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EC TRADE REPORT

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Brussels
July - September 2005

***Included in this issue:***



## I. WTO

### *Arbitrator's Award in the Dispute over the EC Banana Import Regime*

On August 1, an Arbitrator appointed pursuant to the Doha waiver (of EC obligations under Article I GATT 1994)[1] adopted its award in *European Communities – The ACP - EC Partnership Agreement*.[2] The waiver was adopted during the Doha Ministerial Conference to facilitate the EC's reform of its banana import regime in the aftermath of the EC Bananas dispute.

In the course of its reform of its banana import regime, the EC announced an intention to replace its existing tariff quota for Most Favored Nation (MFN) suppliers with a bound duty of € 230/t. By that time the in-quota tariff was € 75 for MFN suppliers and zero for preferential suppliers, and a fraction of the quota had been open exclusively to preferential suppliers.[3] The amount of the new bound tariff was calculated using the "price gap" methodology, whereby € 230/t was the difference between internal (EC) and external (outside of the EC) prices of bananas during a reference period – 2000-2002.

Nine Central and South American States[4] initiated arbitration proceedings pursuant to the Doha waiver, claiming that: (i) the "price gap" methodology was inadequate in this case; and (ii) the reference period and the price data used for the calculations were flawed. The Arbitrator's mandate was "to determine […] whether the envisaged rebinding of the EC tariff on bananas would result in at least maintaining total market access for MFN banana suppliers, taking into account [all EC WTO market access commitments relating to bananas]".[5] Addressing the Parties' disagreement on the interpretation of this provision the Arbitrator determined that: (i) "at least maintaining […] market access" meant preserving effective opportunities to enter the EC banana market rather than preserving pre-existing import volumes; and (ii) "total market access" referred not just to bound commitments but to all aspects of the EC import regime actually applied.

Honduras, Nicaragua and Panama argued that it was also within the scope of the Arbitrator's jurisdiction to review the EC proposal under Paragraph 1 of the Doha waiver, *i.e.,* to make an assessment whether the disputed EC measure was "necessary" to provide preferential treatment to some suppliers and whether it was not "required" to extend such treatment to MFN suppliers. Emphasizing the binding nature of Paragraph 1 the

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1 "European Communities – The ACP-EC Partnership Agreement (Cotonou Agreement), Decision of 14 November 2001" (the Doha waiver), WT/MIN(01)/15.

2 WT/L/616.

3 The out-of-quota rate for non-preferential suppliers was €680 per metric ton and for preferential suppliers €380 per metric ton.

4 Brazil, Columbia, Costa Rica, Ecuador, Guatemala, Honduras, Nicaragua, Panama and Venezuela.

5 Fourth tiret of the Annex to the Doha waiver decision, WT/MIN(01)/15.

Arbitrator, however, held that addressing this issue would go against the express terms of his mandate and that, therefore, it fell beyond his jurisdiction.

On the merits, the Arbitrator upheld the plaintiffs' argument that the "price gap" method employed by the EC to calculate the amount of the new tariff replacing the former tariff quota was inappropriate. The Arbitrator acknowledged that, in the context of the differential between different suppliers, this method had the effect of further increasing the margin of preference enjoyed by preferential suppliers (in this case from € 75 to € 230 per metric ton for in-quota imports). The Arbitrator further upheld the plaintiffs' allegations that the reference period and the price data used by the EC to calculate the gap between internal and external prices of bananas (and on that basis determine the amount of the bound tariff) were flawed. The reference period 2000-2002 was deemed inadequate because it was neither sufficiently recent nor sufficiently representative, given that the EC banana import regime had changed at least three times over that time period. The EC internal price data downloaded from the Food and Agriculture Organization (FAO) web site was also found to be inappropriate as it was based on traders' quotations rather than actual selling prices, which usually are significantly lower.

On that basis, the Arbitrator concluded that replacing the existing tariff quota with a bound tariff duty of € 230 per metric ton, as envisaged by the EC, would not result in "at least maintaining total market access for MFN suppliers taking into account [all EC WTO market access commitments relating to bananas]".

### *Appellate Body Report on the EC Customs Classification of Frozen Boneless Chicken Cuts*

On September 12, the Appellate Body issued its report in the dispute between Thailand and Brazil and the European Communities with respect to the EC customs classification of frozen boneless chicken cuts.[6] A Panel had previously determined that the products in question were covered under the "salted" meat heading – 02.10 (as opposed to the heading of untreated chicken cuts – 02.07 of the EC Schedule), and that the treatment accorded to these products by the EC was less favorable than that provided for in the EC Schedule in breach of Article II:1(a) and Article II:1(b) of GATT 1994.[7] The less favorable treatment resulted from the change of customs classification for frozen boneless chicken cuts with a salt content of 1.2% - 3% by means of Commission Regulation 1223/2002.[8] The Panel's findings were based on its interpretation of the term "salted" in heading 02.10 of the EC tariff commitment in the light of Articles 31 and 32 of the Vienna Convention.[9]

On appeal, the Appellate Body was asked to consider whether the Panel's interpretation was erroneous in view of (i) the ordinary meaning of the term "salted"; (ii) its context in heading 02.10 of the EC Schedule; (iii) the object and purpose of that Schedule; (iv) subsequent practice; and (v) the circumstances of conclusion of the WTO Agreement of which the EC Schedule is an integral part.

The Appellate Body upheld the Panel's conclusions that (i) the ordinary meaning of the term "salted" reflected nothing more than addition of salt to the product at issue, and (ii) its context, consisting of other terms used in heading 02.10, other headings of the EC Schedule (more specifically heading 02.07 invoked by the EC) and the World Customs Organization (WCO) Harmonized System[10] did not suggest that salting must by itself ensure preservation of the product. The Appellate Body further upheld the Panel's reasoning on the object and purpose of heading 02.10 and the WTO Agreement as a whole. It confirmed that legal certainty for all WTO Members was an important part of the Treaty's object and purpose and that the Treaty would be negatively affected by attributing the notion of long-term preservation to the term "salted" regardless of the EC's subjective intent in using that term in its concession.

The determination by the Panel that the EC's customs classification practice between 1996 and 2002 alone constitutes "subsequent practice" was reversed in view of the unilateral character of such practice. The Appellate Body rejected the view that the EC's tariff concessions were unique, considering that, like the concessions of other WTO Members, their structure was based on the WCO Harmonized System. Hence, for interpretation purposes, their implementation by such other Members was also held to qualify as subsequent practice. There was, however, insufficient evidence of a uniform WTO Members' practice to reverse or modify the Panel's interpretation based on the above sources.

On similar grounds the Appellate Body corrected the Panel's failure to take into account the 1990s U.S. customs practice as circumstances of the conclusion of the WTO Agreement. It nevertheless upheld the Panel's conclusion that supplementary means of interpretation considered in Article 32 of

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6 WT/DS 286/AB/R, WT/DS 286/AB/R.

7 WT/DS 286/AB/R, WT/DS 286/AB/R and EC Trade Report April-June 2005, p.3.

8 Commission Regulation 1223/2002 of July 8, 2002 concerning the classification of certain goods in the Combined Nomenclature, OJ 2002 L 179/8.

9 Vienna Convention on the Law of Treaties, UNTS vol.1155, p.331.

10 The Harmonized Commodity Description and Coding System, generally referred to as the "Harmonized System" is a multipurpose international product nomenclature adopted by the World Customs Organization.

the Vienna Convention confirmed that the products in question were covered by the EC tariff commitment under heading 02.10. Accordingly the Appellate Body noted that the change of EC tariff classification resulted in the imposition of higher customs duties than the ones provided for in heading 02.10 and confirmed the Panel's finding that the EC had thus infringed Articles II:1(a) and II:1(b) of GATT 1994.

### *Compliance Panel Report in the U.S. Foreign Sales Corporations Dispute*

On September 30, a WTO compliance Panel released its report in the dispute between the European Communities and the United States with respect to the U.S tax treatment of so-called "Foreign Sales Corporations".[11] The DSB had requested the United States to withdraw a tax exemption on U.S. companies' foreign sales earnings (the FSC measure), which was found by the original Panel and the Appellate Body to constitute a prohibited export subsidy.[12] In response to that request, the United States had enacted the FSC Repeal and Extraterritorial Income Act (ETI Act), which had failed to completely withdraw the prohibited subsidy as the implementation Panel and the Appellate Body had determined in 2002. As a next step the United States had enacted the American Jobs Creation Act (Jobs Act), which according to the EC also fell short of withdrawing the subsidy completely.

In its complaint, the EC singled out two specific provisions of the Jobs Act: (i) the "transition procedure", which provided for a two-year prolongation of part of the ETI benefits; and (ii) the "grandfathering provision", which exempted indefinitely certain transactions from the ETI repeal. The United States did not contest the EC arguments on their substance. Rather, it argued that the report of the first compliance Panel did not contain a recommendation to withdraw the ETI subsidy without delay. The United States also pointed out that the ETI grandfathering clause had not been mentioned in the EC Panel request and it was, therefore, not within the Panel's terms of reference.

Interpreting the text of Article 21.5 of the Dispute Settlement Understanding (DSU), the Panel found that it was beyond the mandate of a compliance panel to make specific recommendations to the non-complying party. It pointed out that such panels could only establish the fact of non-compliance and reaffirm the recommendations and rulings proposed by the original panel, which was exactly what the first compliance panel had done. The task of the second compliance panel was, therefore, to assess the respondent's implementation of the recommendations issued by the original panel and not by the first compliance panel. And to the extent that the United States maintained the prohibited FCS and ETI subsidies through the Jobs Act transition and grandfathering clauses, the Panel found that it failed to fully implement the original DSB recommendations.

As regards the scope of its terms of reference, the Panel first noted that the contested measure in the EC Panel request was Article 101 of the U.S. Jobs Act in its entirety, on account of its failure to fully withdraw the FSC and ETI benefits. One of the ETI benefits in question was the grandfathering clause of Article 5 ETI, which was exempted from repeal by virtue of Article 101(f) of the Jobs Act. Thus, although Article 5 ETI had not been specifically mentioned in the Panel request, the Panel considered that it had been sufficiently identified by the applicant and it formed part of its terms of reference.

## II. EU COMMERCIAL POLICY

### *First Court of First Instance Rulings on the Legality of the EC Instruments for Fighting International Terrorism*

On September 21, the Court of First Instance rendered its first judgments concerning the compatibility with the EU legal order of acts adopted in the context of the fight against terrorism.[13]

Both before and after the terrorist attacks of September 11, 2001, the United Nations Security Council (Security Council) adopted several resolutions imposing restrictive measures on the Taliban, Usama Bin Laden, and the Al-Qaeda network, as well as on individuals and entities associated with them. Pursuant to these resolutions, all Member States of the United Nations (UN) were called on to freeze the funds and other financial resources controlled directly or indirectly by those entities. The task of identifying the persons concerned and the relevant financial resources was entrusted to a UN Sanctions Committee. In the European Union, these UN resolutions were implemented by means of Council Regulations (the Regulations)[14] ordering the

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11 WT/DS 108/RW2.

12 The measure had been found to be inconsistent with Articles 3.1(a) and 3.2 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and Articles 10.1 and 8 of the Agreement on Agriculture.

13 Joined Case T-315/01 *Yassin Abdullah Kadi v Council* and T-306/01 *Ahmed Ali Yusuf v Council*, not published yet.

14 Originally, Council Regulation 467/2001 of March 6, 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation 337/2000, OJ 2001 L 67/1, and, subsequently, Council Regulation 881/2002 of May

freezing of the funds of the persons and entities listed in annexes to the Regulations, measures regularly reviewed by the Commission on the basis of regular Sanctions Committee updates.

Several of the persons and entities concerned brought an action before the Court of First Instance asking for the annulment of the Regulations and alleging, *inter alia*, a lack of competence of the Council to adopt the Regulations and the violation of their fundamental rights. The Court, however, dismissed all applications and confirmed the validity of the Regulations.

The Court assessed first the competence of the Council to impose economic sanctions on individuals and private entities, in light of the fact that the EC Treaty expressly authorizes the Council to impose economic and financial sanctions on third countries only when a common position adopted by the European Union under the Common Foreign and Security Policy (CFSP) so provides. But the Court nevertheless found that, under similar conditions, the Council is also competent to impose economic and financial sanctions on private parties when this is necessary to attain the objectives of the CFSP such as, *inter alia*, the fight against international terrorism and its funding.

The Court then analyzed the applicants' argument according to which the Regulations violated their fundamental rights as recognized, in particular, by the European Convention of Human Rights and Fundamental Freedoms (ECHRFF) and the constitutions of the EU Member States, which are part of the Community legal order. In this regard, the Court preliminarily noted that, according to international law, the obligations of the Member States of the UN under the UN Charter (including the obligations deriving from the Security Council resolutions) prevail over any other international law obligation of these Member States, including those under the ECHRFF and the EC Treaty. Moreover, according to the Court, the Community itself, although not a Member of the UN, is bound by the obligations deriving from the UN Charter. As a consequence, the Court concluded that, in light of the primacy of UN law over Community law, the review of a Community piece of legislation simply implementing a UN Security Council resolution falls outside of the the Court's competency. According to the Court, this would be indeed tantamount to reviewing the legality of the decision of the Security Council against the Community legal order, which cannot be done given the supremacy of UN law over EU law. Nevertheless, the Court also noted that it was still empowered to check the lawfulness of the Regulations and, indirectly, the Security Council resolutions implemented by the Regulations, in light of the higher values of general international law, the so-called *jus cogens*, a superior norm of international law from which neither Member States nor any UN body can derogate.

On the merits, the Court considered that none of the applicants' fundamental rights protected by the jus cogens had been violated by the relevant UN resolutions. It also concluded that the applicants had not been arbitrarily deprived of their property, mainly in light of the fact that the freezing of their funds was only temporary and constituted legitimate means in the fight against international terrorism. The Court further noted that, despite the fact that the applicants did not have the right to be heard before the relevant measures were adopted, nor had access to the evidence relied upon to adopt these measures, their right of defense had not been violated, mainly in light of the fact that the Regulations provided for the possibility of the persons whose funds had been freezed to address, through their national governments, a request to the Sanction Committee to be removed from the list of the persons affected by the sanctions. Finally, the Court also held that the applicants' right to judicial review had also not been violated by the measures at stake since the applicants' interest in having a court fully hear their case on its merits was not strong enough to outweigh the essential public interest in the maintenance of international peace and security.

## III. EU CUSTOMS POLICY

### *Court of First Instance Ruling on the Remission of Import Duties*

On September 13,[15] the Court of First Instance confirmed the decision of the European Commission rejecting a wholesale trader's claim for the remission of import duties under Article 905 of the Community Customs Code Implementing Regulation (IR).[16]

In 1994, the applicant, Ricosmos, filled in 11 "T 1" documents with respect to consignments of cigarettes.[17] The Dutch authorities then found that the goods had not been presented to the office of destination mentioned in the T 1 documents and had not been properly cleared. As a result, the

27, 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Regulation 467/2001, OJ 2002 L 139/9.

15 Case T-53/02 *Ricosmos v. European Commission,* judgment of September 13, 2005, not yet published.

16 Commission Regulation 2454/93 of July 2, 1993 laying down provisions for the implementation of Council Regulation 2913/92 establishing the Community Customs Code, OJ 1993 L 253/1.

17 "T 1" documents are customs declarations covering goods that are in transit within the customs territory of the European Community and are therefore exempt from customs duties.

applicant was found liable to pay a customs debt for the unlawful removal of goods from customs supervision under Article 203(3) of the Community Customs Code (CCC).[18] It turned out that, without the applicant's knowledge, the cigarettes had been the object of a contraband in which a customs agent had taken part. The applicant brought a claim for the remission of his debt under Article 905 IR with the Dutch customs authorities, which referred the case to the European Commission. The Commission rejected the applicant's claim because the conditions for remission were not met, and the applicant appealed that decision before the Court of First Instance.[19]

The issue before the CFI was whether the conditions under which an applicant is entitled to the remission of customs duties under Article 905 IR were met, namely (i) the existence of a "special situation" and (ii) the absence of deception or "obvious negligence" on the part of the applicant. In the case at hand, it was undisputed that there existed a "special situation", namely the fraud in which a customs agent was involved, and that the applicant had not engaged in any deception. The question was then whether the applicant's behavior amounted to "obvious negligence."

The Court found that the applicant had breached three provisions of the Implementing Regulation. First, the applicant's failure to mention the registration numbers of the transport vehicles on copy 5 of the T 1 documents infringed Annex 37 IR. Second, with respect to the majority of the operations, the applicant knowingly stated an incorrect office of destination in the customs declaration, in breach of the combined provisions of Article 199 and Annex 37 IR. Third, the applicant had agreed to a method for returning copy 5 of the T 1 documents from the office of destination to the office of departure that did not comply with Articles 356(2) and 358 IR. The Court emphasized that these practices not only did not comply with the customs rules and trade practices but also facilitated fraud, and therefore concluded that the applicant's behavior constituted "obvious negligence."

But, on the contrary, the Court held that the applicant's failure to obtain accurate information about the alleged buyers of the goods did not amount to obvious negligence. Indeed, the applicant could reasonably rely on the information provided by the intermediary as they had a long-standing commercial relationship and as the specific features of international trade make it difficult to obtain information about foreign buyers within a short period of time.

The Court also addressed the issue of causation. Indeed, for an applicant to be excluded from the benefit of obtaining remission of the import duties under Article 905 IR, there must be a connection, which does not have to be direct or immediate, between his negligent conduct and the special situation. Here, the Court easily found that the applicant's negligence had contributed to the removal of goods from customs supervision, thereby establishing the necessary causal link. Finally, it is interesting to note that the Court rejected the applicant's plea that the non-remission of the customs duties would cause him a major loss, in breach of the principle of proportionality. The Court held that this was a normal business risk that economic operators are expected to bear.

### *Court of Justice Preliminary Ruling on the Interpretation of the Community Customs Code*

On September 15, the European Court of Justice issued a preliminary ruling on the interpretation of Article 203(3)(4) of the Community Customs Code (CCC),[20] which provides that a customs debt is incurred whenever goods liable for import duties are unlawfully removed from customs supervision.[21]

In the present case, Unamar, a maritime transport company, had imported cigarettes from Brazil into Belgium, through the port of Antwerp, presented the goods to the Antwerp Customs Office and lodged a summary declaration. However, the cigarettes got stolen a few days later, after Seaport Terminals, a freight forwarder, had unloaded them from the vessel that had brought them to Antwerp, but before the Antwerp customs authorities cleared the goods, which were to be treated as goods in temporary storage.

Considering that Article 203(3)(4) CCC provides that, when appropriate, the debtor should be the person required to fulfill the obligation arising from temporary storage of the goods, the customs authorities held Unamar and Seaport Terminals as jointly liable for the customs debt. Both Unamar and Seaport Terminals objected to this decision and started proceedings before the Court of First Instance of Antwerp, which dismissed their application. In the subsequent appeal of that decision, the Court of Appeal of Antwerp made a preliminary reference to the Court of Justice, asking who between Unamar and Seaport Terminals should be held liable, if not both.

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18 Council Regulation 2913/92 of October 12, 1992 establishing the Community Customs Code, OJ 1992 L 302/1.

19 Commission decision of November 16, 2001.

20 Council Regulation 2913/92 of October 12, 1992 establishing the Community Customs Code, OJ 1992 L 302/1.

21 Case C-140/04 *United Antwerp Maritime Agencies v. Belgische Staat,* judgment of September 15, 2005, not yet published.

According to the Court of Justice, the obligation arising from temporary storage of the goods referred to in Article 203 is the obligation provided by Article 184 of the CCC Implementing Regulation to re-present the goods in temporary storage to the customs authorities, whenever they require it.[22] Article 184(1) provides that the person who signed the summary declaration may be asked to fulfill the obligation to re-present the goods up until the time when the goods are unloaded; then, under Article 184(2), once the goods have been unloaded, the burden of re-presentation shifts to the "person who holds the goods." The Court inferred from this distinction that the decisive criterion in determining who must fulfill the obligations arising from temporary storage of the goods is possession. The Court underlined that this practical solution makes sense in that it is the person who has custody of the goods who will be able to re-present them, if so requested. This is further corroborated by Article 51(2) CCC, which provides that it is the person holding the goods who may be asked to provide security with a view to ensuring payment of any customs debts arising under Article 203. Consequently, the Court held that Article 203(3)(4) CCC should be interpreted as meaning that the person required to fulfill the obligations arising from temporary storage of the goods refers to the person who holds the goods. In the present case, since the goods were stolen after they had been unloaded, the person having the duty to re-present the goods was Seaport Terminals. It follows that Seaport Terminals alone could be held liable to pay the import duty.

## IV. EU EXTERNAL RELATIONS

### *Trade in Steel*

On July 18, the Council adopted a decision extending until January 1, 2006 the period during which Romania may grant public aid for restructuring purposes in the steel products sector.[23]

On July 12 and 18, the Council also adopted decisions approving the agreements concluded, respectively, with Ukraine[24] and Kazakhstan[25] on trade in certain steel products and regulations on restrictions on imports of certain steel products from Ukraine[26] and Kazakhstan.[27] These new agreements set quantitative limits for imports into the Community of certain steel products and will apply from the date of entry into force until December 31, 2006, or until Ukraine's/Kazakhstan's accession to the WTO, whichever date is earlier.

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22 Commission Regulation 2454/93 of July 2, 1993 laying down provisions for the implementation of Council Regulation 2913/92 establishing the Community Customs Code, OJ 1993 L 253/1.

23 Council Decision 2005/576 of July 18, 2005 on the fulfillment of the conditions laid down in Article 3 of the Additional Protocol to the Europe Agreement establishing an association between the European Communities and their Member States, on the one part, and Romania, on the other part, with regard to an extension of the period laid down in Article 9(4) of Protocol 2 to the Europe Agreement OJ 2005L 195/22.

24 Council Decision 2005/638 of July 12, 2005 concerning the conclusion of an agreement between the European Community and the Government of Ukraine on trade in certain steel products OJ 2005 L 232/42.

25 Council Decision 2005/639 of July 18, 2005 concerning the conclusion of an agreement between the European Community and the Government of Kazakhstan on trade in certain steel products OJ 2005 L 232/63.

26 Council Regulation 1440/2005 of July 12, 2005 on administering certain restrictions on imports of certain steel products from Ukraine and repealing Regulation 2266/2004 OJ 2005 L 232/1.

27 Council Regulation 1441/2005 of July 12, 2005 on administering certain restrictions on imports of certain steel products from the Republic of Kazakhstan and repealing Regulation 2265/2004 OJ 2005 L 232/22.

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