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Turbulent imports of Indian table grapes into the EU due to public health considerations

As of April 2010, EU authorities have been blocking the import of several consignments of table grapes originating in India, on the ground that they contain high levels of chlormequat chloride (*i.e.*, a chemical residue used as plant growth regulator).

The import ban was initiated after the EU Commission received information from several EU food operators that some of the grape consignments to be imported might contain the contested substance at higher levels than the ones permitted under Regulation (EC) No. 396/2005 '*on maximum residue levels of pesticides in or on food and feed of plant and animal origin*'. On the basis of this information, the EU Commission decided to halt all such imports and requested the European Food Safety Authority (hereinafter, EFSA) to issue an opinion on the public health risk posed by the presence of this substance in table grapes. EFSA concluded that the presence of chlormequat residue in table grapes does not constitute a health risk for consumers, as long as the substance's concentration per lot does not exceed 1,06 mg/kg. At the same time, however, it stated that the threshold of 1,06 mg/kg should not be perceived as a maximum residue level, as '*it is affected by uncertainties*' and it is only '*provided for use by risk managers to decide on adequate risk management actions to be taken in order to protect European consumers with regard to the lots for which the urgent request was sent to EFSA*'.

Under the WTO system, measures adopted for the protection of human, animal and plant life and health fall under the scope of the WTO Agreement on Sanitary and Phytosanitary Measures (hereinafter, SPS Agreement). The latter allows each WTO Member to choose the level of health protection that it deems appropriate, even if this may result in the application of trade restrictions. However, at the same time, the SPS Agreement contains a number of provisions to ensure that adopted SPS measures are not a camouflage for protectionism, such as, *inter alia*, the obligation of any country wishing to introduce an SPS measure to conduct a scientific risk assessment; to demonstrate consistency in its SPS actions; and to try minimising negative trade effects, when designing and adopting its SPS measures.

According to reports, India has implied that the grape seizures are part of a wider policy of the EU to create non-tariff barriers against its products, probably referring to the seizures by the EU authorities of generic medicines in transit originating in India (see Trade Perspectives, Issue No. 10 of 21 May 2010). In addition, it has claimed that the real reason behind the EU measures is not the protection of consumer health, but the desire of the EU to protect its farmers. It appears likely that India will contest the grape seizures under the SPS Agreement, attacking the scientific assessment on which the measures adopted by the EU are based.

Several reports suggest that the Indian Government has already engaged in bilateral talks with several EU Member States, in an effort to find a swift solution to the problem. The same reports state that there has been an agreement on the EU side to accept the importation of 70% of the consignments seized. In any case, regardless the outcome of the negotiations, the seizures appear to have already caused major problems to the Indian producers, who, while counting on an upsurge of grape exports to the EU in order to cover the gap that the earthquake in Chile created this year in the EU market, sustained substantial financial losses, either due to the delays upon the consignments' importation, or the extra cost that the diversion of consignments to third countries resulted in.

The negotiations on the special agricultural safeguard mechanism in the WTO heat up

A number of WTO Members have expressed their concerns on the special safeguard mechanism (hereinafter, SSM) for agricultural products currently discussed in the framework of the Doha Round agricultural negotiations at the WTO.

In the Doha Declaration adopted on 14 November 2001, all WTO Members agreed that, with respect to agriculture, special and differential treatment for developing countries has to be an integral part of all elements of the negotiations with the aim of constituting a mechanism that is operationally effective and which enables developing countries to effectively take account of their development needs, including food security and rural development. On such basis, a number of WTO Members, notably those that are Members of the G-33, have tabled proposals in the framework of the Doha negotiations suggesting the establishment of an SSM. Whereas the current Special Safeguards (SSGs) envisaged under Article 5 of the WTO Agreement on Agriculture can be applied by both developing and developed countries that specifically reserved this right, the SSM under negotiation would only be accessible to developing countries in order to seek protection from the negative effects of the diminished flexibility which would be caused by the ever-narrowing gap between the applied and bound tariffs resulting from trade concessions in the context of the negotiations. In particular, the G-33 Members support an effective, easy to operate, simple and accessible instrument which takes into account their developmental needs, in line with the Doha Declaration, by addressing import surges and price declines. The G-33 Group alleges that the rationale of such SSM for developing countries relates to the primary purpose of agriculture, which is not trade, but survival. In addition, it takes into account the distortions which the agricultural sector experiences in such countries. An SSM, therefore, to be considered as an instrument which would allow developing WTO Members to address concerns of food and livelihood security, poverty reduction and rural development, while undertaking liberalisation commitments.

Although the need for an SSM for developing countries is accepted, there are still a lot of issues to be resolved, which reports indicate were part of the reason the high level multilateral talks to conclude the Doha Round failed in 2008. In essence, as the Chairman of the WTO Committee on Agriculture reported to the Trade Negotiations Committee on 22 March 2010, there is a need for a '*fit for purpose*' mechanism, which appears to be very difficult to establish. In the last Chairman texts of 6 December 2008 (*i.e.*, the Revised Draft Modalities for Agriculture and the Revised Draft Modalities for Agriculture – Special Safeguard Mechanism), the application of the SSM is not subject to *a priori* product limitations so that it can be invoked for all tariff lines. There will be two kinds of SSMs: a price based and a volume based SSM. When a volume based SSM is invoked, WTO Members cannot have recourse to exceeding pre-Doha bound tariff rates if the domestic prices for the product are not declining or where imports are at a negligible level in relation to domestic production and consumption. WTO Members cannot resort to the price based SSM if the volume of imports is manifestly declining or is at a manifestly negligible level (*i.e.*, incapable of undermining the domestic price level). However, the G-33 Group issued a communication that such conditions can only apply to those economic models in which the supply of imports and the demand for exports are assumed to be perfectly price elastic, which does not correspond to reality. Other concerns relate to seasonality, flexibilities for small and vulnerable economies (SVEs), and pro-rating (*i.e.*, the fact that a higher trigger is applied on developing countries if they have already previously used the SSM on those tariff lines). Therefore, the G-33 proposes instead to scale down the extra barriers that have been added to the existing SSGs to form the SSMs.

Exporters are afraid that this might lead to a situation where the SSM is used not only for import surges, but also for growth in normal trade. Reports indicate that the Australian and Canadian authorities have recently issued a joint informal paper that argues that an SSM, as the G-33 proposes in an unconstrained form, would gravely affect normal trade. They made a simulation of the application of the SSM to soybeans, palm oil and bananas and concluded that such application

could lead to major trade losses. However, the G-33 responded that it was unlikely that the proposed SSM would ever be applied to these highly-traded products due to high demand.

The above analysis of the SSM only concerns the multilateral negotiations which are going on in the WTO. However, this also has an impact outside of the WTO. More and more free trade agreements (FTAs) contain agricultural safeguard measures, that build on the WTO experience with SSGs and the current negotiations concerning SSMs. Overall, it can be concluded that the conditions to apply an SSG, as compared to the SSM in the latest Chairman's texts, are much more flexible, *inter alia*, concerning data requirement, the duration of the application of the SSG, the applicability to preferential trade (*i.e.*, *inter alia*, with respect to products which are also on the sensitive list) and the lack of restrictive provisions for seasonal products. It is advisable that governments and affected industries closely follow such negotiations to be able to react and express their concerns timely on the multilateral level and to gather inspiration for conducting bilateral negotiations.

ECJ judgment on upper safe levels (USLs) for nutrients in food supplements

On 29 April 2010, the Court of Justice of the European Union (hereinafter, ECJ) delivered a judgement on the interpretation of Directive 2002/46/EC on the approximation of laws of the EU Member States relating to food supplements in case C-446/08 Solgar Vitamin's France, a.o. (Valorimer SARL, Christian Fenioux, L'Arbre de Vie SARL, Source Claire, Nord Plantes EURL, RCS Distribution, Ponroy Santé, Syndicat de la Diététique et des Compléments Alimentaires) v. Ministre de l'Économie, des Finances et de l'Emploi, Ministre de la Santé, de la Jeunesse et des Sports, Ministre de l'Agriculture et de la Pêche. The judgement, a preliminary ruling under Article 234 EC (now Article 267 of the Treaty on the Functioning of the European Union), after a request from the French Conseil d'État, concerns in particular rules that EU Member States have to comply with and criteria to take into consideration when setting maximum safe amounts of vitamins and minerals which may be used in the manufacturing of food supplements.

Directive 2002/46/EC on food supplements states that excessive intake of vitamins and minerals may result in adverse effects and, therefore, there is a need to set maximum safe levels for them in food supplements. Those levels must ensure that the normal use of the products under the instructions of use provided by the manufacturer will be safe for the consumer. When maximum levels are set, account should be taken of the upper safe levels of the vitamins and minerals, as established by scientific risk assessment based on generally acceptable scientific data, taking into account, as appropriate, the varying degrees of sensitivity of different consumer groups and the intake of vitamins and minerals from other dietary sources. Due account should also be taken of reference intake amounts when setting maximum levels. The adoption of the specific values for maximum and minimum levels for vitamins and minerals present in food supplements, based on the criteria set out in the Directive and appropriate scientific advice, would be an implementing measure and should be entrusted to the Commission.

The problem is that the EU Commission has so far not set such limits, although there have been a number of attempts since 2002. In particular, in June 2006 the EU Commission's Directorate General Health and Consumer Protection issued a discussion paper on the setting of maximum and minimum amounts for vitamins and minerals in foodstuffs for which comments were received from almost all EU Member States and numerous stakeholders. Meanwhile, EU Member States did establish upper safe levels (hereinafter, USLs), some of them (like Belgium and Denmark) basing USLs on multiples of recommended daily intakes. A proposal for a Regulation on the addition of vitamins and minerals and of certain other substances to foods, intended to set the criteria for the establishment of maximum and minimum levels of vitamins and minerals in foods through the procedure of the Standing Committee on the Food Chain and Animal Health, however, has not been adopted.

In the ECJ case at question, the French decree of 9 May 2006 sets out, inter alia, a list of vitamins and minerals which may be used in the manufacturing of food supplements and the maximum daily dose which must not be exceeded when those supplements are taken. As regards fluorine, Annex III to the decree of 9 May 2006 sets its maximum daily dose at 0 mg. The decree was challenged and, as the case concerned the interpretation of EU law, the Conseil d'Etat referred specific questions to the ECJ.

The ECJ ruled that, while waiting for the Commission to lay down those amounts, in addition to the obligation to comply with Articles 28 EC and 30 EC (*i.e.*, the rules on free movement of goods), EU Member States must also be guided by the criteria laid down in Directive 2002/46/EC, including the requirement for a risk assessment based on generally-accepted scientific data, in setting the maximum amounts of vitamins and minerals which may be used in the manufacturing of food supplements. Directive 2002/46/EC must be interpreted as meaning that, in a situation such as that in the main proceedings where, when setting the maximum amount of a mineral which may be used in the manufacture of food supplements, it is impossible to calculate precisely the intake of that mineral from other dietary sources (as fluoride is present, inter alia, in water), and so long as the Commission has not laid down the maximum amounts of vitamins and minerals which may be used in the manufacture of food supplements, an EU Member State may, if there is a genuine risk that that intake will exceed the upper safe limit established for the mineral in question, and provided that Articles 28 EC and 30 EC (now Articles 34 and 36 of the Treaty on the Functioning of the European Union) are respected, set the maximum amount at a zero level.

In relation to labelling, the ECJ ruled that it is for the national court to examine whether appropriate labelling informing consumers about the nature, the ingredients and the characteristics of the food supplements concerned constitutes a measure which is sufficient to ensure the protection of the health of those persons, in particular in order to avoid the harmful effects relating to an excessive consumption of the nutrients concerned. Furthermore, the ECJ established that Directive 2002/46/EC must be interpreted as meaning that it precludes the setting of maximum amounts of vitamins and minerals which may be used in the manufacturing of food supplements where, in the absence of a genuine risk to human health, upper safe limits have not been established for those vitamins and minerals, unless such a measure is justified in accordance with the precautionary principle, if a scientific risk assessment reveals that scientific uncertainty persists as regards the existence or extent of real risks to human health. After the upper safe limits have been established, the possibility of setting such maximum amounts at a level significantly lower than those limits cannot be excluded if the setting of those maximum amounts can be justified by taking into account the criteria of Directive 2002/46 and if the setting complies with the principle of proportionality. That assessment is a matter for the national court and must be carried out on a case-by-case basis.

Which conclusions can the food supplements industry draw from this judgment? The question is whether this judgement, in the absence of EU-wide harmonisation, gives clear guidance on how USLs should be calculated and established in the EU Member States. It appears that this is still subject to various interpretations. While it appears that the ECJ ruling establishes that EU Member States may not set maximum permitted levels at low levels unless genuine and real risks can be demonstrated, EU Member States may consider the data on intakes from other sources to be highly unreliable in order to limit the amounts in food supplements to zero without genuine scientific justification. In any event, the ECJ judgement will be a tool to use in discussions with EU Member States in relation to the setting of USLs, however, it should be analysed in depth to avoid backfire. Another avenue which should be considered is the establishment of EU USLs based on the appropriate science established by the EU Commission with the EU Member States in the comitology procedure.

Free trade agreement talks between the EU and Gulf Cooperation Council were suspended

The Gulf Cooperation Council (the GCC, composed of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates), suspended free trade agreement negotiations with the EU.

Bilateral trade relations between the EU and the GCC were first established in 1988, when both parties signed a Cooperation Agreement which contained a commitment by both sides to enter into FTA negotiations. Negotiations first began in 1990, were soon suspended, and then re-launched with a new mandate in 2002. Negotiations between the two blocks were suspended again in December 2008 due to the insistence of the EU to include a chapter on human rights, as well as to the fact that some Gulf countries, notably Saudi Arabia, wanted to retain selective export duties (see Trade Perspectives, Issue No. 8, of 24 April 2009). Subsequently, consultations were revived and suspended a number of times.

According to reports, the Director General of the External Economic Relations Department at the GCC declared that the suspension of talks was announced because of the EU's intention to add '*a clause depriving GCC countries the right to impose duties on EU exports in the future*'. In addition, it appears that disagreements persisted over a range of different issues including, *inter alia*, tariffs and petrochemical subsidies. Reports suggest that subsidies for petrochemicals and other sectors based on cheap energy in the region represent now the biggest issue within the negotiations. This sector appears to be of strategic importance to Gulf countries that enjoy competitive advantage on energy sources. In particular, according to reports, certain Gulf petrochemical companies are able to buy inputs for their petrochemical products at fixed prices from state-owned companies, whereas competitors outside the region need to resort to more expensive inputs linked to the world market price of oil.

Companies in the region appear to benefit also from subsidies in the form of duty-free imports of key inputs. In fact, frictions between the two blocks could have increased following the EU Commission's decision to impose provisional anti-dumping and countervailing duties on imports of polyethylene terephthalate (PET) from, *inter alia*, the United Arab Emirates. The EU Commission's decision (*i.e.*, Commission Regulation (EU) No. 472/2010 of 31 May 2010 imposing a provisional anti-dumping duty on imports of certain polyethylene terephthalate originating in Iran and the United Arab Emirates and Commission Regulation (EU) No. 473/2010 of 31 May 2010 imposing a provisional countervailing duty on imports of certain polyethylene terephthalate originating in Iran, Pakistan and the United Arab Emirates) was taken pursuant to parallel anti-dumping and countervailing duties investigations on imports of PET from 1 July 2008 to 30 June 2009. In particular, the EU Commission found that United Arab Emirates' exporting companies were benefiting from schemes exempting them from import duties on raw materials, packing material and capital goods (such schemes did not comply with the requirements of permissible duty drawback system) or operating under a free trade zone regime, benefiting from duty-free imports of capital goods. As a result, and pursuant to a finding of injury, the EU imposed provisional countervailing duties on imports of PET from, *inter alia*, the United Arab Emirates amounting to 42.34 EUR/tonne, (*i.e.*, a rate of 5.1%). The anti-dumping investigation also led to findings on the existence of dumping and injury to the EU domestic industry. Provisional anti-dumping duties against imports of PET from the United Arab Emirates amounted to 54.80 EUR/tonne (*i.e.*, a rate of 6.6%). Provisional anti-dumping and countervailing duties on PET were imposed on 1 June 2010, and will be in force until 30 November 2010 and 30 September 2010 respectively, if they are not confirmed by the EU Council.

The GCC is currently the EU's fifth largest export market and the EU is the top trading partner for the GCC. The EU exports to the region are mainly machinery and transport materials, such as power generation plants, railway locomotives and aircraft, as well as electrical machinery and mechanical appliances. An FTA with GCC countries stands to be very attractive for certain EU exports. It is supported by EU countries such as Germany and the region is indicated as a priority FTA partner in the EU Commission strategy outlined in the EU Communication Global Europe - Competing in the World issued in 2006. Certain EU competitors have already signed or are considering negotiating trade agreements with Gulf countries. In particular, the US enjoys FTAs with Bahrain and Oman. The US also has a Trade and Investment Framework Agreement with all GCC countries and a bilateral investment treaty with Bahrain. The possibility of launching FTA negotiations with Malaysia and China is being considered by the GCC. However, it appears that

GCC countries intend to formally launch such talks only once the already ongoing negotiations, such as the one with the EU and the US, have been completed.

Recently Adopted EU Legislation

- *Commission Regulation (EU) No. 478/2010 of 1 June 2010 imposing a provisional anti-dumping duty on imports of high tenacity yarn of polyesters originating in the People's Republic of China*

- *Commission Regulation (EU) No. 471/2010 of 31 May 2010 amending Regulation (EC) No. 1235/2008, as regards the list of third countries from which certain agricultural products obtained by organic production must originate to be marketed within the Union*

- *Commission Regulation (EU) No. 472/2010 of 31 May 2010 imposing a provisional anti-dumping duty on imports of certain polyethylene terephthalate originating in Iran and the United Arab Emirates*

- *Commission Regulation (EU) No. 473/2010 of 31 May 2010 imposing a provisional countervailing duty on imports of certain polyethylene terephthalate originating in Iran, Pakistan and the United Arab Emirates*

- *Commission Regulation (EU) No. 460/2010 of 27 May 2010 amending Regulation (EC) No. 1580/2007 as regards the trigger levels for additional duties on tomatoes, apricots, lemons, plums, peaches, including nectarines, pears and table grapes*

- *Commission Regulation (EU) No. 443/2010 of 21 May 2010 entering a name in the register of protected designations of origin and protected geographical indications (Piave (PDO))*

- *Commission Regulation (EU) No. 453/2010 of 20 May 2010 amending Regulation (EC) No. 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)*

- *Decision No. 477/2010/EU of the European Parliament and of the Council of 19 May 2010 repealing Council Decision 79/542/EEC drawing up a list of third countries or parts of third countries, and laying down animal and public health and veterinary certification conditions, for importation into the Community of certain live animals and their fresh meat*