

The EU increases its quantity of out-of-quota sugar exports

The EU Commission has issued Regulation (EU) No. 94/2010 of 3 February 2010 increasing the quantity of the out-of-quota sugar exports in respect of the marketing year 2009/2010 (hereinafter, Regulation No. 94/2010) by an additional 500,000 tonnes of sugar. It has been reported that Australia, Brazil and Thailand allege that the EU, by allowing additional exports of out-of-quota sugar, is acting in violation of its WTO obligations and, in particular, of its export subsidies commitments under the Agreement on Agriculture.

Regulation (EC) No. 1234/2007 establishing a common organisation of agricultural markets sets production quotas for sugar. If such limits are exceeded, the sugar produced in excess of the production quota may be, *inter alia*, used for industrial purposes, carried forward to the quota production of the next marketing year or exported within the limits fixed by the EU Commission on the basis of its WTO exports subsidies commitments for sugar.

The WTO Agreement on Agriculture, negotiated during the Uruguay Round, required WTO Members granting subsidies to domestic producers to cap the level of domestic support and export subsidies to certain predetermined, committed levels. The EU undertook such commitments and capped the level of export subsidies which it grants to sugar producers. The limitation is expressed in terms of the maximum level of expenditure (*i.e.*, the budgetary outlay) and the maximum quantity of (*inter alia*) sugar in respect of which such export subsidies may be granted. Following EU enlargement, it appears that the EU set the allowed quantity of its subsidised sugar exports at 1.37 million tonnes. The quantitative limits for the export of surplus sugar are fixed per each marketing year, and for 2009/2010 the limit had been set at 1.35 million tonnes.

According to the EU, due to the current international economic conditions, out-of-quota sugar exports are not subsidised and, therefore, are not to be included within the committed levels. On the basis of the economic conditions present at the time when the 1.35 million tonnes limit was set, the average cost of production of sugar in the EU could have exceeded the selling price of out-of-quota sugar on the export market and, therefore, the EU's out-of-quota exports of sugar could have been deemed subsidised above the EU's committed levels. The 'cost of production benchmark' for assessing the existence of 'payments' within the meaning of Article 9.1(c) of the Agreement on Agriculture (on the list of export subsidies subject to reduction commitments), was set by the WTO Appellate Body in the dispute *EC - Export Subsidies on Sugar*, brought by Australia, Brazil and Thailand against the EU common market organisation for sugar. In that dispute, the earlier EU sugar regulation was found to be inconsistent with the EU's export subsidies commitments. The panel and the Appellate Body found that the EU was cross-subsidising above the committed levels its exports of C sugar through below average total cost of production sales resulting from the operation of the EU sugar regime.

However, the EU claims that the global economic conditions have developed, world prices for sugar have more than doubled since then, and prices in the sugar market in the EU have decreased. As a consequence, under such conditions, the average production cost of sugar beet in the EU has fallen below the selling price of the out-of-quota sugar beet, and the selling price of the out-of-quota sugar on the world market is above the average cost of production in the EU. Therefore, according to the EU, as long as these conditions are valid, exports of out-of-quota sugar cannot be considered as subsidised above the EU's committed levels. The EU estimates that

about 4.1 million tonnes of out-of-quota sugar will be produced in the marketing year 2009/2010, of which 500,000 will be available for exports. As world sugar production has dropped and world prices have increased, the EU decided to 'dispose' of the surplus production on the export markets, by increasing the out-of-quota export limit.

Australia, Brazil and Thailand appear to be claiming that the sugar which the EU has authorised for export is subsidised, as the design of the EU regime for sugar is constructed in such a way that all sugar production benefits from subsidies. In particular, these WTO Members allege that, as established by the WTO DSB in *EC - Export Subsidies on Sugar*, all sugar products result from a single line of production that does not differentiate between sugar that is destined for the domestic market and sugar that is destined for the export market. Therefore, Australia, Brazil and Thailand claim that the EU measure is a violation of the EU's WTO commitments.

A WTO panel will have to assess whether, in light of the EU's increase of out-of-quota exports, the EU's sugar regulation is again violating the EU's export subsidies commitments. The panel's review will possibly focus on whether the 'cost of production' benchmark can be applied in presence of evolving global market conditions or if another benchmark reflecting the value of surplus sugar need to be sought in order to assess the existence of 'payments' under Article 9.1(c) of the Agreement on Agriculture. However, as Regulation 94/2010 is set to expire on 30 June 2010, it might be difficult for the three sugar exporting countries to launch and conclude a WTO complaint by then.

Vietnam requests consultations with US concerning anti-dumping measures on frozen warm-water shrimp

On 1 February 2010, Vietnam submitted a request for WTO consultations concerning anti-dumping measures applied by the US on frozen warm-water shrimps from Vietnam (*inter alia*, whiteleg shrimp, banana prawn, fleshy prawn, giant river prawn, giant tiger prawn, redspotted shrimp, southern brown shrimp, southern pink shrimp, southern rough shrimp, southern white shrimp, blue shrimp, western white shrimp and Indian white prawn).

Anti-dumping duties on Vietnamese shrimp have been imposed by the US since 2004. In fact, following anti-dumping investigations, in November 2004 the US applied duties on imports of shrimp from Brazil, China, Ecuador, India, Thailand and Vietnam. Duties imposed on all shrimps from such WTO Members ranged from 0.4% to 112.81%. The level of US duties on Vietnamese shrimp has decreased over the years pursuant to subsequent reviews and now ranges from 0.08 to 25.76%.

In its request for consultations, Vietnam challenges a number of measures that include the determinations of the US Department of Commerce (hereinafter, USDOC), the collection of definitive anti-dumping duties by the US Customs and Border Protection (USCBP), and US laws, regulations, administrative procedures, practices and methodologies that led to the imposition and collection of definitive anti-dumping duties on Vietnamese shrimp. In particular, Vietnam's claim targets the US authorities' practice of *zeroing*, which consists in assigning a zero value to those transactions where negative dumping margins were reported (*i.e.*, where the export price is higher than the normal value). The consequence of the use of such practice is to avoid that negative dumping margins for certain transactions could offset positive dumping margins, with the result of inflating the overall dumping margin.

According to Vietnam's request for consultations, the US authorities applied the so-called '*simple zeroing*' methodology, which occurs when, in the context of the comparison between normal value and export prices, authorities compare the weighted average normal value with export prices on a transaction-by-transaction basis. The use of *simple zeroing*, as well as other *zeroing* methodologies, has been condemned by the WTO on a number of occasions. The US was already found to be violating its WTO obligations by applying *simple zeroing* in the *US - Continued*

Existence and Application of Zeroing Methodology brought by the EU. In addition, US anti-dumping measures on imports of frozen warm-water shrimps were already the object of two WTO complaints brought by India and Thailand and by Ecuador, which challenged a different kind of *zeroing* methodology then applied by the US. In both cases the US was condemned.

According to the Vietnamese Association of Seafood Exporters and Producers, Vietnam exported 200,000 tonnes of shrimp in 2009, for a total of USD 1.52 billion. Those figures represented a 7.4% increase in volume and 0.73% in value compared with 2008. Other sources report that the US market is the second largest destination for Vietnamese shrimp, worth 395 USD million in 2009. The other key markets include China, the EU, Japan and South Korea.

The USDOC recently announced the initiation of an administrative review on anti-dumping duties on shrimp from Brazil, China, India, Thailand and Vietnam, to be conducted in parallel to the expiry review already announced in January. The development of the WTO dispute may have an impact on the result of these investigations. In addition, according to the conditions established under Vietnam's WTO Protocol of Accession, WTO Members are allowed to treat Vietnam as a non-market economy for the purposes of price comparability in anti-dumping and countervailing duty proceedings. This helps making Vietnam's exports a frequent target of anti-dumping measures. It should be noted that Vietnam is also closely monitoring the steps that China is taking against the EU anti-dumping measures which have been imposed on exports of footwear from China (and Vietnam) to the EU. Governments, exporters and the US domestic industry should closely follow the development of Vietnam's WTO complaint.

EU ecolabel: new trade barrier or opportunity for third country operators?

On 30 January 2010, Regulation (EC) No. 66/2010 of the European Parliament and of the EU Council of 25 November 2009 on the EU ecolabel (hereinafter, Regulation (EC) No. 66/2010) was published. This Regulation lays down rules for the establishment and application of the voluntary EU ecolabel scheme. It is a revision of the existing (voluntary) EU ecolabel set out in Regulation (EC) No. 1980/2000 of the European Parliament and of the EU Council of 17 July 2000 on a revised Community eco-label award scheme (hereinafter, Regulation (EC) No. 1980/2000). The aim of Regulation (EC) No. 1980/2000 was to establish a voluntary ecolabel award scheme intended to promote products with a reduced environmental impact during their entire life-cycle and to provide consumers with accurate, non-deceptive, science-based information on the environmental impact of products. The EU Commission admits that the experience gained during the implementation of Regulation (EC) No. 1980/2000 has shown the need to amend that ecolabel scheme in order to increase its effectiveness and streamline its operation.

What is new in comparison with the old scheme? In its introduction, Regulation (EC) No. 66/2010 states that the amended scheme should be implemented in compliance with the provisions of the Treaties, including, in particular, the precautionary principle as laid down in Article 174(2) of the EC Treaty (*i.e.*, after the entry into force of the Lisbon Treaty on 1 December 2009, Article 191 of the Treaty of the Functioning of the EU). This explicit reference to the Treaty provision, which states that policy on the environment shall aim at a high level of protection and shall be based on the precautionary principle, suggests what procedure should be followed in the event of risk and insufficient scientific evidence.

Furthermore, the new text states that manufacturers of products containing substances with certain hazardous properties need to prove that either it is not technically feasible to substitute these substances (as such or via the use of alternative materials or design) or the product still has a significantly higher overall environmental performance compared to other goods of the same category (*e.g.*, an energy-saving light bulb containing small amounts of mercury compared to a regular light bulb).

As to the scope, the EU ecolabel applies to any goods or services which are supplied for distribution, consumption or use on the EU market, whether in return for payment or free of charge, but not to medicinal products for human or for veterinary use, nor to any type of medical device. Food and feed products are not excluded from the scope; however, the criteria for these products are yet to be defined. Regulation (EC) No. 66/2010 states that before developing EU ecolabel criteria for food and feed products, the EU Commission has to undertake a study, by 31 December 2011 at the latest, exploring the feasibility of establishing reliable criteria covering environmental performance during the whole life-cycle of such products, including the products of fishing and aquaculture. The study should pay particular attention to the impact of any EU ecolabel criteria on food and feed products, as well as unprocessed agricultural products that lie within the scope of Regulation (EC) No. 834/2007 on organic farming and should consider the option that only those products certified as organic be eligible for award of the EU ecolabel, to avoid confusion within consumers.

The current ecolabel scheme continues to apply to contracts concluded under Article 9 of Regulation (EC) No. 1980/2000 until the date of expiry specified in those contracts, except for its provisions concerning fees. Regulation (EC) No. 66/2010 enters into force on 20 February 2010. The annexes to the Regulation provide for the procedure for the development and revision of EU ecolabel criteria, the form of the EU ecolabel (a slightly re-designed flower symbol with the optional text "*better for the environment... better for you*"), the fees and standard contract covering the terms of use of the EU ecolabel.

As to the relevance of the EU ecolabel on the EU market, since it was established in 1992 the number of companies receiving the label has increased steadily. At the beginning of 2009, more than 750 companies were awarded the ecolabel for their products. Italy and France have the greatest number of ecolabel holders, with more than 240 and 140 licences, respectively. Denmark and Germany hold more than 50 licences each. Austria holds only one licence. As to non-EU Member States, Switzerland holds 28, Norway 6, Thailand 4, Turkey and India each 3, Croatia, Indonesia, Hong Kong and Canada 2 each, Taiwan, New Zealand, Egypt and China 1 license each. The ecolabel is currently awarded to 22 product categories. Tourist accommodation services represent 34% of the total number of licences. This is followed by all-purpose and sanitary cleaners (12%), with textile products and indoor and outdoor paints and varnishes each representing 10% of licences. Other categories are, *inter alia*, light bulbs, televisions, footwear, copying paper, bed mattresses and tissue paper.

To give examples, a large EU producer of graphic paper, sells 250.000 tonnes of eco-labelled paper products per year, with annual revenues of €3.8 billion. The energy consumption of an eco-labelled television during standby mode is 50% of a standard TV. The EU ecolabel is also looking into how carbon footprinting can be systematically considered within its criteria development process. The EU Commission has recently raised the question with stakeholders of how any specific carbon footprint criteria might be best presented with the ecolabel logo, but there is no concrete outcome yet.

Given the growing importance of the EU ecolabel on the EU market, but considering that there are still not many licence holders and it is not used to a large extent on the market, the voluntary EU ecolabel does not appear to result in a non-tariff trade barrier or even a *de facto* requirement to enter the EU market. But it has to be borne in mind that the WTO Agreement on Technical Barriers to Trade not only covers all technical requirements, but also voluntary standards and the procedures to ensure that these are met (*i.e.* conformity assessment procedures). Therefore a scrutiny of the EU ecolabel under WTO law would be possible. On the other hand, the EU ecolabel could also represent an opportunity for third country producers to promote their environment-friendly products or services.

China requests consultations concerning EU anti-dumping measures on certain footwear from China

On 4 February 2010, China requested WTO consultations with the EU concerning the EU anti-dumping measures on footwear with uppers of leather originating from China.

The definitive anti-dumping measures were first imposed on Chinese and Vietnamese footwear with uppers of leather by the EU Council on 5 October 2006 for an initial period of two years. The expiry review was initiated on 7 October 2008 upon request of the European Confederation of the Footwear Industry (see Trade Perspectives, Issue No. 20 of 30 October 2009). The review revealed that injurious dumping was likely to continue after the expiry of the duties. Therefore, on 30 November 2009, the EU Commission submitted a proposal to the EU Council for the extension of the imposition of the duties on footwear products from China and Vietnam (see Trade Perspectives, Issue No. 23 of 11 December 2009). The EU Council adopted the Commission's proposal and extended the anti-dumping duties for an additional period of 15 months through Regulation (EU) No. 1294/2009 of 22 December 2009. China's request for consultation targets both regulations and, in addition, also Council Regulation (EC) No. 384/1996 (hereinafter, the Basic EU Anti-Dumping Regulation).

In particular, China alleges, *inter alia*, that Article 9(5) of the Basic EU Anti-Dumping Regulation violates a number of WTO obligations. This article states that, in case of imports from non-market economies, the duty shall be specified for the supplying country concerned and not for each supplier and that an individual duty will only be specified for exporters that demonstrate that they fulfil certain criteria. China alleges that the requirement that exporters from non-market economies need to prove to fulfil certain criteria to obtain an individual duty results in a violation of Articles VI:1 and X:3(a) GATT, Article XVI:4 of the Marrakesh Agreement, as well as several provisions of the WTO Anti-dumping Agreement, all requiring an individual margin and duty to be determined and specified for each known exporter or producer. China also alleges that the criteria listed in Article 9(5) of the *Basic AD Regulation* to obtain an individual duty are unreasonable and not objective. Furthermore, according to China, the requirement that exporters from non-market economies need to prove to fulfil certain criteria to obtain an individual duty is discriminatory and results into a violation of the most-favoured nation principle embodied in Article I:1 of the GATT.

Article 9(5) of the Basic EU Anti-Dumping Regulation, which refers to Article 2(7), establishes that, in the case of a non-market economy country (such as China), an individual duty will only be specified for exporters that demonstrate that they fulfil the criteria for obtaining market economy treatment or individual treatment. In particular, in order to obtain market economy treatment, the exporting companies need to show (i) that decisions regarding prices, costs and inputs are made in response to market signal reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values; (ii) that they have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes; (iii) that production costs and the financial situation are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts; (iv) that they are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms; and (v) that the exchange rate conversions are carried out at the market rate.

In the framework of China's accession to the WTO, WTO Members decided that, until 2016, price comparability in determining the existence of dumping and subsidisation in case of exporting companies from China could be operated through recourse to third country prices. According to the Report of the Working Party on the Accession of China to the WTO, WTO Members should, when determining the price comparability in a particular case in a manner not based on a strict comparison with domestic prices or costs in China, ensure that they had established, published and notified to the WTO in advance the criteria that would be used to determine whether market economy conditions prevail in the industry or company producing the like product and the

methodology used in determining price comparability. Paragraph 15(a)(i) of China's Protocol of Accession to the WTO establishes, to this extent, that if producers can demonstrate that market-economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, market economy treatment should be awarded to this producing exporter. With its WTO accession, China agreed to the terms and provisions of the Working Party Report and the Protocol of Accession to the WTO. However, China's challenge is directed to the EU criteria as included in Article 2(7) of the Basic EU Anti-Dumping Regulation, which were adopted and entered into force before China's Accession to the WTO and that provide the legal basis for the operation of China's Protocol of Accession provisions to proceedings conducted in the EU. In addition, China targets the application of a single duty rate to all exporting companies from non-market economies. The Protocol of Accession does not provide any specific rule in relation to how the duty rate for exporting companies that were not granted market economy treatment is to be specified.

China is not the only interested party in this case. Vietnamese exports were also affected by the anti-dumping duties that were imposed on footwear. Vietnam already acknowledged that it will monitor closely the specific actions that China takes in this case. This dispute stands to have a huge impact on anti-dumping proceedings in the EU and, possibly, in a number of countries that have not recognised China as a market economy. Exporting companies and manufacturers, not just in the footwear sector, should closely follow this dispute.

Recently Adopted EU Legislation

- *Commission Regulation (EU) No. 121/2010 of 9 February 2010 entering a name in the register of protected designations of origin and protected geographical indications (Provolone del Monaco (PDO))*
- *Commission Regulation (EU) No. 109/2010 of 5 February 2010 concerning the classification of certain goods in the Combined Nomenclature*
- *Commission Regulation (EU) No. 97/2010 of 4 February 2010 entering a name in the register of traditional specialities guaranteed [Pizza Napoletana (TSG)]*
- *Commission Regulation (EU) No. 94/2010 of 3 February 2010 fixing an additional quantitative limit for the exports of out-of-quota sugar in respect of marketing year 2009/2010*
- *Regulation (EC) No. 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel*

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