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Brazilian poultry exporters challenge South African anti-dumping measures

Brazil's poultry association, UBABEF, has announced that it will request the Brazilian Government to initiate a formal WTO dispute settlement procedure concerning recent actions taken by South Africa against imports of Brazilian poultry products. The South African Government has elected to apply provisional anti-dumping tariffs on imports of Brazilian whole frozen chickens and boneless poultry cuts. These duties will be applied for a 26-week period until a preliminary dumping investigation by the responsible South African authority – the International Trade Administration Commission of South Africa (hereinafter, the ITAC) – has been completed. The anti-dumping duties applied to whole frozen chickens will be 62.93%, while a 6.26% anti-dumping duty will be applied to boneless poultry cuts produced and exported by the Coperativa Central Oeste Catarinense – Aurora Alimentos, and a 46.59% anti-dumping duty will apply to other producers and exporters of boneless poultry cuts. The affected South American producers include BRF Brasil Foods SA, the world's biggest poultry exporter, and Seara Alimentos, the pork and poultry unit of Marfrig Alimentos SA, South America's second-largest producer of beef.

The ITAC has claimed that Brazilian poultry products are being sold in South Africa at prices up to 63% lower than retail prices in Brazil. UBABEF claims that, in assessing Brazilian price levels, ITAC did not consider tax levels in Brazil. Although there are apparently no export taxes on Brazilian poultry, these products reportedly face a 16.5% tax rate in the domestic Brazilian market. UBABEF further claims that the data provided by three out of the four Brazilian firms included in the ITAC's inquiry was disregarded and the companies were deemed to have been uncooperative. UBABEF also argues that the sale price of Brazilian chicken cannot be accurately compared to the price of South African poultry products, as South African domestic poultry is generally sold as a '*high quality*' product to wealthier individuals, while imported poultrymeat typically has a lower price point and is marketed for mass consumption.

If the Brazilian Government decides to commence formal WTO dispute settlement, several legal issues will likely be addressed. Article 2.4 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter, the WTO Anti-dumping Agreement) requires that investigating authorities make due allowance for factors which affect price comparability between the export price and the normal value of the exported commodity in the exporting market. These factors include differences in the level of taxation. In its preliminary determination that dumping has occurred, the ITAC appears to have excluded differences in the level of taxation as a difference that could affect price comparability. This may be contrary to the Panel's conclusion in *US - Lumber V*, where it was held that investigating authorities are required to make price adjustments in cases in which differences have been demonstrated to affect price comparability.

Brazil may also claim that South Africa disregarded the information provided by several Brazilian firms in violation of the evidentiary requirements found in Article 6 of the WTO Anti-dumping Agreement. In its preliminary determination of anti-dumping duties, the ITAC concluded that three of four Brazilian exporters provided insufficient information and/or were non-cooperative, and six of eight importers provided deficient information. Information from almost all of the parties with adverse interests to those of South Africa's domestic industry was thus deemed to be deficient and not considered by the ITAC. It might be argued that this was a violation of the first sentence of Article 6.2 of the WTO Anti-dumping Agreement, which states that *'[t]hroughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests*'. In the *Guatemala - Cement II* case, this sentence was interpreted by the Panel as being a '*fundamental due process provision*'. In *Egypt - Steel Rebar*, the Panel emphasised that Article 6.2 of the WTO Anti-dumping Agreement '*creates an obligation on the [investigating authorities] to provide opportunities for interested parties to defend their interests*'. An assessment of South Africa's compliance with Article 6.2 of the WTO Anti-dumping Agreement may thus turn on whether the ITAC honoured this '*due process provision*' by providing the above parties an adequate opportunity to address the deficient information.

It should also be noted that the claim by the Association of Meat Importers and Exporters of South Africa that Brazilian boneless poultry cuts and whole frozen chickens subject to South African anti-dumping duties represent less than 2% of South African production of the same products may not necessarily be a defence against anti-dumping duties. Article 3.7 of the WTO Anti-dumping Agreement sets out certain factors, which should be considered by investigating authorities in determining whether a threat of '*material injury*' (*i.e.*, one of the key determinants for applying anti-dumping duties) to domestic industry, as a result of dumped imports, exists. The list of enumerated factors do not include current import market share, but instead comprise, *inter alia*, whether there has been '*a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation*', and '*whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices*'. Accordingly, rather than citing market share figures, Brazil may have more success by focusing its arguments on the rate of increase of imports and the domestic pricing effects.

UBABEF has estimated that the Brazilian poultry industry will lose 70 million USD annually as a result of the South African measures. Yet South Africa's measures may also have negative commercial consequences for South African industry. South Africa imports approximately 16% of the poultry products consumed in its territory, of which around 73% is sourced in Brazil. Many imported Brazilian poultry products are reportedly used as inputs for South African retail products, and many South Africans are employed to work with imported Brazilian meat products across the value chain. A sudden shortfall of imported Brazilian poultry products may thus disrupt rather than boost local industry. This trade dispute is of crucial importance for Brazilian poultry exporters. The dispute is also significant for global poultry exporters that compete with Brazil in the poultry trade. These include Argentina, Canada, Thailand, and EU Members such as France, Germany, Poland and the UK. These EU Members have historically exported frozen poultry cuts and frozen whole birds to the Sub-Saharan region, and could see significant new trade opportunities if South Africa's anti-dumping measures remain in place. Affected commercial parties should closely monitor the next steps in this trade dispute.

EU and US mutually recognise their respective organic standards and control systems as equivalent

On 15 February 2012, the EU Commission, the US Department of Agriculture (hereinafter, the USDA) and the US Trade Representative concluded in Nuremberg, Germany (at the BioFach World Organic Fair, the world's largest fair for organic products), a bilateral agreement recognising their respective standards and control systems for organic food as equivalent. The agreement was preceded by two years of negotiations, a review of each others' organic regulations and control programs, and on-the-spot missions in the US and the EU to evaluate the systems in place. In simple terms, as of 1 June 2012, the effective date of the agreement, organic products certified in the EU or in the US may be sold as organic in either region. Currently, operators who want to trade products in the EU and the US must obtain separate certifications for two organic standards, and consequently there is a double set of fees, inspections, and paperwork.

The US has determined, pursuant to the *Organic Foods Production Act of 1990* (OFPA) (7 U.S.C. Sec. 6501 *et seq.*), that agricultural products produced and handled in accordance with *Council Regulation (EC) No. 834/2007 on organic production and labelling of organic products* and its implementing Commission *Regulations (EC) No. 889/2008* and *1235/2007*, are produced and handled under an organic certification program that provides safeguards and guidelines governing the production and handling of such products that are at least equivalent to the requirements of the OFPA. Until now, the US Government had only recognised the Canadian system as equivalent.

As to the procedure followed on the EU side, the EU Commission examined a US request to be included in the list of equivalent countries, entertained discussions with the US authorities, and carried out an on-the spot-mission to the US. This led to the conclusion that the US rules governing the production and controls of organic agricultural products are equivalent to those laid down in *Regulation (EC) No. 834/2007*. Consequently, the EU Commission adopted on 14 February 2012 *Commission Implementing Regulation (EU) No. 126/2012 amending Regulation (EC) No. 889/2008 as regards documentary evidence and amending Regulation (EC) No. 1235/2008 as regards the arrangements for imports of organic products from the United States of America*. The US is now listed as an '*equivalent third country*' in Annex III of *Regulation (EC) No. 1235/2008 on imports of organic products from third countries*, together with Argentina, Australia, Canada, Costa Rica, India, Israel, Japan, New Zealand, Switzerland, and Tunisia.

Certain agricultural products imported from the US are currently marketed in the EU pursuant to a different set of rules provided for in Article 19 of *Commission Regulation (EC) No. 1235/2008 laying down detailed rules for implementation of Council Regulation (EC) No. 834/2007 as regards the arrangements for imports of organic products from third countries.* For countries that are not (or not yet) on the third country list, organic products can be exported to the EU when they are certified as organic by a certifier that is recognised by the EU Commission. On 6 December 2011, the EU Commission adopted the *Implementing Regulation (EU) No. 1267/2011 amending Regulation (EC) No. 1235/2008 laying down detailed rules for the arrangements for imports of organic products from third countries,* which includes the long-awaited list of certification bodies that operate in third countries.

Analysing the details of the EU-US agreement, although both parties individually determined that their programs were equivalent, there are nonetheless some differences between the US and EU organic standards, which have to be taken into account when organic products are traded between the US and the EU. The major difference concerns the use of antibiotics. The USDA organic regulations prohibit the use of antibiotics, except for the use of streptomycin to control invasive bacterial infections (*i.e.*, fire blight) in organic apple and pear

orchards. EU organic standards do not provide for this exception. The EU organic regulations allow antibiotics only for the treatment of infected animals, which, on the other hand, is not permitted in the US. Therefore, US organic apples and pears on which antibiotics have been applied for fire blight control may not be exported to the EU as '*organic*', and EU organic agricultural products derived from animals treated with antibiotics may not be exported to the US. In addition, another restriction is that EU aquatic animals (*e.g.*, fish, shellfish) may not be exported to the US. In terms of labelling, in both the US and the EU, a product must contain at least 95% organically produced products to be labelled as organic. In the US, a product that contains 70-95% organic ingredients may be labelled as '*made with organic*'. This option is not permitted in the EU. However, for products containing less than 95% organic ingredients, a percentage statement of organic content may be displayed in the EU. Different from the US organic legislation, which covers products for personal care, the EU organic legislation covers only food and feed products. Another difference between the two systems has been eliminated with the adoption of an EU Regulation on organic wine on 8 February 2012. With the new regulation, which will apply from the 2012 harvest onwards, EU organic wine growers will be allowed to use the term '*organic wine*' on their labels. Until then, the only statement allowed has been '*wine made from organic grapes*'. The permissible sulphite content in organic wine was the most controversial issue in drafting the regulation, with a maximum sulphite content finally set at 100 mg/l for organic red wine (150 mg/l for conventional wine) and 150 mg/l for organic white or rosé wine (200 mg/l for conventional), with a 30 mg/l differential where the residual sugar content is more than 2 g/l. The US and many other wine-producing countries, such as Australia, Chile and South Africa, have already established standards for organic wine. EU organic wines can now compete at the international level.

Prior to 1 June 2012, accredited certifiers will be trained on the terms of the EU-US agreement. The USDA and the EU Commission will conduct regular assessments of each others' organic regulatory systems to ensure that the terms of the arrangement are being met. They will also establish a joint working group to evaluate issues such as the use of veterinary drugs in organic production, and the exchange of information on organic production strategies on animal welfare, on antibiotic-free dairy, and methods to avoid contamination of organic products from genetically modified organisms and other activities to enhance the integrity of organic production systems. The EU-US working group will also establish cooperation arrangements on the recognition of new third country arrangements and initiate a common assessment exercise for third country evaluations.

The combined organic products sector in the EU and the US is valued at around 40 billion EUR, and rising every year. The EU-US agreement is expected to generate more trade and jobs in the organic sector. Third country operators and certifiers cannot directly benefit from the EU-US agreement. For example, third country organic products certified under the USDA organic regulations may not be shipped to the EU. These products must be certified under the EU organic regulation. Only products produced or which had final processing/packaging conducted within the US can be shipped to the EU under the EU-US organic agreement and *vice versa*.

India files a request for consultations on Turkey's cotton yarn safeguards

On 15 February 2012, India requested consultations on safeguard measures on imports of cotton yarn (other than sewing thread) imposed by Turkey. The request deals with the definitive safeguard measures with effect from 15 July 2008, as well as the extension of those measures in January 2012 with a retrospective effect from 15 July 2011. In addition, India is concerned with the imposition of provisional safeguard measures in August 2011, imposed in the course of the expiry review. Turkey's emergency actions on cotton yarn already attracted criticism from India shortly after the imposition of the measure. In 2008,

India voiced its concerns to the WTO Committee on Safeguards, requesting consultations with Turkey under Article 12.3 of the WTO Agreement on Safeguards (hereinafter, the ASG). Similar consultations were requested by India in July 2011 after the initiation of the expiry review of the definitive safeguards and the enactment of provisional measures. Inasmuch as those consultations did not manage to resolve the dispute, a formal request for consultations under the WTO dispute settlement system was filed.

One of the major issues raised by India in the request for consultations is connected with the possibility of applying provisional safeguard measures in the course of the expiry review. The provisional safeguard measure was imposed by Turkey on 4 August 2011 prior to completing the determinations in the expiry review. In India's view, as Turkey initiated a review, Article 7.2 of the ASG obligates it to make a determination before the extension of measures and does not allow for any provisional measures. India believes that Turkey could not take recourse to provisional measures while undertaking a review of existing measures. India maintains that the imposition of provisional safeguard measures is permitted under Article 6 of the ASG solely in an original investigation and not in a review for extension. Turkey disagrees and maintains that the application of a provisional safeguard measure during the extension investigation does not necessarily mean the extension of the definitive measure in force. Turkey believes that provisional measures may be applied if there is a need for such measures and they do not as such contradict the spirit and rules of ASG. This controversy has not been so far addressed or resolved by previous WTO jurisprudence. The textual analysis of Article 6 of the ASG appears to favour the position of Turkey. The cited provision states that '*the duration of any such provisional measure shall be counted as a part of the initial period and any extension referred to in paragraphs 1, 2 and 3 of Article 7*'. The text appears to permit the inclusion of the provisional measure duration into the overall period of the extension, thus allowing such provisional measures to be taken. However, Article 6 of the ASG retains relevance for provisional measures through the expiry review, and thus any provisional remedy may be taken only in '*critical circumstances*' and after a sufficient '*preliminary determination*'. The resolution of the dispute will largely depend on the nature and essence of the preliminary determination which has been performed by Turkey before the imposition of the provisional measure.

In relation to the definitive safeguard measure imposed in 2008 and extended in 2012, India also claims that the safeguards were imposed in violation of Turkey's WTO obligations. India maintains, *inter alia*, that Turkey failed to meet its obligations under Article XIX of the GATT and to demonstrate that increased imports were a result of '*unforeseen developments*' and '*of the effect of GATT obligations*'. The relevance of these requirements has been reiterated by the recent Panel Report in *Dominican Republic - Safeguards on Polypropylene Bags* (see Trade Perspectives, Issue No. 3 of 10 February 2012). Some of the commentators consider these requirements to be extremely difficult to accomplish and, therefore, consider it nearly impossible for respondents in safeguards cases to fulfil the burden of proof of '*unforeseen developments*' as a cause of the import surge. The arguments of Turkey on this matter will be of the highest interest for scholars and practitioners given that there has not been a single safeguards case before WTO adjudicators in which the presence of '*unforeseen developments*' was effectively established.

India has become the world's largest producer and exporter of cotton yarn, accounting for more than 20% of the world's exports. India has rapidly expanded its market share during recent years. Among the other five major exporters of cotton yarn to Turkey affected by the disputed safeguards measures are companies from Turkmenistan, Uzbekistan, Egypt, Pakistan, and the Syrian Arab Republic. Notably, of these major exporters, only Egypt is currently a WTO Member and may therefore be able to request to join the consultations by India and attempt to discuss the review or withdrawal of the safeguard measure. As to India's exporters, their estimates of losses from the application of the safeguard by Turkey amount to 600 million USD annually. Taking into account that two rounds of consultations

under the auspices of the Committee on Safeguards failed to resolve the dispute, the probability of a formal WTO dispute on the issue appears very high. As the application of the safeguard has recently been extended by Turkey for 3 years until 14 July 2014, the rapid decision of the WTO Dispute Settlement Body may be warmly welcomed by businesses affected by the safeguard measure. In addition, the decision may have significant systemic implications, as WTO adjudicators will be called to address the applicability of provisional measures in the course of expiry reviews. The development of the case should therefore be vigilantly monitored by investigating authorities around the world, as well as by all businesses frequently involved in trade defence cases domestically and abroad.

Recently Adopted EU Legislation

Market Access

- *Commission Implementing Regulation (EU) No. 157/2012 of 22 February 2012 amending and derogating from Regulation (EC) No. 2535/2001 laying down detailed rules for applying Council Regulation (EC) No. 1255/1999 as regards the import arrangements for milk and milk products and opening tariff quotas*

- *Commission Implementing Regulation (EU) No. 120/2012 of 10 February 2012 fixing the allocation coefficient to be applied to applications for import licences for olive oil lodged from 6 to 7 February 2012 under the Tunisian tariff quota and suspending the issue of import licences for the month of February 2012*

Trade Remedies

- *Notice of initiation of an anti-subsidy proceeding concerning imports of certain organic coated steel products originating in the People's Republic of China*

- *Notice of initiation of an anti-dumping proceeding concerning imports of threaded tube or pipe cast fittings, of malleable cast iron originating in the People's Republic of China, Thailand and Indonesia*

- *Notice of initiation of an anti-dumping proceeding concerning imports of ceramic tableware and kitchenware originating in the People's Republic of China*

- *Notice of initiation of a partial interim review of the anti-dumping measures applicable to imports of hand pallet trucks and their essential parts originating in the People's Republic of China*

- *Commission Regulation (EU) No. 115/2012 of 9 February 2012 imposing a provisional countervailing duty on imports of certain stainless steel fasteners and parts thereof originating in India*

Customs Law

- *Commission Implementing Regulation (EU) No. 155/2012 of 21 February 2012 amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff*

- *Commission Implementing Regulation (EU) No. 144/2012 of 16 February 2012 concerning the classification of certain goods in the Combined Nomenclature*

- *Commission Implementing Regulation (EU) No. 145/2012 of 16 February 2012 concerning the classification of certain goods in the Combined Nomenclature*

- *Commission Implementing Regulation (EU) No. 146/2012 of 16 February 2012 concerning the classification of certain goods in the Combined Nomenclature*

- *Commission Implementing Regulation (EU) No. 133/2012 of 15 February 2012 fixing the import duties in the cereals sector applicable from 16 February 2012*

Food and Agricultural Law

- *Commission Implementing Decision of 10 February 2012 concerning preventive vaccination against low pathogenic avian influenza in mallard ducks in Portugal and certain measures restricting the movements of such poultry and their products (notified under document C(2012) 676)*

- *Commission Implementing Regulation (EU) No. 140/2012 of 17 February 2012 concerning the authorisation of monensin sodium as a feed additive for chickens reared for laying (holder of authorisation Huvepharma NV Belgium)*

- *Commission Implementing Regulation (EU) No. 143/2012 of 17 February 2012 on the issue of import licences for applications submitted in the first seven days of February 2012 under the tariff quota for high-quality beef administered by Regulation (EC) No. 620/2009*

- *Commission Implementing Regulation (EU) No. 136/2012 of 16 February 2012 concerning the authorisation of sodium bisulphate as feed additive for pets and other non-food producing animals*

- *Commission Implementing Regulation (EU) No. 131/2012 of 15 February 2012 concerning the authorisation of a preparation of caraway oil, lemon oil with certain dried herbs and spices as a feed additive for weaned piglets (holder of authorisation Delacon Biotechnik GmbH)*

- *Commission Implementing Regulation (EU) No. 126/2012 of 14 February 2012 amending Regulation (EC) No. 889/2008 as regards documentary evidence and amending Regulation (EC) No. 1235/2008 as regards the arrangements for imports of organic products from the United States of America*

- *Commission Implementing Decision of 10 February 2012 authorising the placing on the market of products containing, consisting of, or produced from genetically modified soybean A5547-127 (ACS-GMØØ6-4) pursuant to Regulation (EC) No 1829/2003 of the European Parliament and of the Council (notified under document C(2012) 691)*

- *Commission Implementing Decision of 10 February 2012 as regards the renewal of the authorisation for continued marketing of products containing,*

consisting of, or produced from genetically modified soybean 40-3-2 (MON-Ø4Ø32-6) pursuant to Regulation (EC) No 1829/2003 of the European Parliament and of the Council (notified under document C(2012) 700)

- *Commission Implementing Decision of 10 February 2012 authorising the placing on the market of products containing, consisting of, or produced from genetically modified soybean 356043 (DP-356Ø43-5) pursuant to Regulation (EC) No 1829/2003 of the European Parliament and of the Council (notified under document C(2012) 702)*

- *Commission Implementing Regulation (EU) No. 118/2012 of 10 February 2012 amending Regulations (EC) No. 2380/2001, (EC) No. 1289/2004, (EC) No. 1455/2004, (EC) No. 1800/2004, (EC) No. 600/2005, (EU) No. 874/2010, Implementing Regulations (EU) No. 388/2011, (EU) No. 532/2011 and (EU) No. 900/2011 as regards the name of the holder of the authorisation of certain additives in animal feed and correcting Implementing Regulation (EU) No. 532/2011*

Other

- *Council Regulation (EU) No. 134/2012 of 23 January 2012 concerning the allocation of fishing opportunities under the Protocol to the Fisheries Partnership Agreement between the European Community and the Republic of Mozambique*

- *Commission Regulation (EU) No. 101/2012 of 6 February 2012 amending Council Regulation (EC) No. 338/97 on the protection of species of wild fauna and flora by regulating trade therein*

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