EUROPEAN COMMUNITIES - SELECTED CUSTOMS MATTERS

(WT/DS315)

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

October 25, 2005

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. 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.

2. Not surprisingly, uniformity is a goal to which the EC aspires. For example, in the Decision adopting the EC's "Customs 2007" program (Exh. EC-43), 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." 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, and therefore is in breach of that article.

3. Before countering the key themes that have emerged in the EC's response to U.S. claims, 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. 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.

4. 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.

5. Moreover, in suggesting that the logic of the U.S. argument on Article X:3(b) would 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. A Member may be able to accomplish that where courts with regional jurisdiction review actions of a single customs authority. But, this does not occur where, as in the EC, fragmentation of review is coupled with fragmentation of administration.

6. 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. Difficulty of coming into compliance has no bearing on whether the EC is or is not currently in compliance with its obligations under GATT 1994 Article X:3. 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.

7. The EC incorrectly urges on the Panel a relative view of Article X:3(a). 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. A relative standard is suggested by, among other statements, 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.

8. 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." 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) will mean different things for different Members depending on whether, as a matter of "the internal distribution of competence," a Member has decided that certain tools for the administration of its customs law (such as penalties and audits) are to be prescribed and applied by regional governments.

9. 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. Article XXIV:12 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." (GATT Panel Report, *Canada – Gold*

Coins, paras. 63-64.)

10. 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.

11. Moreover, it should not pass without notice that despite its oblique assertion of "constitutional implications" and its reference to "fundamental principles of the EC legal order," 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." (GATT Panel Report, *US - Beverages*, para. 5.79.) Evidently this is a burden that the EC is not prepared to assume.

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

12. 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." Contrary to the EC's assertion, 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 parties. 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. 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.

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."

13. The EC persists in characterizing Article X:3(a) as "a minimum standards provision" or "a subsidiary provision." This characterization is based entirely on a passing reference by the Appellate Body in its report in *US - Shrimp*. That statement, however, does not support the diminished significance the EC attaches to Article X:3(a).

14. 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 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. (Para. 182.) However, the Appellate Body was not probing how strict or lenient the Article X:3 standard is. 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." (Para. 183.)

15. 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.

16. In any event, 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. The EC suggests that in using "minimum standards" and similar phrases, what it really meant was that a breach of the 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.

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).

17. 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. (Para. 181.) Likewise, the EC provides no mechanism to safeguard against the non-uniform administration of EC customs laws by 25 different member State authorities.

18. 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 administration in Article X:3(a) – the *Argentina - Hides* panel – made no reference to a "pattern" requirement for establishing a breach of that obligation. (Paras. 11.80-11.83.) 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." (Para. 11.83.) 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.

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

19. 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.

20. 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 "[a]n arrangement or order discernible in objects, actions, ideas, situations, etc." 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). Despite this apparent anomaly, the EC does not elaborate on the asserted "pattern" requirement.

21. The EC does make oblique references to a "statistically significant sample" of non-uniformity, occurrences of non-uniformity that are "so widespread and frequent as to constitute an overall pattern of non-uniformity," and occurrences of non-uniformity "on a large scale," 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.

22. 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 traders." The interests of traders in 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.

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

23. Moreover, the EC's assertion of a pattern requirement relies on a single sentence from the panel report in *US - Hot-Rolled Steel*. The concept of a pattern was relevant to the question at issue in that dispute in a way that it is not relevant in the present dispute.

24. In any dispute involving a claim of *non-uniform* administration, it must be asked what *uniform* administration would look like. 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. 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, whether or not such non-uniform administration constitutes a pattern.

25. Conversely, in *US - Hot-Rolled Steel* 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. That proposition could be tested only if the panel had an understanding of what uniform administration of U.S. antidumping law looked like.

26. The claim at issue in the present dispute is far different. 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. Evidence of a pattern is not necessary to distinguish the EC system of customs law administration as one that does not meet that obligation.

27. 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*. 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 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*.

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

28. Finally, 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, 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.

29. In addition to general acknowledgments by the EC of divergences in the administration of EC customs law, it has made particular acknowledgments of such divergences in the context of this dispute. Specifically, it has acknowledged divergences in the areas of penalties and audit procedures, approaches to permitting certain customs valuation methods, and administration of the economic conditions test for use of the procedure known as processing under customs control.

30. 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, its 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.

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

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

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

32. 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: (a) The EC acknowledges that the Administrative Guidelines on the European Binding Tariff Information (EBTI) System and its Operation "are not legally binding;" (b) 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); (c) 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; and (d) 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."

33. 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. That provision 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.

B. Binding tariff information does not secure uniform administration.

34. A more concrete instrument for securing uniform administration that the EC identifies is binding tariff information. The EC's replies to questions confirm that BTI does not secure uniform administration.

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

35. One reason that BTI does not secure uniform administration is that traders may engage in BTI shopping. 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.

36. In fact, in its explanatory introduction accompanying the draft Modernized Community Customs Code (Exh. US-32), 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." (P. 12.) 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." (Panel Report, para. 7.261.)

37. 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. 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." 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.

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.

38. 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. *Timmermans* 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 (Exh. US-21) 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." (Para. 59.)

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

40. There is a serious flaw in the EC's logic. It 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.

41. 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. 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 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," 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.

42. 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. If hat authority 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.

43. 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." The EC itself called attention to this limited applicability of BTI in the *EC -Chicken* dispute.

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.

44. 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. The emphasis that the EC puts on this instrument 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 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. 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.

45. 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 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).

46. Third, the EC's emphasis on appeals to member State courts 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."

47. 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 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.

48. 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. 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.

49. 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." 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 – then any resulting lack of uniformity in the administration of EC customs law "cannot be attributed to a failure in [the EC's] system."

50. 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.

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 "ADMINISTER" CUSTOMS LAWS

51. There are no EC rules prescribing penalties for violations of EC customs laws. 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." (Exh. US-32, p. 13.)

52. With respect to audit procedures, there are differences among working practices, including the balance between reliance on examinations of goods at time of importation and post-release audits. As the EC Court of Auditors observed, due to such differences, "'individual customs authorities are reluctant to accept each other's decisions.'" (Exh. US-14, para. 37.) 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.

53. 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 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. Alternatively, the EC argued that certain EC guidelines cause penalties and audit procedures to be uniform within the meaning of Article X:3(a). Of these arguments, the main emphasis to have emerged 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.

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

54. In its reply to the Panel's Question 93, the EC 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." 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." This reasoning is flawed for several reasons.

55. 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." 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*." 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.

56. Of course, the concept of "concrete cases" appears nowhere in the definition of "administer" as quoted by the EC itself. 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.

57. 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." The question, then, is whether audit procedures and penalty provisions of different member States put EC customs laws into effect, or whether it is only the application of those laws by customs authorities in concrete cases that puts them into effect. The answer is that audit procedures and penalty provisions put EC customs laws into effect by verifying and enforcing compliance with those laws.

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

58. The administration of EC customs laws depends in large part on the actions of traders themselves. It is traders who make who make declarations and provide the customs authorities information concerning classification and valuation of goods. 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.

59. 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." Indeed, in other contexts (*e.g.*, Exh. EC-41, p. 1) the EC has acknowledged the critical relationship between penalties and the administration of customs laws.

60. 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." 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." However, the specific sense in which the EC uses the term "customs procedure" for purposes of the CCC has absolutely no bearing on whether audits are customs procedures for administering

the CCC. Indeed, the EC so acknowledged in response to the Panel's Question 64(c).

61. 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." (A framework for post clearance and audit based controls, p. 4.) 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."

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

62. 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." 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).

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

63. 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. (Panel Report, para. 4.203.)

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

64. The distinction between administration and substance that the Appellate Body referred to in *EC – Bananas III* is not to the contrary. The Appellate Body there 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.

65. 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. 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). 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*. The panel rejected that argument, noting that "[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." (Para. 11.70.) 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." (Para. 11.72.)

66. 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 highlighted in *EC - Bananas III*. 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" 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.

67. The EC disputes the relevance of the panel report in *Argentina - Hides*. 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 X:3(a). Second, it suggests that unlike the measure challenged in *Argentina - Hides*, penalty provisions are not recognizable as being administrative in nature. Neither of these arguments is well founded.

68. 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 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" is addressed in the U.S. response to the Panel's Question 90.

69. Of course, 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*. 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. 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.

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

71. The EC recognizes that the focus of Article X:3 is on protecting the interests of traders. 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.

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).

72. 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. 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.

73. Carried to its logical extension, the EC's reasoning 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 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.

74. 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. 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." However, 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.

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)

75. 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).

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.

76. 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.

77. 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." 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.

78. 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." 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.

79. 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.

80. 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." 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.

81. 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." 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 State courts are kept apprised of the customs review decisions of other member State courts.

82. 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. 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 which it may take 19 to 20 months for the ECJ to render a decision (and that is only an average).

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

83. The EC has 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 tribunal with jurisdiction throughout its territory. 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.

84. 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*.

85. 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).

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

87. 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.

88. In sum, the combination of 25 separate EC 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).