



The EC prepares countervailing measures against exports of biodiesel from the US

It appears that the EC Commission is preparing countervailing measures against biodiesel imported from the US. These measures will be the result of a formal complaint lodged by the European Biodiesel Board (hereinafter, EBB) on behalf of the EC biodiesel producers on 29 April 2008. In this complaint, the representatives of the EBB stated that imports of biodiesel from the US have been subsidised and have thereby caused material injury to the EC industry. It was alleged that the US producers of biodiesel have been benefitting from a range of US federal subsidies, including 1) diesel fuel excise tax credits; 2) income tax credits, and 3) the US Department of Agriculture's bio-energy program, as well as from State subsidies, granted by the Governments of several US States. The EBB claimed that the above schemes constitute actionable subsidies, limited to specific industries, and, therefore, are inconsistent with the EC rules on the protection against subsidised imports from countries not members of the EC.

Amid global concerns about climate change, production of bio-fuels is generously subsidised in many developed countries, including the EC and the US. In this regard, WTO rules, as well as WTO Members' domestic laws, provide the legal framework to ensure that these subsidies do not distort the international market. If a WTO Member, on the basis of proper investigations, has reasons to believe that any subsidy, granted or maintained by another Member, results in injury or serious prejudice to its domestic industry, or nullification or impairment of other Member's WTO obligations, it may either refer this matter to the WTO panel or impose on these imports countervailing duties. In the latter case, the other Member may challenge these duties at the WTO.

According to the EC rules on the protection against subsidised imports from countries not members of the EC, provisional measures on subsidised imports may be imposed prior to the termination of investigation, but no later than 9 months from the publication of the notice of initiation of an anti-subsidy proceeding (*i.e.*, up to 13 March 2009). Therefore, it is expected that the Commission will apply provisional measures at the beginning of March. The EBB recently stated that anti-subsidies measures are urgent, since some European producers have already gone bankrupt as a result of the unfair competition brought by US producers. The anti-subsidies investigation must be concluded within 13 months from the date of the publication of the notice of initiation (*i.e.*, by 13 July 2009 at the latest).

EC countervailing measures on the US imports of biodiesel would likely have important implications for the future development of international bio-fuels market and may even result in a WTO dispute. These developments may also affect businesses from third countries, involved in the production or trade in bio-fuels, and equally benefiting from government support schemes.

The G-33 Group of Countries calls for extra flexibility for Small, Vulnerable Economies at the WTO

The revised draft modalities for agriculture, released on 6 December 2008 by Crawford Falconer, the Chairperson of the WTO agriculture negotiations, reflects a significant progress in the negotiations on the so-called Special Safeguards Mechanism (hereinafter, the SSM). The SSM allows temporary increase in import duties in the case of sharp import surges or price falls of agricultural products. In relation to the SSM, the December's draft modalities suggests options for formulas, include possible mechanisms to prevent the application of the SSM for trade restrictive purposes, and proposes when and by how much the increase in import duties may exceed current bound ceilings. Progress has been made, but one of the unresolved issues in the December's draft modalities remains whether the SSM would cover all developing countries, including 'small, vulnerable economies' (hereinafter, the SVEs), or SVEs should be given special status.

On 6 February 2009, the G-33 (a WTO negotiating group, also known as "friends of special products") submitted its negotiating proposal to the Committee on Agriculture, addressing the status of SVEs and calling for extra flexibility for these countries in relation to the SSM. The G-33 Group argues that treating SVEs in the same manner as other developing countries would be "disadvantageous" for these economies and incompatible with other developing countries' level of development. Consequently the proposal suggests a lower benchmark for recourse to SSMs by SVEs.

It appears that so far there has not been formal response to the proposal of G-33. Informal consultations are currently being held among the various coalitions and individual delegations in order to identify Members' views on the controversial issues contained in the December's draft modalities paper and in order to define a strategy for further negotiations. The SSM is one of the issues to be addressed in the process of these consultations and it looks posed to remain one of the stumbling blocks towards the conclusion of the entire Doha Round.

EC prompt intervention provides an example of how to effectively avoid third countries' SPS trade bans

Prompt intervention, open and transparent communication, and close cooperation between WTO Member States' missions prove to be essential in order to avoid or minimise unnecessary market access obstacles based on sanitary or phytosanitary measures (hereinafter, SPS measures). In December 2008, in the process of monitoring the food chain for contaminants, Irish authorities identified high levels of dioxin, as well as other highly toxic chemicals in Irish pig meat. Immediately thereafter, the European Commission took necessary steps to remove the contaminated products from the market and safely disposed of them. In addition, the Commission communicated with third Countries to avoid possible export bans on its meat products. Ultimately, South Africa and Ivory-Coast appeared to be the only two Countries which applied SPS measures in relation to the EC pig meat exports and imposed trade bans. As a result of bilateral consultations, during which the Commission argued that the measures taken in the EC were adequate and that a ban on EC exports of meat was, therefore, not justified, South Africa and Ivory-Coast lifted their EC-wide trade bans on 14 December and 29 December 2008, respectively. On 29 December 2009, South Africa abolished the remaining ban on Irish pig meat.

In the WTO, SPS measures, similar to those applied by South Africa and Ivory-Coast, were also recently taken by Albania in relation to meat and unprocessed milk products from China and live animals, herbivores, ruminants, embryos, biological products, and pathological material from Israel and Italy. The objectives of these measures were to protect human and

animal health in the territory of Albania from the 'Epizootic Aphtha' disease outbreak in China and from the 'Blue Tongue' disease outbreak in certain regions of Israel and Italy.

WTO rules, in particular those of the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter, the SPS Agreement), provide a set of requirements for the application of SPS measures. These requirements, *inter alia*, include: 1) the obligation to ensure that SPS measures are based on a scientific assessment of the risks to human, animal or plant life or health; 2) the obligation to consider available scientific evidence in the assessment of those risks; 3) the obligation to avoid arbitrary or unjustifiable distinctions in the levels that a Member considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade; and 4) the obligation to ensure that SPS measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection. Besides, the SPS Agreement establishes the presumption of consistency of SPS measures with the relevant provisions of the SPS Agreement and GATT 1994 if these measures conform to international standards, guidelines or recommendations.

The immediate reaction of the European Commission, with the purpose of avoiding third Countries' EC-wide import bans on pig meat products, led to the actual minimization of risks for importing countries and, consequently, eliminated possible bases for WTO-compatible (and legitimate, inasmuch as justified) SPS-related import restrictions. This case appears to be a useful example for WTO Members, which may be subject to other Members' SPS measures and trade restrictions, of how to effectively avoid third countries' SPS-related trade bans or to minimize their commercial impacts. Private operators should also be forthcoming with their governmental authorities in order to foster transparency and allow for prompt intervention and management of the problems.

US modifies the list of the EC products subject to additional duties

On 14 January 2009, the United States' Trade Representative (hereinafter, USTR) announced the modification of the July 1999 'retaliatory' measures in connection with the *EC – Hormones* dispute. The *EC – Hormones* dispute between the EC, on the one hand, and the US and Canada, on the other hand, dates back to the early 1980s, when the EC banned the use of growth-promoting hormones, as well as imports of meat treated with such hormones (for more details see Trade Perspectives, Issue No. 1 of 16 January 2009).

According to the announced modification, the USTR exempted from the new list of products (subject to the US 'retaliatory' measures) a range of EC products, including: 1) onions; 2) dried carrots; 3) rusks and toasted bread; 4) roasted chicory and other roasted coffee substitutes and extracts; and 5) prepared mustard. In addition, the USTR exempted from duties a number of products listed for individual EC Member States, such as guts, bladders and stomachs of animals listed for France and Germany, and tomatoes, listed for France, Germany and Italy.

The USTR's modification also includes in the list a range of new products both of the EC and individual Member States. In particular, the new EC products in the list are: 1) poultry and meat products (*i.e.*, fresh, chilled or preserved); 2) foliage, branches and other parts of plants without flowers or flower buds, suitable for bouquets or ornamental purposes; 3) products of the milling industry; 4) chewing gums; 5) chocolate and other cocoa preparations; 6) lingonberry and raspberry jams; and 7) a range of fruit preparations. New products in the list of individual EC Member States are, *inter alia*, grape juice from Austria, Cyprus, France or Poland; frozen meat of swine from Finland, France, Ireland, Netherlands, or Sweden; and chestnuts and mineral waters from France. In addition, the USTR increased *ad valorem* duties on Roquefort cheese from 100 to 300%.

'Retaliatory' measures, in general, are in line with WTO rules as long as they do not exceed the level authorized by the WTO. In the *EC – Hormones* dispute, the level of nullification or impairment equated to US\$116.8 million per year and allowed the suspension of concessions for an equivalent amount. Currently, the EC is challenging the US retaliatory measures in the course of the so-called compliance proceedings in the original *EC – Hormones* dispute. Until such compliance report is adopted by the WTO, or parties reach a mutually satisfactory solution, the US will have legal grounds to maintain its retaliatory measures.

New clash on import policies between Argentina and Brazil

Brazil and Argentina have started consultations concerning a range of import restricting measures imposed by Argentina on Brazilian imports. It appears that, in recent months, Argentina has applied a number of measures in relation to more than 1,000 products from Brazil, including a system of non-automatic import licensing in relation to imported tires and processed food, and a system of minimum pricing, affecting mainly steel pipes and iron. These measures were later extended to another 800 Brazilian products.

Brazilian industries and exporters complain that the measures introduced by Argentina are being applied in a discriminatory manner and cause significant delays to imported shipments. The Brazilian Government was asked to evaluate the possibility of applying retaliatory actions. Argentina appears to have denied Brazil's allegations arguing that its import licensing and minimum pricing measures are necessary to mitigate its trade deficit with Brazil and needed to combat tax evasion and under-invoicing by traders.

The current dispute between Argentina and Brazil will likely be a further test of whether existing international trade instruments can prevent WTO Members from adopting protectionist measures amid the global economic recession. In particular, this dispute entails the assessment of WTO instruments dealing with such issues as non-discrimination, general elimination of quantitative restrictions, restrictions to safeguard the balance of payments, administration of trade regulations, and administration of import licensing procedures.

Recently adopted EC legal instruments:

Council Directive 2008/120/EC of 18 December 2008 laying down minimum standards for the protection of pigs:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:047:0005:0013:EN:PDF>

Council Decision of 19 February 2009 extending the period of application of the measures in Decision 2002/148/EC concluding consultations with Zimbabwe under Article 96 of the ACP-EC Partnership Agreement:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:049:0015:0017:EN:PDF>

Commission Directive 2009/10/EC of 13 February 2009 amending Directive 2008/84/EC laying down specific purity criteria on food additives other than colours and sweeteners:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:044:0062:0078:EN:PDF>

Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:039:0001:0007:EN:PDF>

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