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## Brazil issues preliminary list cross-retaliation

On 15 March 2010, the Brazilian Chamber of Foreign Trade (CAMEX) issued its preliminary list detailing the 'retaliation' on US intellectual property rights in the aftermath of the *US – Cotton* WTO dispute. Previously, on 8 March 2010, Brazil had revealed the list of 102 goods that would be subject to 'retaliatory' tariffs.

On 31 August 2009, a WTO arbitrator issued two awards in the *US – Cotton* case giving permission to Brazil to apply 'retaliatory' measures against the maintenance by the US of illegal subsidies on cotton (*i.e.*, one award to offset the export credit guarantees under the GSM 102 programme and one award in relation to the marketing loans and counter-cyclical payments). In addition, upon Brazil's request under Article 22:3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the WTO arbitrator allowed Brazil to apply cross-agreement suspension of obligations. Therefore, Brazil was granted the possibility that concessions be authorised for suspension also under the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPs) and the GATS (see Trade Perspectives, Issue No. 22 of 27 November 2009).

On 8 March 2010, Brazil revealed the list of 102 US export goods that will be subject to 'retaliatory' measures under the GATT. The list indicates an increase in tariff rates for a number of products (*e.g.*, certain food products, tyres, cosmetics, shampoos, toothpaste, headphones and earphones, automobiles and sunglasses). The increased tariffs range from 12 per cent duties for 'other adhesive dressings and other articles having an adhesive layer' to 100 per cent duties on cotton and cotton products. However, in the two arbitral awards, it was determined that, whenever the permissible amount of 'retaliatory' duties to which Brazil is entitled on an annual level were to surpass a certain threshold (in each of the awards, the threshold was calculated to be USD 409.7 million compared to figures of trade of 2006), Brazil would also be allowed to resort to 'cross-retaliation'. *In casu*, it was determined that Brazil could effectively resort to 'cross-retaliatory' measures worth USD 238 million.

By means of Resoluçao No. 16, Brazil issued a preliminary list of 21 items, object to public consultations during 20 days, that are eligible for 'cross-retaliation'. Such sanctions would include, *inter alia*, the suspension, for a fixed period of time, of intellectual property rights on pharmaceuticals, veterinary medicines, chemicals, biotech products for agricultural use and cultivation rights. In addition, the licensing of patents on products and the related processes concerning pharmaceuticals, agricultural chemicals and biotech products for agricultural use would be allowed without authorisation of the right holder and without compensation, as for the licensing of copyrights of books and audiovisual publications. Parallel imports would be allowed for pharmaceuticals (also for veterinary use), chemical products and biotechnological products for agricultural use, that incorporate patent rights. Furthermore, the Brazilian competent authorities would also be entitled to increase or institute supplementary fees for the registration or renewal of industrial property rights and intellectual property rights related to those sectors, to be paid to the National Institute for Industrial Property and the National Plant Varieties Protection Service, as is the case for copyrights. The list also provides for the (partial) confiscation of royalties obtained by Brazilian branches of US companies through copyrights and trademarks that are destined for the US based headquarters.

If Brazil were to resort to 'cross-retaliation', this would be the first time in the WTO history that such authorisation is actually used. However, Brazil and the US are still conducting talks in order to avoid such outcome. In fact, it appears that both Countries would prefer a mutually agreed solution, particularly since Brazilian industry stands to get affected by the 'retaliatory' measures, as US imports will most probably drop and/or become more expensive. In addition, the US has brought-up the issue that Brazil is a beneficiary of the US Generalised System of Preferences programme (hereinafter, GSP programme). One of the requirements to be able to enjoy such preferential treatment from the US is that Brazil provide 'adequate and effective' protection to US copyrighted materials. During 2009, it is estimated that Brazilian exports to the US under the duty free GSP programme were worth USD 1.97 billion. The measures included in the recently-published list of 'cross-retaliatory' measures are now open for public scrutiny, which is a considerable opportunity for the Brazilian industry to voice any concerns. The result of such consultations will be taken into account when a final version of the list of 'cross-retaliatory' measures is issued.

## EU Parliamentary Committee votes not to make colour coding compulsory for nutritional labelling

At its meeting on 15-17 March 2010, the Committee on Environment, Public Health and Food Safety of the European Parliament (hereinafter, ENVI) voted on the report on the draft food information to consumers regulation (Rapporteur: MEP Renate Sommer, EPP-ED) in which a large number of amendments to the original proposal were tabled (see Trade Perspectives, Issue No. 1 of 29 January 2010). In January 2008, the EU Commission had submitted to the European Parliament and the EU Council a proposal for the revision of EU rules on food labelling in order to meet the requirements of better law-making by consolidating and replacing seven directives and a regulation. Among other provisions, the EU Commission proposal provides for a mandatory and comprehensive nutrition declaration, while nutritional labelling is currently optional and only mandatory if a specific nutrition claim is made.

In relation to nutritional labelling, as to the EU Commission's proposal that the values for five nutrients (*i.e.*, energy, fat and saturated fat, carbohydrates, sugar and salt) be made mandatory on the front of food and beverage packs, the MEPs in the ENVI went even further, including added proteins, fibres, and natural and artificial trans-fats. It was argued that, given the importance of energy, the calorie content should also be made prominent. Furthermore, two particular issues on nutritional labelling were debated controversially in the ENVI: the inclusion of colour coding on the front pack (*i.e.*, the so-called traffic light labelling scheme, as red, orange and green are often used), and the question of whether to indicate nutritional values per portion or per 100ml/g.

The European Parliament's Rapporteur had argued, *inter alia*, against a compulsory system of colour coding of food as the limit values for classification using the three traffic light colours are set arbitrarily, and the range within any one of these colours is too big. Although some MEPs have been keen to see colour coding included on the front pack of food packaging, the ENVI's vote on the Rapporteur's report on the proposed new food information regulation appears to favour general rules, while the idea of making colour coding mandatory seems to be rejected, as is a ban on co-existent national nutritional labelling schemes. This means that the majority in the ENVI was not in agreement that colour coding should be mandatory, stating that the regulation should lay down only quite general rules on how nutritional information should be displayed, which would allow different Countries to keep or adopt national rules. The EP's Rapporteur had also proposed that EU Member States not be able to foresee additional national schemes alongside the EU-wide format, but MEPs chose to reject this idea.

The second contentious issue (*i.e.*, the question of whether information should be given per portion or per 100ml/g of product) is far from being settled. The food industry has tended to prefer a portion-based approach on the front of packs, with the 100ml/g values on the back. The MEPs in

the ENVI agree with the Commission, however, that 100g/ml is preferable, with portion info alongside as an optional extra.
An argument often used for a portion-based approach is that it does not require numeracy skills for consumers to work out exactly how much they would be eating. But there are also arguments against this approach. How much is a portion and who decides how big a portion is? A recent newspaper article gave the example of breakfast cereals for children with the main nutrients indicated for a 90g portion. This resulted in relatively low values for sugar, fat and salt. However, the picture on the package suggests a huge bowl of cereals and it is more than likely that the average portion, which is actually consumed, exceeds 90g by far. Therefore, a portion-based approach may be used in a misleading way which goes against the very principle of food labelling law (*i.e.*, the principle that food labelling shall not mislead the consumer).

After the adoption of the European Parliament's Committee report, the proposal is now awaiting the European Parliament's decision in the first reading. A negative vote in the ENVI Committee, such as in the case of colour coding, does not necessarily mean that the matter is in fact 'out'. It can, in theory, be reintroduced in an amendment in the European Parliament's plenary sitting, although certain requirements have to be met, *inter alia*, the amendment has to be signed by a political group or by an elevated number of MEPs. After being reintroduced in the procedure, it would depend on the political majorities on whether the matter goes ahead or not. The indicative date for the European Parliament's plenary sitting is 14 June 2010. The first reading opinion of the European Parliament is expected to take place in June 2010. After the second reading in the European Parliament, which is to be expected in this controversial dossier, the regulation will finally be adopted by the European Parliament and the EU Council. Food companies will have three years to adjust to the new rules, except in the case of food business operators with, on the date of entry into force, an annual turnover and/or annual balance sheet not exceeding EUR 5 million, which will be given a total of five years.

## Australia takes a controversial step backwards over beef imports

After announcing, on 1 March 2010, the lift of the ban on beef imports from Countries where BSE outbreaks had been reported, the Australian Government revised its decision and, on 8 March 2010, re-instituted the ban for a two-year period, during which an import risk analysis is to be conducted.

Australia imposed an import ban on beef originating in Europe (2001) and the US and Canada (2003) due to concerns over the possible expansion of the BSE disease in its territory. Reports say that, while the decision to lift the ban was prompted by persistent US calls and a threat by Canada to commence proceedings in the WTO, it was the public pressure exercised on the Government, in the aftermath of the announcement, which led the latter to reconsider its position. This public pressure, according to the same reports, emanates not only from fears relating to the compromise of national health, but, also, from concerns as to the repercussions that the lift of the ban might have on the Australian beef market. In particular, it is feared that, on the one hand, there could be a flood of imports in the already abundant domestic market and, on the other, the high-quality reputation of the Australian beef could be endangered. Official statistics indicate that the Country is currently ranked amongst the major beef exporters at a global level, annually exporting a total of 941.400 tons of beef and veal, which amount to USD 4.3 billion, mainly to Japan, Korea and the US.

Import risk analysis has traditionally been used by Australia, before the effectuation of significant changes in quarantine policies, such as the current beef one. The aim of such analysis is to help the authorities in better identifying the existing risks and shaping, accordingly, the appropriate policies. Its main features include a clear timeframe, the consultation of all concerned stakeholders and a rigorous scientific assessment. Upon conclusion, its results will be incorporated into relevant protocols. In this case, the protocols will govern the imports of beef from third Countries into Australia.

The major commercial consequence of initiating an import risk analysis is that, until its conclusion (*i.e.*, for 24 months), no beef or beef products can be imported into Australia. A specific exception will be maintained for beef imported from New Zealand, as the two Countries have already a number of long-standing relevant protocols in place, arguably guaranteeing the safety of the trade products. Besides any challenges that may be based on the allegedly discriminatory character of the aforementioned exception, Australia's *de facto* '*moratorium'* could also be attacked under the provisions of the SPS Agreement, as risk assessment which is not appropriate to the circumstances. Finally, arguments could be made that the same objectives of animal and human health protection could be achieved by Australia through less trade distortive and less disproportionate policies, such as labelling schemes or greater interaction with the animal health authorities of other Countries. It is likely that this controversial decision by Australia will result in WTO consultations and possibly even dispute settlement.

## The Court of Justice of the EU rules that minimum retail prices for cigarettes infringe EU law

On 4 March 2010, the Court of Justice of the EU (ECJ) issued three judgments, in which it concluded that the imposition by France (C-197/08), Austria (C-198/08) and Ireland (C-221/08) of minimum retail prices for the sale of some tobacco products, including cigarettes and fine-cut tobacco for the rolling of cigarettes, constitute infringements of Article 9(1) of Council Directive 95/59/EC on taxes other than turnover taxes which affect the consumption of manufactured tobacco.

The EU Commission decided to initiate infringement proceedings against the three EU Member States for failure to fulfil their obligations under EU law, in 2008, in accordance with the procedure laid down in Article 258 TFEU (ex Article 226 TEC). After giving these States the opportunity to submit their observations on the issue, it issued a reasoned opinion, which called for their compliance within a specified timeframe, the lapse of the latter without any corrective actions indicating the EU Commission's empowerment to bring the case to the Court of Justice of the EU.

Before the Court of Justice of the EU, the EU Commission argued that Article 9(1) of Council Directive 95/59/EC establishes the right of manufacturers and importers of tobacco to freely determine the maximum retail selling prices for their products and that this right is hindered by provisions of national legislation, prohibiting the products' sale at prices lower that the specifically fixed ones. In answering the 'public health' arguments invoked by the respondents the EU Commission argued that adequately high prices of tobacco products can be ensured by other means, such as the imposition of general or specific tax increases and minimum excise duties. However, the respondent EU Member States objected to the alternative offered by tax measures, arguing that the latter do not sufficiently avert the sale of cheap cigarettes, as the higher taxes can be absorbed by the manufacturers and importers, in return for a small profit sacrifice.

In its ruling, the Court of Justice of the EU recalled that the aim of Council Directive 95/59/EC is to aid in harmonising the structures of excise duty on manufactured tobacco, so that the prevention of the distortion of competition and the opening of the national markets of the EU Member States are ensured. In doing so, it provides for a uniform system to calculate the tax base of the proportional excise duty on tobacco products and it establishes that manufacturers or importers of such products are free in determining the latter's maximum retail selling prices. However, national legislation allowing the public authorities to determine minimum retail selling prices results in preventing manufacturers or importers from setting their maximum retail prices at a lower level than that of the obligatory minimum ones, thereby hindering them from taking advantage of low costs and offering more attractive retail selling prices for their products. According to the Court, the only way for a minimum retail selling price system to be compatible with the Directive would be for it to ensure that the comparative advantages that more efficient producers profit of are not

impaired, due to the imposition of minimum retail prices. Otherwise, the safeguarding of health protection can be achieved through the use of fiscal measures.

The judgment is important not only because it verifies the stance that the ECJ has taken in similar previous cases (*i.e.*, C-302/00 and C-216/98), but also because it provides an interesting starting point for considerations relating to the effects that it could have on other categories of products. Reports, for example, indicate that the Scottish Government has declared its intention to introduce a minimum retail pricing system for alcohol, advocating that the latter is differentiated from tobacco. However, even though alcohol is not subject to the specific provisions of Council Directive 95/59/EC and the tobacco jurisprudence, it does fall under (and has to abide by) the general provision of Article 34 TFEU (ex Article 28 TEC), stating that all measures having equivalent effect to quantitative restrictions on imports shall be prohibited between EU Member States. A minimum retail price for alcohol could be deemed to constitute such a measure, as adversely affecting, in law or in fact, the imported products' marketing.

## Recently Adopted EU Legislation

- *Commission Regulation (EU) No. 249/2010 of 24 March 2010 entering a name in the register of protected designations of origin and protected geographical indications (Chorizo Riojano (PGI))*

- *Commission Decision of 23 March 2010 amending Decision 2006/109/EC by accepting three offers to join the joint price undertaking accepted in connection with the anti-dumping proceeding concerning imports of certain castings originating in the People's Republic of China*

- *Council Regulation (EU) No. 219/2010 of 15 March 2010 amending Regulation (EU) No. 53/2010 as regards the fishing opportunities for certain fish stocks and following the conclusion of the bilateral fisheries arrangements for 2010 with Norway and the Faroe Islands*

- *Commission Regulation (EU) No. 206/2010 of 12 March 2010 laying down lists of third countries, territories or parts thereof authorised for the introduction into the European Union of certain animals and fresh meat and the veterinary certification requirements*

- *Commission Regulation (EU) No. 212/2010 of 12 March 2010 amending Regulation (EC) No. 669/2009 implementing Regulation (EC) No. 882/2004 of the European Parliament and of the Council as regards the increased level of official controls on imports of certain feed and food of non-animal origin*