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Season's Greetings

2010 is drawing to a close and all of us in the Trade Group of FratiniVergano would like to wish you, your colleagues and families all the best for a peaceful holiday season and for a successful and healthy 2011. We hope that you have enjoyed Trade Perspectives© throughout this year and that you have always found it stimulating and timely. We have published again a total of 23 issues and invested a great deal of time and energies in this undertaking. You can find all previous issues on our website.

For the year to come, we plan on continuing our editorial efforts and on entertaining a closer dialogue with our readers. We would also be happy to host articles from some of our readers and make our publication a bit more '*inter-active*'. Trade Perspectives is now circulated to over 1,000 recipients worldwide and not a single week goes by without new readers asking to be added to our circulation list. This fills us with pride, but also with a sense of commitment and discipline towards our readers' expectations.

We often hear from some of you with praises, criticisms, new ideas, comments and thoughts. Thank you for your interest in our publication and for helping us make it a better and more useful tool of discussion. We would be particularly interested in knowing your views on Trade Perspectives' format, editorial structure and sections. If you think that anything should be done differently or could be improved, please do not hesitate to share your suggestions with us. We look forward to hearing from you and to another year of exciting trade developments and discussions.

The US approved the extension of subsidies on biodiesel blends and support measures for ethanol production

The US approved a bill that includes a one-year extension for ethanol tax credits and tariffs on imported ethanol, as well as tax credits on biodiesel. The Volumetric Ethanol Excise Tax Credit (hereinafter, VEETC) is a tax credit of 45 USD cents per gallon of pure ethanol blended with gasoline. Its purpose is to stimulate the petroleum industry to blend ethanol into gasoline and encourage the sale of ethanol at the retail level. Initially set at 51 USD cents, the tax credit was reduced in the 2008 Farm Bill to its actual level. The VEETC is coupled to a tariff that applies to imports of ethanol in the US. Because all ethanol blended with gasoline is eligible for the VEETC, regardless of its origin, the tariff intends to offset the benefits that the scheme provides to foreign ethanol production. Therefore, in addition to the *ad valorem* 2.5% tariff that applies on the import of ethanol for use in fuel, ethanol imports are subject to an additional 54 USD cent per gallon tariff. Ethanol imports from countries that are part of the North Atlantic Free Trade Agreement (Canada and Mexico), the Caribbean Basin Initiative, and the Andean Trade Preference Act are not subject to the additional duty, provided that the ethanol is produced with feedstocks from those nations (specific feedstock percentage requirements apply). The support scheme for ethanol also includes the 'Small Ethanol Producer Tax Credit' of 10 USD cents per gallon of ethanol produced.

The '*Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010*' provides for a one-year extension of the VEETC, as well as the extension of the additional import tariff on

ethanol, which were otherwise set to expire at the end of 2010. In addition, this Act also extends for one year the income and excise tax credits on biofuels. Both measures are not without opponents, both within the US and, notably, among US trading partners for their impact on international trade.

In particular, whereas US biofuels subsidies prompted the EU to apply anti-dumping and countervailing duties against US imports of biodiesel into the EU (see Trade Perspectives, Issue No.11 of 5 June 2009), the ethanol support measures are causing frictions between the US and Brazil, leader in sugarcane ethanol production. UNICA, the Brazilian Sugarcane Industry Association, urged the Brazilian government to initiate dispute settlement proceedings at the WTO. Possible profiles of WTO inconsistency may be found in relation to the obligations under Articles II, III and I of the General Agreement on Tariffs and Trade (hereinafter, the GATT). In particular, inasmuch as the US is imposing an additional tariff over and above the 2.5% *ad valorem* rate, it appears to violate the provisions of Article II of the GATT, according to which WTO Members are precluded from applying higher tariffs (and, in general, less favourable treatment at the importation) than those committed and inscribed in their Schedules of Concessions. Another profile of WTO inconsistency of the US measures – and in particular the additional tariff on imported ethanol – may be found with respect to the WTO obligation of national treatment as provided for in Article III of the GATT, inasmuch as the additional tariff would alter the conditions of competition between imported ethanol and domestic ethanol used for blending. Moreover, the measures could also arguably violate the most-favoured-nation treatment, inasmuch as the additional tariff on imports of ethanol does not appear to fall within the '*duties or other regulations of commerce*' (as provided in Article XXIV of the GATT) that are object of liberalisation within the context of Preferential Trade Agreements and do not appear to comply with the principle of non-discrimination that applies in the context of unilateral trade preferences. Lastly, there is an element of harmful subsidisation to the extent that these subsidies may (*inter alia*) cause trade displacement when (and if) the final (blended) gasoline may be exported and unfairly compete with third countries' products.

The US ethanol support scheme has drawn attention and criticism from a number of stakeholders, including environmental groups, which consider that investments should be made in more cutting-edge, clean, and renewable energy that will not cause environmental degradation and increase food prices. WTO Members' energy policies are increasingly under scrutiny for their impact on international trade. In many cases, these policies are aimed at the pursuit of environmental objectives by enhancing climate change mitigation policies. Whereas WTO Members remain free to pursue their energy policies, this must be done in a way that is consistent with the obligations that govern international trade and the commercial concessions exchanged in the context of the WTO.

Formerly 'generic' Dresdner Stollen becomes a protected geographical indication in the EU

On 26 November 2010, the EU Commission adopted Regulation (EU) No. 1098/2010 entering Dresdner Christstollen/Dresdner Stollen/Dresdner Weihnachtsstollen (hereinafter, '*Dresdner Stollen*') in the register of protected designations of origin and protected geographical indications (in class 2.4. '*bread, pastry, cakes, confectionery, biscuits and other baker's wares*'). Regulation No. 1098/2010 enters into force just before Christmas, on the 20th day following its publication in the Official Journal of the EU (hereinafter, OJ), which occurred on 27 November 2010.

Dresdner Stollen is a pastry which contains fresh butter, sweet and bitter almonds and raisins, and is particularly consumed at Christmas. The minimum weight is 500 grams. *Dresdner Stollen* pastries are formed by hand and cut and rolled into loaves and must not be baked in baking tins or moulds. The geographical area of origin has grown historically and is restricted to Saxony's capital Dresden and some municipalities of the greater Dresden area. The tradition of baking *Dresdner Stollen* in this geographical area can be traced back to the 15th century. The so-called '*butter letter*' sent by Pope Innocent VIII (1432 - 92) in 1490 has become particularly famous. In that letter, the 1450 ban on baking with butter during Advent (a period of fasting at the time) was lifted by papal decree for Dresden's bakers.

Germany had applied on 7 June 2008, pursuant to the first subparagraph of Article 6(2) of Regulation (EC) No. 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, to register the name '*Dresdner Christstollen/Dresdner Stollen/Dresdner Weihnachtsstollen*'. The EU Commission published the request in the OJ on 24 February 2010. As no statement of objection by any EU Member State or third country or any natural or legal person having a legitimate interest, established or resident in a Member State other than that applying for the registration or in a third country, has been received by the Commission under Article 7 of Regulation (EC) No. 510/2006, the name was therefore entered in the register.

In principle, geographical indications which have become generic names, are excluded from protection. The case of *Dresdner Stollen* is, therefore, of particular legal interest. Already before the Second World War, the denomination *Dresdner Stollen* was understood in Germany as being a generic name for this type of pastry, which traditionally originated in the region of Dresden. After the German division, Saxony and Dresden were part of the German Democratic Republic, whose Trademark Act of 1984 protected *Dresdner Stollen* in an enclosed register as a geographical indication. After the German Reunification in 1990, the German *Erstreckungsgesetz (Extension Act)* regulated the 'extension' of protected trademarks and intellectual property rights, which were protected in the territory of the German Democratic Republic and the Federal Republic of Germany. In relation to geographical indications, the *Erstreckungsgesetz* provided for an instrument to protect geographical indications, which had been registered on the territory of the German Democratic Republic, but had been legally used as generic name in the other part of German territory before 1 July 1990. These geographical indications could be registered as collective marks under the Federal Trademark Act. This is what took place with respect to *Dresdner Stollen*. There has been jurisprudence on the protection of *Dresdner Stollen* in the last years. Of particular relevance is a judgement of 31 October 2002 in which Germany's Federal Court of Justice found (in a case concerning the use of the collective mark) that the name *Dresdner Stollen* denoted the geographical origin of the product.

The case of *Dresdner Stollen* shows that generic names can turn into geographical indications again. However, it requires a considerable effort to reverse such situation. Consumer surveys are often used to prove that a geographical indication is not a generic name and that it has acquired distinctiveness. It is argued that the majority of the population has to understand that the indication is geographic and not generic, in other words that the product comes from a particular place, which indicates its origin, and not from somewhere else. In 1993, an opinion poll showed that over 60% of those surveyed considered the name *Dresdner Stollen* to contain a statement about the origin of the product.

According to the association of *Dresdner Stollen* bakers (*i.e.*, the *Schutzverband Dresdner Stollen*, which groups about 150 operators), in 1990 around 1.5 million *Dresdner Stollen* were sold, while the number increased to 2 million in 2009 (25% are exported, including to countries like Australia, Japan and the US). The underlying economic and commercial factors that prompted the pursuit of the EU geographical protection are, therefore, clear and should be 'food for thought' for producers of similar products that could receive enhanced marketability and protection from GI status, both within the EU and in third countries.

The EU agrees to amend its customs legislation to settle the WTO dispute with India over the seizure of generic drugs in transit

In the context of the EU – India Summit held on 10 December 2010, the two trading partners confirmed to have settled the dispute over the seizure at EU ports of Indian generic drugs in transit to third countries.

On 11 May 2010, India requested WTO consultations with the EU regarding the repeated seizure of consignments of generic drugs originating in India and in transit to third countries at ports and airports in the EU. In particular, India alleged that over two years, since October 2008, customs authorities in the EU (in particular, in the Netherlands) had, on a number of occasions, seized medicinal consignments that were in transit at EU ports and destined to South America and Africa on grounds of alleged patent infringements. According to India, after having been detained by the authorities, these consignments were either destroyed or returned to India and, only in a few cases, allowed to proceed to the country of destination with considerable delay. The seized products included medicines which are used to treat medical conditions such as AIDS, high blood pressure, dementia and schizophrenia. A WTO dispute on the same matter was also initiated by Brazil, country of destination of some of those shipments (see Trade Perspectives, Issue No. 10 of 21 May 2010).

At the heart of the dispute lies Council Regulation (EC) No. 1383/2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights (hereinafter, the EU IP Border Regulation). The EU IP Border Regulation provides for the rules and procedures applicable to goods found to infringe an intellectual property right. The scope of the EU IP Border Regulation covers goods for release for free circulation in the EU, export or re-export, as well as goods in transit through the territory of the European Union. *Inter alia*, it allows right-holders to apply for action to the competent customs authorities and obtain relief whenever there are sufficient grounds for suspecting that goods infringe intellectual property rights. Under the EU IP Border Regulation '*goods infringing an intellectual property right*' include counterfeited goods, pirated goods and goods which, in an EU Member State where '*an application for customs action*' is made, infringe *inter alia* a patent under that EU Member State's law. Therefore, the EU IP Border Regulation covers (*inter alia*) goods suspected of infringing patent rights or that are found to have infringed patent rights according to the laws of the EU transit Member State where an application for action was made, regardless of the patent status of such medicines in the countries of origin and destination.

Measures that can be taken by customs authorities on goods suspected of infringing intellectual property rights include suspension of release of the goods and detention. In some cases, destruction of the goods may also take place. Where infringement of an intellectual property right has been ascertained, the goods in question must not be: (i) allowed to enter into the Union's customs territory; (ii) released for free circulation; (iii) removed from the EU customs territory; (iv) exported; (v) re-exported; (vi) placed under a suspensive procedure; or (vii) placed in a free zone or free warehouse. Furthermore, the EU Member States' competent authorities are to destroy the goods found to infringe an intellectual property right or dispose of them outside commercial channels in such a way as to preclude injury to the right-holder, without compensation of any sort.

In their request for consultations, India and Brazil targeted the EU IP Border Regulation and other EU (and Dutch) customs regulations, alleging the violation of several provisions of the WTO, notably Article V of the General Agreement on Tariffs on the freedom of transit of goods and several articles of the Agreement on Trade Related Aspects of Intellectual Property Rights (hereinafter, the TRIPs Agreement). India also claimed that the measures at issue severely affected the ability of developing and least developed WTO Members to provide public health care, in contrast with the Doha Declaration on the TRIPs Agreement and Public Health, which provides, in relevant part, that the TRIPs Agreement is to be interpreted and implemented in a manner supportive of WTO Members' rights to protect public health and to promote access to medicines for all.

As it stands, the EU IP Border Regulation clearly has the ability to affect shipments of goods that have minimal jurisdictional contact with EU Member States. According to press reports, the EU agreed to amend the EU IP Border Regulation to terminate the seizure of generic drugs in transit to other countries, except in cases of counterfeiting. Any amendment brought by the EU institutions will have to carefully balance the need for protection of intellectual property rights with the impact

on international trade and (in the case of generic drugs) public health considerations. It is important for the industry and other stakeholders involved to closely follow the procedures for the EU legislative amendment and to represent their interests and concerns to the EU institutions.

The EU Council reached political agreement on a draft regulation on food information to consumers

On 7 December 2010, the EU reached political agreement, at first reading, on a draft regulation on food information to consumers. In 2008, the EU Commission proposed new legislation on providing food-related information to consumers. The proposal combines two existing directives into one regulation (Directive No. 2000/13/EC relating to the labelling, presentation and advertising of foodstuffs and Directive No. 90/496/EEC on nutrition labelling for foodstuffs). The overall aim is to establish a modernised, clearer, simplified and coherent EU scheme, which is more relevant to consumers and enables to make informed and balanced dietary choices. On 16 June 2010, the EU Parliament voted in first reading on the proposal (see Trade Perspectives, Issue No. 12 of 18 June 2010).

One of the key elements agreed by the Council is that the nutrition declaration (*i.e.*, the labelling of the energy value and the quantities of some nutrients such as fat, saturates, carbohydrates, protein, sugars and salt) should become compulsory. As a general principle, the energy value and the amounts of these nutrients would have to be expressed per 100g or per 100ml, but could also be indicated as a percentage of reference intakes. However, food business operators could also use additional forms of expression or presentation as long as certain conditions are met (*i.e.*, they do not mislead consumers and are supported by evidence of understanding of such forms of expression or presentation by the average consumer). According to the Council, all elements of the nutrition declaration should appear together in the same field of vision, but some elements may be repeated on the '*front of pack*'. However, the Council does not support a mandatory '*front of pack*' label.

The Council also agreed that the labelling of the country of origin should, as currently, be compulsory if a failure to indicate the origin were to mislead the consumers. While beef is already subject of compulsory labelling on the country of origin, compulsory labelling of the country of origin would be requested for several other types of meat (*i.e.*, pork, lamb, and poultry). In addition, the Council agreed that the Commission should submit, within three years after the entry into force of the new regulation, a report examining the possible extension of the compulsory labelling on the country of origin to further products (*i.e.*, milk, milk used as an ingredient, meat used as an ingredient, unprocessed foods, single ingredient products, ingredients that represent more than 50% of a particular food).

An exemption for certain alcoholic beverages (such as wines, products derived from aromatised wines, mead, beer, spirits, but not alcopops) from nutrition labelling rules as well as from the indication of the list of ingredients was also agreed. This should be reviewed within five years. Non-prepacked food would also be exempted from nutrition labelling, unless EU Member States decide otherwise. Allergenic ingredients, however, must always be indicated. Finally, the Council established a minimum font size for the mandatory information on the labelling which, added to other criteria, such as contrast, is aimed at ensuring the legibility of the labels.

The '*rapporteur*' for the proposal at the EU Parliament has been quoted as saying that the probability of the Council and the EU Parliament reaching agreement over food information legislation is not very likely, as the Council did not consider a number of the points that the European Parliament had agreed to in the first reading of the proposal in June 2010. One of points viewed most critical by the '*rapporteur*' is the Council's agreement that there should be no mandatory '*front of pack*' labelling, even for energy value. The text of the political agreement reached by the Council will now be legally and linguistically reviewed, before it is formally adopted

at one of the forthcoming Council session as its first-reading position. This text will then be forwarded to the EU Parliament for its second reading.

Reaching a second reading agreement with the Council will likely require some compromise, also within the Parliament itself, as positions appear to be very different between that of the '*rapporteur*' and those of other members of Parliament. Disagreement exists, in particular, concerning the possible re-introduction of rules which set standards for additional and voluntary national schemes. The second reading in the ordinary legislative procedure laid down in Article 294 of the Treaty on the Functioning of the European Union (hereinafter, TFEU) is subject to strict time limits. Within three months of the announcement of the Council's position, the Parliament must approve, reject or amend it at second reading. If the Parliament takes no decision by the expiry of this deadline, the act is deemed to have been adopted in accordance with the common position.

Approval of the common position without amendment requires the support of a simple majority of the Parliament's Members. However, rejection of the common position requires the support of an absolute majority of the Parliament's Members. The Parliament may adopt amendments to the common position: each such amendment must be again supported by an absolute majority of Members. If the Council is unable to approve all of the European Parliament's proposed amendments, the Treaty provides for the convening of the Conciliation Committee in which the two co-legislators negotiate directly. Rejection of the common position by the Parliament ends the legislative procedure: this can only be re-launched by a new Commission proposal.

Recently Adopted EU Legislation

- *Notice of the expiry of certain anti-dumping measures*
- *Commission Regulation (EU) No 1155/2010 of 1 December 2010 concerning the classification of certain goods in the Combined Nomenclature*
- *Commission Regulation (EU) No 1162/2010 of 9 December 2010 refusing to authorise certain health claims made on foods and referring to the reduction of disease risk and to children's development and health*
- *Commission Regulation (EU) No 1161/2010 of 9 December 2010 refusing to authorise a health claim made on foods, other than those referring to the reduction of disease risk and to children's development and health*
- *Commission Regulation (EU) No 1160/2010 of 9 December 2010 amending Annex I to Council Regulation (EEC) No 3030/93 on common rules for imports of certain textile products from third countries*
- *Commission Regulation (EU) No 1159/2010 of 9 December 2010 laying down rules for the management and distribution of textile quotas established for the year 2011 under Council Regulation (EC) No 517/94*
- *Council Decision of 10 November 2009 on the conclusion of an Agreement in the form of a Protocol between the European Community and its Member States and the Republic of Lebanon establishing a dispute settlement mechanism applicable to disputes under the trade provisions of the Euro-Mediterranean Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part*
- *Protocol between the European Community and the Republic of Lebanon establishing a dispute settlement mechanism applicable to disputes under the trade provisions of the Euro-Mediterranean Agreement establishing an association between*

the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part

- *Council Implementing Regulation (EU) No 1185/2010 of 13 December 2010 imposing a definitive countervailing duty on imports of certain graphite electrode systems originating in India following an expiry review pursuant to Article 18 of Regulation (EC) No 597/2009*

- *Council Implementing Regulation (EU) No 1186/2010 of 13 December 2010 imposing a definitive anti-dumping duty on imports of certain graphite electrode systems originating in India following an expiry review pursuant to Article 11(2) of Regulation (EC) No 1225/2009*

- *Council Implementing Regulation (EU) No 1187/2010 of 13 December 2010 terminating the anti-dumping proceeding on imports of glyphosate originating in the People's Republic of China*

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