International Business Law Journal

2009

Chronicle on international trade law

Vincent Bouhier

Case: Carboni e Derivati Srl v Ministero dell'Economia e delle Finanze (C-263/06) Unreported February 28, 2008 (ECJ)

Trade relations within the European Union are widely characterised by recurring tensions between trade partners. The United States had been the main source of tension for a long period. The existing conflicts are numerous, to cite just farm subsidies, the conflict between Airbus and Boeing or that relating to genetically modified organisms as examples. Nevertheless, European institutions seem to have realised or taken into account that another trade partner, such as China, may provoke as many difficulties as a result of its advantages and of its approach to commercial trade. As a consequence, the end of 2007 and the first half of 2008 were marked by various initiatives aiming to settle the arising conflicts and to promote cooperation in order to protect the European Union's interests. The European Commission has also commenced proceedings towards the United States concerning the barriers in the internet gambling sector. Moreover, with regard to the first half of 2008, there should be noted a decision of the Court of Justice of the European Communities (ECJ). This decision clarifies the margin of appreciation of customs authorities concerning the determination or assessment of the value declared for customs with a view to computing the dumping margin in the case of successive sales. This article will first consider the initiatives aimed at restoring balanced trade relations between the European Community and China. Then, it will deal with the commencement of proceedings towards the United States. Finally, a focus will be made on the case law of the ECJ.

INITIATIVES WITH RESPECT TO TRADE RELATIONS BETWEEN THE EUROPEAN COMMUNITY AND CHINA

On the one hand, regulation on trade barriers seems to have been modified mainly regarding China. On the other hand, initiatives oriented in favour of trade cooperation have been taken.

Modification of the regulation on trade barriers

Trade defence instruments have been little changed, except to make necessary adaptations to multilateral trade agreements negotiated first within the framework of GATT and then within that of WTO. As a consequence, stability of rules is focused because said rules are the result of a complex balance of those in favour of globalised trade and those who are pro-interventionism. The Green Paper on EU Trade Defence Instruments issued in December 2006 illustrated that search for balance. Therefore, any change must be

carefully examined because of the resulting consequences. Said modification concerns the Council Regulation (EC) No 3286/94 of December 22, 1994 on trade barriers (ROC) which had not been changed since its adoption in 1994. This important instrument of trade defence aims to enable the European Community to act, on the one hand, in the case where the concessions granted by Member States of WTO are not fulfilled, and, on the other hand, where international trade rules are violated. Said regulation may in particular be applied to goods, services and intellectual property rights, as opposed to other instruments relating only to goods.

The modification of art.4 resulting from Regulation (EC) No 125/2008 eliminates the above-mentioned requirement as no reference to a multilateral trade agreement exists. Said modified article is drafted as follows:

"Any Community enterprise, or any association, having or not legal personality, acting on behalf of one or more Community enterprises, which considers that such Community enterprises have suffered adverse trade effects as a result of obstacles to trade that have an effect on the market of a third country may lodge a written complaint."

Therefore, rules and concessions contained in bilateral agreements may be the subject-matter of a lawsuit. In the event that this action is legally based, the Commission may commence proceedings. The modification of Council Regulation (EC) No 3286/94 results from Council Regulation (EC) No 125/2008 adopted on February 12, 2008 and concerns only art.4 of the first regulation. However, it is more important than it seems because it changes the scope of ROC. Indeed, so that companies may lodge a complaint and finally refer to the Commission, the relevant barrier must violate international trade rules contained in a multilateral trade agreement. Within such scope, only complaints dealing with a violation of WTO rules were started whereas the other complaints had to be rejected.

Said adjustment of ROC may seem to be done lately because bilateral trade agreements amount to instruments used and necessary to establish trade relations. As a consequence, this change may have been inserted as of the first version of the regulation. Therefore, the question is why is this modification only now being made? The reason lies in the change of the organisation of international trade rules begun a few years ago, with the introduction of obligations called "WTO-Plus". If this kind of obligation remained incidental as a result of the number of countries concerned by it but also of its content, this situation has changed with the accession of China to WTO on December 11, 2001. Indeed, many members of WTO negotiated, on the occasion of this accession, some requirements providing "WTO-Plus" obligations, which are mentioned in the accession protocol.

These "WTO-Plus" obligations are added to the usual rules of the WTO and aim to compel strictly the new member through the acceptance of specific concessions, with the view to ensuring and promoting the liberalisation of trade. The concessions granted by China concern barriers relating to the economic and administrative organisation of the country, and include requirements in favour of a better transparency of market, of an improvement of operating conditions, of justice and national treatment. It should be noted that such method reintroduces a kind of fragmentation of the rules applicable to each of the WTO members, and therefore partly renews the criticised GATT system.

The link between the modification of ROC and this practice may easily be identified, as a

reference to "WTO-Plus" obligations is made in the preamble of Regulation (EC) No 125/2008. However, the grounds stated in the preamble also refer generally to bilateral agreements. The need to take the Chinese situation into account is undoubtedly the reason for this adjustment. This suggested justification is confirmed by the other initiatives strengthening dialogue and defence of European interests.

As a result of the adoption of the regulation, the European Community succeeds in acquiring a more efficient and complete instrument intended for companies. This reform was necessary with respect to WTO-Plus obligations which appear to be material guarantees for access to market, in particular in the case where they concern transparency through not only access to information and official acts but also access to jurisdictions in order to contest administrative measures. That may mean that European Community initiates a more offensive stage towards China that has been a particular trade partner with unexpected reactions. Thus, regarding the power of China, the respect of trade rules seems necessary to avoid imbalances and detrimental consequences. Nevertheless, the adopted instrument must be effectively implemented. Since its adoption, said instrument may have been more often used considering the number of listed obstacles.

Moreover, this new approach is confirmed through other European initiatives.

Specific initiatives in favour of trade cooperation

Three initiatives have been initiated during the last months and may be distinguished. They also prove a more offensive approach towards China, but in the light of cooperation and not that of dispute. This approach reveals that both entities started to take reciprocal interests into account whereas China appears to be more disposed to consider the European demands. The first initiative relates to an agreement on trade in textile products. The second one results from a Chinese initiative and deals with trade barriers whereas the third initiative examines China's trade policy.

Textile imports from China into European Community led to an important crisis in 2005. Said crisis resulted not only in the adoption of safeguard measures, but also in the negotiation of an agreement with China for a three-year period, with a view to regulating textile imports from China prior to a new lifting of quotas. Before the termination date of this aforementioned agreement, the European Community decided to negotiate a new agreement with China for 2008. This new agreement was concluded on October 9, 2007 and resulted in the announcement of two official acts as regards the European Community, which consist of Commission Regulation (EC) No 1217/2007 and of a notice to economic operators. The main principle of this agreement was the implementation of a supervision system with double check. Imports shall be subject to an export authorisation delivered by China and to an import authorisation delivered by the European Community. The new agreement provided that China shall issue export authorisations in order to participate in the control of the flow of goods into the European Community. This agreement creates a new kind of cooperation between two trade partners, while promoting their exchanges instead of more restrictive measures of trade defence. This mechanism ended January 1, 2009, but the main interest remains beyond this specific agreement, in the mechanism itself and in the capacity of dialogue between the EU and China. Otherwise, both parties have been able successfully to react and get over the commercial crisis, and at the same

time, they have been able to protect their immediate and mutual common interests. Thus, this approach has permitted in a short period of time, the business relationship to restart between both parties without major barriers in the economic area.

Said approach has been adopted and extended considering the introduction of a new mechanism of economic and commercial dialogue; it constitutes the second initiative herein described. This mechanism jointly adopted was initiated by China. The European Community and China intend to avoid the occurrence of new trade crises and promote dialogue. The first meeting organised to implement the aforementioned mechanism was held in Beijing on April 25, 2008. Several subjects were discussed, such as cooperation in trade and investments, balanced economic development, technology transfer, as well as energy issues, trade in high technology products, protection of intellectual property rights and promotion of trade. Future meetings need to focus on access to market, transport, and questions on regulations, standards and rules. It should be noted that that the second summit was supposed to take place on December 1, 2008, but it has been cancelled for political reasons. However, because of the deep impact of the crisis, both parties decided on January 30, 2009 to meet again during the first semester of the incoming year.

The third initiative occurred within the framework of the WTO. Indeed, in May 2008, the WTO issued the second report relating to the examination of China's trade policy. This important report was long awaited by the other members of the WTO, because it enables conclusions to be drawn on trade progress and barriers to trade globalisation concerning measures as well as sectors. If the report marks some efforts, the general secretary notices that a certain lack of transparency relating to trade policies, practices and measures remains. Moreover, the report states that many products are subject to export restrictions. However, the examination of the situation is not complete, as WTO members may ask questions to China. The European Community seized the opportunity and asked about 170 questions. These questions relate in particular to non-discrimination, and national treatment with respect to State intervention. Protection of intellectual property rights, technology transfers, tariff barriers and transparency were also discussed. China answered all of these questions, which have been integrated and published in the minutes of the meeting.

COMMENCEMENT OF AN INVESTIGATION AGAINST THE UNITED STATES REGARDING THE ONLINE GAMBLING SECTOR

China is not the only State concerned by these practices and commercial issues. Recently, the EU launched an investigation based on the ROC as to whether US prosecutions of foreign online gambling companies are discriminatory or not. The EU came into dispute with the United States after the latter withdrew its WTO commitments to opening up its gambling sector and introduced measures to block access to its territory. The complaint is based on arts XVI and XVII of the General Agreement on Trade in Services and the principle of reciprocity. In fact, the EU Commission has launched this investigation, in order to prosecute the alleged breach of reciprocity on the opening market of the sector of online gambling between EU companies and US companies. However, this investigation is just the first step in the proceedings. If it is proved that the measures introduced by the United States in order to cut off the access of the foreign companies effectively block access to market, the plaintiff may move on to the second step of the proceedings. If there is any

discrimination between the parties, the investigation shall reach the second step of the proceedings, and the dispute will be settled by the Dispute Settlement Body (DSU) of the World Trade Organization, unless the parties negotiate and find a consensus that will end the proceedings.

This is not a first for the United States. Many times before, such proceedings have been launched against the United States before the DSU on the basis of art.XVI. With the 2007 DSU decision, the United States had to modify part of its laws, to conform with the WTO Agreements. It shows that the EU is able to put some very strong pressure on the US Government, and sometimes claim for restitutions in certain cases.

The late commencement of said proceedings may seem surprising. However, the conduct of the proceedings seems to show a lack of will on the part of the European authorities since the investigations should have been concluded in October 2008. Today we are still expecting the report of this investigation.

CASE LAW OF EUROPEAN COURT OF JUSTICE REGARDING COMMERCIAL PROTECTION

The ECJ has handed down a very interesting decision concerning the assessment of the customs value of goods. The Court clarified in a recent judgment the way to calculate the dumping margin, and allowed the parties to claim for duties on the basis of antidumping laws. This decision is founded on "CECA" regulations, but it is transposable under the antidumping rights of the EU treaty.

In this judgment, the Carboni Company ordered a lot of Russian hematite cast-iron from an Italian company. But said lot was previously bought in 1994 by the abovementioned Italian company from a Cypriot company, not part of the EU yet.

When Carboni decided to declare the goods, the customs value was 151 ECU by tonne. During the same period of time, and in accordance with the EU decision of January 12, 1994--Case 67/94--the antidumping duties values were variable, and at this time lower than 149 ECU by tonne. In this situation, Carboni were not subject to any customs duties considering the declared value. However, the Finance department of State considered that the original declaration was not legal because the selling price of the cast-iron goods concluded between the Cypriot and the Italian companies was 130.983 ECU by tonne and therefore the price mentioned on the invoice seemed not to mirror the real market value.

Both parties came into a dispute under the real value of the goods declared by Carboni. Therefore, an interlocutory question was launched before the ECJ. Two questions needed to be discussed by the Court. The first question concerned customs regulations and the choice of the value of the imported goods. Which chosen sale was the most appropriate to calculate customs duties: the prior sale concluded before the customs declaration, or the second sale on the basis of which the first customs declaration was made? In other words, the point is to discuss the legality of the practice of the Customs Authorities of computing the customs duties on a prior sale occurred before the declaration, allowing them, in certain cases to apply antidumping regulations. The second question is whether the Customs Authorities may compute the customs duties on the basis of a prior sale, in case of doubt on the effectiveness of the declared price.

On the first question, the ECJ said: Customs shall not compute the value of duties on the basis of a prior sale occurred before the declaration when the price paid or to be paid by the importer is the one declared at the Customs. However, concerning the second question, when the declared price is miscalculated considering the market value of the goods, Customs Authorities are allowed to calculate the duties value in accordance with the closest prior sale when there is no doubt anymore on the real estimation.

Three points need to be explained regarding the ECJ's solution. First of all: The ECJ will not consider a prior sale as a basis for calculating customs duties. However, this control by Customs Authorities may be possible only when there is reasonable doubt on the value of the declared goods. This position seems very logical. The importer who really paid the price is not supposed to be under the application of antidumping rights. This would be unfair and would constitute an illegal sanction.

In case of successive sales, it would be difficult to evaluate the first transaction value with an importer who is part of the EU. In the case described above, the Cypriot Company sells the goods to an Italian company. On the basis of the declaration made by the importer, no antidumping rights were claimed when the price cost is 130.983 ECU by tonnes, because pursuant to art.29, para.1 of the EU Customs Code, the duties are only claimable for the goods exported inside the territory of the European Community.

The identification of destination of goods is attached to the demand of free circulation of the importer. However, exportation and the formalities of free circulation are not necessary linked to each other.

The Court said, in the case of successive sales, the importer of the exported goods may pay customs duties. Normally the importer chooses the type of transaction and the formalities which need to be carried out before the customs declaration. The Customs Authorities are not supposed to control it. Thus, in the abovementioned case, Carboni declared a price of 151 ECU by tonnes, and was therefore not subject to the payment of any antidumping duties on this basis. The risk of circumvention of these rules exists. But said risk is limited by all the documents to comply with, before the declaration, which prove the value of the goods. And in the case of a doubt concerning the value, the second answer of the Court brings a solution.

Thanks to the second solution, the Court takes into consideration the institution of antidumping rights and tries to improve them inside the European Community, allowing more power to the Customs Authorities to control imports of goods, but strictly managed by EU laws. With this solution the Court gives to the Customs Authorities the opportunity to control and calculate the real price of the imported goods in case of doubt, on the basis of all available documents, even those relating to a prior sale. The solution is founded on the adaptation of art.31, para.1 of the EU Customs Code, which is not particularly precise to be transposable for this type of case. Anyway, this transposition is in the interest of the importer and protects them. The Court wants to make sure that there will be no abuses in the evaluation of the goods and allowing no opportunities to underestimate the value of goods in choosing the lowest price of any transaction sale operated before customs declaration. The Court imposes one condition. The Customs Authorities must find the closest prior sale to control the price declared by the importer, as long as there is no doubt on the reality of the declared price. The Court does not want to impose antidumping duties founded on a superficial evaluation of the price paid by the importer.

The Court allowed Customs Authorities to dispose of a margin of interpretation by allowing them to more easily prevent the circumvention of antidumping regulations and to protect European Community industries. The Court also referred to the principle imposed on the importers concerning the determination of customs value of the goods, except in case of doubt on the reality of the amount declared by the importer.