

European Communities – Selected Customs Matters, DS315 ABR (WTO 2006)

This decision results from appeals by the United States and the European Communities (EC)¹ from a World Trade Organization Panel Report titled *European Communities – Selected Customs Matters*. The US had originally claimed that the EC administers instruments of its customs laws in a non-uniform manner.² According to the US, the non-uniform administration of customs laws by the EC showed that the EC's system of customs administration, as a whole, conflicted with the uniform administration required of Article X:3(a)³ of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”). In addition, the US claimed that the EC did not promptly review and correct administrative action relating to customs matters as required by Article X:3(b)⁴ of the GATT 1994.

The first major issue raised by this appeal deals with Article X:3(a). It asks: did the Panel incorrectly find that the term “administer” relates only to the application of laws and regulations, including administrative processes and their results, but not to the laws and regulations themselves? As a result, did the Panel incorrectly find that the different penalty provisions and audit procedures of EC member states do not conflict with the uniformity required of Article X:3(a)? The second issue deals with the prompt review of administrative action required by Article X:3(b). It asks: did the Panel incorrectly find that Article X:3(b) does not require that a judicial, arbitral, or administrative tribunals’ decisions, or procedures for review and correction of customs matters, must govern the practice of all agencies entrusted with administrative enforcement of customs matters throughout the entire territory of a WTO member?

The US argued that the Panel incorrectly interpreted “administer” under Article X:3(a). The US argued that both the Panel and parties had agreed that substantive differences exist between the penalty provisions and audit procedures of the individual EC member states. Because of these differences, the US argued that the laws themselves

¹ Japan and Korea filed third participant’s submissions under Rule 24(1) of the Working Procedures. Argentina, Australia, Brazil, China, Hong Kong, China, India, and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu each notified the Appellate Body Secretariat that they intended to appear at the oral hearing as third participants under Rule 24(2) of the Working Procedures.

² They are: 1) Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code, 2) Commission Regulation (EEC) No. 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No. 2913/92 of 12 October 1992, 3) Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, and 4) the Integrated Tariff of the European Communities established by virtue of Article 2 of Council Regulation (EEC) No. 2658/87 of 23 July 1987.

³ Article X:3(a) states: Each Member shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

⁴ Article X:3(b) states: Each Member shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts. (original emphasis).

create a non-uniform application of the EC customs law by its member states. The US also argued that the Panel incorrectly interpreted Article X:3(b) in finding the current EC tribunal and review procedures WTO consistent. The US argued that the Panel must read Article X:3(b) in light of Article X:3(a)'s uniformity requirements and that decisions by one reviewing tribunal must apply to all agencies that enforce customs law throughout the EC. Otherwise, the geographically limited jurisdiction of the EC member states results in a geographically fragmented administration of tribunal procedures.

In response, the EC argued that the US had not proved that differences in penalty laws and audit procedures between EC member states automatically lead to non-uniformity of customs laws. The EC argued that the binding principles of EC customs law prevent this result by requiring penalties and audit procedures that are effective, proportionate, and dissuasive. These principles, the EC argued, ensure uniform application of customs law throughout the EC. The EC also argued that Article X:3(b) does not require that one tribunal's review of administrative action of customs law binds all agencies throughout the EC. The EC argued that review by their member state's national courts does not necessarily lead to non-uniform review throughout the EC. Instead, they argue that the national courts, though separate when deciding national legal issues, functionally belong to the EC's legal order when reviewing cases concerning EC law and are bound by prior decisions of the Court of Justice of the EC.

In their decision, the WTO Appellate Body ("AB") reversed the Panel's decision that Article X:3(a) always relates to the application of customs laws, but not to the laws themselves. The AB, however, upheld the Panel's decision that the substantive differences in penalty laws and audit procedures among EC member states do not violate Article X:3(a) on their own. The AB noted that the US offered no evidence about the degree of difference between penalty laws and audit procedures created by the various member states of the EC. It also noted that the US had not offered evidence about the impact of such differences. Additionally, the AB upheld the Panel's decision that Article X:3(b) does not require that the decisions of a judicial, arbitral, or administrative tribunal reviewing customs matters must necessarily govern the practices of all agencies enforcing customs laws throughout a WTO member's territory. In reaching this decision, the AB noted that Article X:3(b) relates to first instance review, and contemplates appeals to higher bodies with superior jurisdictions. This suggested to the AB that the review required by Article X:3(b) need not extend to the entire territory of a WTO member.

Full text of the case is available at the WTO Website
(http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds315_e.htm).