

Brazil issues the preliminary list of imported goods that may be subject to increased tariffs following the WTO arbitrator's findings of 31 August 2009

On 9 November 2009, the Brazilian Chamber of Foreign Trade (hereinafter, CAMEX) has published Resolution No. 74, containing the preliminary 'List of Imported Goods Subject to Increased Duty Rates' of products originated in the US, which may be subject to retaliatory duties as high as 100%, starting in January 2010.

The WTO dispute *United States – Subsidies on Upland Cotton* has been lasting for seven years. On 31 August 2009, a WTO arbitrator issued two awards giving Brazil the permission to suspend concessions and other obligations *vis-à-vis* the US as a consequence of the US non-compliance with the recommendations and rulings of the WTO Dispute Settlement Body (hereinafter, DSB). On the basis of such awards, Brazil is allowed to apply countermeasures on goods imported from the US and, in the event that the amount of total annual sanctions under the proceedings of both Articles 4.11 and 7.10 of the WTO Agreement on Subsidies and Countervailing Measures exceeds a certain threshold determined by the arbitrator and updated every year, to impose also cross-agreement countermeasures on US services provides and US IPR goods (see Trade Perspectives, Issue No. 17 of 18 September 2009).

The preliminary list that the CAMEX has issued on 9 November 2009 relates to the countermeasures that will be applied on imported goods. It contains 222 US goods which are classified under chapters 03 to 97 of the Harmonised System (HS) including, *inter alia*, food products, chemical products, medicines, tires, clothes, textiles, electronic products and vehicles. Such preliminary list aims at triggering public discussions as to which products should be kept on the list (the list is valued much higher than the USD 884.1 million of allowed 'retaliation'). Public consultations remain open until 30 November 2009 for industries and commercial associations to voice their opinions and concerns. Reports indicate that, in early December, the ministries involved and the CAMEX will convene to evaluate the recommendations made and to adapt the list according to the WTO ruling and to the suggestions received. It is expected that Brazil will formalise the final list by the end of December 2009, so that it may start imposing countermeasures as of January 2010.

In order to impose countermeasures, Brazil still needs to obtain formal authorisation from the WTO DSB. Brazil has requested authorisation to apply countermeasures to the WTO DSB on 9 November 2009, and is likely to obtain it unless the WTO DSB decides by consensus to reject the request. Brazil's domestic industry stands to benefit greatly from the imposition of further duties, as it will face reduced competition from the US within the domestic market. In order to attempt to secure that the competing US products are included in the final list of imported US products subject to retaliation, the Brazilian industry, manufacturers and trade associations should contact the CAMEX and voice their interests within the deadline.

Imminent Commission Regulation establishing the new lists of vitamins and minerals and their forms which may be used in food supplements

On 31 December 2008, the permission for food supplements manufacturers to use vitamins and minerals and their forms other than those listed in Annexes I and II to Directive (EC) No. 2002/46 of the European Parliament and of the EC Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements will lapse.

Article 4 of that directive sets out that only vitamins and minerals listed in Annex I, or in the forms listed in Annex II, may be used for the manufacture of food supplements. However, this is subject to paragraph 6 which states that, until 31 December 2009, Member States may allow in their territory the use of vitamins and minerals not listed in Annex I, or in forms not listed in Annex II, provided that: (a) the substance in question is used in one or more food supplements marketed in the Community on the date of entry into force of the Directive (12 July 2002), and (b) the European Food Safety Authority (hereinafter, EFSA) has not given an unfavourable opinion in respect of the use of that substance, or its use in that form, in the manufacture of food supplements, on the basis of a dossier supporting the use of the substance in question to be submitted to the EC Commission by the Member State not later than 12 July 2005.

The publication of an EC Commission Regulation, which establishes the new Annexes I (*i.e.*, the vitamins and minerals which may be used in the manufacture of food supplements) and II (*i.e.*, vitamin and mineral substances which may be used in the manufacture of food supplements) to Directive (EC) No. 2002/46 on food supplements, is imminent. The draft regulation (*i.e.*, Document 12695/09 of 28 July 2009) states that the new vitamin and mineral forms have been evaluated by EFSA and that the substances, which have received a favourable scientific opinion and for which the requirements laid down in Directive No. (EC) 2002/46 are met, should be added to the respective lists. It appears that boron and silicon will be added to the existing list of 15 minerals in Annex I. The number of vitamins seems to remain unchanged (13). The new Annex II would comprise 181 substances. Therefore 69 vitamin and mineral forms would be added to the existing list of 112 forms, including the vitamin forms mixed tocopherols and pantethine and the mineral forms calcium sulphate, magnesium L-lysinate, copper (II) oxide, zinc picolinate, potassium malate, calcium fluoride and sodium borate, just to mention a few. However, according to industry sources, this is inadequate and many products that have been selling freely in the EC will be banned as of 1 January 2010 for containing minerals or vitamins (or their forms) which are not listed. It has been argued that, from a scientific point of view, it appears questionable that, for example, forms of vanadium have not been listed.

In its opinion of 29 January 2008, EFSA concluded that safe use of these sources for vanadium added to foods intended for the general population (including food supplements) cannot be established. EFSA emphasised on the inconsistency and the lack of information on specific elements in the specifications of heavy metals in the different dossiers, as well as the high levels of arsenic and lead in the specifications of some vanadium sources, in comparison to other sources.

What can be done at this stage if a substance has not received a positive opinion and may not be listed? There have been three Court cases against negative EFSA opinions at the European Court of First Instance (hereinafter, CFI). The three applications concerned, firstly, the annulment of opinions of EFSA on the assessment of an active substance under Council Directive (EEC) No.

91/414 concerning the placing of plant protection products on the market and, secondly, two claims for damages for the loss allegedly sustained as a result of the adoption of the respective opinion. All three applications have been declared inadmissible (i.e., Order of the CFI of 17 June 2008 – FMC Chemical v EFSA, Case T-312/06; Order of the CFI of 17 June 2008 – Dow AgroSciences v EFSA, Case T-397/06; and Order of the CFI of 17 June 2008 – FMC Chemical and Arysta Lifesciences v EFSA, Case T-311/06). Applications for interim measures seeking suspension of operation of the contested measures were dismissed as well.

The CFI ruled that *“it is settled case-law that only measures the legal effects of which are binding on the applicant and capable of affecting his interests by bringing about a distinct change in his legal position are acts or decisions against which proceedings for annulment may be brought. As regards, specifically, acts or decisions drawn up in a procedure involving several stages, only measures definitively laying down the position of the institution on the conclusion of that procedure are, in principle, measures against which proceedings for annulment may be brought. It follows that preliminary measures or measures of a purely preparatory nature are not measures against which proceedings for annulment may be brought.”*

The argument of the respective applicants that the contested measures (i.e., EFSA's opinions) produce binding legal effects, was also rejected. Although the CFI admitted that the EC Commission adopts its decisions after obtaining the opinion of EFSA, note must be taken of the fact that there is nothing in the law to suggest that the EC Commission is obliged to comply with EFSA opinions in substantive terms and that, therefore, it has no discretion. Only the EC Commission directive or decision may be regarded as the final stage in the procedure.

In light of this jurisprudence, the 'bans' of vitamins and minerals and their forms, which have not received positive EFSA opinions, may be challenged as soon as the EC Commission Regulation establishing the new Annexes has been adopted and published. Commercial operators, which feel that the new lists of vitamins and minerals are incomplete, should follow with attention the imminent developments and be prepared to challenge the respective EC Commission Regulation.

Conflicting interests between free trade and climate protection

On 23 April 2009, the US State of California adopted the first low-carbon fuel standard, which sets maximum thresholds for emissions in either the production or consumption of all fuels. This regulation is to come into force on 1 January 2011.

Two different issues appear to be more intertwined than ever: climate change and international trade. The former is regulated by the Kyoto Protocol to the United Nations Framework Convention on Climate Change; the latter is disciplined by the WTO. The Kyoto Protocol provides that the participating Developed Countries should reduce emissions of 6 greenhouse gases to an average of 5.2% below 1990 levels by the period of 2008-2012. This objective has a potential to cause adverse effects on world trade, even though the Kyoto Protocol, in its Article 2, specifically requires Parties to minimise the adverse effects on international trade when implementing policies and measures under the Protocol. While more and more Countries are implementing policies that aim at meeting the commitments undertaken under the Kyoto Protocol, the adverse effects on international trade may increasingly become an issue.

While such policies have been advanced by means of carbon taxes or energy taxes, a new kind of measure has recently emerged. In particular, California has adopted a 'low-carbon fuel standard'. This standard is based on the premise that every fuel has a lifecycle, which starts at the moment of production and finishes at its combustion. The lifecycle analysis calculates the emissions that different fuels generate during their lifespan. In addition, the 'low-carbon fuel standard' provides for specific rules for biofuels. In fact, in their case, indirect pollution, which comes (for example) from the conversion of forests to farmland for the cultivation of fuel-feedstock crops, is incorporated in their lifecycle emissions scorecard. The Californian standard aims at achieving emission reductions of 10% for their entire fuel mix by 2020. It is a system administered through the provision of credits (when a certain fuel is rated to generate lower emissions) and deficits (when the opposite occurs). This will ultimately be reflected in the fuel price. This regulation is especially directed to fuel blenders, refiners and importers, as they will start to carefully select their fuel providers in order to buy credits, rather than deficits.

No WTO panel or Appellate Body report has ever considered the possible trade effects of similar measures. However, the introduction of such low-carbon fuel standard could work like a barrier to trade. The legal framework adopted by California may affect national treatment, as provided in Article III of the GATT. In addition, such rules may also violate Article I of the GATT, which embodies the principle of the most-favoured-nation treatment. Fuel that is produced in one Country can be accorded a much higher price than fuel from domestic producers or producers from other Countries, depending on whether different fuel forms are considered to be like products or not. Such negative consequence could, for instance, affect Canadian oil extracted from 'oil or tar sands'. The production process of the oil through this method is very different and comparatively more polluting than, for example, the production process of conventional oil. Therefore, Canadian oil may be treated in a different (more costly) way than the oil produced by other Countries through less polluting techniques.

California's legislation may serve as a basis for the US and a number of other Countries, which plan or are in the process of implementing similar regulations. Such standard may force oil producers to revisit and even alter their production methods or even switch to other energy sources and adopt cleaner-energy standards. However, it is clear that not every Country has the possibility to change its oil production or oil refining methods. Therefore, it is necessary to fully assess the impact that such measures may have *vis-à-vis* the relevant international trade rules and the other applicable multilateral obligations.

The US requested NAFTA consultations with Mexico regarding Mexico's failure to move the Tuna-Dolphin dispute from WTO to NAFTA

On 5 November 2009, the United States Trade Representative (USTR) announced that the US requested consultations with Mexico under the framework of the North American Free Trade Agreement (hereinafter, NAFTA) concerning Mexico's failure to move the WTO dispute '*United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*' (hereinafter, *US – Tuna-Dolphin*) from the WTO to the NAFTA.

In March 2009, Mexico requested the establishment of a WTO panel for the *US – Tuna-Dolphin* dispute, after consultations did not lead to a mutually satisfactory solution (see Trade Perspectives, Issue No. 5 of 13 March 2009). The NAFTA, to which both the US and Mexico are party, allows, under Article 2005(4), the responding party of a WTO complaint to request to move under the

NAFTA a WTO dispute concerning (*inter alia*) standards-related measures either (i) adopted or maintained by a party to protect its animal life or health or to protect its environment; or (ii) raising factual issues concerning the environment, health, safety or conservation. On the basis of such choice-of-*forum* provision, on 24 March 2009, the US requested that the dispute be moved from the WTO to NAFTA.

In particular, the US alleges that it adopted the measures regarding 'dolphin safe' labelling, currently challenged by Mexico under the WTO, for the protection of the dolphin population in the Eastern Tropical Pacific Ocean. Therefore, according to the US, such measures comply with the conditions set forth in Article 2005(4) of the NAFTA to request that a dispute be brought from the WTO to the NAFTA. However, during the meeting of the WTO DSB of 20 April 2009, where the request for the establishment of a WTO panel was being discussed, Mexico argued that the provisions of Article 2005(4) of the NAFTA did not apply to the dispute at stake, which deals with issues having important multilateral implications that must be solved within the WTO as the substantial interest at the international level has to be taken into account. In addition, Mexico stated that informal meetings had already revealed that other WTO Members would be interested in joining the dispute, which would not be possible under NAFTA. A WTO panel was ultimately established during the said DSB meeting. As a consequence, on 5 November 2009, the US requested NAFTA consultations regarding Mexico's failure to move the dispute from the WTO to the NAFTA.

In addition to the substantive aspects of the matter, this controversy poses a fundamental issue of jurisdiction and choice-of-*forum*. Article 2005(4) appears to confer jurisdiction solely to the NAFTA dispute settlement mechanism, once the responding party has lodged a request to move the dispute from the WTO to NAFTA. However, according to Article 23.1 of the WTO DSU, the WTO has exclusive jurisdiction for matters which are covered by the WTO agreements.

This is not the first time that an issue of jurisdiction between NAFTA and WTO arises among the same parties. In *Mexico – Tax Measures on Soft Drinks and Other Beverages* (hereinafter, *Mexico – Soft Drinks*) it was Mexico's turn to argue in favour of NAFTA's jurisdiction. In that case, Mexico did not challenge the WTO panel's jurisdiction. However, it requested the WTO panel to decline its jurisdiction in favour of a NAFTA Arbitral Panel to be established under Chapter 20 of the NAFTA.

In *Mexico – Soft Drinks*, the WTO panel and the Appellate Body concluded that WTO dispute settlement bodies had no discretion to decline jurisdiction on the grounds that, *inter alia*, WTO panels may not add to or diminish the rights and obligations of WTO Members provided in the covered agreements. However, in evaluating Mexico's arguments, the WTO panel and Appellate Body noted that Mexico did not claim that there are legal obligations, under the NAFTA or any other international agreement to which Mexico and the US are both parties, which might raise legal impediments to the Panel hearing this case. This statement leads to the question of whether, in presence of 'legal obligations under the NAFTA' which might result in 'legal impediments', the WTO jurisdiction could be declined in favour of NAFTA. In *US – Tuna-Dolphin*, the WTO panel might have to decide whether Article 2005(4) of the NAFTA raises a 'legal impediment' to the WTO panel hearing this case.

With the proliferation of free trade agreements, many of which include extensive and detailed provisions concerning dispute settlement, matters concerning jurisdiction are likely to arise more frequently. In fact, a number of free trade agreements may provide that jurisdiction to hear trade controversies is not exclusive. Regionalism and bilateralism, therefore, could have an impact on

the solution of disputes as countries may be more inclined to seek a bilateral solution. This will benefit companies and private operators, which will have the possibility of lobbying their Governments to choose the dispute settlement mechanism which better serves their interests. Ultimately, however, the choice might depend on the ability of the chosen mechanism to ensure effective enforcement of the obligations and rulings.

Recently Adopted EC Legislation

- *Commission Regulation (EC) No. 1135/2009 of 25 November 2009 imposing special conditions governing the import of certain products originating in or consigned from China, and repealing Commission Decision 2008/798/EC*
- *Commission Regulation (EC) No. 1093/2009 of 13 November 2009 amending Annex V to Council Regulation (EC) No. 1342/2007 as regards the quantitative limits of certain steel products from the Russian Federation*
- *Commission Decision of 12 November 2009 on emergency measures imposing special conditions on official controls governing the import of pears originating in or consigned from Turkey due to high residue levels of amitraz (notified under document C(2009) 8977)*
- *Regulation (EC) No 1069/2009 of the European Parliament and of the Council of 21 October 2009 laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No. 1774/2002 (Animal by-products Regulation)*
- *Regulation (EC) No 1073/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international market for coach and bus services, and amending Regulation (EC) No. 561/2006*
- *Regulation (EC) No. 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC*
- *Directive 2009/128/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for Community action to achieve the sustainable use of pesticides*
- *Directive 2009/127/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2006/42/EC with regard to machinery for pesticide application*
- *Regulation (EC) No. 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies*

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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

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