EUROPEAN COMMUNITIES - SELECTED CUSTOMS MATTERS

(WT/DS315)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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GATT Panel Report, *Alcoholic Drinks*	GATT Panel Report, *Panel on Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, L/6304, BISD 35S/37, adopted March 22, 1988
Panel Report, *Argentina - Hides*	Panel Report, *Argentina - Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, adopted February 16, 2001
GATT Panel Report, *Canada - Gold Coins*	GATT Panel Report, *Canada - Measures Affecting the Sale of Gold Coins*, L/5863, September 17, 1985, not adopted
Appellate Body Report, *EC - Bananas III*	Appellate Body Report, *European Communities - Regime for the Importation, Distribution and Sale of Bananas*, WT/DS27/AB/R, adopted September 25, 1997
Panel Report, *EC - Chicken*	Panel Report, *European Communities - Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/R, WT/DS286/R, adopted September 27, 2005, as modified by Appellate Body Report
GATT Panel Report, *US - Beverages*	GATT Panel Report, *United States - Measures Affecting Alcoholic and Malt Beverages*, DS23/R, BISD 39S/206, adopted June 19, 1992
Panel Report, *US - Hot-Rolled Steel*	Panel Report, *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted August 23, 2001, as modified by Appellate Body Report
Appellate Body Report, *US - Shrimp*	Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted November 6, 1998
Panel Report, *US - Steel Sunset*	Panel Report, *United States - Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, adopted January 9, 2004, as modified by Appellate Body Report

I. INTRODUCTION

1. The 25 member States of the European Communities ("EC") do not act as one when it comes to the administration of EC customs law or the review and correction of customs administrative decisions. Twenty-five member State customs authorities act independently of one another, and the EC itself does not reconcile divergences among member States so as to achieve uniform administration of EC customs law across the territory of the EC; this is inconsistent with the EC's obligation under Article X:3(a) of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). Moreover, the existence of a diverse array of member State tribunals that review customs decisions – each with jurisdiction confined to a limited geographical region – does not discharge the *EC's* obligation under GATT 1994 Article X:3(b) to provide tribunals or procedures whose decisions govern the practice of "*the* agencies entrusted with administrative enforcement" of EC customs law throughout the EC's territory.

2. Even though the EC in this proceeding disputes the U.S. claims, the EC and EC officials have readily acknowledged the underlying problem in statements outside the dispute settlement context. Thus, in its comments on the EC Court of Auditors report on the administration of customs valuation rules, the EC Commission stated:

> The objective that for all trade in goods the Community should operate as a real customs union with uniform treatment of imported goods can be fully obtained only if this customs union is operating on the basis of a single customs administration, which is not the case.[1]

Likewise, in addressing a major conference on reform of the Community Customs Code this past March, the EC's Commissioner for Taxation and Customs Union openly referred to the problem

[1] Court of Auditors, Special Report No 23/2000 concerning valuation of imported goods for customs purposes (customs valuation), together with the Commission's replies, reprinted in *Official Journal of the European Communities* C84, p. C 84/13 (Mar. 14, 2001) (Exh. US-14) ("Court of Auditors Valuation Report").

of "divergent application of the common rules."[2]

3. Not surprisingly, uniformity is a goal to which the EC aspires. For example, in the Decision adopting the EC's "Customs 2007" program, the European Parliament and the Council of the European Union called for the continuous adaptation of customs policy "to ensure that national customs administrations operate as efficiently and effectively as would one single administration."[3] However, the system of customs administration and review currently in place not only falls far short of that goal, it also falls far short of the requirements of GATT 1994 Article X:3 involving uniform administration and prompt review and correction, and therefore is in breach of that article.

4. Several key themes have emerged in the EC's response to U.S. claims, which the United States will address in the following sections of this submission. First, the EC urges a *relative* standard for assessing its compliance with GATT 1994 Article X:3, that is, a standard that accommodates particular features of its system. Second, the EC seeks to make GATT 1994 Article X:3(a) a mere "minimum standards," "subsidiary" provision, and contends that it is not enough that a Member's administration be non-uniform, but rather, for the EC, a Member breaches its obligation under that provision only when the non-uniform administration exhibits a pattern. Third, the EC asserts that uniformity of administration of EC customs law is in fact achieved through various EC instruments that are non-binding, discretionary, or extremely general in nature (most notable of which is the member States' general duty of cooperation under

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[2] László Kovács, Commissioner for Taxation and Customs Union, Speech delivered at the International Conference on the Modernised Customs Code, p. 1 (Mar. 9-11, 2005) (Exh. US-1).

[3] Decision 253/2003 of the European Parliament and the Council adopting an action programme for customs in the Community (Customs 2007), p. L 36/1 (Exh. EC-43).

Article 10 of the EC Treaty), as well as through traders pursuing litigation through member States' courts, with the eventual possibility of preliminary references of questions of EC law to the Court of Justice of the European Communities ("ECJ"). Fourth, even where the EC admits that administration varies from member State to member State with regard to certain matters, such as penalties and audits, the EC seeks to dismiss the non-uniform administration by arguing that these areas are not subject to the EC's obligations under Article X:3(a). Finally, the EC rejects the proposition that the review tribunals or procedures that a WTO Member provides pursuant to GATT 1994 Article X:3(b) must be tribunals or procedures whose decisions are given effect throughout the Member's territory, so as to govern the practice of "the agencies entrusted with administrative enforcement" of customs measures.

5. The United States will counter each of these arguments in turn. Before doing so, it is necessary to discuss two general points that cut across the EC's various arguments. First, the EC repeatedly strikes an alarmist tone in responding to the U.S. arguments. It states, in effect, that making the findings the United States requests would be bad for the WTO system. For example, the EC accuses the United States of using Article X:3 as "a legal basis for the harmonisation of the systems of customs administration of WTO Members."[4] It submits that acceptance of the U.S. arguments also would have the dire consequence of compelling harmonization of non-customs-related regulations typically prescribed and administered at regional or local levels of government.[5] And, it suggests that the logic of the U.S. argument with respect to Article X:3(b) would require every WTO Member to institute a single tribunal for the review of customs

[4] EC Oral Statement at First Panel Meeting., para. 15; *see also id.*, para. 34.

[5] EC Replies to Panel Questions, paras. 193-195.

decisions throughout its territory.[6]

6. The Panel should regard the EC's prediction of widespread upheaval with a healthy dose of skepticism. Nowhere does the United States argue that Article X:3 compels WTO Members to have identical systems for customs administration and review, nor is that the implication of U.S. arguments. The EC's assertion that the United States has adopted such a "maximalist approach"[7] is baseless. What the United States does contend is that whatever system of customs administration a WTO Member has in place must satisfy the obligation of administration in a uniform, impartial and reasonable manner.

7. Similarly flawed is the proposition that accepting the U.S. arguments will lead to a requirement of harmonization of non-customs-related provisions typically regulated at the regional or local level of government. The EC draws that inference from the fact that the United States calls attention to certain tools of administration of EC customs law – in particular, penalty provisions and audit procedures – which vary dramatically from member State to member State. However, the EC disregards that the U.S. argument is directed at laws and regulations at the sub-federal (*i.e.*, member State) level that are used to verify and enforce compliance with laws and regulations prescribed at the federal (*i.e.*, EC) level. The U.S. argument is not directed at the vast body of laws and regulations at the sub-federal level that have nothing at all to do with verification and enforcement of compliance with other laws and regulations or that concern only verification and enforcement of compliance with other sub-federal laws and regulations.

8. Moreover, in suggesting that the logic of the U.S. argument on Article X:3(b) would

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[6] *See generally* EC Oral Statement at First Panel Meeting, para. 69. The EC elaborated on this point in its interventions at the first Panel meeting.

[7] EC Oral Statement at First Panel meeting, para. 14.

force every WTO Member to have a single, centralized customs court, the EC again distorts the U.S. position. It is not the U.S. view that Article X:3(b) requires every WTO Member to have a single, centralized customs court. It is the U.S. view that Article X:3(b) requires every WTO Member to have review tribunals or procedures whose "decisions . . . govern the practice of" "the agencies entrusted with administrative enforcement" of its customs laws. Where a Member has a single customs authority, for example, it may be able to accomplish that through multiple customs courts, each with jurisdiction over a certain part of the Member's geography. In that case, the single customs authority should be able to take the steps necessary to ensure that the decision of a court for any particular region "govern[s] the practice of" the customs authority throughout the territory of the Member. But, this does not occur where, as in the EC, fragmentation of review is coupled with fragmentation of administration. The EC appears to be unique among WTO Members in this regard.

9. In sum, it is only through gross mischaracterization of U.S. claims that the EC can pretend that acceptance of those claims would result in systemic upheaval for the WTO. Far from implying a broad new set of obligations for all WTO Members, the U.S. claims identify problems unique to the EC's compliance with existing WTO obligations. The United States knows of no other WTO Member in which customs administration is the responsibility of 25 different autonomous agencies and review is also fragmented along regional lines.

10. Just as the Panel should not be swayed by the EC's prediction of a parade of horribles should it accept the U.S. arguments, it also should not be swayed by the EC's contention that coming into compliance with its obligations would be difficult.[8] Difficulty of coming into

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[8] *See*, *e.g.*, EC Oral Statement at First Panel Meeting., paras. 7-8, 61.

compliance has no bearing on whether the EC is or is not currently in compliance with its obligations under GATT 1994 Article X:3. The implication of the EC's argument appears to be that the WTO Members could not possibly have contemplated that complying with WTO obligations would require a Member to undertake difficult changes to its system. Therefore, according to this reasoning, Article X:3 cannot possibly mean what the United States says it means.

11. This argument – that the meaning of a treaty provision should be established according to the relative difficulty a particular party would face in complying with the provision as so interpreted – has no basis in the customary rules of treaty interpretation of public international law. Relative difficulty of compliance sheds no light on the ordinary meaning of the treaty's terms. Nor is it an element of context or the treaty's object and purpose.

II. GATT 1994 ARTICLE X:3 DOES NOT CONTAIN A RELATIVE, MEMBER-SPECIFIC STANDARD

A. The obligations in GATT 1994 Article X:3 do not vary according to the particular features of a Member's customs administration system.

12. The EC incorrectly urges on the Panel a relative view of Article X:3(a).[9] The EC suggests that the obligation of uniform administration may mean different things for different WTO Members, depending on the design of each Member's customs administration system. For example, in response to the Panel's Question 45, the EC states, "At what point instances of non-uniformity would have to be regarded as so widespread and frequent as to constitute an overall pattern of non-uniformity will have to be decided on the facts of the particular case, *taking into*

[9] Although the EC asserts that it "does not claim that it is in any way subject to different or lesser obligations under Article X GATT than other WTO Members," (EC Oral Statement at First Panel Meeting., para. 9), its arguments belie that assertion.

account the features of the system of customs administration in question."[10] Similarly, the EC endorses Japan's statement that compliance with Article X:3(a) must be analyzed "in light of the particular customs system as a whole."[11]

13. A relative standard is also suggested by the EC's allusion to GATT 1994 Article XXIV:12. That article simply provides that each WTO Member "shall take such reasonable measures as may be available to it to ensure observance of the provisions of [the GATT 1994] by the regional and local governments and authorities within its territories." It is not applicable here, because the present dispute does not concern "observance of the provisions of [the GATT 1994] by the regional and local governments and authorities" in the EC. Rather, it concerns observance of the provisions of Article X:3 of the GATT 1994 by the EC itself.

14. Moreover, the EC does not formally invoke Article XXIV:12, but it does argue that "any interpretation of Article X:3(a) which would affect the internal distribution of competence is incompatible with Article XXIV:12 GATT."[12] The EC appears to be trying to turn Article XXIV:12 on its head. Paragraph 13 of the *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994* makes it clear that Article XXIV:12 does not excuse or alter a Member's obligations. That paragraph explicitly states that "[e]ach Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994." The EC instead seems to be saying that read in light of Article XXIV:12, Article X:3(a)

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[10]EC Replies to Panel Questions, para. 11 (emphasis added).

[11]EC Replies to Panel Questions, para. 204 (referring to Japan Third Party Submission, para. 8). *See generally* EC First Written Submission, para. 204 (urging that EC's obligation under GATT 1994 Article X:3(a) be understood in light of its choice of a system of "executive federalism"); EC Oral Statement at First Panel Meeting., para. 12 (same).

[12]EC First Written Submission, para. 220; *see also* EC Replies to Panel Questions, para. 113.

will mean different things for different Members. Where one Member has decided that, as a matter of "the internal distribution of competence," certain tools for the administration of its customs law (such as penalties and audits) are to be prescribed and applied by regional governments, Article X:3(a) simply does not apply to those aspects of administration of the Member's customs law, according to the EC, whereas it does apply to such aspects in the case of other Members that have decided that such tools should be prescribed and applied by the central government.

15. This construction of Article X:3(a) as applying differently to different Members has no basis in Article X:3(a) or in Article XXIV:12.[13] As the United States discussed in response to the Panel's Question 120, Article XXIV:12 does not constitute an exception to Article X:3(a). It does not limit or otherwise qualify the obligation of uniform administration. Indeed, Article XXIV:12 does not qualify the *applicability* of GATT obligations at all. Rather, it is a narrow provision concerning the *implementation* of certain obligations, which must be construed to avoid "imbalances in rights and obligations between unitary and federal States;"[14] that is, it must be construed in a way that does not excuse Members from particular obligations because of their federal structure.

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[13] *See generally* Korea Third Party Submission, para. 10 ("The unique characteristics [of the EC system] . . . should not be referred to as a pretext to deviate from otherwise applicable WTO obligations, including GATT 1994."); Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu Third Party Submission, para. 4 ("[T]he structure and organization of a Member's government should not diminish in any way a Member's obligations under the WTO."); China Oral Statement at Third Party Session, para. 6 ("[T]he obligation of uniform administration should not be varied."); Korea Oral Statement at Third Party Session, para. 5 ("The unique characteristics [of the EC system] . . . should not become a pretext for deviating from otherwise applicable WTO obligations, including GATT 1994.").

[14] GATT Panel Report, *Canada – Gold Coins*, paras. 63-64; *see also* GATT Panel Report, *US – Beverages*, para. 5.79 (supporting narrow construction of Article XXIV:12). *See* U.S. Answers to Panel Questions, para. 188; *see also* China Third Party Submission, paras. 4-8 (discussing inapplicability of GATT 1994 Article XXIV:12 to the present dispute).

16. That GATT 1994 Article XXIV:12 does not support a construction of Article X:3(a) that varies from Member to Member is further demonstrated by contrasting that provision to a provision in another WTO agreement – the *General Agreement on Trade in Services* ("GATS") – that does, in fact, qualify Members' obligations. GATS Article VI:2(a), like GATT 1994 Article X:3(b), requires Members to provide tribunals or procedures for the prompt review of certain administrative decisions. However, that obligation is expressly qualified in the next subparagraph, which states that "subparagraph (a) shall not be construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system." No similar exception appears in GATT 1994 Article X:3. The Panel should reject the EC's attempt to reinvent GATT 1994 Article XXIV:12 as limiting GATT 1994 Article X:3(a) in the manner that GATS Article VI:2(b) limits GATS Article VI:2(a).

17. Moreover, it should not pass without notice that despite its oblique assertion of "constitutional implications"[15] and its reference to "fundamental principles of the EC legal order,"[16] the EC does not formally invoke Article XXIV:12. Had it done so, it would have had the burden to demonstrate that lapses in the uniform administration of EC customs law concern matters "which the central government cannot control under the constitutional distribution of powers."[17] Evidently this is a burden that the EC is not prepared to assume. Thus, the EC seeks

[15]EC Oral Statement at First Panel Meeting, para. 6.

[16]EC Oral Statement at First Panel Meeting, para. 7.

[17]GATT Panel Report, *US - Beverages*, para. 5.79; *see also* GATT Panel Report, *Alcoholic Drinks*, para. 4.34 ("[T]he Panel concluded that Canada would have to demonstrate to the CONTRACTING PARTIES that it had taken all reasonable measures available and that it would then be for the CONTRACTING PARTIES to decide whether Canada had met its obligations under Article XXIV:12.").

to derive a supposed benefit from reference to Article XXIV:12, in the form of a Member-specific construction of its obligation under Article X:3(a) (though Article XXIV:12 would not support such a construction even if properly invoked), while avoiding the burden associated with invocation of that provision.

B. The United States does not seek the harmonization of WTO Members' customs administration systems.

18. Finally, an essential aspect of the EC's urging a relative standard for application of Article X:3 is its mischaracterization of U.S. claims as seeking "the harmonisation of the systems of customs administration of WTO Members through the DSU."[18] Thus, the EC presents a caricature of the actual U.S. claims: It depicts the United States as attempting to get every WTO Member to adopt a system of customs administration modeled on the U.S. system. In arguing against this caricature of the U.S. position, the EC implicitly advances its pursuit of a construction of the Article X:3(a) obligation that varies according to each Member's customs administration system.

19. In fact, the United States does *not* seek the harmonization of WTO Members' customs administration systems. Contrary to the EC's assertion,[19] the United States does not argue that Article X:3 requires each Member to have a single customs agency and customs court. The United States recognizes the diversity of systems of customs administration among WTO Members, which is evidenced in part by the responses to the Panel's Questions 10 and 11 to third

[18]EC Oral Statement at First Panel Meeting, para. 15; *see also id.*, para. 23.

[19]EC Oral Statement at First Panel Meeting, para. 11.

parties.[20] There, the Panel asked how the third parties ensure geographical uniformity of administration of their respective customs laws and how they discharge the obligations under GATT 1994 Article X:3(b). The responses provided by three of the third parties (Japan, Korea, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu) demonstrate the diversity of customs administrative and review systems among three major WTO Members. The United States does not contend that these Members or any other Member must conform to a single model of customs administration and review.

20. It is notable, however, that each of these third parties prominently identified the existence of a single, centralized customs agency in explaining how it ensures uniform administration of customs laws across its territory.[21] As the United States discussed at the first Panel meeting, while establishment of a single, centralized customs agency may not be compelled by Article X:3(a), establishing such an agency is the principal manner by which the United States understands the vast majority of WTO Members (if not all WTO Members) to have undertaken to discharge their obligation under that article. Just as it would be improper for the United States to argue that Article X:3(a) requires harmonization of Members' systems of customs administrations, it is improper for the EC to argue that its unique status within the WTO as perhaps the only Member without a single, centralized customs agency makes it subject to a different standard with respect to the obligation of uniform administration.

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[20] *See* Japan Replies to Panel Questions to Third Parties, paras. 8-15; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu Replies to Panel Questions to Third Parties, pp. 1-2; Korea Replies to Panel Questions to Third Parties, pp. 3-4.

[21] *See* Japan Replies to Panel Questions to Third Parties, para. 8 ("Japan Customs administrates various measures to ensure the uniform customs administration. . . ."); Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu Replies to Panel Questions to Third Parties, p. 1 ("There is also a central government agency responsible for the oversight and monitor of customs administration."); Korea Replies to Panel Questions to Third Parties, p. 3 ("all customs-related issues are monitored and coordinated by a single government agency").

III. GATT 1994 ARTICLE X:3(A) IS NOT A "SUBSIDIARY," "MINIMUM STANDARDS PROVISION" THAT IS BREACHED ONLY WHEN THE NON-UNIFORM ADMINISTRATION OF A MEMBER'S CUSTOMS LAWS EXHIBITS A DISCERNIBLE PATTERN

A. There is no basis for the EC's characterization of GATT 1994 Article X:3(a) as a "subsidiary," "minimum standards provision."

21. In its oral statement at the first Panel meeting and its responses to the Panel's questions, the EC persists in characterizing Article X:3(a) as "a minimum standards provision."[22] As if to underscore the diminished place that this obligation has, in the EC's view, among the array of obligations set forth in the GATT 1994, the EC also describes Article X:3(a) as "a subsidiary provision."[23]

22. It is not clear how the EC makes the distinction between GATT provisions with primary status and those with "subsidiary" status. What is clear is that its characterization of Article X:3(a) is based entirely on a passing reference by the Appellate Body in its report in *US - Shrimp*.[24] That statement, however, does not support the diminished significance the EC attaches to Article X:3(a).

23. The EC misreads the phrase "minimum standards" as used in the *US - Shrimp* report to mean, in effect, "low standards" or "minor standards." In context, however, it is clear that this was not the sense in which the Appellate Body used the term. At issue was a law for which the United States had invoked an exception under Article XX of the GATT. The question for the

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[22]EC Oral Statement at First Panel Meeting, para. 24; *see also id.*, para. 25; EC Replies to Panel Questions, para. 196. *See generally* U.S. Oral Statement at First Panel Meeting, paras. 14-23 (discussing error in EC's belittling of obligation of uniform administration under GATT 1994 Article X:3(a)).

[23]EC Oral Statement at First Panel Meeting, para. 24.

[24]*See* EC Oral Statement at First Panel Meeting, para. 24 (citing Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, para. 183 (adopted Nov. 6, 1998) ("*US - Shrimp*")); EC First Written Submission, para. 231 (same).

Appellate Body was whether the requirements in the chapeau of Article XX had been met – in particular, whether the measure had been applied in a manner constituting "arbitrary discrimination between countries where the same conditions prevail." In analyzing that question, the Appellate Body looked to Article X:3 as a provision establishing requirements analogous to "due process" that would be relevant to analyzing whether the requirements in the chapeau of Article XX had been met.[25] However, the Appellate Body was not probing how strict or lenient the Article X:3 standard is, as it might have done if it were reviewing a measure it considered to come close to the line. In fact, it found it to be clear that various aspects of the measure at issue were "contrary to the spirit, if not the letter, of Article X:3 of the GATT 1994."[26]

24. Thus, in context, it is evident that in using the phrase "minimum standards," the Appellate Body in *US - Shrimp* was not making a judgment about how high or low the Article X:3 threshold is, only that there is a threshold that must be met. It did not need to characterize that threshold, given its view of the measure before it. The EC's reliance on the Appellate Body's passing reference is, accordingly, misplaced.

25. In any event, as discussed in the U.S. oral statement at the first Panel meeting, it is not clear how the EC's characterization of Article X:3(a) as a "minimum standards provision" translates into a legal standard that may be applied by the Panel.[27] In its interventions at the first Panel meeting and in its written responses to the Panel's questions, the EC suggests that in using "minimum standards" and similar phrases, what it really meant was that a breach of the

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[25]Appellate Body Report, *US - Shrimp*, para. 182.

[26]Appellate Body Report, *US - Shrimp*, para. 183.

[27]*See* U.S. Oral Statement at First Panel Meeting, para. 16.

obligation of uniform administration can be established only if non-uniform administration is shown on the basis of "an overall pattern" or "general patterns" of customs administration.[28] Indeed, its oral statement at the first Panel meeting and its replies to questions are replete with references to a supposed "pattern" requirement.[29]

B. The United States is not required to demonstrate a "pattern" of non-uniform administration to establish that the EC is in breach of its GATT 1994 Article X:3(a) obligation.

1. The "pattern" requirement asserted by the EC has no basis in GATT 1994 Article X:3(a).

26. Preliminarily, it should be noted that the Appellate Body report in *US - Shrimp* on which the EC relies for its characterization of Article X:3 as a "minimum standards provision" makes no reference at all to a pattern requirement. Indeed, the Appellate Body's finding that transparency and procedural fairness were lacking in administration of the measure at issue there was based on a finding that certain formal safeguards were absent from the system for administration of that measure, rather than a finding of any "pattern" of non-transparency or lack of procedural fairness as a matter of practice.[30] Likewise, as the United States has explained, the EC provides no mechanism to safeguard against the non-uniform administration of EC customs laws by 25 different member State authorities.

27. More fundamentally, there is no basis in the text of Article X:3(a) (or any other WTO provision) for the proposition that a breach is established only when a pattern of non-uniform administration is shown. The one panel to have examined in any depth the obligation of uniform

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[28] *See* EC Replies to Panel Questions, para. 6 (quoting EC First Written Submission, para. 241).

[29] *See, e.g.*, EC Oral Statement at First Panel Meeting, paras. 26, 27, 29, 32-34; EC Replies to Panel Questions, paras. 6, 11, 12, 15, 20, 21, 179.

[30] Appellate Body Report, *US - Shrimp*, para. 181.

administration in Article X:3(a) – the *Argentina - Hides* panel – made no reference to a "pattern" requirement for establishing a breach of that obligation.[31] That panel found it "obvious . . . that it is meant that Customs laws should not vary, that every exporter and importer should be able to expect treatment of the same kind, in the same manner both over time and in different places and with respect to other persons."[32] As the obligation of uniform administration was explained there, it plainly is capable of being breached even if various instances of non-uniform administration do not exhibit a discernible pattern. Whether non-uniform administration over the territory of a Member exhibits a pattern or is more haphazard in nature will make no difference to the exporter or importer. In either case, the exporter or importer will not be able to expect treatment of the same kind, in the same manner in different places.

2. The EC fails to even explain what it believes the United States must establish to meet the so-called "pattern" requirement.

28. This observation leads to the question of what the EC means by its assertion that a "pattern" of non-uniform administration must be shown in order to establish a breach of Article X:3(a). The simple fact that "pattern" would be an element of a breach in addition to "non-uniform" administration demonstrates the fatal flaw in the EC's proposed approach. The text of Article X:3(a) does refer to administering in a "uniform manner." It does not refer to a "pattern of non-uniform" administration. The EC is simply seeking to impose additional criteria that are nowhere found in the text of Article X:3(a).

29. Furthermore, the EC's proposed approach does not make sense even divorced from the agreed text of the GATT 1994. The ordinary meaning of the word "pattern" as relevant here is

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[31] Panel Report, *Argentina – Hides*, paras. 11.80 to 11.83.

[32] Panel Report, *Argentina – Hides*, para. 11.83.

"[a]n arrangement or order discernible in objects, actions, ideas, situations, etc."[33] When combined with the concept of non-uniform administration, the ordinary meaning of "pattern" gives rise to a paradox and highlights the core problem with the requirement that the EC posits.

30. Central to the concept of a pattern is discernability of arrangement or order. Central to the concept of non-uniformity is the absence of these very qualities. Thus, a pattern of non-uniform administration would appear to refer, paradoxically, to a discernability of arrangement or order in something that lacks a discernability of arrangement or order (*i.e.*, that is non-uniform). Given this apparent anomaly, one might have expected the EC, in asserting a requirement to show a pattern of non-uniform administration, to elaborate on what it believes that requirement to entail. But it does not do so.

31. The EC does make oblique references to a "statistically significant sample" of non-uniformity,[34] occurrences of non-uniformity that are "so widespread and frequent as to constitute an overall pattern of non-uniformity,"[35] and occurrences of non-uniformity "on a large scale,"[36] as if to imply that it equates the existence of a pattern of non-uniform administration with the frequency and scope of non-uniform administration. However, these references shed little light on what the EC believes must be shown in order to satisfy the so-called pattern requirement.

32. More importantly, the suggestion that there is some quantitative criterion for assessing uniformity of administration is at odds with the EC's own acknowledgment that "Article X:3(a) GATT does not require uniformity for its own sake, but rather intends to protect the interests of

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[33]*The New Shorter Oxford English Dictionary*, Vol. II at 2126 (1993).

[34]EC Oral Statement at First Panel Meeting, para. 32.

[35]EC Replies to Panel Questions, para. 11.

[36]EC Replies to Panel Questions, para. 16.

traders."[37] The interests of traders are protected when a Member's system of customs administration affords traders treatment of the same kind, in the same manner in different places within the Member's territory.[38] The interests of traders in such uniform administration of the customs laws do not depend on the statistical significance of occurrences of non-uniform administration, just as they do not depend on whether instances of non-uniform administration manifest a pattern, in the ordinary sense of that term, or occur in a haphazard way. Whether those interests are protected depends on the design of a Member's system of customs administration and the ability of that system to detect and correct instances of non-uniform administration.[39] As discussed in previous U.S. submissions, and in sections IV and V, below, the EC's system of customs administration does not detect and correct instances of non-uniform administration so as to protect the interests of traders in receiving treatment of the same kind, in the same manner in different places within the territory of the EC.

3. The reference to a "pattern" in the panel report in *US - Hot-Rolled Steel* is not relevant to the present dispute.

33. Moreover, the EC's assertion of a pattern requirement is based entirely on one panel's discussion of the obligation of uniform administration in a context entirely different from the present context. The EC relies on a single sentence from the panel report in *US - Hot-Rolled Steel*.[40] The concept of a pattern was relevant to the question at issue in that dispute in a way

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[37] EC Replies to Panel Questions, para. 14.

[38] *See* Panel Report, *Argentina - Hides*, para. 11.83.

[39] *See generally* U.S. Answers to Panel Questions, paras. 59, 93, 122; *see also* Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu Replies to Panel Questions to Third Parties, pp. 6-7 (reply to Question 23).

[40] *See* EC First Written Submission, para. 240 (quoting Panel Report, *US – Hot-Rolled Steel*, WT/DS184/R, para. 7.268; EC Oral Statement at First Panel Meeting, para. 26 (same); EC Replies to Panel Questions, para. 7 (same).

that it is not relevant in the present dispute.

34. In any dispute involving a claim of *non-uniform* administration, it must be asked what *uniform* administration would look like. Non-uniform administration is recognizable as such only when contrasted to some standard of uniform administration. In the present dispute, which concerns a claim of overall geographical non-uniformity of administration, the actual system in the EC is contrasted to a system in which traders can reasonably expect treatment of the same kind, in the same manner when entering their goods through different EC member States. That is the benchmark. To the extent that traders do not receive treatment of the same kind, in the same manner when entering goods through different EC member States, that state of affairs is recognizable as non-uniform administration. It is recognizable as such whether or not instances of non-uniform administration constitute a pattern.

35. Conversely, the conduct at issue in *US - Hot-Rolled Steel* was not recognizable as uniform or non-uniform administration without more information – in particular, information of how the law at issue there was administered in other cases. The relevant claim was that a particular application of U.S. antidumping law to particular producers in a particular investigation amounted to non-uniform administration of U.S. antidumping law.[41] That proposition could be tested only if the panel had an understanding of what uniform administration of U.S. antidumping law looked like. Evidence of a pattern in the administration of U.S. antidumping law might have provided that understanding. Thus, the panel found that "Japan ha[d] not even alleged, much less established, a pattern of decision-making with respect to the specific matters it is raising *which would suggest a lack of uniform, impartial and*

[41] *See* Panel Report, *US – Hot-Rolled Steel*, paras. 7.262 *et seq.*

reasonable administration of the US anti-dumping law."[42] The panel was not referring to a pattern as a generic requirement for making out an Article X:3(a) claim, but as context "which would suggest a lack of uniform, impartial and reasonable administration." A pattern might have enabled the panel to determine whether the particular application of the antidumping law at issue was uniform or not.

36. The claim at issue in the present dispute is far different from the claim Japan was making in *US - Hot-Rolled Steel*. The United States is not arguing that a particular application of EC customs law represents non-uniform administration. If that were the case, the Panel might properly look for evidence of a pattern to put that particular application of EC customs law into a context that would cause it to stand out as uniform or not. Instead, the United States is arguing that the EC's system of customs law administration as a whole does not result in the uniform administration that Article X:3(a) requires. As has already been discussed, evidence of a pattern is not necessary to distinguish the EC system of customs law administration as one that does not meet that obligation.

37. Curiously, in arguing for a generic "pattern" requirement, the EC cites the panel's summary of the U.S. argument in *US - Hot-Rolled Steel*.[43] But, in that dispute, the United States was not arguing for a generic "pattern" requirement. Quite to the contrary, the United States was arguing for a distinction to be made between the way the panel analyzed Japan's Article X:3 claims and the way panels had analyzed Article X:3 claims in disputes challenging the overall administration of particular measures of general application. The EC quotes from the panel's

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[42]Panel Report, *US – Hot-Rolled Steel* (emphasis added).

[43]EC Replies to Panel Questions, para. 9 (quoting Panel Report, *US – Hot-Rolled Steel*, para. 7.264).

paraphrase of the U.S. argument, but the complete argument is set forth in the first written submission of the United States, which is reproduced in Annex A-2 to the panel report. There, the United States explained that "the Panel should distinguish this dispute – in which Japan is complaining about specific decisions made in the context of particular facts under the Anti-Dumping Agreement – from other Article X:3(a) disputes, in which the overall administration of some programme was alleged to be arbitrary."[44] The United States went on to contrast Japan's claim to the claims in *US - Shrimp* and observed that "[s]uch cases, in which the allegation is one of overall arbitrary application addressed by Article X:3 are very different from the purpose for which Japan uses Article X:3 in the present case."[45]

38. That same observation is relevant here. The present dispute is one in which the United States challenges the overall administration of EC customs law. In that sense, the U.S. claim is more like the claim at issue in *US - Shrimp* than the claim at issue in *US - Hot-Rolled Steel*. The U.S. argument in *US - Hot-Rolled Steel* (which the EC endorses at paragraph 9 of its replies to the Panel's questions) does not support a generic "pattern" requirement for all Article X:3(a) claims. Rather, it supports panels making distinctions in the way they analyze different types of Article X:3(a) claims. Following this argument, whereas it may have been appropriate to insist that a complaining party identify a pattern of conduct as context for distinguishing a particular application of a respondent party's law in a particular case, it would not be appropriate to insist on identification of a pattern where, as here, the complaint concerns not a particular application of law in a particular case but the overall system for administration of the respondent's customs

[44]Panel Report, *US – Hot-Rolled Steel*, Annex A-2 (U.S. First Written Submission), p. A-237, para. 9.

[45]Panel Report, *US – Hot-Rolled Steel*, Annex A-2 (U.S. First Written Submission), p. A-237, para. 10.

law.[46]

C. The EC acknowledges the existence of divergences among member State authorities in the administration of EC customs law.

39. Finally, before leaving the subject of what is required to show non-uniform administration, it is important to recall that the EC itself acknowledges that divergences in administration of its customs law among the 25 different member State authorities do in fact occur. It submits that when they occur they either are reconciled through various EC instruments and institutions (the topic taken up in Section IV, below), or they simply are immaterial or not relevant to the EC's Article X:3(a) obligation. But, it acknowledges that divergences occur, and this point should not be lost amidst the EC's arguments on a supposed burden for the United States to demonstrate a pattern of non-uniform administration

40. Two general acknowledgments by the EC of divergences in the administration of EC customs law are noted in the introduction to this submission. To these should be added the admissions the EC made in the course of the *EC - Chicken* dispute that classifications in binding tariff information ("BTI") issued by certain member State customs offices were not followed by other member State customs offices, and that the volume of BTI issued each year make it difficult to monitor uniformity of BTI.[47]

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[46] In addition to relying on the panel report in *US - Hot-Rolled Steel*, the EC makes reference to the panel report in *US - Steel Sunset*. *See* EC Replies to Panel Questions, para. 7. For similar reasons, its reliance on the latter report is misplaced. There, the issue was not uniform administration but reasonable administration. The standard the panel referred to was not the "pattern" standard but the "significant impact on the overall administration" standard. Like the "pattern" standard, the "significant impact" standard might be relevant where the target of a challenge is the particular application of a law in a particular case, as it was in *US – Steel Sunset*. A panel might be expected to look to a pattern or a significant impact to recognize the application at issue as non-uniform or unreasonable. But where, as in the present dispute, the target of a challenge is the system as a whole for administration of customs law, these tests are not needed to recognize the administration at issue as non-uniform.

[47] *See* Panel Report, *EC – Chicken*, paras. 7.260 & 7.264.

41. In the context of this dispute, the EC acknowledges divergences among member States in the areas of penalties and audit procedures.[48] It argues that these matters do not concern administration of EC customs law,[49] or, alternatively, that any divergences are minor.[50] But, the legal significance of such divergences is a separate question, which will be taken up in Section V, below. For present purposes, what is important is that the EC in fact acknowledges divergences in these areas.

42. Similarly, in the area of valuation, the EC acknowledges that some member State authorities require importers to obtain prior approval for valuation on a basis other than the last sale that led to introduction of goods into the territory of the EC, while others do not.[51] Predictably, the EC dismisses this non-uniformity of administration as a "minor variation."[52] But again, this is a question of the legal significance of the divergence rather than the existence of the divergence itself.

43. In the area of processing under customs control, where the United States has demonstrated that different member States administer the economic conditions test differently in deciding whether to permit this procedure,[53] the EC asserts that examination by member State authorities "is required only in rare cases" anyway.[54] It asserts that in most cases the economic conditions either are deemed fulfilled or are examined at the Community level. The EC does not

[48]*See* EC First Written Submission, paras. 144 (penalties) & 400-01 (audit procedures).

[49]*See* EC First Written Submission, paras. 400 & 435.

[50]*See* EC First Written Submission, paras. 400 & 441.

[51]*See* EC First Written Submission, para. 396.

[52]EC First Written Submission, para. 396.

[53]U.S. First Written Submission, paras. 102-107; U.S. Answers to Panel Questions, paras. 21-22.

[54]EC Replies to Panel Questions, para. 109.

substantiate its assertion that cases calling for examination of economic conditions by national authorities are "rare." What is of greater interest here, however, is its statement that "a uniform application of the assessment of the economic conditions is ensured for so-called sensitive goods because the examination has to take place at Community level."[55] Implicit in that statement is a recognition that where examination does *not* take place at the Community level, but rather at the member State level, "uniform application of the assessment of the economic conditions" is *not* "ensured."

44. In calling attention to the EC's various acknowledgments of non-uniform administration of EC customs law, the U.S. purpose is to show that the EC's argument concerning the U.S. burden of proof is not written on a blank slate. While the EC charges that the United States has not met its burden, the EC's own statements preclude it from asserting that the 25 separate member State customs authorities administer EC customs law as would a single EC-wide authority. Given the EC's own statements, there really is no question that divergences occur in the member States' administration of EC customs laws. The more salient question is whether the instruments and institutions that the EC holds out as reconciling such divergences when they do occur in fact do so in a manner consistent with the obligation of uniform administration. The United States has demonstrated in its first written submission and statement at the first Panel meeting that they do not,[56] and this point is elaborated on in the following section.

IV. THE INSTRUMENTS THAT THE EC HOLDS OUT AS ENSURING UNIFORM ADMINISTRATION DO NOT DO SO

45. Central to the EC's argument that it complies with its obligation of uniform

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[55]EC Replies to Panel Questions, para. 108.

[56]U.S. First Written Submission, paras. 120-137; U.S. Oral Statement at First Panel Meeting, paras. 32-45.

administration under GATT 1994 Article X:3(a) is its assertion that certain EC instruments prevent divergences among member States from occurring or correct them when they do occur. Thus, at the March 21, 2005 meeting of the Dispute Settlement Body, at which the Panel in the present dispute was established, the EC stated that it has in place "harmonized customs rules and institutional and administrative measures – enforced by the Commission and the European Court of Justice – to prevent divergent practices."[57] In response to the Panel's Question 43, the EC explained that it "was referring to any divergent practices which, in the absence of the EC instruments currently in place to secure uniform administration, might arise in the area of EC customs administration."[58] As it is these instruments that, according to the EC, "secure uniform administration," it is important to understand what these instruments are and how they operate.

46. In its first written submission and statement at the first Panel meeting, the United States discussed the various instruments that the EC holds out as securing uniform administration.[59] The United States demonstrated that most of these instruments consist of general obligations (such as the member States' duty of cooperation under Article 10 of the EC Treaty), non-mandatory guidelines, or discretionary mechanisms (such as the possibility that a Commission or member State official may refer a matter of non-uniform administration to the Customs Code Committee). The United States showed that the one instrument of a binding nature that the EC points to is the mechanism of appeals to member State courts, with the possibility of eventual preliminary references to the ECJ. The United States argued that this is problematic, as it puts

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[57] *Dispute Settlement Body: Minutes of the Meeting Held on 21 March 2005*, WT/DSB/M/186, para. 29.

[58] EC Replies to Panel Questions, para. 4.

[59] *See* U.S. First Written Submission, paras. 120-137; U.S. Oral Statement at First Panel Meeting., paras. 32-45.

the onus on traders, through litigation, to achieve the uniformity of administration that the EC is obligated to afford traders in the first instance.

47. In its replies to questions, the EC elaborated on its explanation of the instruments that it holds out as the basis for securing uniform administration. Its replies reinforce the points the United States made in its first submission and in its statement and interventions at the first Panel meeting.

A. Most of the instruments that the EC holds out as securing uniform administration are non-binding, discretionary, or extremely general in nature.

48. First, the EC's replies to the Panel's questions underscore the non-binding, discretionary, or extremely general nature of the instruments that supposedly secure uniform administration. For example:

- The EC acknowledges that the Administrative Guidelines on the European Binding Tariff Information (EBTI) System and its Operation "are not legally binding."[60]

- When asked about "practical mechanisms" to deal with the situation in which member States disagree on the classification for a particular good, the EC replies that the member States "*should* consult with one another," that if the disagreement persists the Customs Code Committee "*may* examine the question," and that "[i]n practice, the responsible official in the Member State concerned *will* submit the issue to the Commission" (though the EC does not say what rule will compel this submission).[61]

- When asked how, "in practical terms," the Customs Code Committee reconciles differences in the application of EC rules on customs valuation, the EC explains that "[t]he Committee may issue opinions" which, it later explains, are not legally binding on member States' customs authorities.[62]

[60] EC Replies to Panel Questions, para. 44.

[61] EC Replies to Panel Questions, paras. 47-48 (emphases added).

[62] EC Replies to Panel Questions, paras. 76 & 86.

- When asked to explain "in practical terms" a finding by the ECJ that EC law must be applied uniformly in all member States, the EC states that "this means that they [the authorities of the member States] should interpret and apply Community law in accordance with all available guidance as to its proper meaning."[63]

49. Frequently, in referring to instruments that secure uniform administration, the EC falls back on member States' general duty of cooperation under Article 10 of the EC Treaty.[64] That provision simply states:

> Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
>
> They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

50. EC Treaty Article 10 sets forth a general obligation of member States under EC law. Tellingly, when the EC refers to it as an instrument to secure uniform administration, it does not refer to any measures making that general obligation operational in the specific area of customs administration. It points to no rules giving effect to this general obligation through particular mandates to the member States in particular situations. Thus, in one typical statement (responding to a question about the authority, if any, of the Commission to require member States to provide information about the treatment accorded particular operators with respect to customs valuation), the EC simply explains, "This duty of cooperation implies a duty of facilitating the Commission's tasks as guardian of the Treaty, including a duty to provide all information which is necessary for the Commission in order to ascertain whether Member States

[63] EC Replies to Panel Questions, para. 144.

[64] *See*, *e.g.*, EC Replies to Panel Questions, paras. 44, 79, 86, 167; *see also* EC Replies to Questions from the United States, para. 9.

have applied Community law correctly."[65] Elsewhere, the EC states, somewhat vaguely, that the Article 10 duty of cooperation implies a duty of "due care" on the part of member States when applying the Combined Nomenclature,[66] a duty to take "due account" of administrative guidelines,[67] and a duty to give "due weight" to Customs Code Committee opinions.[68]

51. The problem, of course, is that nowhere is it spelled out, in practical terms, what "due care," "due account," or "due weight" means. Ultimately, in extreme cases of non-cooperation, the ECJ may be the arbiter of whether a given member State has given "due care," "due account," or "due weight." But, as a matter of the routine, day-to-day operation of customs administration in the EC, the implied obligations under EC Treaty Article 10 are so general as to amount to something of a restatement of the obligation of uniform administration itself, rather than a practical effectuation of that obligation.

52. The difficulty with the EC's reliance EC Treaty Article 10 as an instrument of the fulfillment of its obligation under GATT 1994 Article X:3(a) is similar to the difficulty with its reliance on the doctrine of direct applicability of EC law, as highlighted by the Panel's Question 77. That question underscores the implausibility that uniform application of EC law is achieved automatically by an ECJ judgment affirming that EC law must be applied uniformly. Rather, to achieve uniform application there must be some more specific articulation of practical requirements. The same is true of the very general duty of cooperation under EC Treaty Article 10. However, the EC has not identified practical requirements giving operational effect to EC

[65]EC Replies to Panel Questions, para. 79.

[66]EC Replies to Questions from the United States, para. 9.

[67]EC Replies to Panel Questions, para. 45.

[68]EC Replies to Panel Questions, para. 86.

Treaty Article 10 as a key instrument for fulfillment of the EC's GATT 1994 Article X:3(a) obligation.

B. Binding tariff information does not secure uniform administration.

53. A more concrete instrument for securing uniform administration that the EC identifies is binding tariff information. For reasons discussed in the U.S. first written submission, BTI does not secure uniform administration.[69] Rather than contradict this conclusion, the EC's replies to questions actually confirm it.

1. The EC system permits "shopping" for favorable BTI from among the 25 member State customs authorities.

54. In the U.S. first written submission, it was explained that one reason that BTI does not secure uniform administration is that traders may engage in BTI shopping.[70] That is, in a system where each of 25 different member State customs authorities is separately responsible for issuing BTI, traders may manipulate the system to obtain the optimal classification for their goods, regardless of whether such classification is uniformly agreed to among all member States. The opportunity for manipulation is facilitated by the fact that under Article 12(2) of the Community Customs Code (Exh. US-5), BTI is "binding on the customs authorities as against the holder of the information," but it is not binding on the holder. The holder is not bound to rely on BTI that classifies goods unfavorably; it may seek an alternative classification from another member State authority.

55. In fact, in its explanatory introduction accompanying the draft Modernized Community

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[69]*See* U.S. First Written Submission, paras. 45-65.

[70]*See* U.S. First Written Submission, paras. 52-54; *see also* Korea Third Party Submission, para. 13 (discussing problem of BTI shopping).

Customs Code, the EC acknowledges the problem of BTI shopping as a factor detracting from uniform administration. Thus it states that "it is proposed to extend the binding effect of the decision [*i.e.*, the BTI] also to the holder(s) of the decision in order to avoid the system only being used where the applicant is satisfied with the result."[71] Similarly, in its arguments in the *EC - Chicken* dispute, the EC explained that "it is possible under EC law to withdraw an application for a BTI where the outcome is considered unfavourable by the importer."[72]

56. At the first Panel meeting, the United States had understood the EC to assert that the situation in which BTI is used only where the applicant is satisfied with the result is a rather rare circumstance. In a question following the first Panel meeting, the United States asked the EC to substantiate that assertion.[73] The EC's terse response was that it "does not have any evidence that would indicate that such situations are frequent," while also in effect conceding that it does not have evidence that such situations are "rare."[74] This response is not surprising. A problem of BTI shopping from the point of view of uniform administration is precisely the fact that it is done in a way that does *not* generate evidence and thus is difficult to identify. Traders hardly can be expected to come forward and openly admit that they are taking advantage of the opportunity to seek optimal classification of their goods from among 25 different customs authorities. Indeed, lack of transparency in the manipulation of opportunities for BTI shopping compounds the problem of non-uniform administration, as it gives a competitive advantage to

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[71]European Commission, Directorate-General for Taxation and Customs Union, TAXUD/447/2004 Rev 2, *An Explanatory Introduction to the modernized Customs Code*, p. 12 (Feb. 24, 2005) (Exh. US-32).

[72]Panel Report, *EC - Chicken*, para. 7.261 (citing EC's second written submission, para. 51; EC's reply to Panel question No. 117).

[73]*See* U.S. Questions for EC Following First Panel Meeting, Question 6.

[74]EC Replies to Questions of the United States, para. 13.

larger, more experienced exporters over smaller, less experienced exporters that lack the resources to navigate the non-uniformity in the customs administration system.

2. The power of a member State customs authority to revoke BTI based on nothing more than its own reconsideration of the applicable classification rules, as affirmed in the *Timmermans* decision, detracts from uniform administration.

57. The EC's discussion of the *Timmermans* case and the possibility for member State authorities to amend or revoke BTI on their own initiative also reinforces the point that BTI does not secure uniform administration of EC customs law. The U.S. first written submission called attention to the ECJ's recent decision in *Timmermans*.[75] This was the case in which the Court held that a member State's customs authorities may amend or revoke BTI even where the only basis for amendment or revocation is the authorities' own reconsideration of the applicable classification rules. The Court reached that conclusion despite the Advocate General's observation that "the possibility of revoking BTI in this way is not readily compatible either with the objective of the uniform application of the customs nomenclature or with the objective of legal certainty pursued by the introduction of BTI."[76]

58. In explaining its disagreement with the Advocate General's observation, the EC stated

[75]U.S. First Written Submission, paras. 59-65.

[76]*Timmermans Transport & Logistics BV* v. *Inspecteur der Belastingdienst - Douanedistrict Roosendaal* and *Hoogenboom Production Ltd* v. *Inspecteur der Belastingdienst - Douanedistrict Rotterdam*, Joined Cases C-133/02 & C-134/02, Opinion of the Advocate-General, 2003 ECJ CELEX LEXIS 663, para. 59 (Sep. 11, 2003) ("*Timmermans*, Op. AG") (Exh. US-21). The EC takes issue with the U.S. reliance on the Advocate General's opinion. *See* EC Replies to Panel Questions, para. 31. In particular, it notes that "opinions of Advocate Generals are not legally binding in any sense, and are of limited legal value." *Id.* However, the United States did not rely upon the Advocate General's opinion in this case "for ascertaining the correct interpretation of EC law" (*id.*, para. 32). Instead, as is plain from the discussion in its first written submission, the United States cited to this opinion as a persuasive analysis by a respected jurist familiar with the administration of customs law in the EC and how it would be affected by a ruling permitting member State authorities to revoke BTI based on nothing more than their own reconsideration of EC law.

that "[t]he correct classification in the combined nomenclature is not a matter of discretion, and neither is the revocation of BTI which has been found to be incompatible with the combined nomenclature."[77] The EC went on to point out that "the Court made clear that the Customs authorities may revoke the BTI only if it is wrong."[78]

59. There is a serious flaw in the EC's logic on this issue, and that flaw highlights the point that the autonomy of member State authorities affirmed by the Court in *Timmermans* detracts from rather than contributes to uniform administration. The flaw is that the EC assumes, without any basis, that the correct classification of any given good will always be objectively known to all member State authorities and, therefore, "is not a matter of discretion." Under this assumption, the application of classification rules is always a straightforward, mechanical exercise, and if a member State authority revokes BTI, it must be due to an obvious error in the performance of that exercise, the correction of which necessarily will advance uniformity.

60. The EC ignores the fact that applying classification rules to a particular good may require a customs authority to make certain judgments and that, especially in complex cases, these judgments may evolve upon further reflection. In fact, this possibility was recognized by the Court in its reference to "evolution in the thinking in relation to tariff classification."[79] It is not the case that the correct classification is a matter of discretion, but the findings leading to determination of the correct classification may entail exercises of discretion, in the sense of judgment. It is incorrect for the EC to assume that the classification of a particular good will

[77]EC Replies to Panel Questions, para. 27.

[78]EC Replies to Panel Questions, para. 29.

[79]*Timmermans Transport & Logistics BV* v. *Inspecteur der Belastingdienst - Douanedistrict Roosendaal* and *Hoogenboom Production Ltd* v. *Inspecteur der Belastingdienst - Douanedistrict Rotterdam*, Joined Cases C-133/02 and C-134/02, 2004 ECR I-01125, para. 25 (Jan. 22, 2004) ("*Timmermans*") (Exh. US-2).

always be objectively known and obvious to all 25 customs authorities. In relying on the Court's finding that "the Customs authorities may revoke the BTI only if it is wrong,"[80] and asserting that discretion has no part in such action, the EC misunderstands the sense in which discretion is referred to and begs the question of who determines that BTI is wrong. Of course, absent a Commission regulation, it is *the member State authority itself* that determines that the original BTI is wrong. Accordingly, it cannot be assumed that, where a customs authority revokes BTI based on its revised assessment of the good's correct classification, such action will necessarily yield the objectively correct classification and thereby align it with the other member State customs authorities, resulting in uniform administration.

61. Where a member State authority initially issues BTI – presumably believing it has applied the classification rules correctly – that BTI is supposed to be binding on other member State authorities with respect to the particular holder of the BTI and the goods concerned.[81] It may even be the case that other member State authorities are persuaded to apply the classification contained in that BTI to similar goods imported by other persons. However, when the member State authority that issued the original BTI reconsiders its application of the classification rules – again, presumably believing that its revised application of the classification rules is correct – there is no mechanism to impose its reconsideration on a uniform basis. It is in this sense that the member State autonomy recognized in *Timmermans* detracts from uniform administration. As its discussion of this issue in its replies to the Panel's questions makes clear,

[80]EC Replies to Panel Questions, para. 29.

[81]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 establishing the Community Customs Code, including all annexes thereto, as amended, Art. 11 ("CCCIR") (Exh. US-6).

the EC's contention to the contrary is based on an incorrect assumption that the application of classification rules is simpler and more straightforward than is necessarily the case.

62. A final point that bears recalling with respect to BTI is the very limited sense in which BTI is ostensibly binding at all. As Korea underscores in its third party submission, "The BTI from one member state does not necessarily bind another member state to classify similar or identical goods imported by a person other than the holder of the BTI in the same way, resulting in different classifications and treatment for the same or similar product."[82] As has been pointed out, the EC itself called attention to this limited applicability of BTI in the *EC -Chicken* dispute, when it observed that while some member States had issued BTI classifying the product at issue one way, other member States had not followed that precedent.[83]

C. The availability of review by member State courts as the "normal" means of reconciling divergences in member State administration of EC customs laws does not fulfill the EC's GATT 1994 Article X:3(a) obligation to administer its customs laws in a uniform manner.

63. The one instrument the EC holds out as securing uniform administration that is binding in character is review of customs administrative decisions by member State courts. Unlike the various general, non-binding, or discretionary instruments discussed above, review by member State courts is an instrument through which traders have a right to pursue a course of action that may lead to uniform administration. The EC consistently describes appeals to member State courts as the "normal" means of reconciling divergences in member State administration and stresses that other instruments should not be considered substitutes for "the normal appeals

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[82]Korea Third Party Submission, para. 13.

[83]Panel Report, *EC – Chicken*, para. 7.260; *see* U.S. First Written Submission, para. 44.

mechanisms before the national courts."[84]

64. The emphasis that the EC puts on appeals before member State courts as an instrument of securing uniform administration is problematic for at least three reasons. First, as the decision of a member State court is binding only within that member State, an appeal to a member State court will not necessarily engender uniform administration. It is possible that an appeal will have the result of aligning one member State with other member States on a particular question of customs law administration, but it is also possible that it will have the opposite result of creating or entrenching a divergence among member States. In this regard, it is notable that the EC confirms that it has in place no mechanism to notify the courts of other member States of the outcome of review of a customs decision in one member State court.[85] Absent such a mechanism, it is difficult to see how one member State court would be able to take account of relevant decisions of other member State courts, let alone take the step of seeking to bring about uniform administration by affirmatively aligning itself with other member State courts.

65. Second, while the pursuit of an appeal before one member State court might or might not lead to uniform administration in the case of a simple divergence between two member States, it does not address the situation of a divergence involving several member States. In that case, the EC evidently would require a trader to pursue an appeal through each of several member State

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[84]*See, e.g.*, EC First Written Submission, para. 410; EC Oral Statement at First Panel Meeting., para. 46; EC Replies to Panel Questions, paras. 42, 74, 80.

[85]EC Replies to Panel Questions, para. 129. The EC asserts that "[d]ue to the high number of cases" such a mechanism "would be burdensome and ineffective." *Id.* However, it is not at all self-evident that this should be the case. The United States would expect that modern communications technology would diminish the burden substantially. In the United States, databases such as Lexis and Westlaw regularly keep courts informed of many thousands of decisions from other jurisdictions. Moreover, the United States fails to understand the EC's assertion that a notification mechanism would be ineffective. Indeed, given the breadth of the duty of cooperation under EC Treaty Article 10 that the EC has invoked in other contexts, one would think it incumbent on member State courts to be aware of relevant decisions on questions of EC customs law issued by other member State courts.

courts in order to achieve uniform administration. This is a particularly onerous burden to impose on traders to achieve a result – uniform administration – that they are entitled to as a matter of procedural fairness in the first instance, pursuant to GATT 1994 Article X:3(a).

66. This then leads to the third problem with the EC's emphasis on appeals before member State courts as an instrument for securing the uniform administration of EC customs law. This emphasis in effect stands GATT 1994 Article X:3(a) on its head. It takes a GATT obligation under which traders are *entitled* to certain elements of procedural fairness in customs administration and submits that it is fulfilled largely though a system that imposes a requirement on traders to overcome legal hurdles in order to attain those elements of procedural fairness. This can be seen, for example, in the EC's assertion in its statement at the first Panel meeting that "where an individual trader does not exhaust all the remedies and procedural possibilities afforded to him by the system of a WTO Member, a resulting lack of uniformity cannot be attributed to a failure in that Member's system."[86] This assertion stands in stark contrast to the common understanding (including by the EC) that the focus of Article X:3(a) is on the interests of traders.[87]

67. Article X:3 contains a pair of complementary obligations that afford procedural fairness to traders. Pursuant to Article X:3(a), a trader may expect that, consistent with a Member's WTO obligations, its customs laws will be administered in a uniform, impartial and reasonable

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[86]EC Oral Statement at First Panel Meeting., para. 26; *see also* EC Replies to Questions of the U.S., para. 11.

[87]*See, e.g.*, EC Replies to Panel Questions, para. 14 ("Article X:3(a) . . . intends to protect the interests of traders"); Korea Third Party Submission, para. 12; Japan Oral Statement at First Panel Meeting, para. 2; Argentina Replies to Panel Questions, para. 19; Korea Replies to Panel Questions, p. 2 (reply to Question 7); AB Report, *US - Shrimp*, para. 183; Panel Report, *Argentina – Hides*, para. 11.76.

manner across the Member's territory. Pursuant to Article X:3(b), the trader may expect, consistent with the Member's WTO obligations, access to an independent forum for the prompt review and correction of particular instances of the uniform administration of the Member's customs laws. Pursuant to that same provision, the trader may expect not only that the decisions of such independent fora will be implemented by the authorities responsible for customs administration, but also that they will govern the practice of all such authorities, such that the customs laws will continue to be administered in a uniform manner in light of those decisions.

68. Yet the EC appears to say that compliance with Article X:3(b) would in and of itself necessarily equate to compliance with Article X:3(a). In other words, the EC's approach would mean that Article X:3(b) would render Article X:3(a) redundant. For the EC, Article X:3(a) would require no more than compliance with Article X:3(b). The United States sees no basis that would permit reading these provisions so as to render one of them redundant.

69. The EC's explanation of the obligation on the part of traders to secure the uniform administration of EC customs law is not consistent with the foregoing understanding of Article X:3. Article X:3(a) requires a Member, *inter alia*, to administer its customs laws in a uniform manner. Separately, Article X:3(b) requires the Member to provide tribunals or procedures for the prompt review and correction of administrative action relating to customs matters – that is prompt review and correction of action involving the carrying out of the customs laws, which must have been done in a uniform manner, in accordance with Article X:3(a). Yet, as the EC describes it, the trader is not necessarily entitled to expect that the EC's customs laws will be uniformly administered in the first instance. Rather, it is through exercise of the right to review that the trader eventually *may* attain uniform administration. In other words, according to the

EC, the review provided by member State courts serves the purpose not necessarily of review and correction of particular instances of uniform administration of customs law, but rather review and correction *to eventually attain* uniform administration of customs law.

70. Moreover, according to the EC's explanation, a trader must be willing not only to pursue a first level of review in order to attain uniform administration, but to "exhaust all the remedies and procedural possibilities afforded to him by the system."[88] Unless a trader is prepared to pursue multiple layers of appeals, possibly in more than one member State, including opportunities for preliminary reference of questions to the ECJ – a process which itself takes an average of 19 to 20 months to complete[89] – then any resulting lack of uniformity in the administration of EC customs law "cannot be attributed to a failure in [the EC's] system."[90]

71. The United States submits that in emphasizing appeals to member State courts as a key instrument in securing uniform administration, the EC has taken an obligation of the EC to provide an important element of procedural fairness to traders and shifted the obligation to traders to seek out that element of procedural fairness themselves. This is contrary to the text of GATT 1994 Article X:3 and the widely recognized focus of that article on the interests of traders. In short, the one instrument for securing the uniform administration of EC customs law that is binding in character imposes a burden on traders that is contrary to Article X:3 and does not discharge the EC's obligation under that Article.

V. In Arguing That Matters Such as Penalties and Audit Procedures Are Outside the Scope of Its Obligation Under GATT 1994 Article X:3(a), the EC Relies on an Erroneous Understanding of What it Means to

[88]EC Oral Statement at First Panel Meeting, para. 26.

[89]EC Replies to Panel Questions, para. 124.

[90]EC Oral Statement at First Panel Meeting, para. 26.

“ADMINISTER” CUSTOMS LAWS

72. In its first written submission, the United States discussed divergences among member States in customs penalties and audit procedures as examples of the EC’s non-uniform administration of its customs laws, in breach of GATT 1994 Article X:3(a). In particular, there are no EC rules prescribing penalties for violations of EC customs laws. Each member State prescribes its own penalties. As the EC Commission itself has acknowledged, “Specific offences may be considered in one Member State as a serious criminal act possibly leading to imprisonment, whilst in another Member State the same act may only lead to a small – or even no – fine.”[91]

73. With respect to audit procedures, the United States pointed to differences among working practices, including the balance between reliance on examinations of goods at time of importation and post-release audits.[92] As the EC Court of Auditors observed, due to such differences, “‘individual customs authorities are reluctant to accept each other’s decisions.’”[93] Also, at the conclusion of audits, some member State authorities provide traders what amounts to binding valuation information, which they may invoke in future transactions, while others do not.[94]

74. In dismissing the foregoing instances of non-uniform administration, the EC argued that they are outside the scope of its obligation under GATT 1994 Article X:3(a) because penalties

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[91]European Commission, Directorate-General for Taxation and Customs Union, TAXUD/447/2004 Rev 2, *An Explanatory Introduction to the modernized Customs Code*, p. 13 (Feb. 24, 2005) (Exh. US-32); *see* U.S. First Written Submission, paras. 100-101.

[92]*See* U.S. First Written Submission, para. 97.

[93]U.S. First Written Submission, para. 97 (quoting Court of Auditors Valuation Report, para. 37 (Exh. US-14)).

[94]U.S. First Written Submission, paras. 98-99.

and audit procedures are not measures of the type described in Article X:1, and because penalties and audit procedures do not constitute administration of measures that are described in Article X:1.[95] Alternatively, the EC argued that certain EC instruments (in particular, ECJ guidelines for penalty provisions and guidelines for audit procedures developed by Commission and member State representatives) cause penalties and audit procedures to be uniform within the meaning of Article X:3(a).[96]

75. Of these arguments, the main emphasis to have emerged from the EC's interventions at the first Panel meeting and its replies to written questions is the proposition that differences among member States in penalties and audit procedures do not constitute non-uniform administration of EC measures that indisputably *are* within the scope of Article X:1. Accordingly, the United States will focus on that proposition in this section.[97]

A. The EC relies on an erroneous understanding of what it means to "administer" customs laws.

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[95]EC First Written Submission, paras. 399-401, 430-436; EC Oral Statement at First Panel Meeting, paras. 52-53; EC Replies to Panel Questions, paras. 105, 209-210.

[96]*See* EC First Written Submission, paras. 400 & 440-441.

[97]In doing so, the United States does not concede that penalties and audit procedures are not measures of the kind described in Article X:1. On the contrary, they plainly are encompassed by the terms of that provision. For example, a law imposing a sanction for an erroneous declaration of a good's classification or valuation certainly "pertain[s] to the classification or valuation of products for customs purposes." Alternatively, such a law may be considered to pertain to "other charges . . . on imports." Or, to the extent the law requires an importer to make a truthful declaration, failing which it will be subject to a penalty, the law pertains to "requirements . . . on imports."

Similarly, the United States does not concede that the general guidelines to which the EC alludes cause admittedly divergent penalty provisions and audit procedures to be uniform. *See* U.S. Oral Statement at First Panel Meeting, paras. 52 & 55. With respect to penalties, such guidelines merely require that penalties be "effective, proportionate, and dissuasive." *See* EC First Written Submission, para. 440. As noted above, the EC itself concedes that within these very broad parameters, one member State may punish a given violation as a criminal offense, while another may not punish the violation at all. To suggest that such a wide gap is consistent with uniform administration under GATT 1994 Article X:3(a) is nonsensical. With respect to audit procedures, the EC makes only passing reference to the recently completed "Community Customs Audit Guide" (EC First Written Submission, para. 400) and does not argue that the mere existence of this guide causes the disparate audit practices of the different member States to be uniform.

76. The EC's argument is largely laid out in its reply to the Panel's Question 93. There it refers to the definition of the term "administer" and states that, in light of that definition, "Article X:3(a) GATT refers to the execution in concrete cases of the laws, regulations, decisions and rulings of general application referred to in Article X:1 GATT."[98] It then reasons that since a law of a member State, such as a penalty law, "itself needs to be executed or applied," "it cannot be said that such a law 'executes' or 'applies' another."[99] This reasoning is flawed for several reasons.

77. First and fundamentally, the EC relies on an exceedingly narrow, erroneous definition of the term "administer." It begins correctly by referring to the dictionary definition of "administer" as "execute."[100] But, it then purports to paraphrase the definition and in so doing introduces a concept from outside the dictionary definition and relies heavily on that concept in its argument. Specifically, it asserts that "in Article X:3(a) GATT, to 'administer' means to execute the general laws and regulations, i.e. to apply them *in concrete cases*."[101] Thus the EC argues that only when a member State authority applies EC customs laws "in concrete cases" is it administering those laws, and only divergences in the application of EC customs laws "in concrete cases" may constitute non-uniform administration. Conversely, according to the EC's reasoning, the mere employment of dramatically different tools by different member State customs authorities for giving effect to EC customs laws does *not* constitute non-uniform administration.

[98]EC Replies to Panel Questions, para. 188; *see also id.*, para. 197.

[99]EC Replies to Panel Questions, para. 189.

[100]EC Replies to Panel Questions, para. 197.

[101]EC Replies to Panel Questions, para. 197 (emphasis added).

78. Of course, as has already been mentioned, the concept of "concrete cases" appears nowhere in the definition of "administer" as quoted by the EC itself. It is a concept from outside that definition that the EC has introduced in a way that supposedly limits what it means to "administer" customs laws. To be clear, the United States does not dispute that the application of laws and regulations in concrete cases is an action encompassed by the term "administer." However, the United States disputes the EC's suggestion that the term "administer" is *limited* to application in concrete cases.

79. In fact, the absence of any such limiting concept is evident from a closer examination of the term "administer." The EC correctly quotes the dictionary definition of "administer" as "execute." But, it does not probe further to define "execute." In fact, the ordinary meaning of "execute" as relevant here is "[c]arry out, put into effect."[102] The question, then, is whether audit procedures and penalty provisions of different member States put EC customs laws into effect, or whether (as the EC contends) it is only the application of those laws by customs authorities in concrete cases that puts them into effect.

80. The answer is that member States' audit procedures and penalty provisions put EC customs laws into effect by verifying and enforcing compliance with those laws. It is through the tools of audit procedures and penalty provisions, among others, that member State authorities "execute" or "carry out" EC customs laws.

B. Penalties and audit procedures play a critical role in carrying out EC customs laws.

81. It must be recalled that the administration of EC customs laws depends in large part on

[102] *The New Shorter Oxford English Dictionary*, Vol. I, p. 877 (1993).

the actions of traders themselves. It is traders who make the declaration necessary for goods to be released for free circulation in the territory of the EC (or assigned any other customs treatment),[103] it is traders who supply any supplemental information substantiating the declared classification and valuation of goods,[104] and it is traders who are responsible for completing the formalities necessary to clear goods through the customs process.[105] Given the millions of declarations submitted to member State customs authorities each year,[106] it would be impossible for the authorities to thoroughly inspect every shipment or verify the contents of every declaration before clearance. It is for this reason that tools for verifying and enforcing compliance with the customs laws are critical to "carrying out" or "putting into effect" those laws. Compliance with those laws is secured through traders' knowledge that the representations they make to the customs authorities ultimately are subject to verification and enforcement through audits and penalties.

82. Given the critical role that audits and penalties play in giving effect to EC customs laws, it is somewhat surprising that the EC asserts, for example, that "provisions which establish the penalty for a violation of customs laws are not themselves related to the administration of customs laws."[107] Indeed, as pointed out in the U.S. oral statement at the first Panel meeting, in other contexts the EC has acknowledged the critical relationship between penalties and the

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[103]Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, including all annexes thereto, as amended, Arts. 61 & 64 ("Community Customs Code" or "CCC") (Exh. US-5); CCCIR, Art. 199 (Exh. US-6).

[104]CCC, Art. 68 (Exh. US-5); CCCIR, Arts. 241 & 243 (Exh. US-6).

[105]CCC, Art. 53 (Exh. US-5).

[106]*See* EC First Written Submission, para. 236 ("In 2004, customs authorities in the EC had to deal with total of 104 million customs declarations (imports and exports).").

[107]EC Oral Statement at First Panel Meeting, para. 52.

administration of customs laws. For example, in the Resolution on penalties set forth in Exhibit EC-41, the Council of the European Union recognizes that "the absence of effective, proportionate and dissuasive penalties for breaches of Community law could undermine the very credibility of joint legislation. . . ."[108] Moreover, it should be noted that all of the third parties that addressed the Panel's question on this subject agreed that GATT 1994 Article X:3(a) applies to penalties.[109]

83. The EC's position with respect to audits is equally puzzling. In its first written submission, the EC asserted that audits, like penalties, "are not part of customs procedures, and therefore do not concern the administration of customs laws as such."[110] In its response to the Panel's Question 64(e), the EC explained that it does not consider audits to be customs procedures "[b]ecause they are not one of the procedures referred to in Article 3(16) CCC."[111] Article 3(16) of the CCC, in turn, defines "customs procedure" not in the ordinary sense of that term, but rather, in a sense that is specific to the CCC. In that context, "customs procedure" refers to the status that member State customs authorities may assign to a good (*e.g.*, "release for free circulation"; "transit"; "customs warehousing"; "inward processing"; and so forth). The specific sense in which the EC uses the term "customs procedure" for purposes of the EC's Customs Code has absolutely no bearing on whether audits are customs procedures (in the

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[108]Council Resolution of 29 June 1995 on the effective and uniform application of Community law and on the penalties applicable for breaches of Community law in the internal market, p. 1 (Exh. EC-41).

[109]Korea Replies to Panel Questions to Third Parties, p. 5 (reply to Question 13(a)); Japan Replies to Panel Questions to Third Parties, paras. 18-21; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu Replies to Panel Questions to Third Parties, p. 3 (reply to Question 13); Argentina Replies to Panel Questions to Third Parties, p. 2 (reply to Question 13).

[110]EC First Written Submission, para. 400.

[111]EC Replies to Panel Questions, para. 105.

ordinary sense of that term) for administering the Customs Code. Indeed, the EC so acknowledged in response to the Panel's Question 64(c), which asked "why the definition of 'customs procedures' under EC customs laws should govern whether or not such procedures fall within the scope of Article X:3(a) of the GATT 1994." The EC replied, "*These are independent questions*. The term 'customs procedure' is a term of EC law. The scope of Article X:3(a) GATT depends on whether the law or regulation which is administered pertains to one of the subject matters enumerated in Article X:1 GATT."[112] The United States agrees, and therefore wonders why the EC insists that audits "are not part of customs procedures, and therefore do not concern the administration of customs laws as such."

84. In any event, it is notable that in other contexts the EC has acknowledged that audits are tools for administering EC customs laws. For example, the Customs Audit Guide contained in Exhibit EC-90 refers to CCC Articles 13 to 16 as "a legal basis for the undertaking of audits."[113] CCC Article 13, in turn, states that member State customs authorities may "carry out all the controls they deem necessary to ensure that customs legislation is correctly applied." The United States fails to see how a tool "to ensure that customs legislation is correctly applied" can be characterized as not relating to the administration of customs laws.[114]

C. Member States' penalties and audit procedures are properly characterized as tools for the administration of EC customs laws.

[112]EC Replies to Panel Questions, para. 103 (emphasis added).

[113]Community Customs Audit Guide, A framework for post clearance and audit based controls p. 4 (Exh. EC-90).

[114]*See also* Community Customs Audit Guide, A Framework for post clearance and audit based controls pp. 7-8 (summarizing "main objectives of a customs audit" in a way that makes clear that audits give effect to EC customs laws by verifying compliance with those laws) (Exh. EC-90); U.S. Oral Statement at First Panel Meeting, para. 53 (describing regional trade agreement between the EC and Chile, which contains a provision that includes "audit methods" within the category of "customs provisions and procedures").

85. The EC contends that, in describing member States' disparate penalty and audit provisions as tools of the administration of EC customs law which constitute the non-uniform administration of those laws, "the US is undermining the clear distinction between the administration of laws and the laws themselves."[115] In the EC's view, penalty and audit provisions are themselves laws that are administered and therefore cannot be described as tools for administering other laws (in this case, EC customs laws).[116]

1. A law may be a tool for administering other laws.

86. The flaw in the EC's reasoning is its assumption that a law can be viewed only one way, as the thing that is administered and not also as a tool for administering something else. The United States does not disagree with the proposition that a law providing for penalties or audit procedures may be considered as something to be administered. But that does not exclude the possibility of considering the same law as a tool for administering other laws, for example, by putting those laws into effect through verification and enforcement. The EC itself recognized this precise point in *Argentina - Hides*, where it challenged the same Argentinian measure from the perspective of its substance *and* from the perspective of its character as a tool for administering other laws. Thus the panel there explained the EC's argument as follows:

> The European Communities state that since Res. 2,235.96 has an export restrictive effect, they challenge the substance of that measure under [GATT] Art. XI. Since, for the products it covers, it makes an impartial and reasonable application of Argentinian export procedures impossible, the EC properly challenges that effect of the measure under [GATT] Art. X:3.(a).[117]

2. Basing a claim of non-uniform administration on differences among

[115]EC Replies to Panel Questions, para. 190.

[116]*See* EC Replies to Panel Questions, para. 113.

[117]Panel Report, *Argentina – Hides*, para. 4.203.

member State laws that are tools for administering the EC's customs laws is not inconsistent with the Appellate Body's finding that a GATT 1994 Article X:3(a) claim must concern the administration of customs laws rather than their substance.

87. The distinction between administration and substance that the Appellate Body referred to in *EC – Bananas III* is not to the contrary.[118] There, the question was whether it was inconsistent with GATT 1994 Article X:3(a) for the EC to apply one set of import licensing procedures to goods imported from certain WTO Members and a different set of import licensing procedures to goods imported from other WTO Members.[119] The Appellate Body did not have occasion to consider whether the different licensing procedures at issue represented a non-uniformity in the administration of some other law. That question simply was not at issue there, as it is here.

88. By contrast, the panel in *Argentina – Hides* did have occasion to consider whether a regulation could be challenged under Article X:3(a) as a tool for administering Argentina's customs laws in a manner inconsistent with that provision. As was discussed in the U.S. statement at the first Panel meeting, the EC in that dispute challenged a measure of Argentina (Resolution 2235) as a tool for administering Argentina's customs laws (set forth in other statutes and resolutions) in a manner inconsistent with Article X:3(a).[120] Argentina defended, just as the EC does here, by arguing that the complaint was about the substance of a measure rather than its administration, and therefore was outside the scope of Article X:3(a) under the Appellate Body's reasoning in *EC - Bananas III*.[121] The panel rejected that argument, noting that

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[118]*See* EC Replies to Panel Questions, para. 190 (asserting that U.S. argument is incompatible with Appellate Body finding in Appellate Body Report, *EC – Bananas III*).

[119]Appellate Body Report, *EC - Bananas III*, paras. 199-201.

[120]U.S. Oral Statement at First Panel Meeting, paras. 22-23.

[121]*See* Panel Report, *Argentina – Hides*, paras. 4.183 to 4.186 & 11.69.

"[t]he relevant question is whether the substance of such a measure is administrative in nature or, instead, involves substantive issues more properly dealt with under other provisions of the GATT 1994."[122] In finding that the measure in question was administrative in nature the panel observed, "Resolution 2235 does not create the classification requirements; it does not provide for export refunds; it does not impose export duties. It merely provides for a certain manner of applying those substantive rules."[123]

89. Following the panel's reasoning in *Argentina - Hides*, the fact that tools for administration of EC customs laws themselves take the form of laws does not mean that the United States has ignored the difference between substance and administration that was highlighted in *EC - Bananas III*. The United States is challenging the administration of EC customs laws, not the substance of those laws. It just happens that one aspect of the non-uniform administration of those laws is differences in the tools that different member States employ to administer those laws. Like Resolution 2235 in *Argentina - Hides*, member States' penalty and audit provisions do not prescribe rules on classification and valuation, but they do provide means of "putting into effect" – *i.e.*, administering – laws that do prescribe rules on classification and valuation.

3. The findings of the panel in *Argentina - Hides* are directly relevant to the present dispute.

90. The EC disputes the relevance of the panel report in *Argentina - Hides* to the present dispute on two grounds. First, it asserts that a distinguishing feature of the measure challenged in *Argentina - Hides* was that it mandated administration in a manner inconsistent with Article

[122] Panel Report, *Argentina – Hides*, para. 11.70.

[123] Panel Report, *Argentina – Hides*, para. 11.72.

X:3(a).[124] Second, it suggests that unlike the measure challenged in *Argentina - Hides*, penalty provisions are not recognizable as being administrative in nature.[125] Neither of these arguments is well founded.

91. The question of whether the measure at issue in *Argentina - Hides* mandated administrative behavior inconsistent with GATT 1994 Article X:3(a) or merely permitted it was entirely irrelevant to the panel's findings in that dispute. The panel made absolutely no reference to the character of Argentina's Resolution 2235 as mandatory or permissive.[126] Nor did the EC in its arguments.[127] Indeed, contrary to the EC's argument now that a decisive factor in *Argentina - Hides* was the mandatory character of the measure at issue, the EC's arguments in that dispute consistently described the measure as an "authorization" that "allow[ed]" certain conduct in the course of administration of Argentina's export laws.[128]

92. The EC's suggestion that the panel report in *Argentina - Hides* is irrelevant because unlike the measure at issue there penalty provisions are not readily distinguishable as "administrative" or "substantive"[129] is addressed in the U.S. response to the Panel's Question 90.[130] There it was explained:

> The definition of "administrative" is "[p]ertaining to management of affairs; executive." "Executive," in turn, means "[p]ertaining to execution; having the function of putting something into effect. . . ." Thus, a measure is administrative in nature where it has the function of putting something into effect. In other

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[124] *See* EC Replies to Panel Questions, paras. 182, 183 & 185; *see also id.*, para. 196.

[125] *See* EC Replies to Panel Questions, para. 184.

[126] *See* Panel Report, *Argentina – Hides*, paras. 11.69 to 11.72.

[127] *See* Panel Report, *Argentina – Hides*, paras. 4.162 to 4.206.

[128] *See*, *e.g.*, Panel Report, *Argentina – Hides*, paras. 4.162, 4.166 & 4.177.

[129] EC Replies to Panel Questions, para. 184.

[130] U.S. Answers to Panel Questions, paras. 156-160; *see also id.*, paras. 110-114 & 118-120.

> words, it presumes the existence of a distinct law, rule or other measure and serves to execute or carry out that underlying law, rule or other measure. Again, a penalty measure is a good example. A penalty measure necessarily presumes the existence of some underlying measure. It makes no sense to speak of a penalty measure in the abstract, unconnected to a particular measure that is sought to be enforced. A penalty measure has the function of putting into effect underlying measures, such as customs laws.[131]

93. Of course, as noted above, the relevant question for Article X:3(a) purposes is not whether a measure is *either* "administrative" *or* "substantive" in character. A measure may have both qualities depending on the perspective from which it is examined, as the EC argued in *Argentina - Hides*.[132] Distinguishing a measure as "administrative" in character, as the panel in that dispute explained, is a matter of determining whether it prescribes the means for "executing" or "putting into effect" substantive rules on classification and valuation, for example, which themselves are set forth in other measures.[133] Like the measure at issue in *Argentina - Hides*, EC member State penalty and audit provisions do not prescribe substantive rules on classification and valuation, but they do put such substantive rules as prescribed in EC regulations into effect. Therefore, member State penalty and audit provisions are properly characterized as "administrative" in nature vis-a-vis the substantive rules in EC law.

94. The EC's argument to the contrary comes back to its erroneous definition of "administer," which is not based on the ordinary meaning of that term. Since, in the EC's view, a Member administers its customs laws only when it applies those laws "in concrete cases," the EC cannot conceive of the possibility that non-uniform administration of customs laws may take the form of different audit procedures and penalty provisions in different regions of the

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[131]U.S. Answers to Panel Questions, para. 158 (internal citations omitted).

[132]*See* Panel Report, *Argentina – Hides*, para. 4.203.

[133]Panel Report, *Argentina – Hides*, para. 11.72.

Member's territory. The EC's understanding ignores the ordinary meaning of "administer" as "execute," which in turn means "put into effect."

95. The EC recognizes that the focus of Article X:3 is on protecting the interests of traders.[134] From traders' point of view, however, the liability they may face for misclassification of goods or technical errors in clearing goods through customs, the likelihood of being audited, and the possibility that at the conclusion of an audit the customs authorities may issue binding guidance that the traders may rely upon in the future all are considerations that can be as important as the consideration of how the customs authorities will classify and value their goods. If a trader has reason to expect that a classification error may result in a criminal penalty in one member State and a small administrative fine in another, that may affect its decision on where to enter its goods into the EC as much as its expectation that a particular classification is likely to be accepted in the respective member States. Differences in penalty and audit provisions among member States are as much a part of the background against which traders make decisions as the records of those member States in classifying and valuing goods.[135] Like the application of classification and valuation rules by member State customs authorities in particular cases, member State

[134] EC Replies to Panel Questions, para. 14 ("Article X:3(a) . . . intends to protect the interests of traders"); *see also* Korea Third Party Submission, para. 12; Japan Oral Statement at First Panel Meeting, para. 2; Argentina Replies to Panel Questions, para. 19; Korea Replies to Panel Questions, p. 2 (reply to Question 7); AB Report, *US - Shrimp*, para. 183; Panel Report, *Argentina – Hides*, para. 11.76.

[135] The EC argues that the "margin of freedom" required in the application of penalty provisions makes a requirement of uniform administration "somewhat problematic." EC Replies to Panel Questions, para. 211. However, the relevance of different penalty provisions to the non-uniform administration of EC customs laws is not the discretion that member State authorities necessarily have in applying different penalties to different conduct, but rather the very different tools that different member States have at their disposal in exercising that discretion. Where one member State may impose criminal sanctions for certain conduct and another member State may impose administrative fines for the same conduct, they are operating on very different fields even though each may have discretion within its respective field. It is the fact that different member States have at their disposal dramatically different penalty provisions for putting EC customs laws into effect that constitutes non-uniformity in the administration of those laws.

penalty and audit provisions give effect to EC customs laws and, accordingly, differences among those provisions constitute non-uniformity in the administration of those laws.

D. Reference to "penalties" for "minor breaches" in GATT 1994 Article VIII:3 does not put penalties outside the scope of Article X:3(a).

96. The EC makes the additional argument that the mention of "penalties for minor breaches of customs regulations or procedural requirements" in GATT 1994 Article VIII:3 is evidence that penalties are not addressed by GATT 1994 Article X.[136] But this argument is a non-sequitur. The fact that Article VIII:3 sets substantive parameters for penalties for certain types of breaches of customs regulations or procedural requirements – *i.e.*, "minor breaches" – has nothing to do with whether penalties may be considered to be tools for administering a Member's customs laws. The express reference to penalties in Article VIII:3 certainly does not exclude that differences in penalty provisions in different regions of a Member's territory can create and serve as evidence of lack of uniformity in the administration of that Member's customs laws.[137]

97. Indeed, carried to its logical extension, the EC's reasoning – that express reference to penalties in Article VIII:3 means that the absence of an express reference to penalties in another GATT Article is evidence of the deliberate exclusion of penalties from the scope of that article – would lead to manifestly absurd results. For example, it would mean that a Member could discriminate among other Members by applying penalties to customs breaches involving products of some Members but not applying penalties to customs breaches involving like products of other Members. This would not be a breach of GATT 1994 Article I, according to the EC's logic, because that article, like Article X:1, refers only to "charges" and not expressly

[136] EC First Written Submission, para. 441; EC Replies to Panel Questions, para. 212.

[137] *See generally* Japan Replies to Panel Questions to Third Parties, para. 20.

to "penalties."

E. The U.S. argument does not imply a requirement of harmonization of all sub-federal laws of WTO Members that have any similarity in subject matter to federal laws.

98. Equally unavailing is the EC's argument that a finding that differences in member States' penalty and audit provisions constitutes non-uniform administration of EC customs laws would have dire implications for all WTO Members in a variety of regulatory areas.[138] This argument is based on the erroneous premise that under the U.S. argument any sub-federal law that had any similarity in subject matter with a federal law (*i.e.*, a "link") "could be said to constitute 'administration' of the law."[139] That is not the U.S. argument at all. As discussed above, it is not the mere existence of a "link" between member States' penalty and audit provisions and EC customs laws that makes the former administrative in nature. Rather, it is the fact that the very purpose of member States' penalty and audit provisions is to "execute" or "put into effect" EC customs laws that gives them that quality. The penalty and audit provisions have no significance on their own. They necessarily presume the existence of substantive rules, and member States use them to administer those rules by verifying and enforcing compliance with them. There is simply no logical basis for the EC's contention that accepting the U.S. argument with respect to penalties and audit procedures would imply a requirement of harmonization of all sub-federal laws of WTO Members that have any similarity in subject matter to federal laws.[140]

VI. THE DECISIONS OF REVIEW TRIBUNALS IN THE EC DO NOT GOVERN THE PRACTICE OF "THE AGENCIES" ENTRUSTED WITH ADMINISTRATIVE ENFORCEMENT OF EC CUSTOMS LAWS, CONTRARY TO GATT 1994 ARTICLE X:3(B)

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[138]*See, e.g.*, EC Replies to Panel Questions, paras. 193-195.

[139]EC Replies to Panel Questions, para. 194.

[140]*See generally* U.S. Answers to Questions of the EC, para. 1 n.1.

99. The United States turns, finally, to the EC's argument that it discharges its GATT 1994 Article X:3(b) obligation to provide tribunals or procedures for the prompt review and correction of customs administrative decisions through review fora provided by EC member States. The United States has explained that the EC fails to comply with Article X:3(b) because the one review tribunal that it provides whose decisions have EC-wide effect is the ECJ, and review by the ECJ does not meet the requirement of promptness. Review by member State courts does not fulfill the EC's obligation, as the decisions of each such court apply only within its respective member State. The decisions of any given member State's courts do not "govern the practice of" "the agencies entrusted with administrative enforcement" of customs laws in the EC as a whole. Further, Article X:3(b) must be read in light of the obligation of uniform administration in Article X:3(a); accordingly, where review leads to decisions whose effect is limited to particular regions within a Member's territory such review is not consistent with Article X:3(b).[141]

100. The EC has responded that member State courts have the status of EC courts when they are interpreting and applying EC law. It argued that the exercise of review by multiple member State courts is consistent with use of the plural form in Article X:3(b). Finally, it argued that there is no basis for reading Article X:3(b) in light of Article X:3(a). According to the EC, these are independent obligations, and one does not provide context for interpretation of the other.[142]

101. In this section, the United States focuses on the EC's contention that it fulfills its Article X:3(b) obligation even where the decisions of the review tribunals it provides apply only to customs authorities within limited geographical regions. This contention is inconsistent with the

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[141]*See* U.S. First Written Submission, paras. 133-154; US Answers to Panel Questions, paras. 135-137.

[142]*See* EC First Written Submission, paras. 454-470. The United States finds this position rather striking in contrast to the EC's argument that Article X:3(a) must be read in light of Article XXIV:12 of the GATT 1994.

text of Article X:3(b) as well as the context for that provision contained in Article X:3(a).[143]

A. The decisions of the tribunals or procedures a WTO Member provides pursuant to GATT 1994 Article X:3(b) must govern the practice of "the agencies" entrusted with administrative enforcement of the Member's customs laws.

102. The first sentence of Article X:3(b) requires Members to provide tribunals or procedures for the prompt review and correction of administrative action relating to customs matters. The second sentence requires that such tribunals or procedures "be independent of the agencies entrusted with administrative enforcement" *and* that their decisions "be implemented by, and . . . govern the practice of, such agencies." It is the requirement that the decisions of review tribunals or procedures govern the practice of the agencies entrusted with administrative enforcement that makes clear that the EC does not fulfill its obligation under Article X:3(b), since each of the multiple review tribunals it provides renders decisions that govern the practice only of a subset of agencies entrusted with administrative enforcement within a particular region in the EC. A decision of an EC member State court does not "govern the practice" of the EC's agencies in another member State.

103. The EC states that "Article X:3(b) GATT, unlike Article X:3(a) GATT, is not concerned with questions of uniformity, but exclusively with the prompt review of customs decisions."[144] But if this were so, there would be no need for Article X:3(b) to specify that the decisions of review tribunals must "govern the practice of" the agencies entrusted with administrative enforcement. It would suffice simply to require the provision of tribunals or procedures whose decisions are "implemented by" the agencies entrusted with administrative enforcement.

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[143]*See generally* U.S. Oral Statement at First Panel Meeting, paras. 58-60.

[144]EC Oral Statement at First Panel Meeting, para. 60.

104. The ordinary meaning of the term "govern" as relevant here is "[c]ontrol, influence, regulate, or determine" or "[c]onstitute a law, rule, standard, or principle for."[145] Accordingly, the distinct "govern the practice" requirement in Article X:3(b) looks beyond the simple implementation of a decision in the case at hand and requires that the decision "control, influence, regulate or determine" the practice of or "constitute a law, rule, standard, or principle for" "the agencies entrusted with administrative enforcement" of the customs laws going forward.

105. Consider, for example, the case of an importer that seeks review of the customs authority's classification decision for a particular good. Suppose that the review tribunal finds that the customs authority mis-interpreted the applicable classification rules and, as a result, classified the good under the wrong tariff subheading. Under Article X:3(b), the customs authority must implement the tribunal's decision by applying the correct classification to the good at hand. But, in addition, the tribunal's decision must govern the practice of – *i.e.*, "control, influence, regulate, or determine" the practice of or "constitute a law, rule, standard, or principle for" – the customs authority. In other words, in future classification decisions, the customs authority must apply the correct interpretation of the classification rules, as set forth in the tribunal's decision.

106. Moreover, it is "*the* agencies entrusted with administrative enforcement" whose practice is required to be governed by the decisions of review tribunals or procedures. That requirement is not fulfilled where the decisions of review tribunals or procedures govern the practice of only *some of* the agencies entrusted with administrative enforcement. Rather, for the practice of "the

[145] *The New Shorter Oxford English Dictionary*, Vol. I, pp. 1122-1123 (1993).

agencies" to be governed by the decisions of review tribunals, those decisions must govern "the agencies" throughout the Member's territory.

107. This understanding is reinforced by the context provided by Article X:3(a). The EC concedes that Articles X:3(a) and X:3(b) must be interpreted "in a harmonious way."[146] Where the decisions of review tribunals govern the practice of the agencies entrusted with administrative enforcement, they become part of the agencies' administration of the Member's customs laws in future cases. Since the Member's customs laws must be administered in a uniform manner, the decisions of review tribunals must govern the practice of "the agencies" throughout its territory. If they govern the practice of only some of the agencies then, by definition, the administration of the Member's laws will not be uniform; different interpretations of the Member's laws will govern the practice of different agencies within the Member's territory.

108. Australia put the point succinctly in its statement at the first Panel meeting when it observed that "the decisions and rulings of the review bodies should be applied consistently and be available equally throughout the territory of the WTO member."[147] That is not the case in the EC. Not only are the decisions of individual member State courts applicable only within their respective member States, and therefore not applied consistently throughout the EC's territory, but such decisions are not "available equally throughout the territory" of the EC. As the EC explained in response to the Panel's Question 72, there is no mechanism to ensure that member

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[146]EC Replies to Panel Questions, para. 172.

[147]Australia Oral Statement, para. 9; *see also* Argentina Oral Statement, paras. 7 & 10; Japan Replies to Panel Questions, para. 3 ("the matter of uniform implementation of such tribunals or procedures is a matter under Article X:3(a) GATT, where applicable").

State courts are kept apprised of the customs review decisions of other member State courts.[148]

109. The only review tribunal decisions that govern the practice of "the agencies" entrusted with administrative enforcement of EC customs laws throughout the EC's territory are decisions of the ECJ.[149] However, review by the ECJ can hardly be considered to satisfy the Article X:3(b) requirement of prompt review. The ordinary way for questions to be put before the ECJ is through the preliminary reference procedure. In other words, a question of EC law first must be brought before a member State court, which may or may not refer a preliminary question to the ECJ (unless it is a member State court from which there is no further recourse).[150] Once a member State court makes a preliminary reference to the ECJ it may take 19 to 20 months for the ECJ to render a decision (and that is only an average).[151]

B. The U.S. argument does not imply a requirement for every WTO Member to establish a single, centralized customs court.

110. In its interventions at the first Panel meeting, the EC suggested that if the Panel were to accept the U.S. argument on Article X:3(b) it would have implications not only for the EC, but for other WTO Members as well. It indicated that the EC is not the only WTO Member to provide for review of customs administrative actions on a regional basis and suggested that the U.S. argument would imply an obligation for each WTO Member to establish a single review

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[148]EC Replies to Panel Questions, para. 129.

[149]*See* EC Replies to Panel Questions, para. 132 ("Rulings of the Court of Justice on interpretation have been considered binding on other courts by virtue of the purpose of the preliminary ruling procedure, which is to secure uniformity of Community law.").

[150]*See* EC Replies to Panel Questions, para. 122.

[151]EC Replies to Panel Questions, para. 124; *see also Commissioners of Customs and Excise* v. *Anchor Foods, Ltd.*, [1999] V & DR 425 (1998) (at 12th page of exhibit) (UK court citing length of time for obtaining a decision from the ECJ pursuant to a preliminary reference (18 to 24 months) as a factor militating against making such reference) (Exh. US-20).

tribunal with jurisdiction throughout its territory.[152] However, whether or not there are other Members that provide for review of customs administrative action on a regional basis, the EC is the only WTO Member of which the United States is aware that has a combination of geographically fragmented customs administration *and* geographically fragmented review.

111. The United States does not argue that Article X:3(b) requires every WTO Member to have a single, centralized tribunal for the prompt review and correction of customs administrative actions. What the United States does argue is that Article X:3(b) requires that the decisions of the tribunals that a Member provides for the prompt review and correction of customs administrative actions govern the practice of the agencies entrusted with administrative enforcement of the customs laws *throughout the Member's territory*.

112. Where a Member has a single, centralized agency entrusted with the enforcement of its customs laws, it is conceivable that it may fulfill its obligation under Article X:3(b) even where it provides for review and correction through multiple tribunals each of whose jurisdiction is regionally limited. In that case, where the court for a given region renders a decision, the agency should be able both to implement that decision in the region and conform its practice throughout its territory. In this way, the Member's administration of its customs laws would be governed by that decision, and its customs law administration would be uniform. If the decision of a court in one region conflicts with a decision of a court in another region, the agency should be able to resolve the conflict by appealing one or the other decision to a court or tribunal of superior jurisdiction, a possibility contemplated by the second sentence of Article X:3(b).

113. Further evidence for the proposition that the review and correction provided for pursuant

[152] *See generally* EC Oral Statement at First Panel Meeting, para. 69.

to Article X:3(b) must result in decisions that govern the administration of a Member's customs laws throughout its territory is the *proviso* in the second sentence, which states 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." (Emphasis added.) The *proviso* contemplates "the central administration" challenging a tribunal's decision collaterally – *i.e.*, "in another proceeding" – when the central administration determines that "the decision is inconsistent with established principles of law or the actual facts." But, that possibility makes sense only if the decision in the original proceeding would otherwise have effect outside of that proceeding. If the decision's effects were confined to the proceeding in which it was rendered, there would be no need or basis for a collateral challenge.

114. As the possibility of collateral challenge to tribunals' decisions implies that the effects of such decisions are not confined to the particular proceedings in which they are rendered, there is no basis for suggesting that Article X:3(b) contemplates these effects having a scope that is narrower than the Member's entire territory. Not only is there no basis for such a suggestion, but the reference to "the central administration" of the agency entrusted with administrative enforcement itself supports the proposition that the effects of tribunals' decisions are contemplated as having a scope that covers the Member's entire territory.

115. Of course, where a Member has no "central administration" (as is the case in the EC), the possibility set out in the *proviso* would appear not to exist. But, that simply means that in the unusual situation of a Member without a central administration, the various regional customs authorities would have to take other steps to ensure that the decisions of review tribunals

"govern the practice of" "the agencies entrusted with administrative enforcement" *and* that the Member continues to administer its customs laws in a uniform manner.

116. In sum, where a Member has a single, centralized authority entrusted with the administration of its customs laws, it is possible to envision that prompt review and correction of customs matters could be achieved through tribunals with regional jurisdiction consistent with Article X:3(b). However, where a Member, such as the EC, provides for the administration of its customs laws through separate, autonomous, regionally limited authorities, it is difficult to see how the provision of review and correction through tribunals whose jurisdiction is also regionally limited can be consistent with Article X:3(b). In the case of the EC, the combination of 25 separate member State customs authorities and review tribunals that are distinct to each member State results in review tribunal decisions that do not govern the practice of "*the* agencies entrusted with administrative enforcement" of the EC's customs laws. For this reason, the provision of review and correction of member State customs administrative decisions by member State tribunals fails to meet the EC's obligation under Article X:3(b).

VII. CONCLUSION

117. For the foregoing reasons, and for the reasons set out in the U.S. first written submission, in its responses to the Panel's questions, and at the first Panel meeting, the United States respectfully reiterates its request that the Panel find that the EC is not in conformity with Articles X:3(a) and X:3(b) of the GATT 1994 and recommend that it come into compliance promptly.