EUROPEAN COMMUNITIES – SELECTED CUSTOMS MATTERS

WT/DS315

EXECUTIVE SUMMARY OF CLOSING STATEMENT OF THE UNITED STATES OF AMERICA SECOND MEETING OF THE PANEL

November 30, 2005

1. 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. But when the arguments on questions that have no bearing on this dispute are cleared away, the case is in fact very simple.

2. With respect to Article X:3(a), 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.

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

4. In the absence of any processes or institutions that <u>obligate</u> 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. 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.

5. In its opening statement at this Panel meeting, 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." The United States does 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).

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

7. 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." (Second submission, para. 230.) 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).

8. The second point the United States makes 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 they are not accurate.

9. The first 19 paragraphs of the EC's oral statement at this meeting were 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." (Second oral stmt., para. 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" and to bring about "a radical shift in the federal balance within the EC."

10. 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." It claims that "[t]his is of considerable concern to the entire WTO membership."

11. 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. This was evident 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 create a centralized customs agency and customs court. (EC provisional response to Panel Provisional Question 155.)

12. 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."

13. At paragraph 12 of the EC's opening statement at this Panel 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.

14. 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 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.