

EUROPEAN COMMUNITIES – SELECTED CUSTOMS MATTERS

WT/DS315

**CLOSING STATEMENT OF THE UNITED STATES OF AMERICA
SECOND MEETING OF THE PANEL**

November 23, 2005

1. Mr. Chairman and members of the Panel, the United States would like to thank you for agreeing to serve on this Panel. We would also like to thank the members of the Secretariat for all of their hard work on this matter. We also thank you for the accommodation with respect to the Panel's schedule.
2. Our closing remarks will be brief. We will focus on two points: First, the issues in this dispute are far more straightforward than the EC would suggest. Second, the EC's scare tactics – its suggestion that making the findings the United States requests would cause upheaval of the EC's constitutional structure and would have profound implications for other WTO Members as well – are just that, scare tactics, and should not deter the Panel from making the findings that the facts and law compel.
3. The manner in which the EC has argued this dispute gives the impression that the issues are far more complicated than they actually are. At times, the EC has contended that the dispute is about larger philosophical questions, such as differences in the doctrines undergirding federalism in the United States and in the EC. At other times, the EC has contended that the dispute is about the minutiae of whether one or another EC customs authority decided a particular question correctly. It is easy to get lost in the back-and-forth between political theory and technical arcana. Therefore, in our closing statement we want to underscore that when the arguments on questions that have no bearing on this dispute are cleared away, the case is in fact

very simple.

4. With respect to Article X:3(a), we submit that the EC has an obligation to administer its customs laws in a uniform manner. In practice, it administers its laws through 25 different authorities in different parts of its territory. The decisions of any one authority do not bind any of the other authorities. If the EC authority in Spain issues binding tariff information classifying a good in a particular way, the EC authority in Germany is under no obligation to give any weight at all to that decision (other than in the very limited case in which the BTI is invoked by its holder). If a third party urges the EC authority in Germany to follow the classification decision of the EC authority in Spain, even if that third party is an affiliate of the holder, the EC authority in Germany is under no obligation to do so. In short, one part of the EC customs administration apparatus is under no obligation to act consistently with other parts of the EC customs administration apparatus. That is non-uniform administration.

5. The EC tells you that this is not so. It states that processes and institutions are in place to ensure that different parts of the EC customs administration apparatus act uniformly. But this assertion does not withstand scrutiny. With one exception (appeals to member State courts), the processes and institutions are general obligations, non-binding guidance, and discretionary mechanisms. This point was well illustrated yesterday, in the EC's preliminary response to the Panel's question 164(a). When asked to comment on the observation that the EC refers to no measures making EC Treaty Article 10 – the general duty of member State cooperation – operational in the context of customs administration, the EC still referred to no specific measures. It stated simply that the duty of cooperation in Article 10 is a binding legal obligation, which can be enforced through infringement proceedings. Repeatedly, the EC tells you that

matters may get referred to the Customs Code Committee, that infringement actions may be brought, that member States may give deference to the decisions of other member States. But, the constant theme is that all of these so-called tools are discretionary.

6. In the absence of any processes or institutions that obligate different parts of the EC customs administration apparatus to act uniformly, the design and structure of the EC customs administration system is such as to necessarily result in non-uniform administration. Even the one binding instrument to which the EC has alluded does not cure this problem. As we have shown, even when confronted with direct evidence of a divergence in member State administration of customs law, a member State court is under no obligation to refer a question to the ECJ.

7. In its opening statement yesterday, in discussing a point pertaining to classification, the EC stated that “[a]t any given moment, there is only one correct classification for a particular product. . . .”¹ We do not disagree. But, the question is: Who decides what that correct classification is? In the EC, each of the 25 different customs authorities decides, each only with respect to a particular territory, and none with the power to bind the others. The processes and institutions to which the EC refers do not change this. For this reason, the EC does not comply with its obligation under GATT Article X:3(a).

8. With respect to Article X:3(b), we submit that the EC has an obligation to provide tribunals or procedures for the prompt review and correction of administrative action relating to customs matters, and that the decisions of such tribunals or procedures must be implemented by

¹EC Second Opening Statement, para. 56.

and govern the practice of the agencies entrusted with administrative enforcement. The tribunals that the EC points to as providing for the review and correction of administrative action relating to customs matters are the member State courts. The decisions of each member State court apply only within the territory of that member State. The EC customs authority in France is not required to follow the decisions of UK courts. Indeed, there is not even a mechanism to make member State courts aware of customs review decisions by other member State courts.

9. Under the foregoing structure, the decisions of the tribunals that the EC provides do not govern the practice of the EC's agencies entrusted with administrative enforcement. Each court's decisions govern the practice only of a discrete subset of such agencies. Not only is this inconsistent with the text of Article X:3(b), but it also is inconsistent with the context provided by Article X:3(a), which indicates that the obligation to provide review tribunals should be read in a manner consistent with the obligation to administer customs laws uniformly. The EC's only response is to argue that the phrase "govern the practice" really means "implement in fair terms."² As this interpretation would render the separate "implement" requirement in Article X:3(b) superfluous, it should be rejected. Accordingly, the EC fails to meet its obligation to provide review tribunals consistent with Article X:3(b).

10. The second point we want to make in closing is that the Panel should not be distracted by the EC's constant reference to dire consequences that supposedly would flow from making the findings the United States requests. Not only are the EC's predictions not relevant, but, for reasons we have explained earlier in this dispute, they are not accurate.

²EC Second Written Submission, para. 230.

11. The first 19 paragraphs of the EC's statement yesterday are devoted to recasting the U.S. claims incorrectly as claims that GATT Article X:3(a) requires the EC "to set up a centralized customs agency and a customs court."³ Having thus mis-stated the U.S. claims, the EC went on to accuse the United States of seeking to change "a fundamental characteristic of the EC"⁴ and to bring about "a radical shift in the federal balance within the EC."⁵

12. Moreover, the cataclysmic scenario the EC predicts is not confined to its own system. It contends that the findings the United States seeks "would make the involvement of sub-federal entities in the execution of federal laws generally impossible in large areas of economic regulation."⁶ It claims that "[t]his is of considerable concern to the entire WTO membership."⁷

13. These themes have been echoed throughout the EC's submissions and interventions. The EC is trying to dissuade the Panel from drawing the obvious conclusions that the facts and the law compel by resorting to scare tactics. In effect, the EC is saying that its obligations under Article X:3 should be interpreted in light of the consequences that any given interpretation would have. We saw this again yesterday when the EC said at one and the same time that GATT Article XXIV:12 is not relevant to interpretation of GATT Article X:3(a), but that it would be relevant to interpretation of Article X:3(a) if it were found that Article X:3(a) requires the EC to

³EC Second Oral Statement, para. 3.

⁴EC Second Oral Statement, para. 12.

⁵EC Second Oral Statement, para. 16.

⁶EC Second Oral Statement, para. 13.

⁷EC Second Oral Statement, para. 14.

create a centralized customs agency and customs court.⁸

14. In the EC's view, an interpretation should be rejected if, for example, it would require a radical shift in the federal balance within the EC. But this is simply backwards. Relative difficulty of compliance is not a basis for adopting or rejecting a given interpretation of a treaty provision. Moreover, under customary international law, as reflected in Article 27 of the Vienna Convention on the Law of Treaties, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

15. At paragraph 12 of the EC's opening statement at yesterday's meeting, the EC reminded the Panel that "the EC is an original Member of the WTO," and that when the contracting parties agreed that the EC should become an original Member, they did so with knowledge of the EC's "system of customs administration and judicial review." The EC reasons that in light of this knowledge, it cannot be argued that the EC's system is inconsistent with GATT Article X:3. But, again, the EC has it exactly backwards. It is not the case that the other original Members of the WTO must be considered to have acquiesced in the EC's breach of a GATT obligation by having agreed that the EC should become an original Member. Rather, the EC had to have considered and accepted the consequences of Article X:3 when it decided to become a Member of the WTO in its own right. The EC is not now free to argue that it does not like those consequences and so should be relieved of the obligations it freely accepted.

16. In short, the picture that the EC portrays of the institutional changes that would have to be made in the EC if the Panel were to make the findings the United States requests is pure hyperbole, with no bearing at all on the issue at hand. The Panel should decline the EC's

⁸EC's provisional response to Panel Question 155.

invitation to interpret Article X:3 in light of the EC's prediction of what it would take for the EC to come into compliance with its obligations. It also should give no credit to the proposition that the U.S. claims will have dire consequences for other WTO Members. The U.S. claims are directed at a problem unique to the EC, given its unique combination of geographically fragmented administration and geographically fragmented review.

17. Mr. Chairman and members of the Panel, this concludes the closing statement of the United States. We thank you for your attention.