Post-Clearance Demands- New Zealand butter- Cleared on basis of certificates by New Zealand authorities- Later dispute as to validity-Quota under Protocol 18 of Accession Treaty- Whether post-clearance recovery impliedly excluded-No-Current access under WTO agreements-No exclusion in principle of post-clearance recovery under WTO law.

LONDON TRIBUNAL CENTRE

BROOMCO (1984) LTD - Appellant
- and -
THE COMMISSIONERS OF CUSTOMS AND EXCISE - Respondents

Tribunal: THEODORE WALLACE (Chairman)

Sitting in public in London on 25-27 June and 1-4 July 2002

David Pannick QC and Adam Lewis, instructed by DLA, for the Appellant

Dr Paul Lasok QC, Miss Rebecca Haynes and Philippe Sands, instructed by the Solicitor for the Customs & Excise, for the Respondents

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DECISION

1. This decision concerns a preliminary issue in the ongoing litigation before the Tribunal concerning butter imported by the Appellant from New Zealand between 7 March 1994 and 8 December 1997 with certificates that it complied with the requirements for preferential access to the European Community. Prior to 1 July 1995 the preferential arrangements arose from Protocol 18 to the Treaty of Accession dated 22 January 1972 (Cmnd.4862) and subsequent European Regulations, in particular Council Regulation (EEC) No. 858/81. From 1 July 1995 the arrangements were governed by European Regulations including Commission Regulation (EC) No. 1600/95 following the multilateral trade agreements ("the Marrakesh Agreement") establishing the World Trade Organisation.

Introduction

2. UK Customs raised seven post-clearance demands totalling £23,068,836.79 in respect of consignments of butter which are the subject matter of LON/97/7053 on the footing that although certificates had been issued by the New Zealand authorities the butter did not meet the criteria for preferential access because they were not manufactured directly from milk or cream.

3. A large number of other appeals by the Appellant, formerly called "Anchor Foods Ltd", and by an associated company, NZMP (UK) Ltd, involving around £100 million, have been stood over. Some of these involve repayment claims.

4. The preliminary issue concerns the right of the Commissioners after the quota years expired to claim full duty on butter that was cleared with payment of the preferential duty on the basis of the New Zealand certificates which the Commissioners now allege were incorrect. It is not alleged that there was any fraud or bad faith.

5. The Appellant says that, once the butter has been cleared by the Commissioners on the basis of a certificate issued by the New Zealand authorities, the Commissioners cannot go behind the certificate and demand back duty in the absence of fraud or bad faith. It is not said that they were obliged to accept the certificates in the beginning.

6. Following submissions by the counsel before the Tribunal, the hearing of the preliminary issue was directed as follows:

> "Whether under the international arrangements between New Zealand, the United Kingdom and the EU or EEC (to the extent that as a matter of law they are relevant) and the relevant legislative scheme the UK Customs authorities were entitled to raise Post Clearance Demand Notes against an importer of New Zealand butter claiming back duty calculated by reference to the difference between the quota levy or duty under the Regulations establishing the New Zealand butter quota and the higher rate of duty, in circumstances (a) where the butter in question was certified by the New Zealand authorities in a Protocol 18 certificate or an IMA1 certificate as being of New Zealand origin, at least six weeks old, of a fat content by weight of not less than 80% but less than 82%, and manufactured directly from milk or cream, but (b) where the UK Customs authorities allege (and for the purposes of the preliminary issue only it is assumed, correctly allege) that the butter was not manufactured directly from milk or cream or that in one or more of the other matters the certificate was not in fact correct."

7. The issue concerns consignments imported between 7 March 1994 and 30 June 1995 under Protocol 18 certificates issued by the New Zealand High Commission before the Marrakesh Agreement was implemented and also consignments imported from 1 July 1995 under IMA 1 certificates issued by the New Zealand Dairy Board, the issuing agency under Commission Regulation (EC) No. 1600/95, enacted to give effect to the Marrakesh Agreement.

8. Regulation 1600/95 and the Marrakesh Agreement are not of course relevant to the Protocol 18 consignments since the consignments preceded them.

9. The Appellant's case was that Protocol 18 introduced a special scheme or *lex specialis* under which disputes were to be resolved at international level and Post Clearance Demands were implicitly excluded; Mr Pannick relied on the decision of the Court of Justice in *Les Rapides Savoyards and others v Directeur des Douanes et Droits Indirects* (Case 218/83) [1984] ECR 3105. He contended that the Marrakesh Agreement and Regulation 1600/95 preserved "current access"; that Regulation 1600/95 made no provision for Post Clearance Demands and that such demands in respect of IMA consignments were therefore impliedly excluded.

10. The Commissioners' case was that Protocol 18 was a derogation from the general customs regime and contained no provision excluding Post Clearance Demands; that such demands were not excluded by Regulation 1600/95 and were obligatory since the conditions for the preferential quota were not satisfied. Dr Lasok relied primarily on *R v. Commissioners of Customs and Excise, ex parte Faroe Seafood Co Ltd and Others* (Cases C-153/94 and C-204/94) [1995] ECR I-2465; *Pascoal & Filhos Ltd v Fazenda Publica* (Case C-97/95) [1997] ECR I-4209; *Portugese Republic v Council of European Union* (Case C-149/96) [1999] ECR I-8395; and the opinion of the Advocate General in *Ilumitrónica- Iluminação e Electronica Lda v Chefe da Divisão de Procedimentos Aduaneiros e Fiscais Direcçáo das Alfândegas de Lisboa* (Case C-251/00) delivered on 24 January 2002 in which judgment had not yet been given. In view of the importance of the last case, I deferred the decision until judgment which was given on 14 November 2002.

Evidence

11. The witnesses called by the Appellant were:

> (a) Lord Williamson of Horton, GCMG, CB, who was present at the final Accession negotiations as a senior civil servant in the Ministry of Agriculture Food and Fisheries ("MAFF"), and was Deputy Director General, Agriculture, in the European Commission from 1977 to 1983 and Secretary General to the Commission from 1987 to 1997;
>
> (b) Edward Alan Woodfield, a public servant in the New Zealand Department of Industries and Commerce from 1958 to 1988, and
>
> (c) Dr Frieder Roessler, Director of the Advisory Centre on WTO law and from 1989-1996 Director of Legal Affairs, GATT and then the World Trade Organisation ("WTO").

A further statement by Nigel Rodney Mitchell, who died in May 2002, was relied on. Dr Lasok said that virtually none of the contents were accepted by the Commissioners and that the Tribunal should attach little weight to it. I did not rely on it except where confirmed by other witnesses or by documents.

12. The Commissioners called the following witnesses:

> (a) John Richard Cowan, CBE, a civil servant in MAFF from 1971 and a principal from 1980-85, being head of the branch dealing with the EC milk products regime;
>
> (b) Lindsay Graham Mitchell, formerly a civil servant with MAFF who was involved in the discussions prior to Regulation 858/81; and
>
> (c) Colin Bodrell, a civil servant with MAFF from 1953 to 1995, who attended meetings in Brussels after the negotiation of Protocol 18 but before actual Accession in 1973.

All of the witnesses for both parties confirmed witness statements and were cross-examined. All were clearly witnesses of truth, although in the event my

decision is based almost entirely on the Accession treaty, the legislation and the decided cases.

13. The documentary evidence comprised four ring binders of correspondence, reports, minutes, declarations, notes, shipping documents and product specifications; post clearance demand notes, review decisions and associated documents; party and party correspondence; five binders of legislation, mainly European, International treaties and Reports of EU bodies. The legislation is of course not strictly evidence but the recitals are.

14. The Appellant produced a summary with extracts of the relevant legislation, treaties and reports which was described as non-contentious. This was most useful; however part was contentious and the Respondents made amendments after the oral hearing. I treated the summary and amendments as written submissions. The amended version ran to 52 pages.

The History

15. Much of the background to this appeal can be read in the report of *Anchor Foods Ltd v Commissioners of Customs and Excise* [1998] V&DR 32, where the chairman was the same. That was heard as a test case on Ammix and spreadable butter imported in 1997. It concerned the preference criteria, rather than the ability of the Commissioners to make post-clearance demands. The present appeal is that referred to at paragraph 18 of the earlier decision.

16. The decision of the Tribunal was affirmed by Mr Justice Dyson on appeal, reported at [1999] V&DR 425.

17. On 1 January 1973, following ratification of the Treaty of Accession, the United Kingdom became a member of the European Economic Community. The parties to the Treaty which was signed on 22 January 1972 were the original six Member States and the UK, Denmark, Ireland and Norway; in the event Norway did not ratify the Treaty.

18. The EEC had a common agricultural policy with support prices and levies on imports and a common external customs tariff. Neither was compatible with the existing trade arrangements with the Commonwealth, including New Zealand, or with the European Free Trade Area ("EFTA") of which the acceding states had been members.

19. Lengthy negotiations preceded the signing of the Treaty which contained 30 Protocols covering different special issues.

20. Historically New Zealand has been a major supplier of dairy products to the UK including salted butter. Access to the UK market free of duty was enshrined in the Ottawa Agreements in 1932. Bulk purchase arrangements made during the war continued until 1954. An Anglo-New Zealand Trade Agreement in 1959 provided for duty-free entry of goods which were free of duty at 25 November 1958 and under Article 3 and Schedule A provided that the UK would maintain a

margin of preference not lower than 15 shillings per cwt for New Zealand butter. Article 10 provided for full consultation with respect to agricultural and marketing policies. Article 13 covered action against subsidised imports from third countries. Articles 18 and 19 provided for consultation. These agreements contained contractual commitments on access for New Zealand butter to the UK market and preferential tariff treatment. There were no dispute settlement provisions.

21. A further agreement in 1966 provided under Article II for the admission of butter without restriction on quantity until 30 September 1972 with consultations as to future arrangements. Under Article IV New Zealand accorded duty-free entry to specified UK goods. It was provided that Article 13 of the 1959 Agreement should remain in force in relation to butter until 30 September 1972. An exchange of letters on the day of the 1966 Agreement provided that so long as the UK operated a butter quota scheme under Article 13 of the 1959 Agreement it would consult the New Zealand government as to "the quantities both in total and from the New Zealand" proposed during the following quota year and should license not less than 170,000 tons of New Zealand butter. New Zealand agreed that while the quota scheme continued it would waive the preference under the 1959 Agreement and unlimited access under Article II. There were no dispute settlement provisions.

22. The price of butter under the EEC agricultural support system was substantially higher than the price on the UK market. 90 per cent of New Zealand butter and cheese exports came to the UK, which was also the major market for New Zealand lamb. These were of great importance to the New Zealand economy. The EEC however had a large butter surplus commonly referred to as "the butter mountain".

23. There was a substantial conflict between the interests of EEC producers on the one hand and New Zealand producers and UK consumers on the other hand. This conflict was a major issue in the abortive negotiations between the UK and the six in 1961-63.

24. Access for New Zealand butter was thus a highly sensitive issue in the negotiations leading to the Accession Treaty. The UK government was in constant contact with the New Zealand government during the negotiations. New Zealand also made substantial representations to the other parties including the Commission.

25. Protocol No.18 of the Act of Accession which was annexed to the Treaty was entitled,

> "On the Import of New Zealand Butter and Cheese into the United Kingdom."

As already stated it was one of 30 Protocols. Others covered the Faroe Islands (Protocol 2), the Channel Islands and the Isle of Man (No.3), UK sugar imports under the Commonwealth Sugar Agreement (No.17) and Norwegian Fisheries (No.21). These are just examples for illustration.

26. Article 55(1)(b) of the Act of Accession provided for agricultural levies to be applied in trade between the new Member States and third countries. Subject to the Protocol, this covered imports from New Zealand.

27. Article 1.1 of Protocol 18 provided,

"1. The United Kingdom is authorised, as a transitional arrangement, to import from New Zealand certain quantities of butter and cheese on the following terms."

Article 1.2 specified quantities for butter and cheese for the first five years; the figure for butter started at 165,811 metric tons in 1973 and fell to 138,176 in 1977. Article 1.3 and 1.4 and Articles 2 to 5 provided as follows,

Article 1

"3. The quantities of butter and cheese specified in paragraph 2 shall be imported into the United Kingdom at a price the observance of which must be guaranteed at the c.i.f. stage by New Zealand. That price shall be fixed at a level which enables New Zealand to realize a price representing the average price obtained by that country on the United Kingdom market during 1969, 1979, 1971 and 1972.

4. The products imported into the United Kingdom in accordance with the provisions of this Protocol may not become the subject of intra-Community trade or of re-exportation to third countries.

Article 2

1. Special levies shall be applied to imports into the United Kingdom of the quantities of butter and cheese specified in Article 1. Article 55(1)(b) of the Act of Accession shall not be applicable.

2. The special levies shall be fixed on the basis of the c.i.f. price referred to in Article 1(3) and of the market price of the products in question within the United Kingdom, at a level such as to allow the quantities of butter and cheese to be effectively marketed without prejudicing the marketing of Community butter and cheese.

Article 3

The Council, acting by a qualified majority on a proposal from the Commission, shall adopt the measures necessary for implementing Articles 1 and 2.

Article 4

The Community shall continue its efforts to promote the conclusion of an international agreement on milk products so that, as soon as possible, conditions on the world market may be improved.

Article 5

1. The Council shall, during 1975, review the situation as regards butter in the light of prevailing conditions and of supply and demand developments in the major producing and consuming countries of the world, particularly in the Community and in New Zealand. During that review, among the considerations to be taken into account shall be the following:

(a) progress towards an effective world agreement on milk products, to which the Community and other important producing and consuming countries would be parties;

(b) the extent of New Zealand's progress towards diversification of its economy and exports, it being understood that the Community will strive to pursue a commercial policy which does not run counter to this progress.

2. Appropriate measures to ensure the maintenance, after 31 December 1977, of exceptional arrangements in respect of imports of butter from New Zealand, including the details of such arrangements, shall be determined by the Council, acting unanimously on a proposal from the Commission, in the light of that review.

3. After 31 December 1977, the exceptional arrangements laid down for imports of cheese may no longer be retained."

28. The qualified majority required under Article 3 was possible without the UK, see Article 14 of the Act of Accession. Article 3 was implemented on 31 January 1973 by the enlarged Community by Council Regulation (EEC) No.226/73 and on the same day by Regulation (EEC) No.465/73 of the Commission. Regulation 226/73 cited that the UK was authorised to import from New Zealand.

"certain quantities of butter and cheese on special terms" [consisting]"in particular of the non-application of compensatory amounts . and of the introduction of special levies applicable to such imports for which the observance of a minimum price must be guaranteed at the c.i.f. stage by New Zealand."

Article 2 provided,

"The special terms . shall apply only to goods in respect of which it is provided that they are of New Zealand origin and that the minimum price laid down in Article 3 is observed."

Article 3 set the minimum import price and Articles 4 and 5 the special levy. Article 6 required the UK to communicate all information necessary for the application of the Regulation to the Commission and Article 7 required the Commission to report annually to the Council on how the Protocol had been applied. Article 8 provided for the Commission to adopt detailed Rules in accordance with the procedure under Regulation 804/68. This the Commission did on the same day in Regulation 465/73.

29. Article 1 of Regulation 465/73 provided,

> "1. Only butter and cheese which is accompanied on import by a numbered certificate issued by the New Zealand competent authorities, certifying that:
>
> - the goods in question are of New Zealand origin and
>
> - the prices fixed in Article 3 of Regulation (EEC) No.226/73 have been observed at the c.i.f. stage,
>
> may benefit from the special system for imports into the United Kingdom provided for in the Protocol.
>
> 2. The United Kingdom shall inform the Commission of the measures it has taken regarding the certificate."

30. Certificates were issued by the New Zealand High Commission in London, which was the competent authority for those purposes. Under Article 3 the butter was to be marked with an indication of its New Zealand origin and the UK was responsible for preventing butter imported against quota from leaving the UK. Article 4 required the UK to report fortnightly to the Commission on imports both for which customs import formalities had been completed and for which they had not, on stocks, on sales and on cumulative figures from 1 January in each year including quantities in transit.

31. The minimum price under Article 3 of Regulation 226/73 was increased in 1974 from 1 January 1975 and again for the following year. Council Regulation 1655/76 continued the special arrangements under Article 5.2 of Protocol 18 for modestly reduced quantities. Article 4 provided,

> "Only butter which has been proved to be of New Zealand origin and for which the [minimum import price] has been observed, may benefit from the special terms ."

Regulation 465/73 remained in force. Regulation 2157/77 increased the minimum import price; this was increased again in Regulation 2540/80. A series of short-term quantities were fixed for early 1981 before Regulation 858/81 of 1 April 1981 introduced measures for continued New Zealand exports to the UK on special terms "on a degressive scale".

32. Article 4 of Regulation 858/81 added to the matters to be certified, providing

> "Entry under the special import arrangements shall be conditional upon the presentation of a certificate showing that the butter concerned:
>
> - is of New Zealand origin,
>
> - is at least six weeks old,
>
> - has a fat content by weight of at least 80 per cent but less than 82 per cent, and

- has been manufactured directly from milk or milk cream."

The requirement for minimum import prices was not repeated. The limitation to the UK market was continued. Article 9 provided for detailed rules for the application of the regulation to be adopted. This was done in Commission Regulation 1172/81 which replaced Regulation 465/73.

33. Article 1 of Regulation 1172/81 provided,

> "1. The certificate referred to in Article 4 of Regulation (EEC) No.858/81:
>
> (a) shall be a numbered certificate issued by the competent authorities in New Zealand;
>
> (b) shall comply with the further conditions fixed by the United Kingdom in order to allow verification of the identity of the butter in question and of the exactitude of the data given in the certificate; and
>
> (c) shall be presented to the United Kingdom authorities at the time when the customs import formalities are completed.
>
> 2. In order to ensure the compliance with the condition prescribing the minimum age of the butter at the time when the customs import formalities are completed, the certificate shall state the date of manufacture of the butter in question.
>
> 3. The United Kingdom shall inform the Commission of the measures taken pursuant to paragraph 1(b)."

There was no evidence of any further conditions under Article 1(b) being fixed.

34. The quantity of butter and the amount of the special levy were successively altered in five regulations between 21 December 1982 and 17 May 1983. Council Regulation 3667/83 continued the special arrangements for two months, reproducing in Article 5 the certification requirements in Regulation 858/81 (see paragraph 32 above). The new implementing legislation, Commission Regulation 3694/83, replaced Regulation 1172/81 but substantially reproduced Article 1. Regulation 3667/83 was successively amended to increase the period to which it applied, the quantities covered and the special levy rate in eleven regulations from 1984 to 1989, the last being Regulation 2331/89 of 26 July 1989.

35. In 1989 the special arrangements were continued through until 1992 by Council Regulation 2967/89, Article 4 of which reproduced Article 4 of Regulation 858/81 and Article 5 of Regulation 3667/83. The restriction to the UK continued, see Article 5. The new implementing legislation, Commission Regulation 3038/89, repealed 3694/84 but reproduced Article 1 thereof in substantially the same terms. The special levy rate was altered by two regulations in 1989 and 1990.

36. By Regulation 3841/92 of 17 December 1992 the continued import of New Zealand butter into the UK on special terms was continued. The regulation recited Protocol 18. Recitals (3) and (4) provided,

> "Whereas the exceptional arrangements should continue in order to ensure continued imports from New Zealand;
>
> Whereas in view of the current state of the negotiations in the context of the Uruguay Round it is opportune to extend the existing arrangements for access of New Zealand butter on special terms for one year and the annual rate of decrease in the volume should be maintained ."

Article 4 repeated the certificate requirements (see paragraph 32 above) varying the introductory words to read,

> "Eligibility for the special import arrangements shall be subject to presentation of a certificate establishing that the butter in question: ."

The prohibition on intra-Community trade and exports was omitted. The implementing measure, Commission Regulation 3885/92 was in the same terms as 3038/89. The special arrangements were continued in further regulations in 1993 and 1994, the last of which recited the agreement concluded in the Uruguay Round to take effect on 1 July 1995. The final 1994 quota was 51,830 tons, with 25,915 tons to June 1995.

37. Commission Regulation (EC) No.1600/95 of 30 June 1995 laid down detailed rules for the application of the import arrangements and opening tariff quotas for milk and milk products following the Marrakesh Agreement establishing the World Trade Organisation. The Second Recital referred to Regulation 804/68 on the common organisation of the market in milk and milk products. The Regulation was not confined to New Zealand products. The Fourth, Fifth, Sixth and Eighth Recitals provided,

> "[Fourth] Whereas the Agreement on Agriculture concluded during the Uruguay Round multilateral trade negotiations . provides for certain tariff quotas for milk and milk products under the 'current access' and 'minimum access' arrangements; whereas those quotas should be opened for an initial annual period ending on 30 June 1996; whereas rules should be laid down for the management of those quotas;
>
> [Fifth] Whereas tariff quotas are opened under the current access arrangements for specified countries; whereas, in order to check that products imported under the quotas conform to the product description laid down and that the tariff quotas are complied with, use should be made of the arrangements currently in force under which certificates are issued on the responsibility of the exporter country;
>
> [Sixth] Whereas certain special conditions previously applied to imports authorized under special arrangements should be applied to imports of New Zealand butter under the quota provided for in the Agreement in order to monitor their origin and destination;
>
> .

> [Eighth] Whereas, in the interests of clarity and efficiency, the Regulation should contain provisions on the import of milk products under tariff quotas opened pursuant to other international agreements and on the import of milk products under preferential quota arrangements; whereas checks on the description of the products concerned and, where appropriate, on compliance with the quota may be made on the basis of the system of certificates issued by the exporter country."

38. Title I covered General Arrangements. Article 1 provided that imports of milk products were subject to presentation of an import licence. Article 2 required the CN code to be entered on the licence application, that the licence should be valid until the end of the second month following and that it be issued on the working day following submission of the application.

39. Section A of Title II covered imports of milk products under quotas under the Marrakesh Agreement for specified countries, which included New Zealand butter and cheese as well as Australian and Canadian cheese. Article 5 and 6 were as follows:

Article 5

> This section shall apply to certain tariff quotas for milk products referred to in the Agreements concluded under the Uruguay Round of multilateral trade negotiations . opened for specified countries of origin.

Article 6

> The tariff quotas referred to in Article 5 and the duties to be applied shall be as set out in Annex I. The quota for New Zealand butter for the period 1 July to 31 December 1995, however, shall be 38,334 tons."

Annex I specified a quota of 76,667 tons for butter of New Zealand origin under CN code ex 0405 00 11 or 19 under the Description,

> "Butter, at least six weeks old, of a fat content by weight of not less than 80% but less than 82%, manufactured directly from milk or cream."

The import duty was set at 86.88 Ecus per 100kg. Smaller quotas were fixed for cheese for processing and cheddar cheeses.

"*Article* 7

> 1. An import licence for the products listed in Annex I at the rate of duty indicated shall only be issued on presentation of an IMA 1 certificate, or a copy thereof, fulfilling the conditions laid down in Title IV and shall bear the number of that certificate.
>
> 2. The period of validity of the IMA 1 certificate may not extend beyond 31 December of the year of issue.

From 1 November of each year, however, certificates valid from the following 1 January may be issued for quantities covered by the quota for the year concerned."

40. Article 8 provided that the licence application and the licence shall contain the product description, the CN subheading preceded by "ex", the number of the IMA 1 certificate and the country of provenance and origin. Article 9.1(b) and (c) provided that import licence applications for New Zealand butter could only be submitted in the UK and that the IMA 1 certificate bear the date of manufacture of the butter. Article 10 required that New Zealand butter should bear an indication of its origin.

41. Section B of Title II contained provisions for imports of milk products under quotas for unspecified countries of origin which had substantial differences from Section A. These applied to all third countries for specified products. Section C applied to imports from Norway under the EEA Agreement. Title III covered non-quota preferential import arrangements.

42. Title IV contained Rules for IMA 1 certificates. Article 24 and Annex V provided for a specimen form and Article 25 for its dimensions. Article 26 required a separate certificate for each product.

43. Articles 27.2 and 3, 28 and 29 provided,

"2. The certificate shall be valid only if duty completed and authenticated by an issuing agency listed in Annex VII.

3. The certificate shall be regarded as duly authenticated where it shows the date and place of issue; is stamped by the issuing agency and bears the signature or signatures of the person or persons authorized to sign it.

Article 28

1. An issuing agency may be listed in Annex VII only if:

(a) it is recognized as such by the exporter country;

(b) it undertakes to verify the particulars set out in the certificates;

(c) it undertakes to supply the Commission and the Member States, upon request, with any information that may be required to assess the particulars set out in the certificates.

2. Annex VII shall be revised when the condition referred to in paragraph 1(a) is no longer fulfilled or when an issuing agency fails to fulfil one of the obligations it has undertaken.

Article 29

Member States shall take the measures necessary to check that the system of certificates established by this Title is operating correctly."

Annex VII listed issuing agencies for twelve countries including New Zealand. The New Zealand agency for both butter and cheese was New Zealand Dairy Board, Wellington.

44. Article 32 of Regulation 1600/95 provided that it applied until 30 June 1996. The regulation was amended by Regulation 1170/96 which did not contain a termination date and made a minor amendment to the CN code.

45. Regulation 1600/95 was replaced by Regulation 1374/98 from 1 July 1998. Since this came after the imports currently under appeal it is not strictly relevant. There had been other amendments meanwhile of a minor character. Regulation 1374/98 was a consolidating measure and made no fundamental changes.

46. None of the provisions covered thus far made any reference to recovery of customs duties after clearance or to any appeal or other disputes procedure.

47. Prior to 1 July 1980, when Council Regulation (EEC) No.1697/79 took effect, there was no EEC provision for post-clearance recovery and the matter was governed by national law, see *H Ferwerda BV v Productshop voor Vee en Vlees* (Case 265/78) [1980] ECR 617, cited at page 392 of *Lyons, EC Customs Law* (2001) O.U.P. Article 2.1 of Regulation 1697/79 provided,

> "1. Where the competent authorities find that all or part of the amount of import duties . legally due on goods entered for a customs procedure involving the obligation to pay such duties has not been required of the person liable for payment, they shall take action to recover the duties not collected."

Article 2.1 went on to lay down a three year time limit. Article 5.2 provided for remission for official error where the person liable was not at fault. Those provisions are now covered by the Community Customs Code, Council Regulation No.2913/92. Prior to the enactment of the Community Customs Code, there was no express requirement for an appeals procedure in Community law although it was implicit. Appeals depended on national provisions, just as post-clearance recovery had before 1980.

48. Before the Finance Act 1994, which gave effect to the appeals provisions of Article 243 of the Code, there was no statutory appeal or disputes procedure in the UK for post-clearance duties. Section 127 of the Customs and Excise Management Act 1979 only applied before clearance and was preceded by section 260 of the Customs and Excise Act 1952 for customs duty. Section 137 of the 1979 Act empowered any amount due by way of customs duty to be recovered as a debt due to the Crown. Under section 13 of the Crown Proceedings Act 1947 proceedings were in the High Court and in accordance with the rules of court. Post-clearance demands would have been covered in this way.

49. Provisions for entry of goods on importation and other customs formalities were contained in the Customs and Excise Act 1952 and in regulations made thereunder. Some years after the Accession Treaty those were replaced by the Customs and Excise Management Act 1979 and further regulations. Procedures now are largely governed by the Community Customs Code and the Implementing Regulations, see Chapter 9 of *Lyons, EC Customs Law*.

50. I now turn to the Marrakesh Agreements of 1994 establishing the World Trade Organisation and the General Agreement on Tariffs and Trade 1994 ("GATT 1994") which incorporates GATT 1947. These agreements followed complex and

extended negotiations aimed at freeing international trade. They contained a network of interlocking trading arrangements, rights and obligations between all parties including the European Communities and New Zealand. Among other measures they provided for continuation of "current access" for New Zealand butter into the Communities. The WTO agreements also introduced a complex dispute resolution system under which the dispute as to spreadable butter issue was referred to the first instance arbitral panel.

51. The premise that current access for agricultural products should continue was put into effect by schedules. Article 5.2 of the Agreement on Agriculture referred to "current and minimum access commitments established as part of a concession"; any obligations were to be converted to ordinary customs duties or tarification.

52. Schedule LXXX, Part I, Section IB covered New Zealand butter and was in very similar terms to Annex I to Regulation 1600/95 (see paragraph 39 above) which is of course to be expected. It specified butter under tariff item No 0405.00 ex with an initial and final quota of 76,667 tons at a tariff rate of 86.88 Ecu per 100 kg subject to the following terms and conditions:

> "Butter of New Zealand origin
>
> - at least 6 weeks old
>
> - with a fat content of not less than 80% but less than 82% by weight
>
> - manufactured directly from milk or cream
>
> Qualification for the quota is subject to conditions laid down in the relevant Community provisions."

Submissions

53. Both parties provided extensive written outline submissions before the hearing, further written submissions were put in during the hearing and the Appellant provided a written reply in closing. These were invaluable and this decision can do no more than summarise the main points. I have found it convenient to set out the Commissioners' submissions first.

Submissions for the Commissioners

54. Dr Lasok said that the preliminary issue assumed that the certificates were incorrect and that the butter was not within the quota although certified as being within it. The question was therefore whether the Commissioners were entitled to raise post-clearance demands when the certificates incorrectly stated that the conditions were satisfied. The quota was limited by amount and by the quota criteria. Imports in excess of the quota were manifestly subject to the normal rules including post-clearance recovery : so also was butter outside the criteria.

55. Regulation 804/68 set out the protective measures for milk products including butter imported from third countries. There was a variable levy at the frontier so as to make imports economically prohibitive; the levy was protective rather than punitive and was not revenue raising. An import licence was required. The levies

were treated as import duties and were collected in accordance with the normal regime for duties. Formal tarification followed the Marrakesh agreements.

56. Dr Lasok said that the basic rule was that acceptance of a customs declaration at importation, including a certificate, did not preclude the importing state from later checking the documents and recovering additional duty due, see *Van Gend en Loos and another v EC Commission* (Cases 98/83 and 230/83) [1984] ECR 3763; certificates were to facilitate quick clearance and did not prevent subsequent verification, see Advocate-General Mancini at paragraph 7. Regulation 1697/79 made post-clearance recovery mandatory subject to exceptions which met proportionality and human rights requirements. Post-clearance inspections and, where relevant, recovery are now covered by Articles 78 and 220 of the Community Customs Code.

57. He said that before 1979 unpaid duty on imported goods was recoverable under section 301 of the Customs and Excise Act 1952 which was in force at the time of the Act of Accession and Protocol 18. Nothing in the Ottawa agreements precluded post-clearance recovery of unpaid duty.

58. Dr Lasok submitted that in the case of bilateral trade agreements between EC and a third country a Member State is not precluded from investigating the eligibility for a tariff concession and seeking post-clearance recovery unless the terms of the agreement expressly required an agreed disputes procedure, see paragraphs 128-136 of the opinion of Advocate-General Mischo in *Ilumitronica*(Case C-251/00) delivered on 24 January 2002. That case involved the EEC/Turkey Association Agreement providing for reciprocal trade; the provision for an optional disputes mechanism in the agreement did not suffice to preclude post-clearance recovery, see also *Pascaol e Filhos v Fazenda Publica* (Case C-97/95) [1997] ECR I-4209, paragraph 38. *Pascaol e Filhos* also showed that the liability of an innocent importer to pay a post-clearance demand did not infringe proportionality, see paragraph 55 of the judgment. He said that post-clearance recovery is only excluded where there is an express and mandatory provision for a dispute mechanism.

59. He said no exception to the post-clearance recovery principles was ever created for New Zealand butter. Protocol 18 did not provide for any general exemption from customs legislation then in force or for any specific exemption from post-clearance demands. No such exemption could be implied. There was no amendment to the UK legislation. The European regulations were on the basis that the normal rules applied. Regulation 465/73 referred to customs importation formalities, see Articles 2 and 4.

60. Dr Lasok contrasted Protocol 18 with the Agreement between the EEC and Switzerland, which came into force on the same date as enlargement of the EEC, and which was considered in *Les Rapides Savoyards* [1984] ECR 3105. Protocol 3 of the agreement with Switzerland contained detailed provisions concerning the origin of goods, with movement certificates to be issued by the exporting country and express provision for mutual assistance between the countries in checking their authenticity, see Article 16. The decision in *Les Rapides Savoyards* was based on reciprocal obligations; Protocol 18 contained no such reciprocal obligations.

61. He said that the importance of a special procedure involving reciprocal obligations was underlined in *ex parte Faroe Seafood* [1996] ECR I-2465, paragraph 24; the Court also pointed to the absence of any procedure for settling origin disputes, see paragraph 26. That case was decided at a time when there

was a less elaborate disputes procedure under GATT 1947 which was again not mandatory. It was necessary to consider the regime and rules as a whole.

62. He said that Lord Williamson had not said in his evidence that Protocol 18 reflected an agreement to which New Zealand was a party; the negotiations were between the EEC and the UK, although New Zealand was involved in discussions. There was no evidence as to any discussion regarding post-clearance demands or procedures. It had been crystal clear that Regulation 858/81 was a Community measure not negotiated with New Zealand although the criteria did not seem to be contentious. Contemporaneous documents at the time of the regulations indicated general acceptance that the normal customs regime applied subject to identified variations. He instanced a cable dated 4 January 1973 following a meeting attended by New Zealand Dairy Board and the Commissioners when bonded warehouses, customs entries, certification payment of levy and re-export of butter subject to the general levy were all mentioned; there was no mention of excluding post-clearance demands. This was immediately before Regulation 465/73. He pointed to another New Zealand cable dated 9 April 1981 referring to "policing of the [dating] requirement . by the UK Customs." A Fax by Milk Products (NZ) Ltd dated 18 August 1995 said, "The IMA 1 cert does not relieve us of the normal customs check on the validity of the product versus the declaration."

63. Dr Lasok said that, even if there had been an agreement excluding normal procedures, any issues fell to be resolved at an international level and the terms of the agreement could not be relied upon in the present proceedings, see *Portugal v EU Council* [1999] ECR I-8395, paragraphs 34-35. The provisions of the WTO agreements could be relied upon only where the Community intended to implement a particular obligation assumed in the context of the WTO or where the Community measure referred expressly to precise provisions of the WTO, see *Portugal* at paragraphs 47-49 and *Ex parte Omega Air Ltd* (Cases C-27/00 and C-122/00) [2002] 2 CMLR 143. Those two exceptions to the general rule that the WTO Agreements could not be relied upon in domestic courts were narrow and exceptional, see *OGT Fruchthandelgesellschaft mbH v Hauptzollamt Hamburg-St Annen* (Case C-307/99) [2001] ECR I-3159, paragraphs 27-8. Neither exception applied here: the post-clearance recovery rules and Protocol 18 certificate rules predated the WTO Agreements and Regulation 1600/95 rules regarding IMA 1 Certificates neither implemented nor referred to a specific provision of the WTO Agreement.

64. He accepted that Article 1 of Protocol 1 of the Human Rights Convention applied but submitted that post-clearance recovery was not contrary to any right protected by the Convention nor did it infringe the principle of proportionality, see *Faroe Seafood* at paragraph 114. In any event the Tribunal had no jurisdiction to hold EU legislation invalid. Recovery of a debt which had been incurred could not be disproportionate, see *Belgium v Foodic and Others* (Case C-41/97) [1998] ECR I-3527. The purpose of the duty was, in any event, protective; see *Skatteministeriet v Sportsgoods* (Case C-413/96) [1998] ECR I-5285.

65. Dr Lasok said that there was no ambiguity in Article 220.1 of the Code.

66. Professor Sands, also for the Commissioners, said that following the Marrakesh Agreements the importation of New Zealand butter to the Communities is subject to a tariff concession in the European Communities WTO Schedule of Concessions LXXX. The Schedule was under Article II.1(b) of GATT 1947 which was incorporated into GATT 1994.

67. He said that Dr Roessler accepted that it was inherent in tarification under the Marrakesh Agreements that high duties would be used for protection rather than quotas. It is legitimate for the tariff on the excess to be prohibitive. There is nothing in post-clearance recovery, which is inherently incompatible with WTO law.

68. Professor Sands said that Schedule LXXX sets out the terms and conditions; those include "Qualification for the quota is subject to conditions laid down in the relevant community provisions." The "relevant provisions" must be those from time to time. In effect the Appellant sought to read into the terms and conditions the exclusion of post clearance recovery after close of the tariff quota, if not its absolute exclusion. He said that there was no evidence of an unwritten agreement to that effect and there was no written agreement to disapply post-clearance recovery in relation to butter. It was difficult to imply terms into an international treaty.

69. He said that all Member States as well as the European Communities were parties to the WTO Agreements. The interpretation of the WTO Agreements is governed by the Vienna Convention 1969, in particular Article 31. The thrust of Article 31 is to ascertain the intention of the parties. Neither Article 31(2) nor (3) applies with the possible exception of (3)(b). Nor does Article 32 apply : there is nothing ambiguous, obscure or manifestly unreasonable in Schedule LXXX interpreted under Article 31(1) on its ordinary meaning.

70. Professor Sands said that Dr Roessler had been driven to concentrate on Article 26 requiring every treaty to be performed in good faith, relying on the WTO *Shrimp* case, a report of the WTO Appellate Body adopted on 6 November 1998 (WT/D 558/AB/R). In that case it was decided that the United States failed to ensure an opportunity to negotiate before prohibiting certain shrimp imports. There was nothing in the *Shrimp* decision to enable the Appellant to write in a prohibition on post-clearance recovery outside the quota year. Article 26 could not be used to create an intention where there was none.

71. He submitted said post-clearance recovery subject to a three year time limit is reasonable : Canada has a four year period. He said that it is still open to New Zealand to challenge the Commissioners' actions by initiating proceedings under the WTO Dispute Settlement Understanding, contending that New Zealand butter was not receiving fair treatment. The remedies can be either prospective or retrospective; see *Australia- Subsidies Provided to Producers and Exporters of Automotive Leather*- WTO panel report WT/DS 136/RW, 21 January 2000, at parargraph 6.31. If New Zealand succeeded, the EC would be bound by a ruling. In any event the disputes settlement procedure could not affect the substantial content of Schedule LXXX.

Submissions for the Appellant

72. Mr. Pannick, for the Appellant, said that once the butter had been certified by the New Zealand Authorities and admitted by the UK Customs authorities, the Commissioners could not go behind the certificate and issue a post-clearance demand. The whole nature of the agreement is that the UK will only refuse an import if the certification function is not being properly performed, in which case there should be international discussion.

73. Mr Pannick, said that Protocol 18 provided for "exceptional arrangements" for New Zealand butter outside the scope of the normal EC customs rules. Articles 13 to 21 of Regulation 804/68 set out the general system for milk and milk products

including licences and levies. Regulation 465/73 was enacted under Protocol 18 and not under Regulation 804/68 and established a "special system" for imports under the Protocol. The EC Commission had correctly stated in its Response to the Court of Auditors, at paragraph 3.1(a) that Protocol 18 was a *lex specialis,* see OJ 24.4.98. There had been no challenge to Lord Williamson's evidence that the special nature of Protocol 18 had never been disputed and that there had been no discussion as to post-clearance demands, although UK customs law provided for such demands.

74. The system of certificates under Regulation 465/73 with a certificate issued by a sovereign state for entry of goods into another was different to a system where a commercial importer certified that the criteria were satisfied. Once the goods were admitted under a certificate the purpose would be frustrated if the importing state could go behind the certificate. The purpose and effect of the agreement enshrined in Protocol 18 was that any dispute would be taken up with New Zealand. This was what had happened before between the UK and New Zealand and it was implicit in the arrangements under Protocol 18.

75. Mr Pannick said that power to raise post clearance demands up to three years later conflicted with Article 2.2 of Protocol 18 which referred to the quota butter being "effectively marketed". The general levy was prohibitive. The fact that other general administrative arrangements applied to quota butter for convenience did not make post-clearance demands applicable.

76. He said that *Les Rapides Savoyards* [1984] ECR 3105 established a principle at paragraphs 26-27, which was approved in *Faroe Seafood* [1995] ECR I-2465 at paragraphs 18-20. The contrast at paragraph 24 of *Faroe Seafood* was between an international agreement with reciprocal obligations and a unilateral Community measure. Protocol 18 was part of an international agreement binding the UK which was not previously a Community Member and clearly involved reciprocal obligations by the UK; it imposed obligations on New Zealand in Articles 1.3, 1.4 and 2.2 and implicitly obliged New Zealand to give up its existing rights under the post-Ottawa agreement. Article II of the 1966 agreement clearly contemplated further arrangements after September 1972. Protocol 18 could not be properly described as a unilateral Community measure; without it the UK might not have joined. The agreement with Switzerland considered in *Les Rapides Savoyards* was negotiated at the same time as the Accession negotiations. The Schedule LXXX under the WTO agreements was also part of a multi-lateral agreement.

77. Mr Pannick said that the procedure for settling disputes referred to at paragraph 26 of *Faroe Seafood* need not be express: there was no express provision in *Les Rapides Savoyards* beyond an obligation to try to resolve disputes in good faith. It was implicit in Protocol 18 that disagreements would be resolved on an international level. That was what had always happened before. The WTO Agreements did contain a disputes mechanism. He said that in *Faroe Seafood* on which *Ilumitronica* relied, there was no international agreement establishing a quota with a preferential duty.

78. He said that the argument that New Zealand was not a party to Protocol 18 preferred form over substance and ignored the political reality. It was unrealistic to say that New Zealand was not involved : the UK which was a party was representing New Zealand's interests. It was wrong to apply private law concepts of privity of contract.

79. Mr Pannick said that Regulation 858/81 made no relevant alteration to the special scheme under Protocol 18. It stated criteria but did not alter the role of certificates. It did not provide for post-clearance demands although by then Regulation 1697/79 had been made.

80. He said that Regulation 1600/95 continued the earlier regime : it continued "current access", see the Fourth Recital. The position under Regulation 1600/95 depended on the position under Protocol 18. "Current access" applied to the whole regime apart from express changes. There was nothing in Regulation 1600/95 giving the Commissioners' power to make post-clearance demands which they did not have before. He accepted that it was not easy to argue that the WTO agreements removed any existing possibility of post-clearance recovery. The Fifth Recital referred to "arrangements currently in force."

81. Mr Pannick said that Schedule LXXX referred to "qualification for the quota". This was not directed at the consequences of non-qualification. Regulation 1600/95 provided specific measures on breach in Articles 28.2 and 29; those implied negotiations.

82. He said that when construing Regulation 1600/95 it was permissible to have regard to WTO principles because the Regulation was expressly implementing a WTO agreement, see *Portugal v EU Council* (Case C-149/96) [1999] ECR I-8395 at paragraph 49. This applied to interpretation as well as legality, see *EC Commission v Germany* (Case C-61/94)[1996] ECR I-3989 at paragraph 52; this was the same principle as in Ex parte Brind [1991]1 AC 696. The word "only" in Article 7 of Regulation 1600/95 indicated the exclusive role of the IMA 1 certificates. Regulation 1600/95 was ambiguous as to whether it allowed post-clearance recovery following the acceptance of certificates valid in form and issued in good faith, given that it expressly intended to maintain current access coupled with the provisions of Articles 28 and 29.

83. The legislation must be construed so as to avoid conflicting with Article 1 of Protocol 1 to the European Convention on Human Rights. This involved a fair and proportionate balance: see *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, paragraphs 69 and 73. It is a general principle of EU law that any ambiguity is to be resolved in favour of the taxpayer, see *Administration des Douanes v Gondrand Frères* (Case 169/80.) [1981] ECR 1931, paragraph 17.

84. He said that the demands at an uneconomic rate after the close of the quota amounted to a penalty and were disproportionate. The Treasury Minister responsible, Dawn Primarolo, and the European Commission had both accepted that the demands would amount to a windfall. The imposition of the demands after expiry of the quota years was contrary to the good faith required by WTO law in administering a market access concession. This was relevant in construing Regulation 1600/95. A requirement for demands after clearance deprived the Appellant of the choice of not entering the goods or taking up the quota with other goods: this constituted unfair administration. Legislation must be interpreted in a way that affords legal certainty, *see Gebroeders van Es Douane Agenten BV v Inspecteur der Invoerrechten en Accijnzen* (Case C-143/93)[1996] ECR I-431, paragraph 27; *Ireland v EC Commission* (Case 325/85)[1987]ECR 5041 at paragraph 24; *Karl Könecke GmbH&Co v BALM* (Case 117/83)[1984] ECR 3921, paragraph 11 and *BASF AG and Others v EC Commission* (Joined Cases T-79/89 and others)[1992] ECR II-315 at paragraph 35. Protocol 18 and the Regulations did not allow for post-clearance demands: Regulation 1600/95 should be similarly interpreted.

85. He said that the arrangements specifically provided for certificates by New Zealand; once the butter had been certified by the New Zealand authorities and the butter had been cleared by the Commissioners, the Commissioners could not go behind the certificates in the absence of fraud. He did not need to argue that they were bound to accept the certificates before clearance. Disputes after clearance were to be settled by negotiation.

Conclusions

86. The case for the Appellant depends on implying from the arrangements in respect of New Zealand butter under Protocol 18 to the Act of Accession in 1972 terms which excluded post-clearance demands and which required disputes to be resolved at international level rather than in the Community courts. Since the Marrakesh agreements provided for continuation of current access, it is argued for the Appellant that Regulation 1600/95 did not alter those provisions. The Appellant's case depends therefore on the effect of Protocol 18.

87. There is no doubt that Protocol 18 provided for a special scheme for New Zealand butter. The Protocol itself referred to "exceptional arrangements" and the recitals to Regulation 226/73 referred to "special terms". The normal levies did not apply to quota imports, re-exports were prohibited and import licences were not required. The issue is not whether there was a special scheme but whether the arrangements excluded post-clearance demands.

88. Mr Pannick relied on the decision in *Les Rapides Savoyards* [1984] ECR 3105, which concerned the origin of products imported into France from Switzerland under Protocol 3 of the Agreement between the EEC and Switzerland of 22 July 1972.

89. The dispute in that case involved ballpoint pens, for which the cartridges, barrels and clips came from the USA. A certificate of origin was issued by Switzerland on the footing that the goods originated in Switzerland having undergone sufficient working or processing there. This depended on the value of the components compared with the finished product; this in turn depended on the exchange rate and the relevant dates. The French Customs authorities determined the value on the basis of the dollar exchange rate of the components on the date of importation into France of the finished product. The question referred concerned the exchange rate.

90. The Court of Justice did not answer the question as posed but stated at paragraph 32,

> ". Protocol No.3 [of the Agreement] must be interpreted as meaning that the assessment of the elements used in determining the origin of a product and, accordingly, in determining whether it is eligible for the preferential treatment provided for by the Agreement is the responsibility of the customs authorities of the State exporting."

91. The Agreement between the EEC and Switzerland governed trade in both directions. The Court of Justice pointed out at paragraph 24 that under Article 10 of the Protocol a movement certificate issued by the customs authorities of the exporting country served as documentary evidence for preferential treatment.

92. Paragraphs 25 to 29 read as follows,

"25. Finally Articles 16 and 17 of the Protocol afford the Community customs authorities the widest scope for resolving, in co-operation with the Swiss customs authorities, any problems that may be caused by the determination of origin and the issue of movement certificates.

26. It follows from all those provisions that the determination of the origin of goods according to Protocol No.3 is based on a division of powers between the customs authorities of the parties to the free-trade Agreement inasmuch as origin is established by the authorities of the exporting country and the proper working of that system is monitored jointly by the authorities concerned on both sides. That system is justified by the fact that the authorities of the exporting State are in the best position to verify directly the facts which determine origin; moreover, it has the advantage of producing certain and uniform results regarding the identification of the origin of goods and of thereby avoiding deflections of trade and distortions of competition in trade.

27. However, that mechanism can function only if the customs authorities of the importing country accept the determinations legally made by the authorities of the exporting country. Recognition of such decisions by the customs authorities of the Member States is necessary in order that the Community can, in turn, demand that the authorities of other countries with which it has concluded free-trade agreements accept the decisions taken by the customs authorities of the Member States concerning the origin of products exported from the Community to those non-member countries.

28. There is no danger that the application of those provisions may encourage abuses, in view of the fact that Articles 16 and 18 of Protocol No.3, in particular in their new version, have set out in detail the methods of co-operation between the customs authorities concerned, where the origin is contested or where the exporters or importers have acted fraudulently.

29. The functioning of that system - based, as has been stated above, on a division of duties between the customs authorities of the parties to the free-trade Agreement and on the reliance which must be placed on the acts of those administrations in the exercise of their powers - does not encroach on the fiscal autonomy of the Community and its Member States or of the non-member countries concerned, since the rules laid down in Protocol No.3 were established on the basis of reciprocal obligations placing the parties on an equal footing in their dealings with each other."

93. The Court said that since the goods were assembled in Switzerland it was for the Swiss authorities to establish the origin of products for export to the Community and the issue of a movement certificate by the Swiss authorities certified that the Swiss origin had been established correctly; the importing authorities only had power to assess the value of the finished product at the time of importation.

94. Article 16 of Protocol No.3 to the EEC- Switzerland Free Trade Agreement read as follows:

> "In order to ensure the proper application of the provisions of this Title, the Member States of the Community and Switzerland shall assist each other, through their respective Customs Administrations, in checking the authenticity and accuracy of movement certificates, including those issued under Article 8.4
>
> The Joint Committee shall be authorised to take any decisions necessary for the methods of administrative co-operation to be applied at the due time in the Community and in Switzerland."

Article 17 provided for penalties on any person causing a document to be drawn up with incorrect particulars to obtain a certificate. These Articles are in their old version but paragraph 28 of the decision was not limited to the new version. The wording of the new Article 17.3 appears at [1995] ECR I-2465, 2485.

95. The decision in *Les Rapides Savoyards* was considered by the Court of Justice in *Faroe Seafood* [1995] ECR I-2465. The latter case concerned the origin of shrimps and prawns imported into the UK from the Faroe Islands. The Faroese authorities issued certificates of origin which a Community inquiry later found to be incorrect. UK Customs sought post-clearance recovery.

96. The Faroe Islands is an autonomous community linked to Denmark. Denmark had the option of notifying the Community that the EEC Treaty applied to the Faroe Islands but did not do so. Article 3 of Protocol 2 to the Accession Treaty (the same treaty as that which covered the UK's Accession) required the Council in the event of Denmark being unable to give the notification, to decide on the arrangements for solving the problems for the Community and especially for Denmark and the Faroe Islands. Council Regulation 2051/74 was part of a process of progressive removal of duties on Faroese imports, see Advocate-General Slynn. Administrative arrangements were contained in Commission Regulation 3184/74.

97. In its judgment, the Court cited *Les Rapides Savoyards* and two other decisions, *Huygen and Others* (Case C-12/92)[1993]ECR I-6381 and *Anastasiou and Others* (Case C-432/92) [1994] ECR I-3087, at paragraph 18 and continued,

> "19. It follows from that case-law that determination of the origin of goods is based on a division of powers between the authorities of the exporting country and those of the importing country, inasmuch as origin is established by the authorities of the exporting country and the proper working of that system is monitored jointly by the authorities concerned on both sides. As the Court pointed out, that system is justified by the fact that the authorities of the exporting country are in the best position to verify directly the facts which determine origin.
>
> 20. In the same judgments, the Court also considered that the mechanism can function only if the customs authorities of the importing country accept the determinations legally made by the authorities of the exporting country."

The Court said that in *Les Rapides Savoyards* the Court had explained that recognition of the decisions of countries exporting to the Community was necessary if the Community was to demand acceptance of origin decisions on exports from the Community; that agreement had involved reciprocal obligations.

The Court then referred to the co-operation provisions in Articles 16 and 17 of the agreement with Switzerland.

98. At paragraph 24 the Court said this,

> "24. . the need for the customs authorities of the Member States to recognise the assessments made by the customs authorities of the exporting country does not arise in the same way where the preferential system is established not by an international agreement binding the Community to a non-member country on the basis of reciprocal obligations, but by a unilateral Community measure.
>
> 25. .
>
> 26. Furthermore, the second factor on which the Court based its interpretation in the *Rapides Savoyards* judgment, namely the existence of a procedure for settling disputes concerning origin, is missing in this case."

The Court stated that Regulation 3184/74 did not incorporate the principle of settling disputes by a joint customs committee as was the case under Article 17.3 of the (amended) Swiss agreement.

99. In *Pascaol & Filhos* [1997] ECR I-4209, the Court referred at paragraph 31 of *Les Rapides Savoyards* and went on to cite paragraphs 19 and 20 of *Faroe Seafood*.

100. In my judgement, in the present case the element of reciprocation referred to at paragraph 27 of *Les Rapides Savoyards* is absent. There was no provision in Protocol 18 or any other provision of the Accession Treaty or in any other protocol to the Treaty which gave preferential treatment to any Community products on the New Zealand market. From the Community viewpoint, the arrangements were one-way. The arrangements were closer to those in *Faroe Seafood.*

101. Although Mr Pannick pointed to obligations imposed on New Zealand, those were solely for the purpose of giving effect to the preferential access. There was no independent obligation; indeed, if there had been, a separate agreement would have been necessary to which New Zealand was a party. New Zealand was not bound to give guarantees under Article 1.3 of Protocol 18 or to prevent re-export under Article 1.4 for all butter exported to the UK; it could, if it wished, supply butter outside the quota. There was evidence that some small quantities were re-exported to maintain markets.

102. A further major problem for the Appellant is the absence of any reference in Protocol 18 to a disputes procedure. There was not even any reference to a disputes procedure or to co-operation in the Regulations implementing Protocol 18. The provisions for administrative co-operation in Article 46 of Regulation 3184/74 were held to be insufficient in the *Faroe Seafood* case.

103. On the evidence before the Tribunal no consideration at all was given to post-clearance demands during the negotiations leading up to Accession. I can readily accept that neither the UK nor the New Zealand negotiators considered them to be relevant. That does not mean that the other parties shared that assumption, in particular continental butter producing countries. No doubt all

involved hoped that any disputes would be settled by negotiation; however no structure was put in place. I do not consider that it is possible to conclude that the ten parties to the Accession Treaty, which did not include New Zealand, must be assumed to have intended to exclude the possibility of post-clearance demands in the event of imports of New Zealand butter which did not meet the quota requirements.

104. The normal customs regime clearly applied to any butter which was not within the quota. While substantial imports of New Zealand butter in excess of the quota were clearly not anticipated because of the high levy, there was no prohibition on such imports. The normal procedures including licences applied to such butter. I do not see how post-clearance demands can be impliedly excluded for amounts in excess of quota. In *Les Rapides Savoyards* the products either qualified as originating in Switzerland or they did not; there was no quantity aspect. Later jurisprudence does not suggest that it is at all likely that the principle in that case will be extended to cover a case such as the present.

105. As stated in paragraph 10 above, I deferred this decision until the judgment of the Court of Justice in *Ilumitrónica* (Case C-251/00) which was given on 14 November 2002.

106. That case arose in the context of the Association Agreement between the EEC and Turkey, aimed at strengthening trade between the parties.

107. Ilumitrónica declared to Portuguese customs a consignment of colour TV sets from Turkey accompanied by a certificate by the Turkish authorities on the basis of which preferential treatment was granted. Nearly three years later in July 1995 Portuguese customs claimed payment of duty, on the basis of a finding by the Commission that the goods did not fulfil conditions for preferential treatment.

108. The Portuguese Tribunal referred five questions to the Court of Justice, the fifth being so far as material:

"5. Is the decision of..the Portuguese customs authorities.to take action for

> post-clearance recovery of the import duties valid without first initiating the procedure provided for by Articles 22 and 25 of the EEC-Turkey Association Agreement.?"

Article 22 provided for the establishment and powers of the Council of Association and Article 25 provided that the "Contracting Parties may submit to the Council" any dispute relating to the application of the agreement.

109. In its judgment the Court of Justice stated at paragraph 73 that Article 25 "provided for a possibility and not an obligation of submission". At paragraph 24 the Court said,

> "The authorities of the importing state retain the right to take action for the post-clearance recovery on the basis of the results of the checks carried out after the initial transaction, without being obliged to have recourse to the mechanisms for settling disputes provided for by the Association Agreement (see, to that effect, *Pascaol e Filhos*, paragraph 38)."

110. It is quite clear from the reference to *Pascaol e Filhos* that the Court of Justice also had in mind *Faroe Seafood* and *Les Rapides Savoyards* which were referred to in that case, although those latter cases were not referred to in the judgment. *Ilumitrónica* does not assist the Appellant and further reinforces *Faroe Seafood*. It is to be noted that although the post-clearance demand came after the Marrakesh Agreement took effect, there was no reference to it in the judgment.

111. Dr. Roessler's evidence and a considerable amount of submissions were directed at the Marrakesh Agreements and Regulation 1600/95. It seems to me that WTO law is a question of law rather than fact and I have treated his evidence as submissions. His statements and evidence are available for any appeal. Given the conclusions I have formed under Protocol 18, current access at the time of the Marrakesh Agreement does not assist the Appellant. I find nothing in the Regulations from 1973 to 1994 to confer an exclusion of post-clearance demands in the absence of such exclusions under Protocol 18.

112. There is an additional factor under Regulation 1600/95 in that the relevant part of the Regulation also applied to certain Australian and Canadian cheese. It would be anomalous if post-clearance demands were excluded for New Zealand butter under the quota but were not excluded for Australian and Canadian cheese although governed by the same Regulation.

113. I accept Professor Sands' submission that there is no inherent incompatibility between post-clearance recovery and WTO law. Dr. Roessler accepted that also. His criticism concerned the use of post-clearance recovery after the quota had closed so that the quota could not be filled. He said that the concession must be administered in a fair manner which did not frustrate it. Any contention that the procedures have not operated in good faith within WTO law is not within the question for preliminary issue. In any event it is far from clear that this is within the jurisdiction of this Tribunal.

114. My conclusion on the preliminary issue is that under the international arrangements and the relevant legislative scheme the Commissioners were not precluded from raising Post Clearance Demand Notes in the circumstances assumed by the question. Whether the facts are as alleged will have to be decided in the substantive appeals. This decision is not concerned with the question of whether the demands should be waived or remitted.

THEODORE WALLACE

CHAIRMAN

RELEASED:

LON/97/7053 & LON/00/7065

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