addressed by the EU.

The EU's trade agreements and their role in global trade dynamics

The Report marks the Commission's 4th consolidated annual report on the implementation and enforcement of trade commitments made via PTAs in the context of the World Trade Organization (hereinafter, WTO) agreements. The Report outlines the Commission's main activities and achievements in 2023 and during the first months of 2024. The Report notes that, by the end of 2023, the EU had established 42 PTAs with 74 trading partners, with a trade value of EUR 2.3 trillion, corresponding to 45.8% of the EU's total external trade. Emphasising the benefits of PTAs, the Commission notes that the EU's broad network of PTAs provides EU businesses with access to "*growth markets while relying on a stable and more predictable set of rules*" and has made the EU "*more resilient in the face of global challenges by providing safer, more diverse sources of supply*" for imports and markets for exports.

The EU's mechanisms to identify, prevent, and resolve trade barriers

Following years of intense trade negotiations and the conclusion of a good number of PTAs, the EU is assertively moving towards a greater focus on implementation and enforcement. To address trade concerns, the EU disposes of a growing toolbox at the bilateral and multilateral levels, namely: 1) The *Single Entry Point*, which provides a one-stop-shop for businesses to raise trade concerns (see *Trade Perspectives*, Issue No. 22 of 27 November 2020); 2) Diplomatic channels via institutional structures, such as the technical committees under the PTAs or at the WTO, as well as formal PTA or WTO dispute settlement procedures; and 3) The EU's Enforcement Regulation, which allows the EU to take autonomous action when dispute settlement procedures are blocked (see *Trade Perspectives*, Issue No. 1 of 17 January 2020).

The Report notes that, thanks to these mechanisms, the Commission has successfully pursued the removal of 140 barriers to EU exports in more than 40 countries over the past five years. Most significantly, the Commission notes that the removal of trade barriers between 2018 and 2022 unlocked "*an additional €6.2 billion of EU exports in 2023 alone*". For 2023, the Report shows that a total of 41 market access barriers were "*partially or totally eliminated in 28 countries*".

A notable example concerns Peru's elimination of restrictive rules on the labelling of foodstuffs by amending its legislation to allow the use of adhesive labelling on food packaging "*indefinitely*" in July 2023, following discussions in the Subcommittee on Technical Barriers to Trade of the *EU-Colombia-Ecuador-Peru Trade Agreement*. On the basis of the *Supreme Decree No. 015-2019-SA*, Peru had amended its *Manual of Advertising Warnings* by prohibiting, from June 2020, the use of stickers or adhesive labels to convey mandatory warning icons and phrases on food packaging. Peru's law was linked to public policy measures to protect public health through, *inter alia*, the regulation of advertising of food and non-alcoholic beverages targeting children and adolescents to reduce non-communicable diseases.

The EU had argued that Peru's prohibition on the use of stickers or adhesive labels created an unnecessary barrier to international trade, contrary to Peru's obligations under Articles 2.1 and 2.4 of the WTO Agreement on Technical Barriers to Trade, which according to Article 73 on "*Relationship with the TBT Agreement*", is an integral part of the *EU-Colombia-Ecuador-Peru Trade Agreement.* Under Article 2.1 of the TBT Agreement, Peru must "*ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade"* and, on that basis, technical regulations must "*not be more trade-restrictive than necessary to fulfil a legitimate objective*", such as the protection of human health. Additionally, Article 2.4 of the TBT Agreement requires Peru to use international standards as the basis for preparing its technical regulations, where they exist.

Notably, Article 8 of the Codex standard CODEX-STAN 1-1985 on the "*presentation of mandatory information*", provides for the possibility of using a "*supplementary label*" if the language of the original label is not necessarily that of the consumer for whom it is intended, as long as "*the mandatory information provided fully and accurately*" reflects the information provided "*in the original label*". Arguably, by adopting this standard, Peru's policy objective would still be met without burdening businesses engaged in international trade with additional costs of making permanent labels only for Peru's market. In that regard, the Report notes that Peru's amendment of its restrictive labelling rules was "*a big relief*" for EU exporters of processed food and non-alcoholic beverages to Peru, *"a market worth EUR 140-180 million annually*".

The EU's continued focus on trade and sustainable development

Aside from creating opportunities for EU businesses in foreign markets, PTAs also provide an avenue to promote compliance with international commitments in International Labour

Organization (ILO) conventions and Multilateral Environmental Agreements, through commitments set out in the Chapters on Trade and Sustainable Development (hereinafter, TSD) of the EU's PTAs. The Report notes that the EU's new approach vis-à-vis the TSD Chapters (see *Trade Perspectives,* Issue No. 13 of 4 July 2022), which combines a cooperation-based approach with trade sanctions in order to strengthen compliance, has provided the Commission with "*fresh impetus*" to implement and enforce TSD commitments included in twelve of the EU's PTAs covering 18 partner countries. The EU's new approach to enforcing TSD commitments has only been included in recent PTAs, namely the PTAs with New Zealand and Kenya, respectively.

The Report notes that, so far, only two TSD complaints have been lodged via the *Single Entry Point*. The first complaint concerns labour rights in the mining sector in Peru and Colombia, (see *Trade Perspectives*, Issue No. 22 of 4 December 2023). For now, the EU appears to be pursuing a cooperation-based approach to resolving the complaint, entertaining dialogue with Colombia on "*the progress on its domestic labour reform*" and dialogue and technical cooperation with Peru on issues regarding "*freedom of association, child labour, forced labour, the fight against informality, and notably in strengthening the labour inspection system*". In March 2024, a second formal complaint was lodged via the *Single Entry Point* in the context of the TSD Chapter in the *EU-Vietnam Free Trade Agreement*, but no further details are provided apart from indicating that the complaint is "*currently under review*".

Addressing trade irritants, facilitating trade

Businesses can only derive benefits from the EU's PTAs if they are properly implemented by all involved and enforced as necessary when it comes to the trade barriers maintained by EU trading partners. The first step to addressing trade issues consists in utilising the EU's *Single Entry Point* to alert the Commission of the existence of a problem and a possible breach of the agreed commitments by an EU trading partner. In this context, it is worth underlining that businesses should be vigilant in identifying and reporting market access barriers in third countries and should seek expert assistance to ensure well-prepared complaints. Given the EU's greater assertiveness, it is also important to play an active role in supporting the negotiations of new or revised PTAs, especially when it comes to new generation obligations and commitments within the TSD Chapters of these legal instruments. Equally important is to understand the economic dimension of these chapters and negotiating wisely to ensure that they provide valuable rights and remedies to all parties to the PTAs.

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A new era for plant-based '*meaty*' products: Implications of the CJEU's ruling on '*meaty*' terminology for plant-based products

By Ignacio Carreño García, Alejandro López Bo, and Tobias Dolle

On 4 October 2024, the Court of Justice of the European Union (hereinafter, CJEU) issued a preliminary ruling in Case C-438/23 *Protéines France,* following a request from France's Council of State (*i.e.*, *Conseil d'État*). The judgement concerns the concept of '*specific harmonised matters*' in Article 38(1) of *Regulation (EU) No 1169/2011 on the provision of food information to consumers* (hereinafter, FIR), which precludes EU Member States from adopting or maintaining national measures, unless authorised by EU law. This ruling responds to France's attempts to prohibit certain terms on the labelling of plant-based '*meaty*' products. The CJEU ruled that EU Member States may not prohibit the use of commonly used terms if they are not legally defined. As a result, EU Member States are not permitted to restrict manufacturers of plant-based meat substitutes from using '*meaty*' terms, such as '*steak*'.

France and Italy oppose the use of '*meaty*' terms for plant-based alternatives

While plant-based meat-like food is increasingly popular, the meat industry and some EU Member States, notably France and Italy, are opposing the use of terms traditionally used for meat products for plant-based alternatives. Against this background, *Protéines France*, representing the interests of operators active in the French market for vegetable proteins, the *Union Végétarienne Européenne* (EVU), the *Association Végétarienne de France* (AVF), and the US company *Beyond Meat*, which manufactures and markets vegetable protein-based products, have brought actions before France's *Conseil d'État*, seeking the annulment of France's *Decree No. 2022-947 of 29 June 2022 on the use of certain names used to designate foodstuffs containing vegetable proteins*. *Decree No. 2022-947* prohibits the use of names designating foodstuffs of animal origin to be used to describe, market, or promote foodstuffs containing vegetable proteins. In their actions, the four applicants argued that the Decree infringed a number of provisions of the FIR. France's *Conseil d'État* referred preliminary questions regarding the interpretation of these provisions to the CJEU.

In the course of the proceedings before the CJEU, on 26 February 2024, France adopted *Decree No 2024-144 on the use of certain names to designate foods containing vegetable proteins,* which repealed the Decree at issue. The *Conseil d'État* confirmed to the CJEU that the answer to the questions remained decisive for the outcome of the disputes pending before it. In light of the information provided by the *Conseil d'État*, the scope of the two decrees was partly identical and a number of applicants in the main proceedings had demonstrated their intention to challenge the second Decree as well. Therefore, the CJEU declared the action admissible, as it had become neither devoid of purpose nor hypothetical.

Legal names may be set, but *Decree No. 2022-947* does not contain legal names

In its judgement of 4 October 2024, the CJEU summarises the relevant provisions of the FIR as follows: 1) Foods must bear a name; 2) That name must be a legal name or, in the absence of such a name, a customary name or, failing that, a descriptive name; 3) That name must be accurate, clear and easy to understand for the consumer; 4) That name must not mislead consumers, particularly as to the characteristics of the food concerned, which include its nature and composition, and as to the substitution of components naturally present or ingredients normally used with different components or different ingredients; and 5) Such requirements must be complied with when marketing and promoting any food.

The CJEIU acknowledged that the FIR permits EU Member States to adopt legal names where such names are not provided at the EU level. Where legal names are set, these may not be used for products not complying with the specifications of those names. As an example, the CJEU refers to the term '*meat*', which is legally defined as '*the edible parts of animals*'. A food not containing such parts may, therefore, not use the name '*meat*', even if it is accompanied by specifying terms such as '*vegetarian*'. For plant-based dairy names, such as "*milk*" or "*yoghurt*", the debate was mostly settled on 14 June 2017, when the CJEU issued its judgment in Case C-422/16 *TofuTown* (see *Trade Perspectives*, Issue No. 14 of 18 July 2022).

On 5 September 2024, the CJEU's Advocate General *Tamara Capeta* delivered her Opinion in case *C-438/23*, which concluded, in line with the French Government, that, since EU law does not prescribe legal names for meat or meat substitute products, EU Member States may do that on the basis of national legislation. In the case of *Decree No. 2022-947*, France had established a list of '*meaty*' terms that are prohibited for the designation of their plant-based counterparts (such as '*steak*') and, by authorising the use of certain *'meaty*' terms for foods containing vegetable proteins, provided that they do not exceed a certain proportion, such as '*cured ham*' (*i.e.*, '*jambon cru*') with a maximum proportion of 0,5% vegetable protein.

The CJEU, however, considered that the *Decree No. 2022-947* at issue does not contain any '*legal name*', but rather concerns the question of which '*customary names*' or '*descriptive names*' may not be used to designate vegetable protein-based foods. The CJEU ruled that legal names must, under the FIR, be defined in order to designate a foodstuff. The adoption of

a legal name, therefore, means associating a specific expression with a given food by establishing certain conditions, namely with regard to the composition of the food. *Decree No. 2022-947* prohibits the use of certain '*meaty*' terms, which are not legally defined by *Decree No. 2022-947*, for plant-based foods.

Consequently, the CJEU ruled that the FIR's provisions on the naming of food must be interpreted as specifically harmonising, within the meaning of Article 38(1) of the FIR, "*the protection of consumers against the risk of being misled by the use of names, other than legal names, consisting of terms derived from the butchery, charcuterie and fish sectors for the purpose of describing, marketing or promoting foods containing vegetable proteins instead of proteins of animal origin, including in their entirety, and therefore as precluding a Member State from adopting national measures that regulate or prohibit the use of such names*".

Arguably, the existing provisions of the FIR provide sufficient legal basis to protect consumers from being misled by denominations for plant-based meat alternatives, if those are also denominated '*vegan*' or '*vegetarian*'.

Italy also prohibited the use of '*meaty*' terms on plant-based meat product labelling

Similar discussions are taking place in Italy. On 1 December 2023, Italy published *Law No. 172 on Provisions regarding the ban on the production and placing on the market of food and feed consisting of, isolated or produced from cell or tissue cultures deriving from vertebrate animals as well as the ban on the denomination of meat for processed products containing vegetable proteins* in its Official Journal. *Law No. 172/2023* prohibits the production and sale of cultivated meat (also known as '*lab-grown*' meat) within the country, as well as the use of meat-related terms, such as '*steak*' and '*salami*', on the labels of plant-based products. Italy's Law needed to be approved by the Commission via the so-called Technical Regulations Information System (TRIS) procedure, to which Italy initially adhered and suspended all legislative activities. In February 2024, before the Commission was able to comment on the Law, Italy withdrew from the procedure and adopted the Law without approval, which could mean that the Italian law is not enforceable if declared by national courts as inapplicable to individuals.

Outlook for the alternative protein sector: A new era for plant-based '*meaty*' products?

Now that the CJEU has given its interpretation of the FIR, it is for France's *Conseil d'État* to decide the main actions at national level in accordance with the CJEU's preliminary ruling, which is similarly binding on other national courts. This means that the prohibition to enact national measures regulating or prohibiting the use of '*meaty*' names in the absence of legal names applies in other jurisdictions as well, which may lead to changes in other EU Member States.

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Recently adopted EU legislation

Trade Law

- *Notice concerning the date of entry into force of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part and the Protocol of Accession to the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, to take account of the accession of Ecuador*

- *Commission Implementing Regulation (EU) 2024/2715 of 24 October 2024 making imports of glyoxylic acid originating in the People's Republic of China subject to registration*

Customs Law

- *Commission Implementing Regulation (EU) 2024/2522 of 23 September 2024 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff*

Food Law

- *Commission Delegated Regulation (EU) 2024/2791 of 29 January 2024 amending the Annex to Regulation (EU) No 609/2013 of the European Parliament and of the Council to allow the use of iron milk caseinate as a source of iron in total diet replacement for weight control and in food for special medical purposes, excluding food for infants and young children*

- *Commission Implementing Regulation (EU) 2024/2766 of 30 October 2024 concerning the non-approval of 1,3,7-trimethylxanthine (caffeine) 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*

Ignacio Carreño García, Tobias Dolle, Alejandro López Bo, Stella Nalwoga, and Paolo R. Vergano contributed to this issue.

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