

EUROPEAN COMMUNITIES – SELECTED CUSTOMS MATTERS

Notification of an Appeal by the United States
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the Working Procedures for Appellate Review

The following notification, dated 14 August 2006, from the Delegation of the United States, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel on *European Communities – Selected Customs Matters* (WT/DS315/R) and certain legal interpretations developed by the Panel.

The United States seeks review by the Appellate Body of the following aspects of the Report of the Panel.

I. Terms of Reference

The United States seeks review of three sets of errors committed by the Panel with respect to its analysis of its terms of reference.

(A) As the first step in its analysis the Panel found, in paragraph 7.20 of the Report, that "when a violation of Article X:3(a) of the [*General Agreement on Tariffs and Trade 1994*] is being claimed," the "measure at issue" that Article 6.2 requires to be identified in the request for establishment of a panel is "the manner of administration that is allegedly non-uniform, partial and/or unreasonable." This finding is in error and is based on erroneous findings on issues of law and related legal interpretations contained in paragraphs 7.8 through 7.22 of the Panel Report. In making this finding, the Panel misinterpreted or misapplied Article 6.2 of the DSU.

While the Panel's finding that "manner of administration" is the measure at issue in a dispute involving Article X:3(a) of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") was in error and should not be allowed to stand, the U.S. panel request did in fact identify the manner of administration of European Communities ("EC") laws, regulations, decisions, and rulings of the kind described in Article X:1 of the GATT 1994 at issue (referred to hereafter collectively as "EC customs law"), and the Panel did not find against the United States on this ground.

(B) Having incorrectly found "manner of administration" to be the measure at issue in a dispute involving Article X:3(a) of the GATT 1994, the Panel also misconstrued the specific measures at issue identified in the U.S. panel request as confined to the manner of administration of EC customs law in certain specific areas, as opposed to the manner of administration of such measures irrespective

of area. Thus, the Panel found in paragraph 7.33 of the Report that the "specific measure at issue" in this dispute, within the meaning of Article 6.2 of the DSU, was:

[T]he manner of administration by the national customs authorities of the member States of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff, the TARIC and related measures in the areas of customs administration specifically identified in the United States' request for establishment of a panel – namely, the classification and valuation of goods, procedures for the classification and valuation of goods, procedures for the entry and release of goods, procedures for auditing entry statements after goods are released into free circulation, penalties and procedures regarding the imposition of penalties for violation of customs rules and record-keeping requirements.

This finding is in error and is based on erroneous findings on issues of law and related legal interpretations contained in paragraphs 7.23 through 7.32 and 8.1(a)(i) of the Panel Report. In making this finding, the Panel misinterpreted or misapplied Articles 6.2 and 7.1 of the DSU.

(C) The Panel then made the erroneous legal conclusion that its terms of reference excluded the U.S. claim that the design and structure of the EC system of customs administration as a whole results in the administration of EC customs law in a non-uniform manner, contrary to Article X:3(a) of the GATT 1994. For example, paragraph 7.50 of its Report, the Panel made the erroneous finding that "its terms of reference regarding the U.S. claim under Article X:3(a) of the GATT 1994 do not include a challenge to the EC system of customs administration overall or as a whole under Article X:3(a) of the GATT 1994." The Panel made a similarly erroneous finding in paragraph 7.63, stating that "the United States is precluded from making an 'as such' challenge with respect to the design and structure of the EC system of customs administration as a whole and also with respect to the design and structure of the EC system in the areas of customs administration that have been specifically identified in the United States' request." This finding is repeated at paragraph 8.1(a)(iii) of the Panel's Report.

These findings are in error and are based on erroneous findings on issues of law and related legal interpretations contained in paragraphs 7.11 through 7.20, 7.23 through 7.32, 7.40 through 7.50, 7.53 through 7.63, and 8.1(a)(iii) of the Panel Report. In making these findings, the Panel misinterpreted or misapplied Articles 6.2 and 7.1 of the DSU.

The Panel's error in excluding from its terms of reference the U.S. challenge with respect to the EC system of customs administration as a whole did not depend on its first two errors with respect to its terms of reference. Even if the first two findings in the Panel's analysis of its terms of reference were correct (which we contend they were not), the Panel still should not have excluded the U.S. challenge with respect to the EC's system of customs administration as a whole. The U.S. claim was about features that are absent from the EC system of customs administration, which result in the EC administering its customs laws in a non-uniform manner, contrary to Article X:3(a) of the GATT 1994. That central aspect of the U.S. complaint – which was evident from the panel request, elaborated in U.S. submissions and statements, and well understood by the EC as evidenced by its submissions and statements – was part of the U.S. panel request whether that request is understood as encompassing the administration of EC customs law in all areas or only in certain areas (as the Panel found).

Accordingly, the United States asks the Appellate Body to reverse the Panel's finding that this claim was outside the Panel's terms of reference. Additionally, the United States asks the Appellate Body to complete the Panel's analysis based on the undisputed facts and the Panel's factual findings regarding the EC system of customs administration. In light of the Panel's factual findings that the

various institutions and mechanisms that the EC held out as securing the uniform administration of its customs laws – in an environment where administration is the responsibility of 25 separate, independent customs authorities – do not actually do so, the Appellate Body should find that the EC system of customs administration as a whole results in the non-uniform administration of EC customs law, in breach of Article X:3(a) of the GATT 1994.

II. Interpretation of the term "administer" in Article X:3(a) of the GATT 1994 as it relates to the existence of divergent penalty laws and audit procedures

The United States seeks review of the Panel's legal conclusions that the existence of divergent penalty laws and audit procedures are not inconsistent with Article X:3(a) of the GATT 1994, and the related issues of law and legal interpretation. At paragraph 7.444, for example, the Panel found "no violation of Article X:3(a) of the GATT 1994 with respect to the substantive differences in penalty laws between member States." At paragraph 7.434, for example, the Panel found "no violation of Article X:3(a) of the GATT 1994 with respect to the manner of administration of the audit procedure requirements in the European Communities by the member States applicable to goods following their release for free circulation."

In finding that the EC does not breach its Article X:3(a) obligation of uniform administration to the extent that it puts EC customs law into practical effect through divergent penalty laws and audit procedures, the Panel erred in its interpretation of the term "administer" as used in that provision. The Panel's error regarding its approach to differences in customs penalty laws is based on erroneous findings on issues of law and related legal interpretations contained in paragraphs 7.113 through 7.119, 7.442 through 7.444, and 8.1(d)(ii) of the Panel Report. Its error regarding its approach to differences in audit procedures is based on erroneous findings on issues of law and related legal interpretations contained in paragraphs 7.113 through 7.119, 7.425 through 7.434, and 8.1(d)(i) of the Panel Report.

The United States asks the Appellate Body to reverse the Panel's legal conclusions that the existence of divergent penalty laws and audit procedures are not inconsistent with Article X:3(a) of the GATT 1994. The United States further asks the Appellate Body to complete the Panel's analysis. In light of the Panel's findings and undisputed facts regarding the existence of divergent penalty laws and audit procedures, the Appellate Body should find that the EC fails to administer EC customs law in a uniform manner, in breach of Article X:3(a) of the GATT 1994, to the extent it gives effect to EC customs law through the maintenance of divergent penalty laws and audit procedures.

III. Interpretation of Article X:3(b) of the GATT 1994

The United States seeks review of the Panel's legal conclusion that "the European Communities does not violate Article X:3(b) of the GATT 1994 merely because the decisions regarding review of administration action relating to customs matters, which are taken by authorities in the member States acting as organs of the European Communities, do not apply and have effect throughout the territory of the European Communities." Panel Report, para. 7.554; *id.*, paras. 7.539, 7.556, and 8.1(e). That conclusion represents an erroneous interpretation of Article X:3(b) of the GATT 1994, which was based on erroneous findings on issues of law and related legal interpretations contained in paragraphs 7.526 through 7.538.

The United States asks the Appellate Body to reverse the Panel's erroneous interpretation of and conclusion under Article X:3(b). Further, the United States asks the Appellate Body to complete the Panel's analysis. It is undisputed that each of the tribunals and procedures the EC provides is limited to reviewing the administrative actions of the customs authority within a particular EC member State. It also is undisputed that none of these tribunals or procedures issues decisions that govern the practice of all of the agencies entrusted with administrative enforcement of the EC's customs law (that is, the customs authorities of the 25 EC member States). In light of these

undisputed facts, the Appellate Body should find that the EC is in breach of its obligation under Article X:3(b) of the GATT 1994.
