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US CUSTOMS MOVE CATCHES EU OFF GUARD

By Graham Austin

European policymakers and business interests were taken by surprise in mid-September when the United States launched a World Trade Organisation complaint against the EU, alleging that the 25 Member States have an array of inconsistent customs rules and procedures, which constitute a barrier to US export.

EU officials such as Pascal Lamy, the EU's trade commissioner, expressed bewilderment at the US action because it was taken at the WTO rather than in the EU-US joint customs council or other bilateral venue.

Japan and Australia have recently announced they are supporting the USA's complaint, given credence to the widespread belief in Europe that US action is politically motivated (both countries being coalition partners in the Iraq War). In simplistic terms, the Bush Administration and its allies could be seen to be punishing Europe for opposing various aspects of its foreign policy.

There are serious and far ranging implications presented by the US action, including significant penalties for EU companies and US-based operations. These implications are outlined in detail below. Close monitoring of developments and positioning of issues with both EU players and US bodies will be crucial and companies are advised to consider the full impact to their customs related operations of successful US action at the WTO.

Background:

The EU and the USA have had a number of significant disputes at the WTO recently, with the Union winning its actions on US steel tariffs, leading to billions of dollars in retaliation and the USA's 'Byrd amendment' on anti-dumping, which the WTO found unlawful under international trade rules.

EU Customs Law and Business

The European Union is not a State or federation but an international organisation, which introduces legislation the Member States apply nationally.

Customs Legislation was amalgamated into the Community Customs Code (the Code) at the advent of the Single Market and it contains the basic rules traders must follow to classify, import, export or enter goods onto the EU marketplace, as well as other related matters, such as liabilities, debts and appeals against official decisions.

The Code is enacted by implementing provisions, which are extremely complex and detailed. Consequently, it is often difficult for EU operators, even global companies, to organise their EU customs affairs efficiently and profitably without specialist advice or assistance and many overlook the possibilities to use the regulations more efficiently to improve margins and cash-flows. This has led to the current discussions to revolutionise the Code and its implementing regulations, creating both significant opportunities and implications for EU economic operators.

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The current modernisation discussions arose because the Union's subsidiarity rules allow Member State customs authorities to interpret and apply the Code nationally against local conditions. This can result in administrative differences. For example, some northern Member States tend to make entry into a customs regime as easy as possible, with the minimum of formalities required under the law, but other States apply allowable simplified procedures as an exception. The European Commission only intervenes where a weakness is found in the law, or the manner it is applied leads to a distortion of trade or where national application creates a 'Community Own resources' problem.

The WTO Disputes Procedure

Dispute Settlement Body settles disputes (DSB). It is effectively the General Council and has the sole authority to establish expert "panels". It can accept or reject the panels' findings or the results of an appeal and monitors the implementation of the rulings and recommendations and authorise retaliation when a country does not comply with a ruling.

Sixty days are granted for 'consultation' between the sides involved. The appellant country can request a panel to be appointed, which can take up to forty-five days if this fails. Officially, the panel helps the DSB make rulings or recommendations. Panel conclusions are difficult to overturn because only the DSB can take such action. The Panel aims to report to the dispute parties within six months. This can be shortened to three months in urgent cases.

A final report is submitted to dispute parties at the end of the process. If it is decided that a trade measure does break WTO agreements or obligations and it can recommend retaliation through increased tariffs. The full process can take up to eighteen months.

The USA Action at the WTO

The action, launched by the US Trade Representative *Robert B. Zoellick* on 21 September, holds major implications for all EU-based companies of all profiles. The timing falls politically at a difficult time for the EU because of enlargement, a new European parliament and importantly, the transition between the outgoing and incoming Commission.

The USA argues that variations in applying the Code within twenty-five different EU customs authorities cause problems that burden all traders. This is compounded by an inability to obtain prompt EU-wide reviews of national administrative decisions. In many respects the roots of this action can be traced as far back as the 'Fortress Europe' concerns expressed by the US during the creation of the Internal Market. The US cites three main points to support the action:

- The EU enlargement to twenty-five Member States and the perceived lack of uniform customs administration, which the US argues is a trade barrier, expanded accordingly – hitting US exporters seriously,
- Enhancing trade facilitation is a key part of the Doha Development Agenda. The United States believes pressing the EU to administer its customs laws and regulations in a uniform manner will help to advance that part of the agenda, *and*

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- The allocation of responsibilities between national authorities and the EU level means that the US cannot achieve necessary systemic solutions on either individual or sector-wide cases.

If the USA's complaint is not resolved and it develops into a full 'Dispute Procedure':

- Success by the US at the WTO could lead to significant penalties for both natural EU companies and US based operations identically, possibly in agriculture, electronics, steel, chemicals and textiles exports,
- The level of penalty arising from a successful case at the WTO is likely to be based on \$155.2 billion, which the US exported to the EU-25 in 2003,
- The action would call into question EU subsidiarity for national customs authorities to apply and enforce EU law, *and*
- Action at the WTO could provide an argument for some of the less ambitious EU actors involved in the modernisation of the Customs Code to deflate the momentum for essential change until after the dispute has been settled.

Conclusions:

The complaint laid by the USA could grow into a fundamental issue. It is not about one aspect or another of a customs system, but the whole of the EU customs structure. One could question whether the Bush Administration has adequately considered the possible results of their action, both in commercial as well as political terms.

Now that the EU of twenty-five countries is a reality, the USA seem to have chosen their timing to coincide with key EU transitional events, such as the new European Parliament and more importantly, the changeover between the outgoing and new Commission.

At the political level it calls into question subsidiarity for national customs authorities to apply and enforce EU law. At the business level, success could lead to significant penalties for EU based exporters, affecting both natural EU companies and US based operations identically.

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