World Trade Review (2009), 8: 1, 45–48 Printed in the United Kingdom
© Joost Pauwelyn doi:10.1017/S1474745608004217

Comment

Nothing dramatic (… regarding administration of customs laws)

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Hoekmand and Mavroidis have it right when they claim that *EC–Selected Customs Matters* amounts to 'nothing dramatic'. But it could have been different. When the case was first filed, many saw it as 'the mother of all customs disputes' or, at the very least, a crucially important challenge to the very structure of how customs matters are decided and implemented within the EC and how, in this respect, powers are divided between the EC institutions (Council, Commission, and EC Courts) and the institutions of its member states.

Customs matters in the EC are run in a rather peculiar way. The EC as a supranational body has 'exclusive competence' over the administration of customs matters in respect of all goods entering the EC customs union. That much can be expected from a customs union. Yet, when it comes to the execution of EC customs law, that is the day-to-day implementation of EC customs laws including product-classification decisions and decisions on audits or penalties for breach, this task remains in the hands of the administrations and courts of individual EC member states (albeit with oversight, of course, by the EC Commission and the EC Courts). This amounts to what has been referred to as 'executive federalism' (to be distinguished from, for example, US federalism, which generally prohibits so-called 'commandeering' by the federal level of the state level, a difference that may explain why the United States, being a federal state itself, did not hesitate to challenge the EC over its particular form of federalism). Although the division of powers and 'subsidiarity' inherent in this type of 'executive federalism' was no doubt politically palatable for policymakers within the EC (even if, as Hoekman and Mavroidis point out, 'from an economic perspective it is not clear why an importing country would permit non-uniformity in the first place'), for foreign traders doing business with the EC it surely complicates matters. For one thing, it meant that the same LCD monitor shipped from the United States was classified as a 'video monitor' when entering one EC member state (paying the EC tariff of 14%), but as a 'computer monitor' (paying no EC duties) when entering another. Although this ended up being the sole and rather limited finding of violation in the entire case, the fact that the Appellate Body concluded that such differential classification of LCD monitors within the EC amounts to 'non-uniform

https://doi.org/10.1017/S1474745608004217 Published online by Cambridge University Press

administration' of customs laws in violation of GATT Article X:3(a) is very important. From this perspective, *EC–Selected Customs Matters* is but one dispute in a larger series of cases challenging, in particular, divergent customs classifications within the EC, such as *EC–LAN Equipment*, *EC–Chicken Cuts*, and, most recently, *EC–Tariff Treatment of Certain Information Technology Products* (a US complaint, filed in May 2008, regarding, *inter alia*, the classification of flat-panel displays). In all of these cases, a lot is at stake both financially (the difference between 14 % and zero duties is enormous) and institutionally (again, it goes to the heart of the EC's institutional setup).

So why did the outcome of this much-anticipated dispute turn out to be 'nothing dramatic'? One explanation could be found in the way the United States framed and litigated the matter. Another rests, no doubt, with a number of procedural rulings by the original Panel, which clipped the wings of much of the substance of the US complaint. First, the Panel decided that the core US challenge against the EC system of customs administration 'as a whole or overall' was outside its terms of reference. As Hoekman and Mavroidis explain, the Appellate Body reversed this ruling, but by then it was too late, since the Appellate Body, for lack of sufficient evidence on the record, was unable to complete the analysis. The absence of remand power – that is, for the Appellate Body to send the case back to the original Panel – meant that the US claim became stranded here and there.

Second, the Panel concluded that, since GATT Article X:3(a) – prescribing uniform administration of, *inter alia*, customs laws – applies only to the 'administration' of legal instruments and not to the 'substantive content' of legal instruments, 'laws and regulations themselves', including divergent penalty and audit provisions in EC member states, fall *outside* the scope of Article X:3(a). Fortunately, the Appellate Body reversed this formalistic finding and applied Article X:3(a) also to 'laws and regulations themselves' for as long as they, in turn, regulate the administration of *other* legal instruments, *in casu*, the substantive EC customs laws to which the penalty and audit provisions relate. Yet, even after this reversal, the Appellate Body could not move much further, since before the Panel the effects of the differences in penalty provisions in terms of actual non-uniform administration had not been established. So, in this instance as well, the US complaint was stranded.

Although the specific case thus ended on quite an anticlimax, the Appellate Body's reversal on both of the above points is probably the legacy of *EC–Selected Customs Matters*. These reversals constitute a crucial safeguard for the future operation and reach of GATT Article X. The importance of the 'publication and administration' provisions in Article X is clearly on the rise, not only in terms of cases brought under Article X (which in itself is a novelty), but also in terms of Article X's future impact on enhancing transparency and good governance in economies in transition such as China or Russia, and the role Article X is playing as a launching pad for ongoing negotiations on the broader topic of so-called trade facilitation.

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There remains the question of which track future complainants should choose when considering a challenge against 'non-uniform' applications of laws or regulations within another WTO Member (as Hoekman and Mavroidis point out, this could include sensitive questions such as corruption or, one might add, political censorship). Several elements may play a role.

First, the traditional avenue of nondiscrimination under GATT Articles I or III focuses on national origin of the product, and may not cover the complaint. In *EC–Selected Customs Matters*, for example, the United States was not complaining about any discrimination against US products as compared to other imports or domestic EC products, but rather about a discrepancy in treatment of the same US product depending on where that product entered the EC. Second, as Hoekman and Mavroidis point out, a complaint targeted at the substantive treatment of specific imports under Articles I, II, or III assumes that there is a high degree of certainty about the treatment imports are likely to get. Yet uncertainty – or not knowing how much in import duties you will have to pay because the importing country is not transparent, is corrupt, or is otherwise non-uniform – is most often at the core of the problem. Traders may be able to live with non-uniform duties as long as they are predictable (as Hoekman and Mavroidis illustrate, traders may even prefer non-uniformity, as it allows arbitrage – that is, goods can then be shipped to those ports where the lowest duties apply). However, uncertainty is another matter and something businesses abhor. (For one thing, by definition, uncertainty does not allow for calculated arbitrage.)

Third, when the importing country is a customs union, non-uniformity in customs matters may mean that duties and other regulations of commerce are no longer 'substantially the same'. This, in turn, opens the alternative of challenging the non-uniformity under GATT Article XXIV:8. When Hoekman and Mavroidis ask why the United States in *EC–Selected Customs Matters* did not bring a complaint under Article XXIV, the answer likely goes beyond what they call the 'glass house' syndrome (i.e., the US being afraid of Article XXIV subsequently being held against it in respect of NAFTA and other US free-trade agreements (FTAs)). Indeed, whereas under Article X the analysis is limited to one or more specific laws or regulations or applications thereof, to establish a violation of Article XXIV, the entire gamut of duties and other regulations of commerce must be examined. This is the legacy of the Appellate Body report on *Turkey–Textiles*; it makes the evidentiary burden and fact-collection process for any Article XXIV claim extremely burdensome, and cost-effective only if one truly wants to challenge the entire customs union or FTA. Moreover, whereas Article X remains silent on what to do with sub-federal entities, Article XXIV:12 includes an explicit *caveat* in this respect, limiting the obligation of, for present purposes, the EC to take 'such reasonable measures as may be available to it'. In a questionable ruling, the Panel in *EC–Selected Customs Matters* explicitly found that this *caveat* in Article XXIV:12 has no impact whatsoever on the uniformity standard in Article X as it applies to customs unions or FTAs. This flexibility present in Article XXIV, but

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(at least according to the Panel) not available under Article X, could be another reason why complainants, like the United States, choose to submit their case under Article X rather than Article XXIV. Finally, the remedy under Article XXIV may also be less predictable or useful than that under other GATT provisions. The remedy for violation of Article II is likely to be a lower tariff within the agreed ceiling; the remedy for violation of Article I or III, equal treatment. The remedy for violation of Article X, in turn, is publication or uniform treatment as regards the specific law or regulation at issue (think, for example, of LCD monitors). In contrast, the requirement of having 'substantially the same duties and other regulations of commerce' under Article XXIV:8 can be met in many ways other than harmonizing, for example the treatment of LCD monitors. Since some flexibility is allowed (not all duties and regulations must be the same, only 'substantially all'), the non-uniform treatment of greatest interest to the complainant could always be maintained and some other discrepancy removed for the defendant to fall in line with Article XXIV. In sum, after being neglected for over 50 years, GATT Article X has a bright future ahead of it or, at least, a brighter one than that of GATT Article XXIV.

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