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WTO arbitration allows Brazil to apply cross-sector countermeasures against US subsidies on cotton

On 31 August 2009, a WTO arbitrator issued two awards giving permission to Brazil to apply countermeasures worth a total of USD 294.7 million against the US maintenance of illegal subsidies on cotton. The arbitrators recognised countermeasures for the amount of USD 147.4 million to offset the export credit guarantees under the GSM 102 programme and USD 147.3 million in relation to the marketing loans and countercyclical payments. The countermeasures were authorised against the adverse effects of the US continued grant of both prohibited and actionable subsidies to cotton producers, following the DSB findings of inconsistency with the relevant WTO obligations of the US. Upon Brazil's request, the WTO arbitrator allowed Brazil to apply cross-agreement suspension of obligations, therefore granting the possibility that concessions be authorised for suspension also under the TRIPs Agreement and the GATS (rather than only the GATT 1994).

The WTO arbitration follows a seven year long dispute before the WTO. On 3 March 2005, in the *US – Subsidies on Upland Cotton* case, the WTO Appellate Body found that the US was violating its obligations under the WTO Agreement on Agriculture, the SCM Agreement and the GATT through a number of measures granting WTO inconsistent domestic support and export subsidies to cotton producers. Brazil requested the authorisation to suspend its concessions and, pursuant to the US objection, the matter was referred to the WTO for two separate arbitration proceedings under Article 22.6 of the DSU. Such proceedings were suspended and subsequently resumed by Brazil on 25 August 2008, following the conclusion of WTO compliance proceedings according to which the US was found to be again in violation of the SCM Agreement and the Agreement on Agriculture and to have failed to comply with the earlier DSB recommendations and rulings.

The WTO dispute settlement rules allow WTO Members to suspend their concessions against a WTO Member which fails to remove measures found to be inconsistent with WTO law. In order to apply such countermeasures, the complaining party must request and obtain an authorisation by the DSB first. The request for authorisation opens a new arbitration proceeding if the party against which such countermeasures are requested objects to the level of suspension proposed or to the procedures followed by the complaining party. WTO rules require countermeasures to be sought first in relation to obligations with respect to the same sector(s) where the violation was found. If this solution is impracticable or ineffective, the complaining party may seek to apply countermeasures in other sector(s) under the same agreement. Lastly, the complaining party may seek to suspend concessions or other obligations under another WTO agreement if it is determined that it is not practicable or effective to seek suspension with respect to other sectors under the same agreement and 'the circumstances are serious enough'.

In the arbitration proceedings, Brazil requested authorisation to apply countermeasures in the annual amount of, overall, USD 2.681 billion with respect to both prohibited subsidies (which, in

Brazil's request to the arbitrator included also Step 2 payments for which the arbitrator considered there was no legal basis to apply countermeasures) and the domestic support measures. Brazil considered that it was neither practicable nor effective to suspend concessions only on imports of US goods and that the circumstances were serious enough to justify the suspension of concession or obligations under other WTO agreements. Brazil argued that the imposition of additional duties on imports from the US would impose additional costs to the Brazilian economy. In particular, Brazil explained that countermeasures applied on capital goods, intermediate goods and other essential inputs would impose additional costs to the Brazilian industry. In addition, the imposition of duties on consumer goods would negatively affect the consumers. As a consequence, Brazil argued that additional import duties would have a much greater negative impact on Brazil than on the US. Brazil, therefore, proposed to suspend obligations under the GATT 1994, and also under the TRIPs Agreement and the GATS, by virtue of Article 22.3(c) of the DSU.

The WTO arbitrator allowed Brazil to suspend its GATT 1994, GATS and TRIPs concessions vis-à-vis the US. However, cross-agreement countermeasures can only be applied with respect to the amount of total annual sanctions that Brazil is entitled to exceeding a specific threshold determined by the arbitrator. Therefore, to the extent that such threshold is not reached, Brazil cannot apply cross-agreements sanctions as the requirement under Article 22.3(c) that 'it is not practicable or effective to seek suspension under the same agreement' is not met.

Through cross-agreement countermeasures, the complaining WTO Member avoids the negative effects caused by increased tariffs, which may harm its own consumers and the domestic producers that are users of the goods. It is also an effective tool for exercising pressure against Members where IPR goods and services are an important sector of the economy. Authorisation for cross-agreement suspension of concessions had already been previously awarded to two other WTO Members: to Ecuador, following the EC failure to comply with the *EC – Bananas III* rulings and to Antigua, as a consequence of the US failure to comply with the *US – Gambling* ruling. However, none of the two countries effectively applied countermeasures. In its request to the WTO, Brazil asked to suspend concessions, *inter alia*, on copyrights, patents, trademarks, and on its obligations in relation to the protection of undisclosed information. In relation to services, it asked to suspend concessions on, *inter alia*, communication services, distribution services, financial services and transport. According to the press and other reports, it appears that Brazil is already preparing the measures allowing domestic pharmaceuticals companies to produce medicines protected by US patents. In terms of procedures, Brazil needs to request authorisation to the DSB, which is likely to grant it unless it decides by consensus to reject the request.

US producers and exporters of affected goods, IPR holders and services providers (and their competing counterparts in Brazil and elsewhere, to the extent that they operate in Brazil) should urgently assess the situation, the likelihood that Brazil's decision will impact their business opportunities, market share and competitive stand, and should work with their Governments and the Government of Brazil in order to minimize (or avoid) the negative consequences or make the most out of this commercial opportunity.

Judgement of the European Court of Justice on online gambling

On 8 September 2009, the European Court of Justice (hereinafter, 'ECJ') gave its preliminary ruling in Case C-42/07 Liga Portugesa de Futebol Profissional (hereinafter, 'Liga'). This case concerned the legislation on games of chance, which, in Portugal, are exclusively to be exploited

by one non-profit organisation, Santa Casa da Misericórdia de Lisboa (hereinafter 'Santa Casa'). An online gambling company that is established in Gibraltar, Bwin International Ltd. (hereinafter, 'Bwin'), tried to offer its services through the web as well for games of chance and online betting on football matches. The Santa Casa Gambling Department sanctioned Bwin for this attempt. Bwin is the main institutional sponsor of the First Soccer Division in Portugal, run by Liga. Therefore, both Liga and Bwin challenged the application of sanction against Bwin. They alleged before the Portuguese courts and the ECJ that the exclusivity that was granted to Santa Casa was a violation of Article 49 EC.

The ECJ decided that the granting of exclusivity upon Santa Casa is indeed a restriction to the freedom to provide services, which goes against the spirit of Article 49 EC. However, Article 46.1 EC, applicable through Article 55 EC, states that derogations from this principle of freedom of services are possible when there is a reason of public policy, public security or public health. Portugal resorted to the argument of public policy as a defence. In previous ECJ case law, consumer protection, the prevention of fraud and incitement to squander money on gambling and the preservation of public order, have been recognised as legitimate objectives for purposes of justifying the restriction of the provision of certain services. First, the ECJ determined that the legislation of EC Member States differs greatly when it comes to games of chance on grounds of religious, moral and cultural convictions. Because there is no harmonisation in the EC in this field, Member States are allowed to draft their own laws following their own values and pursuing their own objectives and policies. Therefore, differences between the legislation of Member States might exist. However, when it comes to judging the proportionality of the provisions enacted in the national laws of a Member State, the ECJ argues that this should only be done against the background of the objectives persistently pursued by the competent authorities of that country.

The ECJ examined whether in Portugal the objectives pursued by this legislation were founded on legitimate concerns. It first recognised that limiting the authorisation of games on an exclusive basis had the advantage of facilitating the control thereon. There has been no community harmonisation concerning internet gambling. Therefore, any EC Member State is allowed to conclude that the authorisation given in one Member State doesn't suffice as a guarantee that consumers will be protected against crime and fraud within its own jurisdiction. This possibility is always a heightened risk for services provided on the internet, as there is no direct contact between the provider of the game and the consumer. The ECJ also argued (in what may appear a controversial assumption and legal reasoning) that, because Bwin is also the main sponsor of the First Soccer Division, results might be influenced. Therefore, the Court concluded that Portugal's exclusivity restriction is permitted in light of its policy objective of consumer protection against crime and fraud.

EC Member States have started to reform their gambling laws to adapt themselves to the latest trends and changes that are offered via the internet. This ruling, in line with the previous case-law of the ECJ, confirms that the betting/gambling/gaming sector is a sensitive one and that EC Member States retain the power to regulate it, in the absence of EC legislation. Given the absence of EC legislation, the validity of national frameworks, whose effect is to limit the free provision of services, must be assessed against the basic principles of EC law: necessity, proportionality, non-discrimination and transparency. The ruling refers to the specific situation in Portugal and, therefore, it cannot be excluded that the Court will deal with similar cases in the future. Companies and services providers active in this economic sector should closely monitor the legislative and regulatory reforms at EC Member State level, ensuring that all systems adhere to the basic

principles of EC law and that, if anything by these means, a certain amount of EC harmonisation can nevertheless be achieved.

Vietnamese footwear risks facing definitive anti-dumping duties in Canada

On 26 August 2009, the Canada Border Services Agency (hereinafter, 'CBSA') made a final determination that certain waterproof rubber footwear originating in, or exported from, China and Vietnam were being dumped, confirming earlier findings that led to the imposition of provisional duties.

Canadian anti-dumping proceedings on imports of certain waterproof rubber footwear from China and Vietnam initiated upon a claim from the Shoe Manufacturers Association of Canada under the Canadian Special Import Measures Act. Dumping and injury investigations started on, respectively, 27 February and 3 March 2009. Both investigations led to positive findings and preliminary anti-dumping duties were imposed on 28 May 2009. Such duties ranged from 5.2% to 49% for imports from Vietnam and 7.8% to 52.3% for imports from China. Definitive duties will be imposed if the Canadian International Trade Tribunal's findings confirm that the dumped products have caused injury. The decision is expected to be issued by 25 September 2009. Provisional duties will apply until such date.

Anti-dumping duties on certain Chinese and Vietnamese footwear products are being applied also in the EC since 6 October 2006. In the EC, duties are being imposed on leather footwear and are currently subject to an expiry review, the result of which is expected by the end of 2009. In addition, the EC Generalised System of Preference (Council Regulation No. 732/2008) in force as of January 2009 and for a period of three years, suspended preferences on a number of Vietnamese items, including footwear, on the basis of the 'graduation' mechanism. According to such mechanism, tariff preferences must be removed when imports into the EC from a beneficiary country exceed a certain value threshold for three consecutive years. As some of Vietnam's products, including footwear products, exceeded the set threshold (*i.e.*, 15% of the value of Community imports of the same products from all beneficiary countries and territories), tariff preferences were suspended as of 1 January 2009.

Interested parties and traders should closely monitor these developments with a view of safeguarding their rights under the proceedings and assessing the most favourable market opportunities.

Diverging MRLs in different markets: trade barriers or normal regulatory hurdles?

Traders of all sorts of commodities, to which agrochemicals have been applied, face diverging Maximum Residue Levels (hereinafter, 'MRLs') when they supply different markets where different laws and regulatory systems apply. In the EC MRLs are finally being harmonised after many years of uncertainty for both producers and traders. However, on world markets, the problem of diverging MRLs persists and often results in barriers to trade. To give a recent example, the US Environmental Protection Agency (hereinafter, the 'EPA') has, as a result of the petition from Dow AgroSciences (which produces the insecticide methoxyfenozide), reviewed the available scientific data and has increased the MRL for citrus fruit from 2 parts per million (hereinafter 'ppm') to 10

ppm and established an MRL for pomegranate of 0.6 ppm. The corresponding MRLs in other markets, like the EC, are different.

As EPA correctly points out, there are currently no Codex Alimentarius MRLs established for methoxyfenozide on commodities involved in this regulatory action. The Codex Alimentarius Commission (hereinafter, the 'Codex Alimentarius') is an intergovernmental body established by the Food and Agriculture Organisation and the World Health Organisation. There are Codex Alimentarius MRLs for methoxyfenozide in other products than the ones set now by the EPA. As indicated above, the EC had set MRLs which do not correspond to the ones now established in the US. The EC MRL for methoxyfenozide in or on citrus is 1 mg/kg (=1ppm), as set in Commission Regulation (EC) No. 839/2008 of 31 July 2008 amending Regulation (EC) No. 396/2005 of the European Parliament and of the Council as regards Annexes II, III and IV on maximum residue levels of pesticides in or on certain products. This is 10 times lower than the US MRL of 10 mg/kg. The US MRL for pomegranates is of 0.06 mg/kg, while in the EC the so-called limit of determination (LOD) of 0.02 mg/kg applies, *i.e.*, the lowest concentration of an agrochemical that can be routinely identified and quantitatively measured in a commodity with an acceptable degree of certainty by the method of analysis.

Diverging MRLs in the US and the EC for citrus fruit or pomegranates are, however, not the only problem for traders. While EC and Codex Alimentarius MRLs correspond for methoxyfenozide in tomatoes (2mg/kg), pome fruit (2mg/kg) and grapes (1mg/kg), the Codex Alimentarius MRL for chilli peppers (for example) is 20 times higher than the MRL set in the EC (1mg/kg). Is it a food safety problem when fruits and vegetables, which exceed the MRL set in one market, are shipped to another market where they are perfectly legal? Not necessarily. MRLs are often mistaken for toxicological safety limits, however, they are not. MRLs are based on good agricultural practices (hereinafter 'GAP') and they represent the maximum amount of residue of a given agrochemical that might be expected in or on a commodity if GAP was adhered to during its authorised use. Therefore, MRLs serve two grounds, first to prevent illegal and/or excessive use of an agrochemical (*i.e.*, to prevent damage to the environment or to the health of farmers) and second to protect the health of consumers of the harvested products. Exposure to residues in excess of an MRL does not automatically imply a hazard to health. In fact, in many cases MRLs are much lower than the toxicological limit, simply because it is not necessary to apply a higher quantity of the agrochemical to achieve control of a pest.

However, are diverging MRLs in different markets a trade problem? For traders supplying the EC and US citrus market or traders of chilli peppers (which take into account the Codex MRL and ship into the EC) there is, at least, a legal problem. The EC Member State authorities may not permit release of the products on the market if the statutory MRL (*i.e.*, the one established in EC and Member State law) is exceeded, although the products may still be within the Codex Alimentarius MRL. What about the producers of a given plant protection product, like the insecticide methoxyfenozide? How do they label their product with the correct instructions of use when they supply users in different markets to ensure that it is applied 'label conform' (*i.e.*, in conformity with the instructions)? What if Codex establishes an MRL? Which one prevails? For the purposes of identifying which international standards are to be used by WTO Members as the basis for their measures in their harmonisation efforts, the WTO SPS Agreement specifically recognises in Annex A(3)(3) the Codex Alimentarius for food safety. The General Principles of the Codex Alimentarius establish that 'the Codex Alimentarius is a collection of internationally adopted food standards presented in a uniform manner. These food standards aim at protecting consumers' health and ensuring fair practices in the food trade'.

However, Codex Alimentarius MRLs are not embodied in EC or Member State law. An MRL in the EC, which is lower (*i.e.*, stricter) than the corresponding Codex Alimentarius MRL, can be justified on grounds of health, a principle which is in line with the WTO SPS Agreement. It should be noted that there are occasions where an MRL, which has been established under Codex Alimentarius, may not reflect GAP in the EC (where more residues of the agrochemical may be allowed on the produce). In such cases, the Codex MRL is exceeded. However, on the other hand, it is not likely that products with residues of agrochemicals which exceed the MRLs established in EC law (but still below the Codex Alimentarius MRL), for example in the case of chilli peppers, will be permitted on the EC market. Traders (but also commodity producers and producers of plant protection products) are therefore reminded to be informed and to respect the MRLs set in the market which they supply (or intend to supply) and support their Governments in pursuing further harmonisation in order to avoid legal and, maybe, food safety problems. However, if they believe that the MRLs set in a particular market deviate from the existing Codex levels in a way which is arbitrary, not scientifically based and resulting in a trade barrier, they should consider working with their Governments to address the issue with the appropriate WTO mechanisms, if need be even dispute settlement procedures.

Recently adopted EC legislation:

- *Council Regulation (EC) No 847/2009 of 15 September 2009 amending Regulation (EC) No 682/2007 imposing a definitive anti-dumping duty on imports of certain prepared or preserved sweetcorn in kernels originating in Thailand*

- *Commission Regulation (EC) No 835/2009 of 11 September 2009 amending Council Regulation (EC) No 872/2004 concerning further restrictive measures in relation to Liberia*

- *Commission Decision of 9 September 2009 on a derogation from the rules of origin set out in Council Decision 2001/822/EC as regards sugar from the Netherlands Antilles (notified under document C(2009) 6739)*

- *Council Regulation (EC) No 826/2009 of 7 September 2009 amending Regulation (EC) No 1659/2005 imposing a definitive anti-dumping duty on imports of certain magnesia bricks originating in the People's Republic of China*

- *Council Regulation (EC) No 825/2009 of 7 September 2009 amending Regulation (EC) No 1659/2005 imposing a definitive anti-dumping duty on imports of certain magnesia bricks originating in the People's Republic of China*

- *Council Regulation (EC) No 803/2009 of 27 August 2009 imposing a definitive anti-dumping duty on imports of certain tube and pipe fittings, of iron or steel, originating in the People's Republic of China and Thailand, and those consigned from Taiwan, whether declared as originating in Taiwan, or not, and repealing the exemption granted to Chup Hsin Enterprise Co. Ltd. and Nian Hong Pipe Fittings Co. Ltd.*

- *Commission Regulation (EC) No 822/2009 of 27 August 2009 amending Annexes II, III and IV to Regulation (EC) No 396/2005 of the European Parliament and of the Council as regards maximum residue levels for azoxystrobin, atrazine, chlormequat, cyprodinil, dithiocarbamates, fludioxonil, fluroxypyr, indoxacarb, mandipropamid, potassium tri-iodide, spirotetramat, tetraconazole, and thiram in or on certain products (1)*

- *Commission Regulation (EC) No 790/2009 of 10 August 2009 amending, for the purposes of its adaptation to technical and scientific progress, Regulation (EC) No 1272/2008 of the European Parliament and of the Council on classification, labelling and packaging of substances and mixtures*