

## **The EC opens a tariff-rate quota on imports of high-quality beef to implement the deal to end the *EC - Hormones* dispute**

To end the long-standing trade dispute over the EC ban on imports of US beef produced with growth-promoting hormones, the EC and the US reached a deal that allows the EC to maintain its trade ban on US imports of beef treated with growth-promoting hormones in exchange for greater market access to US high-quality beef (produced without growth-promoting hormones). Details of the deal were circulated within the WTO by the EC and the US on 30 September 2009.

The deal is structured in three phases. In phase 1, the EC committed to establish an autonomous annual tariff rate quota (TRQ) of 20,000 tonnes for high-quality beef at a zero rate of duty for in-quota imports. The US, in turn, will still maintain the additional (retaliatory) import duties that it currently applies on EC products (such as Roquefort cheese), but it will refrain from increasing the level of such duties and from imposing the 'carousel sanctions' that it had threatened to impose on EC products (see Trade Perspectives, Issue No. 10 of 22 May 2009). In phase 2 of the deal, the EC will increase its TRQ to 45,000 tonnes and the US will suspend all countermeasures it imposes on EC products in connection with the outcome of the *EC – Hormones* dispute. Under phase 3, the EC will maintain the TRQ at the level of 45,000 tonnes and the US will cease to impose countermeasures on EC products.

As required by the deal, phase 1 commenced on 3 August 2009, with the opening of the TRQ by the EC. In particular, through Council Regulation No. 617/2009 and Commission Regulation No. 620/2009, the EC opened an autonomous TRQ of 20,000 tonnes for high-quality beef. On the basis of the definition agreed by the parties in the deal, the EC Commission Regulation defines high-quality beef as '*beef cuts obtained from carcasses of heifers and steers less than 30 months of age which have only been fed a diet, for at least 100 days before slaughter, containing not less than 62% of concentrates and/or feed grain co-products on a dietary dry matter basis*' meeting or exceeding certain indicated parameters. Such definition could *de facto* exclude from the TRQ beef supplied by a number of WTO Members where beef is fed in a different way. Reports suggest that such definition would exclude grass-fed beef, exported by Latin American countries. In this respect, although it appears that the TRQ is opened to all supplying countries (*i.e.*, on an MFN-basis), only the US may (*de facto*) stand to benefit from the concession. This initial phase is to last three years. Under the deal, the EC and the US are to review the operation of this phase before entering in the subsequent phase of the agreement.

It appears that the deal has been carefully and ingeniously crafted in such a way as to comply on its face with WTO requirements but, in practice, to confer a benefit only to the US. This is no surprise since it is aimed at 'compensating' the US for the nullification and impairment of its rights as sanctioned by the WTO Dispute Settlement Body in the *EC - Hormones* case and in order to halt US countermeasures on a wealth of EC products. This is also indirectly confirmed by the 'insurance policy' which seems to have been 'purchased' by the US or offered by the EC in the

deal by structuring it along the lines of 3 phases to be fully phased-in by 3 August 2013 (i.e., when phase 3 is expected to commence). This timeframe, in fact, seems to be designed with in mind the possibility (or maybe the high likelihood) that a number of other beef-exporting WTO Members will challenge the EC measure for being contrary to relevant WTO provisions (i.e., *inter alia*, Articles XI and XIII of the GATT and Article 4.2 of the Agreement on Agriculture). Presumably, should the WTO declare this ingenious deal contrary to WTO law, the US will not want to fully withdraw its countermeasures and the EC will not want to offer such TRQ to the actual benefit of all exporting countries. This is understandable. It remains to be seen whether any of the other beef-exporting countries (i.e., in particular, Argentina, Brazil, India, New Zealand, Nicaragua, Paraguay and Uruguay), which look posed to be *de facto* discriminated upon by the opening of the TRQ, will challenge the measure at the WTO and which decision will eventually be taken by the WTO.

### **The WTO Dispute Settlement Body established a WTO panel on the application of the zeroing methodology by the US on Brazil's exports of orange juice to the US**

On 25 September 2009, the WTO Dispute Settlement Body established a WTO panel to decide on the US application of the 'zeroing' methodology for the determination of dumping of Brazilian exports of orange juice to the US. Brazil requested the establishment of a WTO panel on 31 August 2009, after holding consultations with the US in January and June 2009.

'Zeroing' refers to the practice, applied in the calculation of dumping margins, of assigning a zero value to those transactions where negative dumping margins were reported (i.e., where the export price was higher than the normal value). The use of such practice avoids that negative dumping margins for certain transactions could offset positive dumping margins. Thus, this practice has the effect of inflating the overall dumping margin.

The complaint brought by Brazil concerns four US measures: the original anti-dumping duty investigation on certain orange juice from Brazil; the review of 2005-2007 and the one of 2007-2008; and the continued use of 'zeroing' by the US in subsequent administrative reviews. Brazil claims that, by resorting to the practice of 'zeroing' when comparing the normal value and the export price, the US is in violation of Article 2 of the Anti-Dumping Agreement (concerning the determination of dumping). According to Brazil, as a result of the use of such practice, the US is also in violation of Article VI:2 of the GATT (on anti-dumping and countervailing duties) and Article 9.3 of the Anti-Dumping Agreement (regarding the imposition and collection of anti-dumping duties) because the imposition of the duties exceeds the margin of dumping that would have been established should the procedures under Article 2 of the Anti-Dumping Agreement have been properly followed. Brazil further claims that Articles II:1 and II:2 of the GATT are breached to the extent that the US charges higher duties than those permitted under its WTO Schedule of Concessions.

The WTO Appellate Body has condemned the use of 'zeroing' on a number of occasions, where it has found that the use of 'zeroing' does not allow a fair comparison between export price and normal value as required by the WTO Anti-Dumping Agreement. The US was first found to be violating the Anti-Dumping Agreement by resorting to 'zeroing' in the *US - Final Dumping Determination on Softwood Lumber from Canada* case. Before Brazil's complaint, the last case targeting the US authorities' use of 'zeroing' was brought by Japan in the *US - Measures related to Zeroing and Sunset Reviews* case.

Following the WTO findings of inconsistency of 'zeroing', the US has amended its anti-dumping procedures in 2007, eliminating the possibility of resorting to 'zeroing' in dumping margin calculations. However, it appears that the US amendment only applies to future investigations, whereas the application of 'zeroing' would still be possible in proceedings started before the amendment entered into force. Therefore, this case could have interesting consequences for exporters of countries whose products are facing anti-dumping duties under investigations commenced prior to the change in the US anti-dumping procedures.

### **The EC Council agreed on the imposition of anti-dumping duties on imports of aluminium foil from Armenia, Brazil and China**

In its meeting of 24-25 September 2009, the EC Council adopted a regulation imposing a definitive anti-dumping duty on imports of certain aluminium foil originating in Armenia, Brazil and China. The regulation follows a proposal from the EC Commission transmitted to the Council on 4 September 2009 and must be published before the expiration of the provisional duties, six months after their imposition on 9 April 2009.

Anti-dumping investigations on imports of aluminium foil from Armenia, Brazil and China into the EC started after a complaint was lodged by the European Association of Metals (Eurometaux). The investigations revealed the existence of dumping and injury to the domestic producers caused by such dumping. As a result, provisional duties were imposed on 9 April 2009 for six months, ranging from 23.9% to 42.9%. According to the provisional regulation, imports of aluminium foil products from Armenia, Brazil and China were found to have a combined market share of 49% in the EC.

The EC Commission's proposal to the Council broadly confirmed the findings made during the investigations that led to the imposition of the provisional duties. Therefore, definitive duties are to be imposed on a specific form of aluminium foil in rolls, with a width not exceeding 650 millimetres and a weight over 10 kg. The limitation of the weight resulted in the exclusion of the consumer aluminium foil from the application of the anti-dumping duties, leaving the so-called 'jumbo rolls' (which need to be rewound further before they can be considered as a consumer product suitable for household applications and packaging) as the main target of the duties.

The EC Commission proposed to impose definitive duties on Chinese imports of aluminium foil ranging between 6.4% and 30%. Brazilian imports will be subject to a rate of 17.6%. The Companhia Brasileira de Alumínio offered to enter into an undertaking with the EC Commission in return for the concession to sell at a certain minimum price. Such offer was accepted by the EC Commission, which, however, rejected a similar application from the Armenian company Rusal-Armenal, which will face a duty-rate of 13.4%. This is the first anti-dumping proceeding that Armenian exporters are facing in the EC in 2009. Brazilian companies are involved in an anti-dumping case related to polyethylene terephthalate (PET) film. Chinese firms, on the other hand are involved in a number of cases. By 31 August 2009, the EC imposed definitive anti-dumping measures on 52 products exported from China.

The EC aluminium foil rewinding industry stands to be affected by the exclusion of consumer aluminium foil rolls from the product concerned by the investigations. Throughout the investigations, such industry expressed its concerns that imports of 'jumbo rolls' may be substituted by imports of 'consumer rolls' evading the anti-dumping duties. According to the EC

rewinding industry, the exclusion of 'consumer rolls' from the application of the duty could give rise to increased exports of consumer rolls (*i.e.*, the downstream products) as the rewind operations would take place in the exporting countries instead of the Community. In addition, it argued that consumer rolls should also be subject to the duties as both products have basically the same characteristics, the only difference being the packaging. In relation to this latter point, the EC Commission's proposal established that the physical differences between consumer rolls and jumbo rolls are not limited to packaging, because the product concerned has to be rewound before being repacked and resold to the final customer. In addition, the Commission did not find that the EC rewinding industry had brought sufficient evidence in support of its argument that exporters of jumbo rolls into the Community would resort to in-house rewinding and switch their exports from 'jumbo rolls' to 'consumer rolls'.

### **New trade opportunities under the Canada/Ukraine and Canada/EC FTA negotiations**

On 22 September 2009, Canada and Ukraine announced that trade talks are underway to conclude an FTA. Trade relations between Canada and Ukraine have always been strong. In particular, Canadian exports to Ukraine have increased dramatically over the years. Compared to 2004, Canada's exports rose 400% and, compared to 2008, by a further 80%. Both countries agreed on a road-map of priorities for Canada-Ukraine relations. This document sets out, *inter alia*, the principles of economic, trade, energy and development cooperation. The two Countries agreed to focus on expanding market access for trade in goods and services. The agreement between Canada and Ukraine could be highly beneficial to Canadian producers of not only agricultural products and agricultural machinery, but also seafood products and pharmaceuticals. For Ukrainian exporters, an FTA with Canada could be of great commercial interest in areas like agriculture, aerospace and communication technologies.

Earlier this year, FTA talks between the EC and Canada had also been launched (see Trade Perspectives Issue No. 5 of 13 March 2009). The EC is the second biggest trading partner of Canada and Canada is the eleventh for the EC. Although trading relations between the two blocks are generally good, there are some points of occasional friction and disagreement like the ban of Canadian beef on the EC market and the most recent and highly contentious issue of the EC ban on seals products. Both countries agreed to conduct negotiations in order to reach a Comprehensive Economic and Trade Agreement (CETA). These negotiations will cover a very broad segment of trade-related issues. Worth mentioning is the ambition set forth for the services negotiations. Concerns have been voiced about the fact that, in the joint report of 5 March 2009, it is stated that no mode of supply and no services sector shall *a priori* be excluded from the negotiations. In addition, the access to public procurement on central and sub-central level is also on the table, which could terminate the preference in Canada for Canadian suppliers in government procurement contracts. This concession appears to be crucial for the EC to conclude an agreement. Studies show that trade between the EC and Canada could benefit from a boost of 20% with the conclusion of an FTA.

Canada is not new to the FTA front. It concluded agreements with Mexico and the US (NAFTA), Israel, Chile, Costa Rica, Colombia, EFTA, Jordan and Peru. Additional negotiations are taking place with Andean Community, Caribbean Community, Central America Countries (El Salvador, Guatemala, Honduras and Nicaragua), the Dominican Republic, India, Korea, Morocco, Panama, and Singapore. There is also the possibility that a far-reaching FTA of the Americas be achieved. Canada does so in the framework of its Global Commerce Strategy that has been inserted in its

economic plan of November 2006 (known as 'Advantage Canada: Building a Strong Economy for Canadians'), that encourages the pursuit of regional and bilateral trade and investment agreements. These two most recent FTA negotiations open up considerable opportunities for better market access terms in Canada, the EC and Ukraine. Interested operators should closely monitor the talks and closely interact with the Governments of the negotiating parties in order to pursue their commercial interests.

### Recently adopted EC legislation:

- *Council Regulation (EC) No. 913/2009 of 24 September 2009 terminating the new exporter review of Regulation (EC) No. 1174/2005 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of hand pallet trucks and their essential parts originating in the People's Republic of China, re-imposing the duty with regard to imports from one exporter in this country and terminating the registration of these imports*
- *Commission Regulation (EC) No. 868/2009 of 21 September 2009 amending Regulation (EC) No. 748/2008 on the opening and administration of an import tariff quota for frozen thin skirt of bovine animals falling within CN code 02062991 and Regulation (EC) No. 810/2008 opening and providing for the administration of tariff quotas for high-quality fresh, chilled and frozen beef and for frozen buffalo meat*
- *Commission Regulation (EC) No. 860/2009 of 18 September 2009 on the issue of licences for importing rice under the tariff quotas opened for the September 2009 subperiod by Regulation (EC) No. 1529/2007*
- *Commission Regulation (EC) No. 872/2009 of 18 September 2009 concerning the classification of certain goods in the Combined Nomenclature*
- *Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent*
- *Council Regulation (EC) No. 862/2009 of 15 September 2009 terminating the partial interim review of the anti-dumping measures imposed by Regulation (EC) No. 1487/2005 on imports of certain finished polyester filament fabrics originating in the People's Republic of China*
- *Council Decision of 7 September 2009 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Community and Brazil pursuant to Article XXIV:6 and Article XXVIII of the General Agreement on Tariffs and Trade (GATT) 1994 relating to the modification of concessions in the schedules of the Republic of Bulgaria and Romania in the course of their accession to the European Union*
- *Council Regulation (EC) No. 880/2009 of 7 September 2009 concerning the implementation of the Agreement in the form of an Exchange of Letters between the European Community and Brazil pursuant to Article XXIV:6 and Article XXVIII of the General Agreement on Tariffs and Trade (GATT) 1994 relating to the modification of concessions in the schedules of the Republic of Bulgaria and Romania in the course of their accession to the European Union, amending and supplementing Annex I to Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff*
- *Decision No. 2/2009 of the EC-Switzerland Joint Committee of 13 July 2009 amending Protocol No 3 to the Agreement between the European Economic Community and the Swiss Confederation*

*concerning the definition of the concept of 'originating products' and methods of administrative cooperation*

FratiniVergano specializes in European and international law, notably WTO and EC trade law, EC agricultural and food law, EC competition and internal market law, EC regulation and public affairs. For more information, please contact us at:

**FRATINIVERGANO**

EUROPEAN LAWYERS

Rue de Haerne 42, B-1040 Brussels, Belgium Tel.: +32 2 648 21 61 - Fax: +32 2 646 02 70  
[www.FratiniVergano.eu](http://www.FratiniVergano.eu)

Trade Perspectives© is issued with the purpose of informing on new developments in international trade and stimulating reflections on the legal and commercial issues involved. Trade Perspectives© does not constitute legal advice and is not, therefore, intended to be relied on or create any client/lawyer relationship.

To stop receiving Trade Perspectives© or for new recipients to be added to our circulation list, please contact us at:

[TradePerspectives@FratiniVergano.eu](mailto:TradePerspectives@FratiniVergano.eu)