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WTO Panel report finds Colombian measures on indicative prices and restrictions on ports of entry inconsistent with GATT obligations

On 27 April 2009, a WTO panel issued a ruling on Colombian customs measures affecting the importation into Colombia of textiles, apparel and footwear products. The measures included the setting of indicative prices for the payment of customs duties and taxes and a restriction of ports of entry for textiles, apparel and footwear products exported or re-exported from the Colon Free Zone (hereinafter, 'CFZ') and from Panama to Colombia.

In particular, through a series of regulations promulgated in 2007, Colombia had established a mechanism of indicative prices on the basis of which it required importers of textiles, apparel and footwear products to pay customs duties and taxes. Indicative prices applied at the time of the presentation of the customs declaration. Under this system, if the declared f.o.b. value indicated in the import declaration of textiles, apparel and footwear was lower than the indicative price, the release of such products was not to be authorised unless the importer corrected the value on the declaration on the basis of the indicative price. Customs duties and sales tax were then to be paid on this basis. If an importer did not comply with these requirements, special procedures were initiated under the Colombian Customs Code, including the detention of goods. These measures applied to imports of certain textiles, apparel and footwear products originating in all countries, except those with which Colombia had signed free trade agreements. Moreover, through Resolution No. 7373 of June 2007, Colombia imposed restrictions on ports of entry on textiles, apparel and footwear products exported or re-exported from the CFZ and Panama, which were only allowed to be imported through the ports of Bogota and Barranquilla, a requirement that did not apply for products exported or re-exported from third countries.

The panel upheld Panama's claims. In particular, it found that the use of indicative prices was a prohibited method of customs valuation, inconsistent with the provisions of the WTO Customs Valuation Agreement. This conclusion was reached by the panel after it found that Colombia's use of indicative prices constituted 'customs valuation', within the meaning of the WTO Customs Valuation Agreement.

The panel found the measure restricting ports of entry for certain goods arriving from Panama also inconsistent with WTO obligations, as they resulted into prohibited restrictions on the importation, within the meaning of Article XI of the GATT. According to the panel, a measure restricting ports of entry may well qualify as an 'other measure' under Article XI:1 of the GATT. Following such conclusion, the panel found that the measure restricting ports of entry qualified as a 'restriction' on the importation. The panel based its arguments on the limiting effect of the measure and on the uncertainties that it caused to traders, which were found to adjust their shipping patterns to the changes in the customs legislation affecting ports. The panel noted that the measure was imposed already in 2005, extended and then terminated, imposed again in 2007, and later extended until December 2008. Therefore, according to the panel, such unpredictable nature of the measure, which included access to one seaport for extended

periods of time and the increased costs likely to arise under the constraints of the port restrictions, limited competitive opportunities for imports arriving from Panama.

The panel also found that the point of entry measure was inconsistent with a number of obligations relating to transit goods under Article V of the GATT. In particular, the panel found that the measure restricting the ports of entry was inconsistent with Colombia's obligation to provide freedom of transit to the extent that it required transit goods to be trans-shipped in order to be exempted from the requirement of entry through the two ports.

In addition, as only transit goods arriving from Panama or the CFZ were subject to the trans-shipment requirement, the panel also found the measure to be in violation with the most favoured-nation obligation. Furthermore, the panel found that, as the restriction was imposed only on goods (of all origins) that have passed through Panama or the CFZ prior to their arrival in Colombia as their final destination (while it would not apply to those same goods, had they not entered Panama), Colombia was in violation of its obligation to extend 'treatment no less favourable' to goods arriving from Panama and the CFZ than that accorded to the same goods had they been transported directly from their place of origin to Colombia.

It should be noted that Colombia had imposed measures setting indicative prices and restrictions of the ports of entry already back in 2005. Panama had challenged such measures through a request for WTO consultations lodged one year later. In that case, however, the parties settled the matter before the dispute could reach panel proceedings. Now the panel has found both measures to be inconsistent with WTO rules. Therefore, unless such findings are reversed on appeal (and following adoption of the report by the WTO Dispute Settlement Body) Colombia must terminate such measures or face retaliation from Panama. Another interesting aspect of this case is that it is the first time ever that a finding is issued on the interpretation of the obligations on transit of goods (*i.e.*, GATT Article V).

ACP Countries oppose the EC's intention to further modify its scheduled commitments in the aftermath of the Bananas dispute

Since April 2009, African, Caribbean and Pacific (hereinafter, ACP) Countries have expressed their opposition to the proposal made by the EC to modify its scheduled tariff commitments on bananas. ACP Countries express their concern about the effect of the proposed EC schedule modifications on the interests of their exporters, estimating a revenue loss of at least 350 million Euros for their exporters between 2009 and 2016 and claiming that their developmental needs would not be fulfilled by the 100 million Euros offered as aid by the EC.

The Bananas dispute at the WTO is a long-standing one. Over a decade, there have been subsequent DSB rulings and arbitration procedures about the EC banana import regime and its compliance with WTO obligations. Initially, bananas imports were subject by the EC to one of the two-tier tariff rate quota systems based on the country of origin, differentiating between ACP bananas that benefited from preferential treatment and bananas imported from non ACP Countries, namely the Latin American ('dollar zone') bananas-supplying Countries. After the EC import regime was found to be discriminatory and inconsistent with a number of WTO Agreements, the EC affirmed its intention to bring itself into compliance with the recommendations and rulings of the WTO DSB by modifying its scheduled tariff commitments on bananas.

Under the current import regime, a 176 Euros/tonne tariff is imposed on bananas from MFN suppliers, while a 775,000 tonne duty-free import quota is reserved for ACP Countries. In the process of negotiating with Latin American bananas-supplying Countries in order to conclude a comprehensive agreement on bananas that would establish the level of the new EC bound tariff duty, the EC proposed in February 2009 to lower the current tariffs of 176 Euros/tonne to

114 Euros/tonne by 2019. The tariff, after an initial reduction, would be frozen at 136 Euros/tonne from 2011 to 2014, and then further gradual reductions would resume and be implemented until 2019.

Two sets of interests, both of Developing Countries (*i.e.*, those of ACP Countries on the one hand, and those of the Latin American bananas-supplying Countries, on the other) have to be taken into consideration for this long-lasting dispute to be finally settled. New preferential tariffs on bananas imports negotiated within the scope of the EPAs (for example, the EPA between the EC and Cameroon) appear as possible instruments of negotiation through which a solution to the matter may be found.

Food enzymes: EC list on approved food enzymes and labelling requirements

In April 2009, the European Food Safety Authority (hereinafter, EFSA) initiated a public consultation for the evaluation of the safety of food enzymes. The EFSA consultation, which is open until 8 June 2009, intends to contribute to the safety assessment of food enzymes in terms of source materials, manufacturing processes and dietary exposure. At the same time, the EC Commission is in the process of specifying the information required to be submitted for a risk assessment of food enzymes, a process that is to be concluded in 2011, so that the industry can submit the relevant dossiers for evaluation and authorization until 2013. According to EC Regulation No. 1332/2008 on food enzymes, an EC list of approved food enzymes is to be created so that manufactures and formulators of enzyme products, as well as consumers, may be informed about the food enzymes approved by the EC. Only the approved food enzymes will be allowed to be commercialised.

The EC Regulation No. 1332/2008 was adopted on 16 December 2008 by the European Parliament and the Council and covers enzymes that are added to food to perform a technological function in the manufacture, processing, preparation, treatment, packaging, transport or storage of such food, including enzymes used as processing aids. Specific uses of food enzymes include the improvement of texture, the appearance or the nutritional value of food products. A unified approach is now adopted in order to assess enzyme safety among EC Member States, instead of the various approval procedures that existed in the past. What still needs to be completed is the safety evaluation of food enzymes, especially of the ones that are already placed on the market.

EC Regulation No. 1332/2008 also lays down specific requirements for the labelling of food enzymes, food enzyme preparations and food prepared with enzymes. Food enzymes and food enzyme preparations that are not intended for final sale to the consumer, whether sold alone or mixed with other enzymes and/or other food ingredients, may only be marketed with the appropriate labelling. The provisions on labelling of food enzymes and food enzyme preparations will enter into force in January 2010, whereas the provisions on labelling of food prepared with enzymes are already in force since 20 January 2009.

Removing disparities among EC Member States for the approval and safety assessment procedures of food enzymes used in food processing within the EC and harmonising the labelling requirements will have a significant impact on the functioning of the EC internal market. The impact on imports from third countries will be significant as only enzymes approved by the EC and its Member States may be used and third country products will have to be labelled according to EC Regulation No. 1332/2008.

Series of bans imposed on pork trade

A series of bans on pork trade have been imposed recently worldwide as a reaction to the outbreak of the H1N1 flu virus in Mexico in April 2009. Mexico has notified the WTO SPS Committee on the matter, stressing the fact that a scientific justification is needed for the adoption of such measures. Exporters of pork meat maintain that the restrictions cannot be justified scientifically. Among the countries that implemented the first bans are China and Russia. China, in particular, adopted measures according to which shipments in transit would be tested for the virus before the entry and justified the measures taken as necessary to exclude any risk of experiencing a situation similar to the one in 2003 caused by the outbreak of the SARS virus. Alongside Mexico, the US, Spain, the UK and Canada have also been among the countries affected by the series of measures imposed. According to*El Pais*, Russia, China, South Korea, Kazakhstan, Uzbekistan, Kirgizstan, Azerbaijan, Ukraine, Macedonia, Serbia, Croatia, Thailand, UAE, Indonesia, Saint Lucia, Ecuador, Armenia, Lebanon, Malaysia, Philippines and Bolivia imposed trade bans on pork and pork products.

According to the relevant WTO provisions and previous case law, scientific justification is needed for the exceptions under the GATT Article XX(b) and the SPS Agreement to be applied. The exception refers to the protection of human or animal health. The World Organization for Animal Health (OIE), the WTO, the UN Food and Agriculture Organisation (FAO) and the World health Organisation (WHO) stated that there is no justification in the OIE Terrestrial Animal Health Standards Code for the imposition of restrictive trade measures on the importation of pigs or their products. The international organisations stressed the fact that the virus is not transmitted by food. The countries adopting measures restricting imports of pork meat must assess the appropriate level of protection or the acceptable level of risk on the basis of a scientific risk assessment in accordance with Article 5 of the SPS Agreement.

In the cases at stake, it appears that the restrictions on pork or pork products or any meat products have not been based on any scientific evidence. At best, Countries adopting the bans may have been acting on the basis of the precautionary principle. WTO obligations exist also in relation to the way in which the inspection and control procedures are to be applied and administered. The largest producers and exporters of pork meat are the EC, the US, Brazil, Canada and China.

Recently adopted EC legislation:

Commission Regulation (EC) No 366/2009 of 5 May 2009 entering a name in the register of protected designations of origin and protected geographical indications (Lapin Poron liha (PDO))

Commission Regulation (EC) No 367/2009 of 5 May 2009 entering a name in the register of protected designations of origin and protected geographical indications (Znojemské pivo (PGI))

Commission Decision of 4 May 2009 fixing for the marketing year 2009/2010 the amounts of the aid for diversification and the additional aid for diversification to be granted under the temporary scheme for the restructuring of the sugar industry of the Community (notified under document number C(2009) 3158)

Commission Regulation (EC) No 359/2009 of 30 April 2009 suspending the introduction into the Community of specimens of certain species of wild fauna and flora

Commission Decision of 28 April 2009 authorising the placing on the market of lycopene from Blakeslea trispora as a novel food ingredient under Regulation (EC) No 258/97 of the European Parliament and of the Council (notified under document number C(2009) 3039)

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FRATINIVERGANO
EUROPEAN LAWYERS

Rue de Haerne 42, B-1040 Brussels, Belgium Tel.: +32 2 648 21 61 - Fax: +32 2 646 02 70
www.FratiniVergano.eu