European Communities – Selected Customs Matters

(AB-2006-4)

OTHER APPELLEE SUBMISSION OF THE UNITED STATES OF AMERICA

September 11, 2006

BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

European Communities – Selected Customs Matters

(AB-2006-4)

SERVICE LIST

OTHER APPELLANT

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Short Title	Full Title and Citation
Argentina - Hides	Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, adopted 16 February 2001.
Canada - 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 22 March 1988.
Canada - Gold Coins	GATT Panel Report, *Canada - Measures Affecting the Sale of Gold Coins*, L/5863, 17 September 1985, not adopted.
Chile - Price Bands	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002.
EC - Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R - WT/DS286/AB/R, adopted 27 September 2005.
EC - Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998.
EC - Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998.
EC - Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R adopted 23 October 2002.
EEC - Dessert Apples	GATT Panel Report, *European Economic Community - Restrictions on Imports of Dessert Apples (Complaint by Chile)*, L/6491, BISD 36S/93, adopted 22 June 1989.
India - Quantitative Restrictions	Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted 22 September 1999**.**

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Japan -Film	Panel Report, *Japan - Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998.
Korea - Alcoholic Beverages	Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999.
Korea - Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000.
Mexico - HFCS (Article 21.5)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001.
Panel Report	Panel Report, *European Communities – Selected Customs Matters*, WT/DS315/R, circulated 16 June 2006.
US - Beverages	GATT Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R, BISD 39S/206, adopted 19 June 1992.
US - DRAMS from Korea	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005.
US - Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996.
US - Hot Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001.
US - Lamb Meat	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001.

US - OCTG Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004.
US - Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998.
US - Underwear	Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997.
US - Upland Cotton	Panel Report, *United States - Subsidies on Upland Cotton*, WT/DS267/R, adopted 21 March 2005 (with Appellate Body Report).
US - Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001.
US - Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997.

Table of Abbreviations

Submissions and Statements From Panel Proceeding

Short Title	Full Title and Citation
U.S. First Written Submission	First Written Submission of the United States of America, *European Communities – Selected Customs Matters* (WT/DS315) (12 July 2005).
EC First Written Submission	First Written Submission of the European Communities, *European Communities – Selected Customs Matters* (WT/DS315) (16 August 2005).
U.S. First Oral Statement	Opening Statement of the United States, First Meeting of the Panel, *European Communities – Selected Customs Matters* (WT/DS315) (14 September 2005).
EC First Oral Statement	Oral Statement of the European Communities, First Meeting of the Panel, *European Communities – Selected Customs Matters* (WT/DS315) (14 September 2005).
U.S. Answers to First Set of Panel Questions	Answers of the United States of America to the Panel's Questions in Connection With the First Substantive Meeting, *European Communities – Selected Customs Matters* (WT/DS315) (23 September 2005).
EC Replies to First Set of Panel Questions	Replies of the European Communities to the Questions of the Panel after the first substantive meeting, *European Communities – Selected Customs Matters* (WT/DS315) (23 September 2005).
U.S. Second Written Submission	Second Written Submission of the United States of America, *European Communities – Selected Customs Matters* (WT/DS315) (18 October 2005).
EC Second Written Submission	Second Written Submission of the European Communities, *European Communities – Selected Customs Matters* (WT/DS315) (18 October 2005).
U.S. Second Oral Statement	Opening Statement of the United States, Second Meeting of the Panel, *European Communities – Selected Customs Matters* (WT/DS315) (22 November 2005).
EC Second Oral Statement	Oral Statement of the European Communities, Second Meeting of the Panel, *European Communities – Selected Customs Matters* (WT/DS315) (22 November 2005).

EC Closing Statement at Second Panel Meeting	Closing Statement of the European Communities, Second Meeting of the Panel, *European Communities – Selected Customs Matters* (WT/DS315) (23 November 2005).
U.S. Answers to Second Set of Panel Questions	Answers of the United States of America to the Panel's Questions in Connection With the Second Substantive Meeting, *European Communities – Selected Customs Matters* (WT/DS315) (7 December 2005).
EC Replies to Second Set of Panel Questions	Replies of the European Communities to the Questions of the Panel after the second substantive meeting, *European Communities – Selected Customs Matters* (WT/DS315) (7 December 2005).
EC Comments on U.S. Answers to Second Set of Panel Questions	Comments of the European Communities on the Replies by the United States to the Questions of the Panel after the second substantive meeting, *European Communities – Selected Customs Matters* (WT/DS315) (14 December 2005).
US Comments on EC Replies to Second Set of Panel Questions	Comments of the United States of America on the Replies of the European Communities to the Questions of the Panel After the Second Substantive Meeting, *European Communities – Selected Customs Matters* (WT/DS315) (14 December 2005).
EC Comments on Interim Report	Comments of the European Communities on the Interim Report of the Panel, *European Communities – Selected Customs Matters* (WT/DS315) (24 February 2006).
U.S. Comments on EC Comments on Interim Report	Comments of the United States on the Request of the European Communities for Review of Precise Aspects of the Interim Report, *European Communities – Selected Customs Matters* (WT/DS315) (3 March 2006).

Other Abbreviations

Short Term or Title	Full Term or Title and Citation
BDL	blackout drapery lining
Bremen Main Customs Office Decision	Hauptzollamt Bremen, Letter Decision to Bautex-Stoffe GmbH, Sep. 22, 2004 (original and English translation) (Panel Exhibit US-23).
BTI	binding tariff information

CCC or Community Customs Code	Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, including all annexes thereto, as amended (Panel Exhibit US-5).
CCCIR or Community Customs Code Implementing Regulation	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 (Panel Exhibit US-6).
Common Customs Tariff or Tariff	Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, as amended.
Court of Auditors Valuation Report	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, (Mar. 14, 2001) (Panel Exhibit US-14).
DVI	digital video interface
Hamburg Main Customs Office Letter	Letter from Main Customs Office Hamburg-Waltershof to ORNATA GmbH, July 29, 1998 (original and English translation) (Panel Exhibit US-50).
Hamburg ZPLA Letter	Letter from Oberfinanzdirektion Hamburg to HZA Bremen regarding Protest of Bautex-Stoffe GmbH, Feb. 3, 2003 (original and English translation) (Panel Exhibit US-41).
LCD	liquid crystal display

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The appeal of the European Communities ("EC") is based in large part on an extremely narrow view of what constitutes a breach of the obligation in Article X:3(a) of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") that a Member "administer in a uniform . . . manner all its laws, regulations, decisions and rulings of the kind described in [Article X:1]." Under that view, administration is not an ongoing process but, rather, starts and stops with each individual instance in which the Member applies its law. It has no continuity and therefore cannot be challenged except by challenging individual instances of application of the law. Even then, the individual instances of application of the law must still be occurring at the time the panel is established. And, they must constitute a "pattern" of non-uniformity and have a "significant impact on the administration of the laws." Moreover, under this view, non-uniform administrative processes do not constitute a failure to administer customs law in a uniform manner unless they yield non-uniform "administrative outcomes" in identical circumstances, regardless of the different burdens and risks to traders associated with different processes.

2. This understanding has no basis in the text of Article X:3(a), ignores its context, and renders the obligation of uniform administration virtually meaningless. Accordingly, it should be rejected, as should the EC's requests for the reversal of findings by the Panel based on that erroneous understanding.

3. Throughout its appeal, the EC confuses administration with individual acts of administration. It assumes without basis that administration must have clear start and end points, such as those that may be associated with individual acts of administration.[1] It thus rejects the

[1] *See, e.g.*, EC Other Appellant Submission, paras. 63-68.

Panel's understanding that simply because individual acts reflecting non-uniform administration have expired does not mean that the relevant manner of administration has become uniform.[2]

4. Based on its erroneous premise, the EC claims that the Panel erred by making findings about acts of administration that had expired before the Panel was established or about evidence post-dating panel establishment that confirms the manner of administration existing at the time of panel establishment.[3] In the EC's view, the Panel treated these acts and evidence as if they were "measures at issue" alleged to breach Article X:3(a) in and of themselves and thus "overstepped" the temporal boundaries of its terms of reference. In context, however, it is clear that the Panel referred to these acts and evidence not as "measures at issue" but as relevant facts to inform its understanding of the manner of administration existing at the time of panel establishment. Therefore, the Panel did not overstep the boundaries of its terms of reference.

5. A second theme repeated throughout the EC's appeal is that non-uniform administrative processes do not breach Article X:3(a) unless they lead to non-uniform administrative outcomes.[4] The EC offers no textual or other basis for this view. In fact, nothing in the ordinary meaning of the terms "administer" or "uniform" in Article X:3(a), the context of that article, or the object and purpose of the GATT 1994 supports the interpretation the EC proposes.

6. Morever, the EC never even explains what is encompassed by its understanding of "non-uniform administrative outcomes." It seems that the EC would include in this concept differences in tariff classification of identical goods,[5] though only to the extent that such

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[2] *See Panel Report*, paras. 7.36 - 7.37.
[3] *See, e.g.*, EC Other Appellant Submission, paras. 105-107, 164-168.
[4] *See, e.g.*, EC Other Appellant Submission, paras. 13, 81, 125-136, 180, 221.
[5] *See* EC Other Appellant Submission, para. 128.

differences translated into differences in duty paid.[6] It is not clear, however, what else the EC would consider to be a "non-uniform administrative outcome."

7. Indeed, even accepting, *arguendo*, the EC's view that non-uniform administrative processes breach Article X:3(a) only to the extent that they lead to non-uniform administrative outcomes, it is not clear why differences in the burdens and risks associated with conveying goods into the EC through one region rather than another due to non-uniform processes would not be non-uniform outcomes. The Panel essentially recognized that such differences do lead to non-uniform outcomes in finding, at several points in its report, that when different customs authorities in different regions of the EC's territory administer EC customs law in a non-uniform manner, the consequence may be diversion of trade.[7] Exporters with sufficient resources may be able to adapt to non-uniform administrative processes by conveying their goods into the EC through the region whose authority administers the law in a more favorable manner, or by appealing customs actions that reflect non-uniform administration. At the same time, smaller exporters, with fewer resources to know the differences among administration by EC authorities may be particularly disadvantaged.[8]

8. The EC's disregard of this aspect of geographically non-uniform administration is especially evident in its argument that particular instances of non-uniform administration do not constitute breaches of Article X:3(a) of the GATT 1994 because they allegedly amount to

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[6] *See* EC Other Appellant Submission, para. 180.

[7] *See, e.g.*, *Panel Report*, paras. 7.275 n.517, 7.304 n.579, 7.383.

[8] *See Panel Report*, para. 7.167 ("Given the cost and time implicated by such an appeal [of customs administrative action to an EC member State court], it is unclear whether traders will resort to such an option in all cases in which non-uniform application of EC customs law among the customs authorities of the member States becomes apparent.").

divergences in administrative process without divergences in administrative outcome. Thus, for example, the EC contends that different customs authorities' application of different tariff classifications to certain liquid crystal display ("LCD") monitors does not amount to non-uniform administration in breach of Article X:3(a), as long as the products are subject to zero duty regardless of classification, pursuant to a temporary duty suspension.[9] That assertion simply ignores the ordinary meaning of "uniform" and further ignores the burden and resulting impact on trade.

9. Likewise, the EC's reference to "the millions of customs decisions taken by EC customs authorities every year, most of which are entirely unproblematic"[10] misses the point. The possibility that, in response to non-uniform administration, trade is diverted from one EC region to another or that, out of frustration, economic operators avoid the risks of non-uniform administration by moving production into the territory of the EC, and that the number of individual instances of non-uniform administration therefore diminishes is not "unproblematic." It may show that some traders have determined how best to navigate a system the Panel described as "complicated and, at times, opaque and confusing."[11] However, that does not mean, as the EC wrongly suggests, that there is no problem of non-uniform administration.

10. In this submission, the United States first will show that the EC's appeal rests on an erroneous construction of Article X:3(a). Contrary to the EC's arguments, the Panel's findings with respect to the "general issues" the EC identifies – *i.e.*, "temporal limitations on the Panel's

[9] EC Other Appellant Submission, para. 180.
[10] EC Other Appellant Submission, para. 147.
[11] *Panel Report*, para. 7.191.

terms of reference" and "uniformity as regards administrative processes" – are entirely consistent with the ordinary meaning of the terms of that article, in context, and in light of the object and purpose of the GATT 1994.

11. Second, the United States will show that the Panel's findings with respect to the three particular issues for which the EC seeks review are consistent with a correct construction of Article X:3(a), are within the Panel's terms of reference, and are consistent with the Panel's obligation under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") to make an objective assessment of the matter before it.

12. Finally, with respect to the EC's conditional appeal of the Panel's findings regarding Article XXIV:12 of the GATT 1994, the United States will show, first, that part of the EC's appeal (as it relates to the U.S. claim under Article X:3(b)) is outside the scope of this proceeding, as it was not an issue of law or legal interpretation covered by the Panel Report. Further, Article XXIV:12 is not applicable to this dispute, because the EC did not invoke it in the panel proceeding, and because the U.S. claim concerns observance of obligations under Article X:3(a) by the EC, not by regional and local governments of the EC. And, in any event, the EC's understanding of Article XXIV:12 as a basis for attenuating or derogating from the EC's obligations under Article X:3(a) of the GATT 1994 is unfounded.

II. ARGUMENT

A. Temporal Aspects of the Panel's Terms of Reference

13. The first general issue for which the EC seeks review concerns the Panel's findings with respect to temporal aspects of its terms of reference. Specifically, the EC contends that the Panel

erred by referring to events that pre-dated and post-dated the establishment of a panel in this dispute.

14. As an initial matter, the United States would note that the EC appears to assume that the date of panel establishment is the controlling date for purposes of a panel's terms of reference. However, delegations in the context of the negotiations concerning the DSU are currently discussing the issue of the relevant date.[12] In any event, that issue is not presented in this appeal. This dispute does not concern measures that were not in existence on the date of consultations or panel establishment. The measures at issue clearly were in existence on both dates. Accordingly, the Appellate Body does not need to reach the issue of the precise date that is controlling for terms of reference purposes. Moreover, the Panel's explanation of its understanding in paragraph 7.36 of the Panel Report of the "general principle" of when a panel may or may not make findings with respect to a measure does not constitute "findings" with respect to the issues in dispute. In this regard, the "understanding" of the Panel is *obiter dicta*.

15. In any event, the EC's argument confuses *administration* of EC customs law in existence when the Panel was established with individual *acts of administration* that occurred prior to

[12] See e.g., TN/DS/W/82/Add. 2: "A further implication of the 'measure affecting' language is that WTO dispute settlement is not concerned in a dispute with a measure of a Member that expired prior to the date of the request for consultations by another Member in that dispute or that otherwise does not exist as of the date of the request for consultations." Among other issues, the EC's argument that measures that expire before the date of panel establishment are outside a panel's terms of reference would mean that it would be impossible to pursue a measure even though it has been duly consulted upon. This position would have very troubling implications for the dispute settlement system, including the possibility of a measure being repealed prior to panel establishment and then re-instituted.

establishment and with *evidence* that came to light during the panel proceeding that confirm the existence of non-uniform administration at the time of panel establishment.[13]

1. The EC Confuses Administration With Individual Acts of Administration

16. Focusing on paragraphs 7.36 and 7.37 of the Panel Report, the EC charges the Panel with having taken a "cavalier approach to the temporal limitations on its terms of reference."[14] The EC misunderstands the Panel's statements in these two paragraphs, especially when considered in light of later parts of the Panel Report.[15]

17. At the outset, it should be emphasized that the specific measures at issue in this dispute – the EC's customs laws, regulations, decisions and rulings as a whole as identified in the U.S. panel request – unquestionably were in existence on the date on which the Panel was established. Also on that date, the EC was administering these measures in a manner the U.S. claimed – and the Panel found in certain instances – to be non-uniform.[16] Contrary to the EC's suggestion in its

[13] For purposes of this discussion, for the sake of convenience the United States will refer to the date of panel establishment to be clear that even using the EC's reference point, the Panel followed the correct approach. The use of date of panel establishment is without prejudice to the question of the correct relevant point in time.

[14] EC Other Appellant Submission, para. 42. The EC asks the Appellate Body to reverse the Panel's "findings" in paragraphs 7.36 and 7.37 of its report. EC Other Appellant Submission, paras. 61, 70, 249. In fact, these paragraphs do not set forth "findings" by the Panel, but, rather, a general understanding of the Panel, which informs findings that it makes later in the report.

[15] As the Panel explained at the end of paragraph 7.37, the relevance of its general observations regarding temporal aspects of its findings would become apparent as it addressed particular instances of alleged non-uniform administration. Indeed, its discussion of those particular instances makes clear that the Panel was referring to events pre-dating and post-dating panel establishment in order to elucidate the manner of administration existing at the time of panel establishment.

[16] *See generally* U.S. Appellant Submission, paras. 54-57.

discussion of temporal issues, the United States was not making claims with respect to measures that had expired or were not yet in existence at time of panel establishment.

a. Distinction between administration and individual acts of administration

18. The Panel correctly understood that to find a breach of Article X:3(a) of the GATT 1994, it must find that the EC failed to administer its customs law in a uniform manner as of the date the Panel was established. It said nothing different at paragraphs 7.36 and 7.37 of its report. In those paragraphs, the Panel simply recognized that there is a difference between administration of EC customs law and individual instances of administration of EC customs law. As it explained, "administration may be part of an ongoing series of interlinked acts or measures," and "the steps and acts of administration that pre-date or post-date the establishment of a panel may be relevant to determining whether or not a violation of Article X:3(a) of the GATT 1994 exists *at the time of establishment*."[17] Thus, the Panel made clear that it would take account of individual instances of administration pre-dating and post-dating panel establishment not to determine whether each established a WTO-inconsistency in its own right, but as a means of elucidating the manner of administration that may be in existence at the time of panel establishment.

19. This distinction between administration and individual acts of administration is exemplified by the Panel's approach to the issue of the tariff classification of blackout drapery lining ("BDL"). As discussed in greater detail below, the Panel identified individual acts of administration exhibiting the non-uniform administration of EC customs classification rules

[17] *Panel Report*, para. 7.37 (emphasis added).

pertaining to this product. Notably, the customs authority in one member State (Germany) administered those rules by relying on an interpretive aid not relied on by customs authorities in other member States and without distinguishing the decisions of other EC customs authorities concerning the same or similar products.[18]

20. The Panel found that the individual acts of administration it had identified reflect a manner of administration that is non-uniform. It found no evidence that this non-uniform manner of administration had ceased as of the date of panel establishment. No evidence indicated that if BDL had been imported into the EC through Germany on the date of Panel establishment the customs authority there would have declined to rely on the German-specific interpretive aid or would have been required to distinguish the decisions of other EC customs authorities concerning products that are similar – or even the same.[19]

21. In other words, a person seeking to export BDL to the EC on the date of panel establishment would have had no basis to assume that the non-uniform manner of administration reflected in the particular acts identified by the Panel had changed and become uniform. This makes the BDL example different from other acts of administration examined by the Panel, for which it found evidence that the non-uniform administration represented by those acts had ceased prior to panel establishment and, therefore, found no breach of Article X:3(a) and gave no further consideration to those acts.[20]

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[18] *Panel Report*, paras. 7.267 - 7.276.

[19] *See Panel Report*, paras. 7.271, 7.275, 7.276.

[20] *See, e.g.*, *Panel Report*, para. 7.206 (finding evidence that differences regarding tariff classification of network cards for personal computers were resolved prior to panel establishment); *id.*, para. 7.217 (finding that adoption of regulation resolved differences regarding tariff classification of drip irrigation products); *id.*, para. 7.402 (finding that enactment

22. In sum, in the BDL example as in other areas, the Panel referred to individual acts of administration that occurred prior to commencement of the dispute *not* as potential breaches of Article X:3(a) of the GATT 1994 in and of themselves, but as evidence of the manner of administration of the relevant provisions of EC customs law. It found that manner of administration to be non-uniform when the dispute was initiated and found no evidence that the non-uniformity had ceased. Accordingly, it found the manner of administration to breach Article X:3(a) of the GATT 1994.

b. EC's misreading of distinction between administration and individual acts of administration

23. The EC misreads the logical distinction the Panel made between administration as an ongoing phenomenon and individual instances of administration. The EC does acknowledge that administration "may extend over a period of time."[21] Nevertheless, it contends that the Panel erred by referring to events that pre-dated and post-dated panel establishment in order to understand administration occurring at the time of panel establishment.

24. The EC's argument is based on its view that in the context of a claim under Article X:3(a), it is not appropriate to consider administration as an ongoing phenomenon (or, in the

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of regulation resolved differences regarding administration of valuation rules pertaining to vehicle repair costs covered under warranty). Surprisingly, the EC cites these same examples as illustrations of what it believes to be "[t]he Panel's lax approach to the temporal limitations on its terms of reference." EC Other Appellant Submission, para. 41. In fact, they show just the opposite. They show the Panel's strict approach to the temporal limitations on its terms of reference, inasmuch as the Panel declined to find breaches of Article X:3(a) of the GATT 1994 when the evidence indicated that the non-uniform administration exemplified by particular acts of administration had ceased as of the date of panel establishment.

[21] EC Other Appellant Submission, para. 64.

Panel's words, a "continuum") as distinct from individual acts of administration.[22] In the EC's view, administration must have a clear start point and end point, such as may be identified with respect to particular acts of administration.

25. The EC does not cite text in Article X:3(a) to support this view. Instead, it relies on the argument that considering administration as a continuum would make an assessment of administration "open ended," would impinge on a defendant's ability to defend against a claim of non-uniform administration, and would make it difficult to know whether a Member had come into compliance with its obligations under Article X:3(a).[23] This argument assumes incorrectly that a panel's ability to assess a claim of non-uniform administration and a Member's ability to defend against such a claim and to come into compliance depend on knowing the start and end points of the administration at issue. However, what is relevant to both the panel and the Member is not the start and end points, but, rather, the manner of administration existing when the matter of a Member's compliance is referred to dispute settlement for review.

26. In fact, Article X:3(a) of the GATT 1994 is not the only WTO obligation involving circumstances that do not have a clear start point or end point. For example, the threat of serious injury that may support the imposition of a safeguard measure does not have a clear end point. Thus, the Appellate Body has explained that the term "threat of serious injury" as used in the *Agreement on Safeguards* refers to "a future event whose actual materialization cannot, in fact, be assured with certainty."[24] The inability to know a threat's end point (and possibly even its

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[22] EC Other Appellant Submission, paras. 63-68.

[23] EC Other Appellant Submission, paras. 65, 66, 68.

[24] Appellate Body Report, *US - Lamb Meat*, para. 125; *see also id.*, para. 136. The Appellate Body has made a similar observation with respect to the threat provisions of the

start point) when a safeguard measure is imposed does not prevent panels from evaluating claims under the *Agreement on Safeguards* or Members from complying with their obligations under that agreement. Likewise, there is no reason that inability to identify a specific start point or end point for "administration" should prevent a panel from assessing a claim of non-uniform administration under Article X:3(a) of the GATT 1994 or prevent a Member from being in compliance with its obligations under that article.

27. Having rejected the Panel's understanding of administration as an ongoing phenomenon, the EC then makes the erroneous assumption that the Panel referred to acts of administration pre-dating and post-dating panel establishment as potential breaches of Article X:3(a) of the GATT 1994 in and of themselves, and thus faults the Panel for making what the EC understands to be findings regarding "historical grievances."[25] Throughout its submission, the EC refers to the principle that a panel may consider only measures in existence at the time of panel establishment.[26] These references make no distinction between acts of administration themselves being considered as potential breaches of Article X:3(a) and acts of administration being considered as evidence of an ongoing course of administration that potentially is a breach of Article X:3(a).

28. In each of the Appellate Body reports from which the EC seeks support, the question was whether a measure that came into existence after panel establishment (*EC - Chicken Cuts* and

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Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. *See* Appellate Body Report, *Mexico - HFCS (Article 21.5)*, para. 85 (recognizing "intrinsic uncertainty" in making a finding of threat of material injury).

[25] EC Other Appellant Submission, para. 59.

[26] *See, e.g.*, EC Other Appellant Submission, paras. 42, 46, 105-110, 166.

Chile - Price Bands) or that had expired prior to panel establishment (*US - Upland Cotton*) could itself be found to breach an obligation under a covered agreement. None of these reports addressed the issue of whether events pre-dating or post-dating panel establishment may be referred to as evidence of breach of an obligation under a covered agreement.

29. Likewise, statements throughout the EC's argument allude to the impermissibility of a panel finding that expired acts themselves constitute a breach of Article X:3(a) at the time of panel establishment. For example, the EC states that "[i]t is thus not the objective of WTO dispute settlement to address historical *grievances* relating to expired measures."[27] It quotes language from the panel report in *Japan - Film* regarding adjudication of "'*claims* involving measures which no longer exist or which are no longer being applied.'"[28] Later it states that, from its reading of the Panel's findings regarding temporal issues, "violations which occurred far in the past and which no longer have any current effect could be claimed to be continuing because 'administration has no end point.'"[29] None of these statements addresses the potential relevance of past acts as demonstrating a course of administration in existence at the time of panel establishment.

30. The necessary implication of the EC's argument is that administration exists from individual act to individual act, but there is no continuity of administration between individual acts of administration. Accordingly, in the EC's view, individual acts of administration can be

[27] EC Other Appellant Submission, para. 59 (emphasis added).

[28] EC Other Appellant Submission, para. 57 (quoting Panel Report, *Japan - Film*, para. 10.58 (emphasis added)).

[29] EC Other Appellant Submission, para. 65.

challenged as non-uniform and therefore inconsistent with Article X:3(a) of the GATT 1994, but administration as an ongoing phenomenon distinct from individual acts cannot be so challenged.

c. EC's view lacks textual and contextual support

31. There is no textual support for this argument. Article X:3(a) requires the EC to administer certain laws, regulations, decisions and rulings in a uniform manner. It does not state that a breach of that requirement is demonstrated only when individual acts of administration in existence on the date a panel is established diverge. That is, it does not preclude a finding of breach based on a manner of administration found to exist at the time of panel establishment and evidenced by individual acts of administration pre-dating panel establishment or confirmed by events post-dating panel establishment.

32. In fact, the distinction the Panel drew between administration as an ongoing phenomenon and individual acts of administration is supported by the context of Article X:3(a). As the Panel found, the context provided by Article X as a whole indicates that "administer in a uniform manner" should be interpreted to refer to "administrative processes and their results."[30] The EC itself recognized that Article X:3(a) provides "certain minimum standards of predictability for traders."[31]

33. The Panel's consideration of administration as an ongoing phenomenon distinct from individual acts of administration is consistent with this context for Article X:3(a). As noted in connection with the blackout drapery lining example, a trader planning to export goods to the EC must rely on its understanding of the manner of administration of EC customs law by the

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[30] *Panel Report*, para. 7.108.
[31] *See Panel Report*, para. 7.96 (summarizing EC argument).

different customs authorities. That understanding necessarily is informed by prior acts of administration. If in a prior act of administration a given EC customs authority classified goods by relying on an interpretive aid not relied on by other EC customs authorities, a trader logically must assume that the authority will rely on that aid in a future act of administration (absent, for example, the authority's express abandonment of that aid). The trader must decide on the EC region through which to convey its goods based on this understanding of different administration in different regions. Indeed, if the trader were not able to rely on an understanding of how different customs authorities administer the law based on how they have done so in past acts of administration (and barring any intervening event announcing a change), that in itself would be problematic from the standpoint of uniform administration

34. It was appropriate for the Panel to focus on administration as distinct from (albeit represented by) individual acts of administration. Conversely, the EC's rejection of administration as a continuum distinct from individual acts of administration is not appropriate. The EC's view fails to recognize that traders must base their decisions on the existing manner of administration of EC customs law, which may well be reflected in past acts of administration, and that if this manner of administration is non-uniform it is a breach of Article X:3(a).

d. EC's view would render the obligation of uniform administration under Article X:3(a) ineffective

35. Under the EC's view, since administration is not a continuum, only individual acts of administration can be challenged as breaching Article X:3(a), and those acts of administration must be in existence at the time of panel establishment. If this understanding were correct

(which it is not), the obligation of uniform administration under Article X:3(a) would be rendered ineffective, contrary to customary rules of interpretation of public international law.[32]

36. Individual instances of non-uniform administration occurring prior to panel establishment could result in a diversion of trade towards the region administering EC customs law in a manner more favorable to imported product. Indeed, although the EC professes bewilderment at the Panel's references to the continuing "effects" of instances of non-uniform administration pre-dating panel establishment,[33] the Panel noted trade diversion as such an effect at several points in its report.[34]

37. In the case of a specialty product exported by only one or a small number of entities, the diversion could well be complete, such that the occasion for a further act of non-uniform administration may not arise. This does not mean that administration has become uniform. It simply means that the affected traders have adapted to the non-uniformity. However, under the EC's theory, this non-uniform manner of administration could not be challenged as a breach of Article X:3(a) of the GATT 1994. Only a comparison of the law's administration in two or more identical situations existing on the date of panel establishment would support such a claim.

38. Even then, the possibility of enforcing the obligation of uniform administration would be extremely limited given the restriction on a panel's making findings with respect to "expired" acts of administration. The non-uniformity in two or more individual acts of administration will

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[32] *See, e.g.*, Appellate Body Report, *US - Gasoline*, p. 23 ("[I]nterpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility").

[33] *See, e.g.*, EC Other Appellant Submission, para. 109.

[34] *See, e.g.*, *Panel Report*, paras. 7.275 n.517, 7.304 n.579, 7.383.

become apparent only once those acts have occurred. Yet, once they have occurred, the EC would consider them as "expired" and the non-uniform manner of administration therefore not eligible for consideration by a dispute settlement panel.

39. Moreover, the EC maintains (as it did before the Panel) that non-uniform administration is not susceptible to challenge under Article X:3(a) unless the acts of non-uniform administration exhibit a "pattern."[35] This supposed additional requirement (which has no basis in the text of Article X:3(a) and the contours of which the EC has never explained[36]), when coupled with the supposed requirement that an Article X:3(a) claim concern individual acts of administration rather than administration as a continuum and the supposed limitation on a panel's referring to acts of administration pre-dating panel establishment, deepens the impression that the EC has posited a construction of the obligation of uniform administration under Article X:3(a) that would render it ineffective.[37]

40. The EC also contends that an Article X:3(a) claim of administration in a non-uniform manner cannot succeed unless, by the date of panel establishment, a "reasonable period of time" has passed during which the Member failed to correct the non-uniformity between two or more individual acts of administration.[38] It is difficult to see how this aspect of the EC's argument, which also has no basis in text, can be reconciled with its view that acts of administration pre-

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[35] *See* EC Other Appellant Submission, paras. 14, 64, 89, 93.

[36] *See, e.g.*, U.S. First Oral Statement, paras. 17-19; U.S. Answers to First Set of Panel Questions, paras. 36-41 (answer to Questions No. 9); U.S. Second Written Submission, paras. 26-38.

[37] *See* Appellate Body Report, *US - Gasoline*, p. 23 (under general rules of treaty interpretation, treaty provision should not be interpreted in a way that would render it redundant or inutile).

[38] *See* EC Other Appellant Submission, para. 189.

dating panel establishment cannot be the basis of a claim under Article X:3(a). In any event, this further requirement posited by the EC reinforces the conclusion that the EC has advanced a view of that provision that would render it ineffective.

41. As the EC's argument regarding the temporal aspects of the Panel's findings lacks a basis in the text or context of Article X:3(a) of the GATT 1994 and would render the obligation of uniform administration under that provision ineffective, it should be rejected. Accordingly, the Appellate Body should decline the EC's request to reverse the Panel's "findings" at paragraph 7.36 and 7.37 of its report.[39]

2. The EC Confuses Administration With Evidence of Administration

42. Before leaving the general issue of the temporal aspects of the Panel's terms of reference, the United States wishes to respond specifically to the EC's argument concerning events that post-dated panel establishment. In charging the Panel with overstepping its terms of reference by referring to measures post-dating panel establishment,[40] the EC again ignores the context in which the Panel referred to those measures.

43. The only actual measures post-dating panel establishment that the EC faults the Panel for referring to concern the tariff classification of liquid crystal display ("LCD") monitors with digital video interface ("DVI"). Specifically, the Panel referred to a decree issued by the EC customs authority in the Netherlands and binding tariff information ("BTI") issued by the EC customs authority in Germany, both dating from July 2005.[41] Contrary to the impression

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[39] As noted above, the Panel does not make "findings" at paragraphs 7.36-7.37 of its report, but merely expresses an understanding that informs findings later in its report.

[40] EC Other Appellant Submission, paras. 48-50, 164-168.

[41] EC Other Appellant Submission, paras. 164-168.

conveyed by the EC's argument, the Panel did not refer to these measures as instances of non-uniform administration breaching Article X:3(a) in and of themselves and therefore outside the Panel's terms of reference. Rather, the Panel referred to them as *evidence* confirming the existence of non-uniform administration at the time of panel establishment and rebutting the EC argument that steps taken prior to panel establishment had resolved the non-uniform administration existing at least from 2004 of EC rules pertaining to the customs classification of LCD monitors with DVI. This was entirely consistent with the context in which the United States brought this evidence to the Panel's attention.

44. The United States will discuss the LCD monitor case in greater detail below. It bears mentioning here that the Dutch decree expressly discusses administration existing well before the date on which it was issued. It was relevant not only because its operative provisions reflected a continuation of non-uniform administration, but also because it confirmed the existence of non-uniform administration of the relevant provisions of EC customs law starting from before the date of panel establishment and continuing after panel establishment. Indeed, it is evident that the existence of this non-uniform administration and the disadvantage it was causing to Dutch interests is what prompted the Netherlands to issue the decree in the first place. Thus, as quoted at paragraph 7.301 of the Panel Report, the decree referred to "advice" provided by the Customs Code Committee on December 15, 2003, regarding the administration of EC customs classification rules relevant to LCD monitors with DVI. The decree then went on to state that

"'[n]ot all member states are following this policy. The result is a diverted flow of business, which is harmful to the competitiveness of Dutch industry in the logistics and services sector.'"[42]

45. Similarly, the Panel referred to the BTI issued by the EC customs authority in Germany as evidence of the continuation of non-uniform administration in existence at the time of panel establishment, not as an instance of administration that might itself be inconsistent with Article X:3(a) of the GATT 1994.[43] The United States brought this BTI to the Panel's attention in response to the EC's claim that Customs Code Committee guidance from July 2004 had helped to secure the uniform administration of EC classification rules pertaining to LCD monitors with DVI. The BTI showed that not all EC customs authorities were following this guidance (which notably conflicted with the applicable chapter note in the EC's Common Customs Tariff) and thus countered the EC's assertion that the guidance had redressed non-uniform administration existing at least from 2004.[44]

46. In short, contrary to the EC's assertions, the Panel's references to evidence post-dating panel establishment do not show the Panel overstepping its terms of reference. They show the Panel properly taking account of evidence relevant to understanding the manner of administration of EC customs law existing at the time of panel establishment.

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[42] *Panel Report*, para. 7.301 (quoting Douanerechten. Indeling van bepaalde LCD monitoren in de gecombineerde nomenclatuur, No. CPP2005/1372M (8 July 2005) (original and unofficial English translation) para. 1 (Panel Exhibit US-77)).

[43] *See Panel Report*, para. 7.302 ("Further, in BTI dated 19 July 2005, the German customs authority appears to have *continued* classifying LCD monitors with DVI under heading 8471, even where they are principally though not solely for use with computers.") (emphasis added).

[44] *See* U.S. Second Oral Statement, paras. 53-56 (responding to argument in EC Second Written Submission, paras. 125-128).

47. In this regard, the EC's reliance on the Appellate Body report in *EC - Chicken Cuts* and the panel report in *US - Upland Cotton* misses the point.[45] The relevant issue in both of those disputes was whether measures that came into existence after panel establishment could be considered "measures at issue" that themselves were in breach of obligations under covered agreements.[46] Neither the Appellate Body in *EC - Chicken Cuts* nor the panel in *US - Upland Cotton* found that a panel may not refer to evidence that comes to light after panel establishment to confirm the manner of administration of the measures at issue at the time of panel establishment.

48. Finally, the EC attempts to contrast the Panel's consideration of evidence that came into existence after panel establishment and that was relevant to understanding the manner of administration existing at the time of panel establishment with the Panel's decision (relying on the Appellate Body report in *EC - Sardines*) not to consider other evidence the EC introduced after the Panel had issued its interim report and having no relevance to the manner of administration existing at the time of panel establishment. The EC wrongly asserts that this contrast amounts to a failure by the Panel to make an objective assessment of the matter.[47]

49. As the Appellate Body explained in its report in *EC - Sardines*, and as the United States recalled in its comments on the EC's comments on the interim report in this dispute, "The

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[45] *See, e.g.*, EC Other Appellant Submission, para. 50.

[46] *See* Appellate Body Report, *EC - Chicken Cuts*, paras. 151-152; Panel Report, *US - Upland Cotton*, para. 7.158 (referring to Brazil's "claim in respect of" the measure that had not yet come into existence as of the date of the panel request).

[47] *See* EC Other Appellant Submission, paras. 67, 199.

interim review stage is not an appropriate time to introduce new evidence."[48] The Panel correctly explained that "Article 15.2 of the DSU clearly indicates that the purpose of the interim review stage of the Panel's proceedings is to review 'precise aspects' of the Interim Report."[49] Thus, it cannot be the case that the Panel failed to make an objective assessment of the matter by declining to expand the interim review stage to include the consideration of new evidence.

50. Moreover, unlike the evidence that the EC faults the Panel for considering, the evidence the EC introduced at the interim review stage had nothing to do with the manner of administration existing at the time of panel establishment. According to the EC, the evidence concerned steps taken after the fact-finding and argument stage of the panel proceeding, supposedly to "re-establish uniformity."[50] However, as the EC itself states, "the relevant point of time for establishing whether a violation of Article X:3(a) GATT has occurred is the date of establishment of the Panel."[51] For this additional reason, the contrast the EC draws between the Panel's treatment of different evidence does not show a failure by the Panel to make an objective assessment.

51. As the Panel's approach to the temporal aspects of its terms of reference was entirely consistent with Articles 6.2 and 7.1 of the DSU, as well as with the Panel's obligation under Article 11 of the DSU to make an objective assessment, the Appellate Body should decline the EC's request to reverse the "findings" at paragraphs 7.36 and 7.37 of the Panel Report.

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[48] Appellate Body Report, *EC - Sardines*, para. 301; *see also* U.S. Comments on EC Comments on Interim Report, para. 2.

[49] *Panel Report*, para. 6.6

[50] EC Other Appellant Submission, para. 67.

[51] EC Other Appellant Submission, paras. 63, 188.

B. The EC's Obligation to Administer its Customs Law in a Uniform Manner Includes Uniformity With Respect to Administrative Processes

52. The second general issue for which the EC seeks review is the Panel's finding that the EC's obligation under Article X:3(a) of the GATT 1994 to administer its customs law in a uniform manner covers uniformity of administrative processes as well as uniformity of administrative outcomes. The EC wrongly argues that its obligation covers only the latter and that non-uniformity of administrative process is relevant only when it has "a direct and significant impact on the outcome of the process."[52]

1. EC Fails to Explain What is Encompassed by "Administrative Outcome"

53. As an initial matter, it must be observed that the EC never explains what it means by "administrative outcome." It appears from the EC's discussion of the blackout drapery lining case that "administrative outcome" includes the tariff classification ultimately assigned to a good.[53] However, from the EC's discussion of the LCD monitors case, it appears that the EC also believes that even a difference in tariff classification does not constitute a difference in administrative outcome if, due to a temporary duty suspension regulation, it does not result in a difference in duty paid.[54] In any event, it is not at all evident what besides tariff classification the EC's concept of "outcome" may entail or whether it encompasses anything other than classification.

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[52] *See, e.g.*, EC Other Appellant Submission, paras. 13, 18, 81, 125, 128, 132, 138, 221.
[53] EC Other Appellant Submission, para. 132.
[54] EC Other Appellant Submission, para. 180.

54. The EC apparently would not include in "administrative outcome" the different costs and risks that may be associated with conveying goods into the EC through one region rather than another due to non-uniform administrative processes. For example, if different EC customs authorities administer in a non-uniform manner the EC's rules on "local clearance procedures"[55] – *i.e.*, rules permitting goods to be released for free circulation at an importer's premises, rather than being transported to a customs office for clearance and release – such that the time and expense associated with those procedures varies from member State to member State, it seems the EC would not consider this to be a difference in "administrative outcome" capable of being challenged under Article X:3(a).[56] Even if the time and expense vary dramatically, as long as the "outcome" in each different region is that the goods are released, the EC's view is that there is no inconsistency with Article X:3(a).[57]

2. EC's View Lacks a Textual Basis

55. The EC's posited exclusion of administrative processes from the obligation of uniform administration has no basis in the text of Article X:3(a). Article X:3(a) requires the EC to "administer in a uniform . . . manner all its laws, regulations, decisions and rulings of the kind

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[55] *See* CCCIR, Arts. 263-267 (Panel Exhibit US-6).

[56] *Cf.* EC Replies to First Set of Panel Questions, para. 17 (reply to Question No. 46).

[57] This view is notably at odds with the argument advanced by the EC in the *Argentina - Hides* dispute. There the EC argued, *inter alia*, that the administrative process applied to some goods – hides – was non-uniform as compared with the administrative process applied to other goods, and that this non-uniformity amounted to a breach of Article X:3(a) of the GATT 1994. There is no indication that the EC alleged a non-uniformity of "administrative outcome" – such as an inability to successfully export raw hides from Argentina as contrasted to the ability to export other goods. *See* Panel Report, *Argentina - Hides*, para. 4.173 (summarizing EC argument that "the non-uniform application of the Argentinean export procedures – i.e. the fact that Argentina only gives a certain industry the right to be present, for certain products – shows that the Decree violates Article X:3(a)"); *see also id.*, para. 11.78 (same).

described in [Article X:1]." It does not make the distinction between administrative processes and administrative outcomes the EC now urges.

56. In fact, the EC concedes that "the term 'to administer' relates to the application of laws, and that this may potentially include both the administrative process and its results." It then speculates that Article X:3(a) may apply to administrative processes to the extent that Article X:3(a) requires administration in a manner that is "reasonable" and "impartial." It distinguishes those requirements from uniform administration on the ground that they "have a strong procedural component," though it offers no explanation for this theory.[58] It is not at all evident that uniform administration does not also have "a strong procedural component."[59] And, the terms "administration" and "manner" are used for all three requirements of "uniform," "reasonable," and "impartial," as is the term "laws, regulations, decisions and rulings of the kind described in paragraph 1 [of Article X]." There is no basis for arguing that these terms have different meanings for "reasonable" and "impartial" than they do for "uniform." In other words, if administering laws, regulations, decisions and rulings includes the administrative processes involved for purposes of determining if the administration is "reasonable," then administrative

[58] EC Other Appellant Submission, para. 75.

[59] Here again, the contrast between the EC's current argument and the argument it advanced as the party asserting an Article X:3(a) claim in the *Argentina - Hides* dispute is notable. In that dispute, far from arguing that there is a distinction between uniform administration, on the one hand, and reasonable and impartial administration, on the other, in terms of the scope of the Article X:3(a) obligation, the EC argued that "the obligation to administer trade regulations (in the sense of Article X:1) in a uniform manner must be read in its context, which is to administer those regulations in a 'uniform, impartial and reasonable' manner. These words inform one another and clarify the meaning of the obligation." Panel Report, *Argentina - Hides*, para. 4.173 (summarizing the EC's argument).

processes would be included for purposes of determining if the administration is "uniform" as well.

57. Further, that the obligation of uniform administration applies to administrative processes as well as administrative outcomes is supported by the fact that it applies to all of the EC's laws, regulations, decisions and rulings of the kind described in Article X:1. Those laws, regulations, decisions and rulings do not pertain only to customs classification – the matter the EC appears to contemplate when it refers to "administrative outcome." Article X:1 covers a variety of other matters, including "requirements . . . on imports or exports." The manner in which a Member administers laws pertaining to requirements on imports may well affect the burdens associated with importation without affecting the "outcome" (in the sense the EC apparently means of how the good is classified). For the obligation of uniform administration to be meaningful as applied to laws, regulations, decisions and rulings pertaining to requirements on importation, it must apply to administrative processes as well as outcomes.

58. If the Appellate Body were to reverse the Panel and reach the contrary conclusion, significant areas of customs administration could be conducted in a non-uniform manner (as well as an unreasonable and partial manner since, contrary to the EC's suggestion, there is no textual basis for finding a different scope for each of these three obligations) without breaching Article X:3(a). As the Panel noted, the main instruments of EC customs legislation "contain, literally, thousands of different provisions, they relate to a vast array of different customs areas, and may entail administration in a multitude of diverse ways."[60] It is not the case that non-uniform

[60] *Panel Report*, para. 7.30

administration of every one of these "thousands of different provisions" will yield a non-uniform "administrative outcome" in the sense that the EC appears to understand that concept. Under the EC's theory, it would seem that provisions in EC customs law dealing with everything from the examination of goods by customs authorities, to the filing of declarations and related documentation, to the storage of goods prior to release, to the application of simplified procedures for the release of goods, to the conduct of audits, and numerous other matters could be administered in a non-uniform manner without breaching Article X:3(a).

3. EC's View Would Permit Differential Burdens on Traders

59. From the standpoint of traders, there is no basis for the EC's assertion that, in effect, non-uniform administrative outcomes matter, but non-uniform administrative processes do not, even when they entail differences in the costs and risks associated with importing goods into one region rather than another. Put another way, from the trader's view, there is no basis for assuming (as the EC does) that the "outcome" of administration consists only of the release into the EC customs territory of an imported good with a particular classification and valuation and does not also include the burden associated with the administrative process. Accordingly, the context of Article X:3(a) also supports the conclusion that non-uniform administrative processes are inconsistent with that article's obligation of uniform administration.

4. EC's Reference to *de Minimis* Variations is Beside the Point

60. The EC makes the additional argument that "an interpretation which would require a *full* uniformity of administrative procedures would not be warranted."[61] By referring to "full

[61] EC Other Appellant Submission, para. 78 (emphasis added).

uniformity" (a term not used by the Panel), the EC misleadingly suggests that the Panel's finding that Article X:3(a) requires uniformity of administrative processes would exclude the possibility of even *de minimis* variations (such as "formal requirements or issues of internal organisation") between different branches of the EC's customs authorities.[62]

61. In this dispute, the possibility of *de minimis* variations in the EC's administration of its customs law was not at issue. Where the Panel found divergences in administrative processes inconsistent with Article X:3(a), the divergences were material to traders' decisions to convey goods into the EC through one region rather than another. This was the case, in particular, with respect to administrative processes leading to the tariff classification of blackout drapery lining[63] and administrative processes used to implement Article 147(1) of the Community Customs Code Implementing Regulation ("CCCIR"), concerning customs valuation on a basis other than the transaction value of the last sale leading to the introduction of goods into the territory of the EC.[64]

62. The EC seeks support from the findings of the GATT panel in *EEC - Dessert Apples* and the panel in *US - Hot Rolled Steel*.[65] However, it offers no basis for finding the "'minor administrative variations'"[66] at issue in those disputes – differences in license application forms in the former and the timing of the issuance of administrative questionnaires in the latter – comparable to the divergences in administrative processes at issue in this dispute. Unlike the

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[62] EC Other Appellant Submission, para. 78.
[63] *Panel Report*, para. 7.275 & n.517.
[64] *Panel Report*, para. 7.383.
[65] EC Other Appellant Submission, paras. 79-80.
[66] EC Other Appellant Submission, para. 79 (quoting GATT Panel Report, *EEC - Dessert Apples*, para. 12.30).

Panel in this dispute, the panels in *EEC - Dessert Apples* and *US - Hot Rolled Steel* did not find that the administrative variations could have an impact such as trade diversion. The EC's reliance on these reports, therefore, is misplaced.

63. The EC's request for a reversal of the Panel's findings with respect to administrative processes is telling. The EC asks the Appellate Body to reverse the Panel's findings "that Article X:3(a) GATT requires uniformity of administrative processes irrespective of their impact on the uniform administration of the laws."[67] That formulation assumes that "administrative processes" are distinct from "administration of the laws." As this assumption lacks any support in the text or context of Article X:3(a), it should be rejected, and the Panel's findings in paragraphs 7.102 to 7.113 and 7.119 of its report should be affirmed.

C. Objective Assessment of the Facts

64. Before turning to the EC's appeal with respect to particular areas of customs administration, the United States will briefly address the Panel's obligation under Article 11 of the DSU "to make an objective assessment of the matter before it."

65. It is well established, as the EC acknowledges, that "it is not in the competence of the Appellate Body to review findings of fact made by the Panel."[68] Nonetheless, much of the EC's argument regarding particular areas of customs administration is devoted to re-argument of the facts, as will be discussed below.

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[67] EC Other Appellant Submission, para. 82.

[68] EC Other Appellant Submission, para. 84; *see also* Appellate Body Report, *Japan – Agricultural Products II*, para. 141; Appellate Body Report, *EC - Hormones*, paras. 132-33; Appellate Body Report, *EC – Poultry*, para. 133; Appellate Body Report, *Korea – Alcoholic Beverages*, para. 163.

66. Additionally, the EC's argument that the Panel did not make an objective assessment of the matter before it depends significantly on the EC's erroneous understanding of what is required to establish a breach of Article X:3(a) of the GATT 1994. Thus, in discussing the objective assessment standard under Article 11 of the DSU, the EC restates its narrow, non-text-based understanding of the obligation of uniform administration in Article X:3(a) of the GATT 1994. In particular, it contends that a breach of Article X:3(a) may be found only when a panel finds "a pattern of violation with a significant impact on the administration of the laws in question."[69] It also suggests that there is a different evidentiary standard for finding breaches of Article X:3(a) than for finding breaches of other GATT 1994 obligations.[70] It argues that the Panel failed to make an objective assessment if it found a breach of Article X:3(a) without finding a "pattern" or a "significant impact" and without applying this higher evidentiary standard.[71]

67. The EC's argument of what an objective assessment involving a claim of non-uniform administration under Article X:3(a) entails is flawed for several reasons. First, the EC's assertion that a finding of breach must be based on "a pattern of non-uniformity with a significant impact on the administration of the laws in question" is entirely unfounded. Article X:3(a) contains neither a "pattern" requirement nor a "significant impact" requirement for establishing a breach. As the United States explained in its argument before the Panel, the EC derives these supposed

[69] EC Other Appellant Submission, para. 89.
[70] EC Other Appellant Submission, para. 89 (referring to a "high standard of evidence").
[71] EC Other Appellant Submission, para. 93.

requirements from the report of the panel in *US - Hot Rolled Steel*, which did not actually reach the question of what "uniform administration" means.[72]

68. Second, although the EC acknowledges that what constitutes an "objective assessment" "'must be understood in the light of the obligations of the particular covered agreement at issue,'"[73] it bases its understanding on obligations *not* at issue in this dispute – in particular, the obligations of reasonable and impartial administration under Article X:3(a). Thus, it asserts the existence of a "high standard of evidence" for finding a breach of Article X:3(a) – apparently a different standard of evidence than must be met to find a breach of other obligations under the GATT 1994 – based on statements by the Appellate Body in its report in *US - OCTG Sunset Reviews* in connection with the obligations of reasonable and impartial administration.

69. The EC recognizes that the relevant claim in *US - OCTG Sunset Reviews* was one of unreasonable and partial administration, but states without any support that "it does not appear that a different standard of review would apply to a claim of non-uniform administration."[74] However, the fact that that dispute involved claims of unreasonable and partial administration evidently was relevant to the Appellate Body, as it recalled this point in the text immediately preceding the text quoted by the EC.[75] Indeed, a claim of unreasonableness and partiality could

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[72] *See* U.S. First Oral Statement, paras. 15-18; U.S. Answers to First Set of Panel Questions, paras. 36-41 (answer to Question No. 9).

[73] EC Other Appellant Submission, para. 86 (quoting Appellate Body Report, *US - DRAMS from Korea*, para. 184).

[74] EC Other Appellant Submission, para. 88 n.46.

[75] Appellate Body Report, *US - OCTG Sunset Reviews*, para. 217 ("We observe, first, that allegations that the conduct of a WTO Member is biased or unreasonable are serious under any circumstances.").

well imply a pejorative not associated with a claim of non-uniformity, which might explain the Appellate Body's view.

70. More fundamentally, there simply is no basis for (and nothing in the text to indicate any agreement on how one could go about) ranking obligations under the WTO Agreement and assuming there to be different evidentiary standards according to the relative "gravity" of each obligation.

71. Finally, while the EC accepts that "the evidentiary requirements may also depend on the scope and nature of the claim," its discussion of what constitutes an objective assessment fails to take account of the fact that this dispute involves a claim of geographical non-uniform administration by a Member with 25 separate and independent customs authorities. The EC's assertions of a "pattern" requirement, a "significant impact" requirement, and a "high standard of evidence" are based on Appellate Body and panel statements made in completely different contexts, involving a single agency's administration of the law. While it might have made sense to refer to a "pattern" of non-uniform administration in that context, it does not necessarily make sense in the context of geographical non-uniformity. As the United States observed before the Panel, the logical implication of the EC's argument is that where a lack of geographical uniformity is widespread and unpredictable – that is, where there is no *pattern* – there is no breach of Article X:3(a). This proposition has no basis in Article X:3(a).[76]

72. With these clarifications of the objective assessment standard in mind, the United States turns to the EC's appeal with respect to particular areas of administration.

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[76] U.S. First Oral Statement, para. 19.

D. Administrative Processes Leading to Tariff Classification of Blackout Drapery Lining

73. The EC's challenge to the Panel's findings regarding the tariff classification of blackout drapery lining is based in part on its erroneous view of the temporal aspects of the Panel's terms of reference and of the distinction between administrative processes and administrative outcomes. Additionally, the EC attempts to reargue certain factual issues and in so doing misrepresents the relevant facts.

1. The EC Misrepresents Relevant Facts

74. As review of the Panel's factual findings is beyond the scope of this appellate proceeding, the United States will not provide an extensive discussion of the facts concerning classification of blackout drapery lining. However, to understand why the EC's contention that the Panel failed to make an objective assessment is unfounded, it is necessary to correct certain misrepresentations by the EC.

75. The issue before the Panel was whether the EC administers in a uniform manner its regulations pertaining to the tariff classification of the specialty textile product known as "blackout drapery lining" ("BDL"). EC customs authorities in the United Kingdom, Ireland, and the Netherlands administer those regulations in a manner that has led them to classify imports of BDL under tariff heading 5907 ("Textile fabrics otherwise impregnated, coated or covered; painted canvas being theatrical scenery, studio back-cloths or the like"), while the EC customs authority in Germany administers those regulations in a manner that has led it to classification under tariff heading 3921 ("Other plates, sheets, film, foil and strip, of plastics").[77]

[77] *See generally* U.S. First Written Submission, paras. 66-68.

76. The Panel found that the EC customs authority in Germany follows administrative processes different from the other customs authorities. In particular, the EC authority in Germany classifies BDL by relying on an interpretive aid not relied on by other EC customs authorities and is not obliged to make reference to the decisions of these other authorities concerning the classification of the same or similar products. This non-uniformity "may have had an impact and may continue to have an impact in the future upon trade in blackout drapery lining in the European Communities."[78]

77. The EC states that the product considered by the EC authority in Germany in the instances of administration the Panel reviewed was different from the product considered by other EC customs authorities, because the latter contained "textile flock" (scissors dust) on its surface while the former did not.[79] That assertion is incorrect. The product before the German authority did in fact contain textile flock.[80] The German authorities appear to have focused on whether the flock formed a distinct "layer",[81] although that criterion was not relevant to classification of the product, as evidenced by the decision of other EC customs authorities to classify BDL under heading 5907, even when flock was found to be "sparsely applied."[82]

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[78] *Panel Report*, para. 7.275 & n.517.

[79] EC Other Appellant Submission, paras. 99, 113.

[80] *See Panel Report*, para. 7.253 (quoting Hamburg Main Customs Office Letter (Panel Exhibit US-50) (describing product as containing "flocking with individual fibres")).

[81] *See Panel Report*, para. 7.253 (quoting Hamburg Main Customs Office Letter (Panel Exhibit US-50)); *id.*, para. 7.252 (quoting Hamburg ZPLA Letter (Panel Exhibit US-41)); *see also* Bremen Main Customs Office Decision, p. 4 (Panel Exhibit US-23).

[82] *See* BTI UK103424227 (Panel Exhibit US-51); *see also* U.S. Answers to First Set of Panel Questions, para. 62 (answer to Question No. 17); U.S. Second Oral Statement, para. 61.

78. In any event, contrary to the EC's suggestion, the presence of flock or the quantity of flock is not decisive for the German authorities. The Panel was entirely correct to find that the density of the fabric (the key criterion provided for in the German interpretive aid) "played a critical role for the German authorities."[83]

79. The German interpretive aid directs the authority to consider the tightness of the weave of the fabric (also referred to by the German authority as the "density" of the fabric) to determine whether the fabric is present merely for reinforcing purposes (indicating classification under heading 3921) or for other purposes (indicating classification under a heading in Chapter 59).[84] It does so even though the notes pertaining to Chapter 39 of the Common Customs Tariff make no reference to tightness of weave as a relevant criterion, and the notes to Chapter 59 expressly provide that classification under that chapter is to be determined *regardless* of weight per square meter (*i.e.*, density).[85]

80. The EC asserts that "the Panel is wrong to claim that all decisions or letters of the German authorities rely on the German interpretative aid."[86] But, in fact, they do. As the EC acknowledges, the February 3, 2003, opinion of the Hamburg ZPLA makes "explicit reference" to that aid.[87] The EC also acknowledges that the September 29, 2004, decision of the Bremen

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[83] *Panel Report*, para. 7.270. In fact, the German authority cites the density of the weave to be "an important difference" between two products that are otherwise "corresponding." *See Panel Report*, para. 7.252 (quoting Hamburg ZPLA Letter (Panel Exhibit US-41)).

[84] *See* National Decisions and Indications accompanying Chapter 59 of the German Tariff Schedule (original and English translation) (Panel Exhibit US-43)

[85] *See* U.S. Answers to First Set of Panel Questions, para. 66 (answer to Question No. 17); *see also* U.S. Second Oral Statement, para. 63.

[86] EC Other Appellant Submission, para. 112.

[87] EC Other Appellant Submission, para. 112 (referring to Hamburg ZPLA Letter (Panel Exhibit US-41)); *see also Panel Report*, para. 7.268 n.502.

Main Customs Office "was based on the opinion issued by the Hamburg ZPLA."[88] And, indeed, in describing the product at issue, that decision states that "[t]he fabric is not dense," in apparent reference to the tightness-of-weave criterion set out in the interpretive aid.[89] Likewise, the July 29, 1998, letter from the Main Customs Office in Hamburg notes that "[t]he spun fabric is not dense."[90]

81. The EC also asserts that "[the] interpretative aid is purely a non-binding text."[91] However, the aid's formal legal status as "binding" or not is irrelevant. What matters from the standpoint of uniform administration is that the aid exists – indeed, it is set out as a chapter note in Germany's version of the Common Customs Tariff – and is relied upon by the EC customs authority in Germany but not by other EC customs authorities. An importer would have no basis for assuming that the authority in Germany would *not* rely on the interpretive aid when classifying a future importation of BDL.

82. The EC further contends that "the Panel had no basis for claiming that the criterion of whether the web was 'dense' or 'tightly woven' played a critical role for the German authorities."[92] But, in fact, the Panel did have such a basis. In its 1998 letter, the Hamburg Main

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[88] EC Other Appellant Submission, para. 112 n.71 (referring to Bremen Main Customs Office Decision (Panel Exhibit US-23)). The EC mistakenly refers to this decision as "the Decision of the Main Customs Office Hamburg in the Bautex case." In fact, the decision was from the Main Customs Office of Bremen.

[89] *Panel Report*, para. 7.251 (quoting Bremen Main Customs Office Decision (Panel Exhibit US-23)); *see also id.*, para. 7.269 (explaining that "the Hamburg ZPLA appeared to correlate the criterion of 'tightly woven' in the German interpretative aid with the criterion of density of fabric").

[90] *Panel Report*, para. 7.253 (quoting Hamburg Main Customs Office Letter (Panel Exhibit US-50)); *see also id.*, para. 7.269.

[91] EC Other Appellant Submission, para. 132.

[92] EC Other Appellant Submission, para. 113.

Customs Office stated that BDL should be classified under heading 3921 immediately after finding that "[t]he spun fabric is not dense" and that it "is merely a base for reinforcement purposes."[93] Similarly, in its 2003 letter, the Hamburg ZPLA described the fabric in the merchandise under consideration as "not dense" and concluded that "[c]onsequently" the product must be classified under heading 3921. It also stated that the relative density of the fabric was "an important difference" if one were to compare corresponding products.[94] As already noted, the 2004 decision of the Bremen Main Customs Office was based on the latter conclusions.[95]

83. Finally, the EC contends that even if the German authority's reliance on the interpretive aid was decisive, its reliance was consistent with uniform administration because "density of the web is a relevant criterion for determining whether the textile fabric is present for reinforcing purposes."[96] The EC cites no support for this statement, and, as the United States demonstrated to the Panel, it is factually incorrect. Note 2(a) to Chapter 59 of the Common Customs Tariff expressly excludes fabric density as a criterion for classification of coated fabrics, stating that heading 5903 applies to "textile fabrics, impregnated, coated, covered or laminated with plastics, *whatever the weight per square meter* and whatever the nature of the plastic material. . . ."[97]

84. The EC also criticizes the Panel's dismissal of the EC's explanation that reliance on the German interpretive aid was consistent with uniform administration because the aid was derived

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[93] *See Panel Report*, para. 7.253 (quoting Hamburg Main Customs Office Letter (Panel Exhibit US-50)).

[94] Hamburg ZPLA Letter (Panel Exhibit US-41); *see also Panel Report*, para. 7.252.

[95] *See* Bremen Main Customs Office Decision, p. 4 (Panel Exhibit US-23); *see also Panel Report*, para. 7.251.

[96] EC Other Appellant Submission, para. 114.

[97] *See* U.S. Answers to First Set of Panel Questions, para. 66 (answer to Question No. 17); U.S. Second Oral Statement, para. 63.

from an EC regulation on classification of ski trousers that "implicitly concerned the classification of the fabric out of which garments are made."[98] Even if this were so, the EC fails to acknowledge that in analogizing to the ski trousers regulation, the German customs authority relied only on certain of the criteria for classification of that product but not others (excluding, for example, the criterion of the fabric's strength and stability).[99] More fundamentally, even if there were a rational justification for the German authority's reliance on its interpretive aid, this does not change the fact that it does so uniquely among EC customs authorities and, as a result, the EC administers its tariff classification rules pertaining to BDL in a non-uniform manner.

85. The foregoing discussion of the numerous factual bases supporting the Panel's findings well illustrates why the Appellate Body does not disturb panel factual findings or re-weigh the evidence that was before a panel. Thus, for the foregoing reasons, the Appellate Body should reject the EC's claim that the Panel failed to make an objective assessment of the facts in considering administrative processes for classifying BDL.

2. The EC's Argument Regarding Tariff Classification of BDL Confuses Administration With Individual Acts of Administration

86. The BDL case is a specific example of the more general error in the EC's argument of confusing administration as an ongoing phenomenon with individual acts of administration.[100] As discussed above, the divergence between how the EC customs authority in Germany

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[98] EC Other Appellant Submission, para. 115.

[99] *See* Commission Regulation 1458/97 (Panel Exhibit EC-78).

[100] *See* EC Other Appellant Submission, paras. 105-107. Thus the EC queries "how the Panel's findings should be implemented" (*id.*, para. 145) given the EC's view that the issue with respect to BDL is "customs transactions which have taken place in the past" rather than the manner of administration of EC customs law regarding the tariff classification of BDL in existence at the time of panel establishment.

administers the Common Customs Tariff and how EC customs authorities in other member States administer it constitutes a lack of uniform administration. The particular transactions called to the Panel's attention are instances of that non-uniform administration.

87. The EC offered no evidence to show that the authority in Germany has changed its manner of administration or that the authorities in other member States have changed theirs, either on their own initiative or at the insistence of EC-level entities. For example, the EC does not claim that the interpretive aid used to classify BDL has been deleted from the version of the Tariff used in Germany or added to the version used in other member States. To the contrary, both before the Panel and on appeal the EC vigorously defends the German authority's exclusive use of its interpretive aid.

88. An exporter seeking to convey BDL into the territory of the EC today (as at the time of panel establishment) has every reason to expect that the customs authority in Germany will administer the Common Customs Tariff as it did in the particular acts of administration that the Panel considered, diverging from the manner in which other EC customs authorities administer the Tariff. The result, as the Panel recognized, may be the diversion of trade from one EC region to another.[101] As this non-uniform manner of administration was in existence at the time the

[101] *Panel Report*, para. 7.275 n.517. Thus, contrary to the EC's assertion at paragraph 109 of its Other Appellant Submission, the Panel does explain the "'potential effects'" it is referring to. It also is notable in this regard that the EC misunderstands the term "effect" as used by the Panel. The EC states that "it is no[t] simply sufficient for an expired measure to still have effect in order to be within the terms of reference of a Panel." EC Other Appellant Submission, para. 108. The EC appears to understand "effect" in this context to refer to lingering damage from a past act of non-uniform administration. However, in context, the Panel clearly uses "potential effect" to refer to the fact that traders reasonably will plan their transactions based on existing non-uniform administration as reflected in past instances of non-uniform administration and the absence of any indication that the manner of administration has changed. Indeed, if the

dispute commenced, the EC is incorrect in arguing that the Panel's findings on this matter were "outside its terms of reference."[102]

3. The Panel Correctly Found Non-Uniform Administrative Processes in Classifying BDL to be Inconsistent With Article X:3(a) of the GATT 1994

89. The BDL case also is a specific example of the error in the EC's general argument that the obligation of uniform administration under Article X:3(a) covers administrative processes only to the extent that they have a "direct and significant impact" on "administrative outcomes." Certain flaws in this argument have been discussed in part II.B, above. Additional flaws are evident in the EC's application of its view of Article X:3(a) to the Panel's findings regarding BDL.

90. Initially, it must be noted that the EC misreads the Panel's findings with respect to what the EC calls "administrative outcome." The Panel did *not* find, as the EC seems to suggest, that differences between the BDL presented to the customs authority in Germany and the BDL presented to other EC customs authorities justified different tariff classifications.[103] What it

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importers involved in the BDL transactions reviewed by the Panel were to act on any other basis – *e.g.*, by declaring new importations of BDL into Germany as classifiable under Tariff heading 5907 based on the administrative processes applied in other member States – they could well be liable for penalties. *See generally* CCCIR, Art. 199(1) (Panel Exhibit US-6) (declarant "responsible under the provisions in force for . . . the accuracy of the information given in the declaration").

[102] EC Other Appellant Submission, para. 110.

[103] *See, e.g.*, EC Other Appellant Submission, paras. 132 (asserting that "divergence in the motivation did not lead to any divergence as regards the administrative outcomes"), 140 (asserting that Panel found that "there was an objective basis for the different classifications issued").

found was an absence of evidence to support a finding of divergent tariff classifications in Germany, on the one hand, and other member States on the other.[104]

91. The Panel stated that it could "only assume that the products that were the subject of classification by the [customs authorities in Germany] were not identical to those that were the subject of classification by the customs authorities in the United Kingdom, Ireland, the Netherlands and Belgium."[105] However, the fact that products are not "identical" does not necessarily mean that uniform administration of the customs law justifies different tariff classifications. For example, the BDL products covered by the UK, Irish, and Dutch BTI provided to the Panel were not "identical" to one another,[106] as is evident from the descriptions summarized at paragraph 7.249 of the Panel Report. Nevertheless, in each case the product was classified under tariff heading 5907.

92. A finding of insufficient evidence of divergent classification obviously is not the same as a finding that different customs authorities correctly reached different tariff classifications. This distinction is important, as it explains why the Panel's findings regarding administrative processes for the classification of BDL are entirely consistent with its findings regarding administrative outcomes. Nothing the Panel said regarding administrative outcomes precluded its finding that if administrative processes were uniform, administrative outcomes could be different than they are under the current state of non-uniformity.

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[104] *Panel Report*, paras. 7.264 - 7.265. Indeed, the EC seems to acknowledge this, for example, at paragraph 95 of its Other Appellant Submission (characterizing Panel as finding "no evidence of an actual divergence in the tariff classification of BDL").

[105] *Panel Report*, para. 7.264.

[106] *See* Panel Exhibit US-22.

93. In a variation on its general argument that non-uniform administrative processes are not inconsistent with Article X:3(a) unless they have a "direct and significant impact" on administrative outcomes, the EC contends that the non-uniformity the Panel found regarding tariff classification of BDL is not even non-uniformity of administrative process but, rather, non-uniformity of "motivation."[107] By "motivation," the EC seems to mean the justification or rationale supporting a customs authority's classification decision. It is not clear why the EC believes that the justification or rationale an authority provides for its decision is not an element of administrative process.

94. The ordinary meaning of "administer" is to "put into practical effect."[108] An EC customs authority puts the Common Customs Tariff into practical effect when it selects and applies a given analytical tool to aid it in determining the correct heading under which to classify a good. Its reliance on that tool is a step in the administrative process. What the EC refers to as the "motivation" set forth in its classification decision is simply a memorialization of that step. Therefore, the distinction the EC seeks to draw between "motivations" and "administrative processes" is without basis.[109]

95. The EC also argues that the Panel erred in finding the administrative processes leading to the classification of BDL to be non-uniform because it compared decisions and letters issued by

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[107] EC Other Appellant Submission, paras. 126-128.

[108] *Panel Report*, para. 7.104.

[109] The EC also asserts that if "motivations" are part of administrative processes, "it would have to be demonstrated that the motivation in question had an impact on the administrative outcome, namely the actual tariff classification of BDL." EC Other Appellant Submission, para. 138. However, this argument is simply nonsensical. If by "motivation" the EC means the justification or rationale for a decision, then by definition a "motivation" will have "an impact on the administrative outcome."

customs authorities in one member State with BTI issued by customs authorities in other member States. The EC asserts that decisions and letters, on the one hand, and BTI, on the other, are "fundamentally different" instruments and therefore are not comparable.[110]

96. This argument is remarkable for two reasons. First, the EC suggests that had the Dutch, Irish, and UK authorities considered the classification of BDL in decisions on appeal rather than in BTI, they, like the German authorities, might have considered the density of the fabric to be a relevant classification criterion. The EC offers no explanation as to why a criterion not mentioned in any of the BTI issued by these authorities suddenly would become relevant by virtue of the authorities' consideration of classification in the context of decisions on appeal. The EC points to no evidence, for example, that versions of the Tariff used in the Netherlands, Ireland, and the United Kingdom include in the notes to Chapter 59 an interpretive aid like that contained in the version of the Tariff used in Germany.

97. Second, the EC's argument is remarkable because it contradicts assertions the EC made throughout the course of the panel proceeding that BTI is an important tool for securing the uniform administration of EC customs law.[111] It is difficult to see how an instrument that may not reliably reflect a customs authority's thinking on a given classification question nevertheless can be an important tool for securing uniform administration.

98. The EC makes the equally remarkable argument that since customs decisions can be appealed, it would be "absurd to require . . . that the motivation of decisions of customs

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[110] EC Other Appellant Submission, para. 129.

[111] *See, e.g.*, EC First Written Submission, paras. 304, 324, 329; EC First Oral Statement, para. 38; EC Replies to First Set of Panel Questions, para. 25 (reply to Question No. 50); EC Second Written Submission, paras. 89, 91.

authorities should be uniform."[112] This argument seems to put the onus of achieving uniform administration on traders themselves. However, under Article X:3(a) of the GATT 1994, it is the obligation of the Member to administer its customs law in a uniform manner.[113]

99. For the foregoing reasons, as well as the reasons discussed in connection with the EC's general argument on non-uniform administrative processes, the Appellate Body should reject the EC's claim that the Panel erred in finding non-uniform processes leading to the tariff classification of BDL to be inconsistent with Article X:3(a) of the GATT 1994.[114]

4. The Panel Properly Found the German Customs Authority's Failure to Refer to the BDL Classification Decisions of Other EC Customs Authorities to be Inconsistent With Article X:3(a) of the GATT 1994

100. The EC's arguments regarding the failure of the EC customs authority in Germany to take into account the decisions of other EC customs authorities are equally unfounded. In this regard,

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[112] EC Other Appellant Submission, para. 130.

[113] As the Panel noted, "Given the cost and time implicated by such an appeal, it is unclear whether traders will resort to such an option in all cases in which non-uniform application of EC customs law among the customs authorities of the member States becomes apparent." *Panel Report*, para. 7.167.

[114] At the end of its argument on administrative processes, the EC faults the Panel for making a finding on what the EC characterizes as a "systemic issue[]." EC Other Appellant Submission, paras. 133-135. In fact, the finding at issue is more properly characterized as background for the Panel's ultimate conclusion that the use by one EC customs authority but not others of a particular interpretive aid to administer EC classification rules pertaining to BDL is inconsistent with Article X:3(a) of the GATT 1994. The EC suggests that the finding at issue is inconsistent with the statement elsewhere in the Panel Report that the United States had not shown that the design and structure of the EC system of customs administration is inconsistent with Article X:3(a). (It makes a similar suggestion at paragraph 143 of its submission.) However, far from supporting the EC's position, any inconsistency between these two statements supports the point the United States made in its Appellant Submission that the latter statement is conclusory and contradicted by various findings in the Panel Report. *See* U.S. Appellant Submission, para. 101 n.112.

it is important to consider the context in which the German authority administers EC customs law. As the Panel observed, that context includes the absence of any requirement of "reference by customs authorities to decisions taken by other customs authorities operating within the same system and/or cooperation between customs authorities before customs decisions are taken."[115] The absence of such a requirement shows that the administrative process applied by the customs authority in Germany does not violate EC law, and the particular acts of administration reviewed by the Panel cannot simply be dismissed as an anomaly.[116]

101. The EC challenges the Panel's factual finding of no obligation on an EC customs authority in one EC member State to refer to the decisions of other EC customs authorities in other EC member States.[117] However, in its comments on the Panel's interim report, the EC acknowledged that "the EC system does not contain any general obligation to 'refer to decisions of other customs authorities.'"[118] The EC relies instead, as it did before the Panel, on general obligations of EC law, such as the basic "duty of cooperation" under Article 10 of the EC Treaty and the obligation under Article 6(3) of the Community Customs Code that a customs authority "set out the grounds" on which certain decisions are based. However, it points to no provisions making these general obligations operational in a way that requires an EC customs authority to

[115] *Panel Report*, para. 7.272; *see also id.*, paras. 7.177, 7.180.

[116] As the Panel's finding concerned context relevant to its evaluation of the German authority's failure to take account of other customs authorities' decisions in its classification of BDL, the EC is wrong to criticize the finding as a "systemic" matter beyond the Panel's definition of its terms of reference. *See* EC Other Appellant Submission, paras. 142-143, 147.

[117] EC Other Appellant Submission, para. 122.

[118] EC Comments on Interim Report, para. 56.

address the decisions of other EC customs authorities classifying the same or similar goods.[119] It asserts that the obligation in CCC Article 6(3) means that "the customs authority shall address" differing classification decisions brought to its attention by the applicant, but cites no basis for this assertion.[120]

102. The EC's argument also wrongly criticizes the Panel for suggesting that the German customs authority "wanted" or "wished" to ignore differing decisions of other customs authorities.[121] The issue was not what the authority "wanted" or "wished" to do. What the Panel properly found to be relevant was that the German authority by its own admission was aware of other EC authorities having classified "'comparable goods,'" yet gave scant consideration to such classification and apparently undertook no investigation of those other authorities' findings.[122]

103. The EC offers an alternative view of the evidence. It posits that a statement by the Hamburg ZPLA in its February 2003 decision (which decision in turn was the basis for the September 2004 decision of Bremen Main Customs Office) shows that the German authority did *not* disregard the decisions of other customs authorities. The EC refers, in particular, to the Hamburg ZPLA's reference to Belgian BTI classifying BDL under heading 5907.[123]

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[119] Indeed, the Panel made the factual finding that "Article 10 of the EC Treaty does not prescribe the 'appropriate measures' which the member States (including customs authorities of the member States) must take to ensure fulfilment of their obligations under EC law, including EC customs law." *Panel Report*, para. 7.164. It made the additional factual finding that "EC customs law does not appear to make provision for the situation where a customs authority of a member State refuses to consult with a customs authority of another member State regarding disagreements concerning the tariff classification of a particular good. *Id.*, para. 7.180.

[120] *See generally* U.S. Second Written Submission, paras. 49-52.

[121] EC Other Appellant Submission, paras. 118, 119, 141.

[122] *Panel Report*, paras. 7.273 - 7.274.

[123] EC Other Appellant Submission, para. 119.

104. Again, the EC tries to raise factual arguments, which are outside the scope of this appellate proceeding. Moreover, the facts do not support its argument. The Hamburg ZPLA noted that the documents submitted by the BTI applicant to the Belgian authority were "the same documents" submitted to the Hamburg ZPLA. It then expressed its "suspicion that the documents do not necessarily match the merchandise" (seeming to imply that had the Belgian authority issued BTI based on an examination of the actual merchandise rather than documents describing the merchandise it might have classified it under a heading other than 5907).[124] The EC reads this expression of a "suspicion" by the Hamburg ZPLA as undermining the view that this authority "wished to ignore the decisions of other EC customs authorities."[125]

105. In fact, it does just the opposite. It shows that, rather than follow up a "suspicion" as to another EC customs authority's basis for classifying comparable goods – for example, by making inquiries with that authority – the German authority simply assumed that suspicion to be accurate and proceeded to classify BDL on the basis of what it understood to be the relevant criterion (*i.e.*, density of the fabric).

106. Finally, in discussing the Panel's findings regarding the German authority's failure to take account of the decisions of other EC customs authorities, the EC repeats its argument that non-uniform administrative processes breach Article X:3(a) only if they lead to non-uniform "outcomes."[126] As already discussed, this argument is based on a mis-reading of Article X:3(a). In this context, the EC also makes the erroneous assumption that non-uniform administrative

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[124] *See Panel Report*, para. 7.252 & Panel Exhibit US-41.
[125] EC Other Appellant Submission, para. 119.
[126] EC Other Appellant Submission, paras. 138-140.

processes could not lead to non-uniform outcomes based on the Panel's finding that the product before the German authority was not "identical" to the product before other EC customs authorities. As discussed in part II.D.3, above, that assumption mistakes the Panel's finding of a lack of evidence for a finding that the different EC customs authorities properly made different classifications of the products before them.

107. For the foregoing reasons, as well as the reasons discussed in connection with the EC's general argument on non-uniform administrative processes, the Appellate Body should reject the EC's claim that the Panel erred in its findings regarding the failure of the EC customs authority in Germany to take account of the decisions of other EC customs authorities regarding the classification of BDL.

E. Tariff Classification of LCD Monitors With DVI

108. As in its appeal with respect to the BDL tariff classification issue, in its appeal with respect to the issue of tariff classification of LCD monitors with DVI the EC misrepresents key facts. In addition, it ignores the distinction between administration and evidence of administration, and it relies on the specious argument that the Panel erred by declining to consider new evidence introduced following issuance of the Panel's interim report.

1. The Panel's Finding That the EC Acknowledged Administration in 2004 to be Non-Uniform was Based on an Objective Assessment of the Facts

109. In its first written submission to the Panel, the United States demonstrated that the EC fails to administer in a uniform manner the Common Customs Tariff provisions relevant to the classification of LCD monitors with DVI. Prior to 2004, EC customs authorities had consistently classified these products under heading 8471 ("Automatic data processing machines and units

thereof. . . ."). However, in 2004, the EC customs authority in the Netherlands began classifying them under heading 8528 ("Reception apparatus for television. . . ."), resulting in imposition of a 14 percent *ad valorem* duty, as contrasted to duty-free treatment if classified under heading 8471. The non-uniformity was brought to the attention of the Customs Code Committee in 2004. Absent a resolution by that body, the Council of the European Union issued a regulation in March 2005 that did not resolve the problem of non-uniform administration but, instead, temporarily suspended the imposition of duty on LCD monitors with DVI below a certain size found to be classifiable under heading 8528.[127]

110. In its first written submission, the EC did not rebut the U.S. demonstration that from 2004, the EC's administration of the Tariff with respect to the classification of LCD monitors with DVI was non-uniform. Instead, it made various statements suggesting that the EC was aware of the issue and was working to address it. It stated that it is "difficult for customs authorities to establish on an objective basis the precise purpose for which a particular monitor is intended" (though, in fact, the "purpose . . . intended" for a monitor is irrelevant to its tariff classification).[128] It then stated that "EC institutions have kept this particular classification issue under very close review from the outset."[129] It asserted that EC institutions "have taken the necessary measures to ensure a correct and uniform classification practice in this respect," by which it appeared to be referring to non-binding "conclusions" reached by the Customs Code Committee at its June 30 - July 2, 2004 meeting; the duty suspension regulation noted above

[127] U.S. First Written Submission, paras. 73-76.
[128] EC First Written Submission, para. 349.
[129] EC First Written Submission, para. 351.

(Council Regulation (EC) 493/2005); and another regulation (Commission Regulation 634/2005) classifying a subset of LCD monitors in heading 8528.[130]

111. None of these statements contradicted the U.S. demonstration that the EC's administration of its classification rules with respect to LCD monitors with DVI was non-uniform from 2004. The EC did not deny that, prior to 2004, EC customs authorities had been uniformly classifying LCD monitors with DVI under heading 8471. Nor did it deny that the Dutch authority was now classifying these products under heading 8528. In fact, it defended the manner of administration by the Dutch authority as "in line with the [Combined Nomenclature], as confirmed by the Customs Code Committee."[131] Moreover, the EC's identification of the various steps it was taking suggested a recognition of the existing problem of non-uniform administration.[132]

112. Accordingly, the Panel was well justified in finding that "the European Communities does not appear to dispute that, in 2004, a divergence in tariff classification of LCD monitors with DVI among customs authorities of the member States occurred."[133] Nevertheless, the EC now claims that it did dispute the existence of a divergence.[134] It refers to paragraph 364 of its

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[130] EC First Written Submission, paras. 351-353, 356, 361.

[131] EC First Written Submission, para. 354.

[132] *See* EC First Written Submission, para. 363 (EC stating its belief that it has not been "ineffectual or slow in dealing with this problem"); U.S. First Oral Statement, paras. 27-28.

[133] *Panel Report*, para. 7.294 ("[T]he European Communities does not appear to dispute that, in 2004, a divergence in tariff classification of LCD monitors with DVI among customs authorities of the member States occurred. . . .").

[134] EC Other Appellant Submission, paras. 156, 171.

first written submission.[135] However, that paragraph merely contains a conclusory denial of a lack of uniformity and stands in contrast to the EC's substantive responses just described.

113. The EC also challenges the Panel's citation (in footnote 557 of its report) to various EC statements supporting the Panel's finding that the EC did not dispute the existence of a divergence in tariff classification of LCD monitors with DVI in 2004.[136] This essentially is a challenge to the Panel's evaluation of the evidence and, under Article 17.6 of the DSU, is not an appropriate matter for appellate review.[137] In any event, contrary to the EC's characterization, the statements confirm that when confronted with the U.S. claim that existing administration of classification rules pertaining to LCD monitors with DVI is non-uniform, the EC responded by saying that the matter is complex, that the situation is being monitored, and that the EC is taking steps to secure uniform administration, all of which supports the Panel's finding.[138]

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[135] EC Other Appellant Submission, para. 156.

[136] EC Other Appellant Submission, paras. 171-173.

[137] *See, e.g.*, Appellate Body Report, *US - Wheat Gluten*, para. 151; Appellate Body Report, *Korea - Alcoholic Beverages*, para. 161; Appellate Body Report, *EC - Hormones*, para. 132.

[138] The EC asserts that its closing statement from the second panel meeting and its comments on the U.S. reply to the Panel's question 137(b) (both cited in footnote 557 of the Panel Report) are "besides the point," because there the EC was referring only to events dating from July 2005. EC Other Appellant Submission, para. 172. However, these statements in fact continue the point the EC had been making starting with its first written submission – *i.e.*, before the United States made reference to events from July 2005. As in its first written submission, the EC's statements in these later submissions consistently referred to the LCD monitors issue as an "ongoing issue" being monitored by EC institutions. *Compare* EC First Written Submission, paras. 351, 361, 363, *with* EC Comments on U.S. Answers to Second Set of Panel Questions, para. 50 (comment on U.S. answer to Question No. 137(b)). Therefore, it was consistent with an objective assessment for the Panel to rely on these statements to support its finding that rather than deny the existence of non-uniform administration in 2004, the EC asserted that the problem was being addressed.

114. Finally, the Panel cited as additional support for its finding a May 2005 press release by the law firm of Greenberg Traurig describing the manner in which the Dutch customs authority had been classifying LCD monitors with DVI since November 2004. The EC criticizes the Panel's reliance on this evidence on the ground that it "does not identify the specific monitors at issue."[139] However, as the Panel found (and the EC does not contest), the EC never contended that what it described as the "ongoing issue" with respect to the classification of LCD monitors with DVI[140] was "limited to a subset of LCD monitors that can serve both as a computer monitor and as a video monitor."[141]

115. Indeed, if, as the EC now claims, the evidence on which the Panel relied was "excessively general" because it did not "identify the specific monitors at issue," then the June/July 2004 Customs Code Committee "conclusions" that the EC referred to as addressing the problem of non-uniform administration must also have been "excessively general." As quoted by the EC in its first written submission, those conclusions made no reference to specific monitors.[142]

116. Having found, based on an objective assessment of the facts, that EC administration of the Tariff with respect to LCD monitors with DVI was non-uniform from 2004, the next question

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[139] EC Other Appellant Submission, para. 176.

[140] EC Comments on U.S. Answers to Second Set of Panel Questions, para. 50 (comment on U.S. answer to Question No. 137(b)).

[141] *Panel Report*, para. 7.294.

[142] *See* EC First Written Submission, para. 353. In its Other Appellant Submission (para. 175), the EC repeats the argument it made to the Panel that the Dutch authority's practice described in the Greenberg Traurig press release was "in line" with the Customs Code Committee conclusions. In this regard, the United States refers to paragraph 28 of the U.S. First Oral Statement, in which it explains why this assertion does not support the EC's argument that the problem of non-uniform administration with respect to LCD monitors with DVI is being resolved.

for the Panel was whether the steps the EC referred to as addressing the problem of non-uniform administration in fact did so.

2. The Panel's Finding That Steps the EC Took did not Resolve the Non-Uniform Administration was Based on an Objective Assessment of the Facts

117. Before the Panel, the EC argued that three steps taken by EC institutions were addressing the non-uniform administration of the Tariff in classifying LCD monitors with DVI. As noted above, these were the June/July 2004 Customs Code Committee "conclusions," the EU Council duty suspension regulation, and EU Commission regulation 634/2005 classifying certain monitors under heading 8528.[143] The Panel considered each of these measures and found that none of them resolved the problem of non-uniform administration.[144]

118. On appeal, the EC criticizes the Panel's findings with respect to the duty suspension regulation and Commission regulation 634/2005. The EC acknowledges that both regulations apply only to "specific types of monitors, and not all monitors,"[145] but argues that they eliminate any inconsistency with Article X:3(a) of the GATT 1994 to the extent of their coverage. Once again, the EC's appeal invites the Appellate Body to overturn panel factual findings and to re-

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[143] EC First Written Submission, paras. 351-353, 356, 361.

[144] *See Panel Report*, paras. 7.295 - 7.299.

[145] EC Other Appellant Submission, para. 178. The subsets of monitors covered by the two regulations are defined by various criteria including, significantly, diagonal screen measurement and aspect ratio. The duty suspension regulation applies only to monitors with a diagonal screen measurement of 48.5 cm or less and an aspect ratio of 4:3 or 5:4. *See Panel Report*, para. 7.296 (discussing Council Regulation (EC) No. 493/2005 of 16 March 2005 (Panel Exhibit US-28)). Regulation 634/2005 applies to monitors with an even smaller diagonal screen measurement. *See id.*, para. 7.298. Thus, non-uniform administration of EC classification rules for monitors with a diagonal measurement greater than 48.5 cm remains unaddressed. *See* U.S. Answers to First Set of Panel Questions, para. 70 (answer to Question No. 17).

weigh the evidence, which the Appellate Body has consistently and rightly declined to do. And, in any event, the facts on the record amply support the Panel's findings.

119. The EC does not contest that the duty suspension regulation merely suspends the imposition of duty on certain products and does not resolve the non-uniform administration of classification rules pertaining to those products. However, it expresses its "belie[f]" that even if different customs authorities administer those rules in a non-uniform manner, there is no breach of Article X:3(a) if there is no difference in the duty to be paid.[146] That "belief" has no basis in the text of Article X:3(a). Moreover, it ignores the reality of the commercial environment in which traders operate.

120. As the United States explained to the Panel, traders organize their business affairs with a long-term view, and in making their shipping decisions they are likely to take account of which customs authorities will accord the more favorable tariff treatment after the temporary regulation expires.[147] This point was confirmed by a letter from a trade association interested in the LCD monitors issue to the EU Commission, which the United States put before the Panel, expressing the concern that non-uniform administration was "making the consequences of sourcing and routing decisions almost impossible to predict."[148] Accordingly, the Panel correctly found that "the trading environment has been affected as a result of divergent tariff classification," even if

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[146] EC Other Appellant Submission, para. 180.

[147] U.S. Answers to Second Set of Panel Questions, para. 56 (answer to Question No. 137(b));

[148] Letter from Mark MacGann, Director General, EICTA, to Manuel Arnal Monreal, Director International Affairs and Tariff Matters, European Commission, p. 1 (Sep. 2, 2005) (Panel Exhibit US-75); *see* U.S. Second Oral Statement, para. 52.

products classifiable under heading 8471 and certain products classifiable under heading 8528 are both subject to a zero rate of duty until the end of 2006.[149]

121. Concerning regulation 634/2005, the EC criticizes the Panel's finding that the steps towards uniform administration that regulation may have achieved "could be undermined when read in the light of the [June/July 2004] opinion of the Customs Code Committee."[150] The EC's argument that a Committee opinion cannot undermine a Commission regulation[151] misses the point of the Panel's finding.

122. The Panel's point was not that the Committee opinion might be understood as prevailing over the Commission regulation with respect to the monitors covered by the regulation. Rather, it was that the co-existence of the two instruments gives customs authorities conflicting information on how to administer the Tariff in classifying the many LCD monitors with DVI that are *not* covered by regulation 634/2005. The Committee opinion indicates that a monitor should be classified under heading 8471 if it is "*only* to be used with an ADP machine," while the regulation – which an EC customs authority could well refer to by analogy in classifying LCD

[149] *Panel Report* para. 7.304 n.579. In a submission to the Panel, the EC dismissed the relevance of the impact on traders of non-uniform administration of classification rules regarding LCD monitors, as long as monitors remain subject to the same duty rate regardless of classification. It argued that Article X:3(a) "is not a provision which prohibits legislative changes, or which protects expectations of traders as regards the continuation of certain measures." EC Comments on U.S. Answers to Second Set of Panel Questions, para. 48 (EC comment on U.S. answer to Question No. 137(b)). That argument misses the point, which is that the mere temporary elimination of the effect on duties of non-uniform administration is not the same as the elimination of non-uniform administration in breach of Article X:3(a).

[150] *Panel Report*, para. 7.299.

[151] EC Other Appellant Submission, para. 181.

monitors not covered by the regulation[152] – indicates that a monitor may be classified under heading 8471 if it is "of a kind *solely or principally* used in an automatic data-processing system."[153] Accordingly, the EC's criticism of the Panel's finding regarding regulation 634/2005 is unfounded.

123. In sum, the Panel's findings that the measures referred to by the EC did not resolve the problem of non-uniform administration of the Tariff in classifying LCD monitors with DVI were based on an objective assessment of the facts and should be upheld.

3. The Panel Appropriately Relied on Evidence Post-Dating Panel Establishment to Confirm its Findings of Continuing Non-Uniform Administration

124. The EC argues incorrectly that the Panel based its findings regarding LCD monitors "primarily on circumstances subsequent to the establishment of the Panel."[154] As the discussion in the preceding two sections shows, this simply is not so. The Panel based its findings primarily on the EC's acknowledgment that classification rules pertaining to LCD monitors with DVI were being administered in a non-uniform manner from 2004, and the Panel's examination of the measures that, according to the EC, addressed that non-uniformity. In fact, in the Panel's thorough analysis of the LCD monitors issue, evidence post-dating panel establishment becomes

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[152] *See* EC First Written Submission, para. 93 ("classification regulations may also become relevant by analogy to products similar to those described in the regulation"); *id.*, para. 343 (citing with approval German customs authority's reliance on aid for administering classification rules pertaining to BDL, which was developed by analogy to regulation pertaining to ski trousers).

[153] *Panel Report*, para. 7.299; *see also* U.S. First Oral Statement, para. 28 (noting that relevant Tariff chapter notes also refer to sole or principal use).

[154] EC Other Appellant Submission, paras. 164-168.

relevant only in the last of four reasons the Panel gives for finding that the duty suspension regulation and regulation 634/2005 do not resolve the non-uniform administration.[155]

125. In addition to wrongly faulting the Panel for relying on this evidence "primarily," the EC in this context repeats its error of confusing administration with individual acts of administration. Thus, it contends that the Panel overstepped its terms of reference by referring to acts of administration that post-dated panel establishment, even though the Panel referred to these acts not as breaches of Article X:3(a) of the GATT 1994 in their own right, but as evidence of a manner of administration in existence at the time of panel establishment that breaches Article X:3(a).[156] For the reasons described in part II.A.2, above, this EC argument is not well founded.

126. Of the two instruments post-dating panel establishment to which the Panel referred (*i.e.*, the Dutch decree and the German BTI), one (the Dutch decree) expressly refers to the manner of administration existing from 2004, as discussed above. Both instruments are relevant evidence supporting the Panel's finding that, contrary to the EC's assertion, measures put into place since 2004 have not resolved the problem of non-uniform administration and may well have increased confusion.[157]

127. As the Panel relied on evidence post-dating panel establishment to confirm the continuation of a non-uniform manner of administration existing since 2004, and not to treat acts

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[155] *See Panel Report*, paras. 7.300 - 7.303.

[156] *See* EC Other Appellant Submission, paras. 150, 166.

[157] *See Panel Report*, para. 7.300 ("Panel has evidence that customs authorities of the member States do not appear to have a clear idea of the practical effect of the various measures existing at the Community level regarding the tariff classification of LCD monitors with DVI.").

of administration that came into existence after panel establishment as "measures at issue," it did not overstep its terms of reference as the EC contends.

4. The Panel Properly Gave no Weight to a Draft Regulation on LCD Monitors and Declined to Consider new Evidence the EC Introduced at the Interim Review Stage

128. Finally, the EC argues that a regulation adopted on December 23, 2005 (*i.e.*, after the filing of the last submissions to the Panel before issuance of its interim report) addressed the problem of non-uniform administration with respect to LCD monitors with DVI (a problem which the EC now states existed only from July 2005), and that the Panel erred in not taking that regulation into account, either in its draft form or as adopted and presented to the Panel (along with other new evidence) during the interim review stage. The EC's argument is flawed for several reasons.

a. Panel's consideration of draft regulation

129. First, the EC assumes incorrectly that non-uniform administration of EC classification rules pertaining to LCD monitors with DVI did not come into existence until July 2005. On the basis of this faulty assumption, the EC argues that the Panel should have considered the draft regulation (as included with the EC's comments on the U.S. answers to the Panel's questions following its second meeting with the parties) as a step taken within a reasonable period of time to restore uniform administration.[158] For the reasons described above, the EC's characterization

[158] EC Other Appellant Submission, paras. 184, 189-90.

of the evidence from July 2005 as new instances of non-uniform administration rather than a continuation of non-uniform administration in existence since 2004 is unfounded.[159]

130. Second, the EC's argument is self-contradictory. On the one hand, the EC states that "the relevant point in time for the establishment of whether there is a violation of WTO obligations is the date of establishment of the Panel."[160] On the other hand, the EC faults the Panel for not taking account of a draft measure that came into existence at the very end of panel proceedings, which the EC claims eliminates non-uniform administration.[161]

131. Third, the EC ignores the fact that the only version of the regulation that was properly before the Panel was a draft version which the Panel, in preparing its report, could not assume would be adopted. The EC glosses over this point by asserting that the Panel should have taken into account "the measures which the EC was in the process of adopting in December 2005."[162] However, as the EC notes, one of the steps that had to be taken to get the regulation adopted was consultation with the Customs Code Committee.[163] As the Panel found, "the European

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[159] Additionally, the EC's argument that it is not in breach of Article X:3(a) unless a "reasonable period of time" has passed since non-uniform administration came into existence (EC Other Appellant Submission, paras. 9, 23, 64, 165, 185, 189-190) is without basis. The obligation of uniform administration in Article X:3(a) is not qualified by a "reasonable period of time" provision.

[160] EC Other Appellant Submission, para. 188.

[161] *Cf.* Appellate Body Report, *Chile - Price Bands*, para. 144 ("demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'").

[162] EC Other Appellant Submission, para. 192.

[163] EC Other Appellant Submission, para. 189.

Communities has acknowledged that there are no specific time limits for how long a matter can remain on the agenda of the Customs Code Committee."[164]

b. Panel's decision not to consider new evidence introduced at interim review stage

132. Regarding the Panel's decision not to consider new evidence introduced by the EC at the interim review stage, the EC makes a false comparison between this evidence and evidence from July 2005 that the United States properly introduced during the argument stage of the Panel proceeding. On the basis of this false comparison, the EC wrongly accuses the Panel of failing to make an objective assessment.[165]

133. As discussed in part II.A.2, above, the July 2005 evidence to which the EC refers is different from the evidence the EC submitted at the interim review stage in a way that justified different treatment by the Panel. The July 2005 evidence was properly submitted during the evidence-gathering stage of the Panel proceeding, whereas the other evidence was not submitted until after that stage was over. Moreover, unlike the July 2005 evidence – which confirmed the continuation of non-uniform administration in existence since 2004 and countered the argument that certain measures were addressing that non-uniform administration – the evidence the EC submitted at the interim review stage had nothing to do with the manner of administration of EC customs law existing at the time of panel establishment.

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[164] *Panel Report*, para. 7.159 n.322 (citing EC Replies to Second Set of Panel Questions, reply to Question No. 159(a)).

[165] *See* EC Other Appellant Submission, para. 199.

134. As noted above, the Appellate Body in *EC - Sardines* explained that "[t]he interim review stage is not an appropriate time to introduce new evidence."[166] The EC acknowledges this, but expresses its view that there must be an exception for evidence introduced to correct errors of fact. It asserts that this view is supported by Article 15.2 of the DSU (concerning the review of precise aspects of the interim report), but offers no substantiation for that assertion.[167]

135. Indeed, the exception the EC posits makes no sense. A panel's findings in an interim report necessarily are based on its appreciation of the evidence before it. If a panel makes a factual error based on a mis-appreciation of that evidence, that error should be correctable by calling to its attention aspects of that evidence that would support a revised finding. It is unclear why new evidence would be necessary to correct a factual error stemming from a mis-appreciation of existing evidence.

136. Further, it is unclear what limits (if any) would apply to the exception the EC posits. The EC does not suggest that the exception would apply to only narrow categories of error, such as numerical errors relating to quantity or measurement or errors relating to the date on which an event occurred. Indeed, in this dispute, the EC states that the evidence it sought to put before the Panel at the interim review stage was evidence to correct an "impression" it believed to have been created by findings in the interim report.[168] It is difficult to see how a panel could prevent the EC's exception for the introduction of new evidence at the interim review stage from becoming a basis for a full re-opening of the argument in a dispute.

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[166] Appellate Body Report, *EC - Sardines*, para. 301.
[167] EC Other Appellant Submission, paras. 195-196.
[168] EC Other Appellant Submission, para. 197.

137. In fact, in putting its new evidence before the Panel, the EC did not confine itself to asking the Panel to correct alleged factual errors. Rather, on the basis of the new evidence, the EC argued that "any temporary inconsistency which may have existed has been removed," and it urged the Panel to reverse its legal conclusion that the EC administers its classification rules pertaining to LCD monitors with DVI in a non-uniform manner in breach of Article X:3(a) of the GATT 1994.[169] Thus, even under the exception for the correction of factual errors that the EC itself posits, it was proper for the Panel to decline to consider the EC's new evidence introduced at the interim review stage.

138. The EC argues that the Panel acted "contrary to its own decision" by making two corrections in light of the EC's new evidence but not considering that evidence for other purposes.[170] The corrections at issue pertained to two sentences in the interim report that referred to the EU Commission's December 2005 regulation as not yet enacted. However, far from evidencing the Panel having acted arbitrarily (as the EC contends), these corrections simply reflect an express non-objection by the United States to a modification proposed by the EC.[171]

139. Finally, the EC asserts that consideration of the evidence it introduced at the interim review stage would not have been contrary to due process, as the United States had an opportunity to comment on the EC's comments on the interim report.[172] However, this assumes without any basis that the one week the United States had to respond to the EC's comments

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[169] EC Comments on Interim Report, paras. 70-71.
[170] EC Other Appellant Submission, para. 198.
[171] *See* U.S. Comments on EC Comments on Interim Report, para. 57.
[172] EC Other Appellant Submission, para. 200.

would have been adequate to address the EC's new evidence, including, potentially, through the evaluation of further rebuttal evidence.

140. For the foregoing reasons, the Panel properly gave no weight to the EC's December 2005 draft regulation on LCD monitors and declined to consider the new evidence the EC introduced at the Interim Review Stage.

F. Administration of the Successive Sales Provision

141. The Panel's finding that the EC administers the "successive sales provision" of its law on customs valuation (Article 147(1) of the Community Customs Code Implementing Regulation) in a non-uniform manner was based on an admission by the EC in a report by the EC Court of Auditors.[173] The EC's appeal wrongly asserts that the statements at issue did not amount to an admission. Additionally, as with the LCD monitors issue, the EC asserts without basis that the Panel should have considered evidence (in this case, e-mail correspondence from member State customs officials denying administration of the successive sales provision in the manner described by the Court of Auditors) introduced at the interim review stage.

1. EC's Admission of Non-Uniform Administration

142. The successive sales provision concerns the circumstances under which goods imported into the customs territory of the EC may be valued on the basis of a sale preceding the last sale that led to their introduction into the EC. To value goods on this basis, "'it must be demonstrated to the satisfaction of the customs authorities that this sale of goods [*i.e.*, the sale preceding the last sale] took place for export to the customs territory in question.'"[174]

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[173] *Panel Report*, paras. 7.381 - 7.383.

[174] *Panel Report*, para. 7.379 (quoting CCCIR, Art. 147(1) (Panel Exhibit US-6)).

143. In a March 2001 report, the EC Court of Auditors found that EC customs authorities in different member States administer this provision differently. Specifically, as the Panel found, "the Court noted the existence of a 'practice' on the part of customs authorities to impose a form of prior approval with respect to the successive sales provision," which practice "has no basis in Community law and is not being followed in other member States."[175] This finding by the Court of Auditors amounted to an admission of non-uniform administration by the EC, and the Panel treated it as such.[176]

144. In arguing that the Panel erred in treating the Court of Auditors finding as an EC admission, the EC states that other EC institutions – notably, the Commission – did not agree with the Court.[177] The EC renders the Commission's comment on the Court's report as follows: "'The Commission's view is that customs authorities do not "impose" such a *notification.*'"[178]

145. In fact, this is *not* an accurate rendering of the Commission's comment. The comment actually reads: "The Commission's view is that customs authorities *in some Member States* do not 'impose' such a notification."[179] The words "in some Member States," omitted from the EC's quotation of the Commission comment, reveal that the Commission did *not* disagree with the Court on the existence of divergent practice. The quotation marks around the word "impose"

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[175] *Panel Report*, para. 7.382.

[176] As the International Court of Justice has explained: "In the general practice of courts, two forms of testimony which are regarded as prima facie of superior credibility are, first the evidence of disinterested witnesses . . . and secondly *so much of the evidence of a party as is against its own interest*." *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. 14, para. 69 (emphasis added).

[177] EC Other Appellant Submission, paras. 207, 218-219.

[178] EC Other Appellant Submission, para. 207 n.142 (emphasis added by EC in quotation in its Other Appellant Submission).

[179] Court of Auditors Valuation Report, p. 17 (Panel Exhibit US-14).

in the Commission's comment indicate that its disagreement with the Court was over the Court's characterization of the divergent practice at issue. This is supported by the sentence that immediately follows: "The practice can be explained by the importer's interest to obtain legal security. . . ."[180]

146. Thus, contrary to the EC's argument,[181] the Panel did not base its finding on statements by one EC institution while ignoring contrary statements by another EC institution. Indeed, the very fact that in its comments on the Court of Auditors Report the Commission disagreed with the Court on a variety of issues but not on the Court's finding of divergent administration among different EC customs authorities supports the Panel's consideration of the Court's finding as an EC admission.

147. The EC also argues that the United States "should have been able to document" actual non-uniform administration of the successive sales provision.[182] However, as the United States provided the Panel with an admission by the EC, it did not need to adduce additional evidence in order to make its *prima facie* case. Rather, it was the EC's burden to adduce evidence refuting the admission.[183]

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[180] Court of Auditors Valuation Report, p. 17 (Panel Exhibit US-14).

[181] EC Other Appellant Submission, para. 219.

[182] EC Other Appellant Submission, para. 220.

[183] *See, e.g.*, Appellate Body Report, *US - Wool Shirts and Blouses*, p. 14 (if the party asserting the affirmative of a claim "adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption"); Appellate Body Report, *EC - Hormones*, para. 104 ("*prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case").

148. The EC further argues that the Court of Auditors report "was not prepared for the purposes of assessing conformity with Article X:3(a) GATT," and that its finding of "minor variations of administrative practice" did not necessarily amount to a finding of a breach of Article X:3(a).[184] This argument seems to assume that a statement amounts to an admission of breach of a legal obligation only if it expresses the legal conclusion that the obligation was breached. In other words, admitting the facts necessary to support a legal conclusion of breach does not constitute an admission of breach. The United States fails to see the logic in this proposition, and the EC offers no support for it.

149. Moreover, contrary to the EC's characterization, the variations of administrative practice identified by the Court of Auditors were not "minor." Rather, the Court stated that it "ha[d] drawn some significant examples of inconsistency to the attention of the Commission."[185] The Commission did not deny this in its comments on the Court's report.[186]

150. The EC here repeats its argument that non-uniform administrative processes breach Article X:3(a) of the GATT 1994 only if they lead to non-uniform administrative outcomes.[187] However, as discussed above, this view of Article X:3(a) has no basis in the text.

151. Finally, the EC contends that the Court of Auditors statements on which the Panel relied were "excessively vague," because they did not specify "the precise nature" of the form of prior approval that some EC customs authorities use in administering the successive sales provision or

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[184] EC Other Appellant Submission, para. 221.

[185] Court of Auditors Valuation Report, para. 64 (Panel Exhibit US-14).

[186] *See* Court of Auditors Valuation Report, pp. 16-17 (Panel Exhibit US-14) (Commission's replies regarding paras. 62-64).

[187] EC Other Appellant Submission, para. 221.

the customs authorities involved.[188] However, what was relevant to the Panel's finding of non-uniform administration was not the form of prior approval that some EC customs authorities use but, rather, the fact that some authorities administer the law through a form of prior approval and others do not. Similarly, in light of the EC's admission of non-uniform administration in this regard, a specification of which customs authorities administer the law in which manner was not necessary to demonstrate a breach of Article X:3(a).

152. In sum, the Panel's finding of non-uniform administration of the successive sales provision was based on an objective assessment of the facts, which consisted of an unrebutted admission by the EC.

2. The Panel Properly Declined to Consider Evidence Introduced at the Interim Review Stage

153. The only evidence the EC offered to counter its admission of non-uniform administration was e-mail correspondence with EC customs officials in various member States, which the EC did not introduce until after the Panel had issued its interim report. Like the LCD monitors evidence submitted at that stage, the new evidence regarding administration of the successive sales provision was properly not considered by the Panel.

154. Unlike the evidence pertaining to LCD monitors that the EC introduced at the interim review stage, the evidence pertaining to administration of the successive sales provision could have been submitted at an earlier stage in the panel proceeding. The EC alluded to this evidence in its comment on the U.S. answer to the Panel's question 137(d), stating that it had surveyed the

[188] EC Other Appellant Submission, para. 217.

practices of the customs authorities of all member States and determined that none of them "applies . . . a requirement of prior approval" in administering the successive sales provision.[189]

155. Of course, the EC's assertion was not evidence, and the Panel accordingly found that the EC "had not submitted any evidence to substantiate its assertion."[190] The EC now professes surprise at that finding, observing that the Panel did not indicate that the burden of proof had shifted to the EC and did not ask the EC to substantiate its assertion.[191] However, the Panel had no obligation to do either of these things.[192]

156. The EC also argues that the Panel should have taken account of the e-mail correspondence introduced as an exhibit at the interim review stage. It contends that this evidence "relate[d] to specific aspects of the interim report within the meaning of Article 15.2 DSU."[193]

157. For the reasons discussed in parts II.A.2 and II.E.4.b, above, the Panel properly declined to consider evidence introduced by the EC at the interim review stage. Notably, the EC does not argue (as it did in connection with its new evidence on LCD monitors) that the evidence it sought to introduce on administration of the successive sales provision was intended merely to correct an error of fact.[194] Thus, even under the EC's own reasoning it was proper for the Panel not to consider this new evidence.

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[189] EC Comments on U.S. Answers to Second Set of Panel Questions, para. 55 (comment on U.S. answer to Question No. 137(d)).

[190] *Panel Report*, para. 7.382.

[191] EC Other Appellant Submission, para. 225.

[192] *See* Appellate Body Report, *Korea - Dairy*, para. 145; Appellate Body Report, *India - Quantitative Restrictions*, paras. 140-142.

[193] EC Other Appellant Submission, para. 227.

[194] *Compare* EC Other Appellant Submission, para. 196, *with id.*, para. 227.

158. Finally, the United States notes that the e-mail correspondence the EC sought to introduce at the interim review stage consists of statements made during the course of dispute settlement by persons (*i.e.*, officials of EC customs agencies) with an interest in the outcome of the dispute. The significance the EC attaches to those statements is in marked contrast to the significance it attached to evidence the United States introduced during the panel proceeding, which the EC characterized as statements by a party with an interest in the dispute. The United States refers, in particular, to a sworn affidavit by the chief executive officer of Rockland Industries, the producer of the blackout drapery lining at issue in the various EC classification decisions submitted to the Panel.[195] The EC dismissed that affidavit as a "statement by a person with a clear interest in the classification of BDL [which] has no probative value whatsoever."[196] The United States fails to see the distinction the EC would draw between the probative value of that affidavit and the probative value of the correspondence with EC officials with an interest in the dispute that the EC sought to introduce at the interim review stage.[197]

159. For the foregoing reasons, the Appellate Body should reject the EC's appeal with respect to the Panel's finding of non-uniform administration of the successive sales provision in breach of Article X:3(a) of the GATT 1994 and affirm that finding.

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[195] Panel Exhibit US-79.

[196] EC Closing Statement at Second Panel Meeting, para. 16.

[197] In fact, as the United States noted in the panel proceeding, the CEO of Rockland Industries has no stake whatsoever in the outcome of this dispute (except, of course, the shared stake that exporters to the EC in general have in the uniform administration of EC customs law). Neither he nor Rockland stands to be directly affected. *See* U.S. Answers to Second Set of Panel Questions, para. 55 n.39 (answer to Question No. 137(a)). By contrast, the EC customs authorities that responded to the inquiries of the EC's counsel have a direct stake in the outcome of this dispute.

G. Article XXIV:12 of the GATT 1994

160. Finally, the United States responds to the EC's conditional appeal of the Panel's findings regarding Article XXIV:12 of the GATT 1994, in which it asks the Appellate Body to reverse the Panel's finding "that Article XXIV:12 cannot be relied upon to attenuate or to derogate from the provisions of the GATT 1994, including Article X:3 GATT."[198]

1. Possible Relevance of Article XXIV:12 to EC Obligation Under Article X:3(b) is Outside the Scope of the Appeal

161. As an initial matter, the question of the possible relevance of Article XXIV:12 to the EC's obligation under Article X:3(b) is outside the scope of this appeal. Article 17.6 of the DSU provides that "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." No issue of law or legal interpretation in the Panel Report concerned the possible relevance of Article XXIV:12 to the EC's obligation under Article X:3(b), because the EC never raised that issue. The EC referred to Article XXIV:12 only in its argument to the Panel concerning the obligation of uniform administration under Article X:3(a).[199]

2. Article XXIV:12 is not Applicable to This Dispute

162. Secondly, the United States recalls that the EC did not invoke Article XXIV:12 in this dispute and, therefore, whatever effects that provision may have on a Member's obligations under the GATT 1994, the EC cannot invoke Article XXIV:12 for the first time on appeal, as it

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[198] EC Other Appellant Submission, para. 248.

[199] *See* EC First Written Submission, para. 220; EC Replies to First Set of Panel Questions, para. 113 (reply to Question No. 68).

attempts to do at paragraph 236 of its Other Appellant Submission.[200] Rather than invoke Article XXIV:12 before the Panel, the EC referred to it as "support" for the EC's proposed interpretation of Article X:3(a) of the GATT 1994.[201]

163. The difference between actually invoking Article XXIV:12 and merely referring to it as support for a proposed interpretation of Article X:3(a) is important. As the GATT panels that have considered Article XXIV:12 have found, that provision applies only when the Member invoking it satisfies its burden of proving that the measures at issue are "measures taken at the regional or local level which the federal government cannot control because they fall outside its jurisdiction under the constitutional distribution of competence."[202] The EC made no such showing in this dispute.

164. Moreover, as the United States explained to the Panel, Article XXIV:12 is not relevant to this dispute, because that provision applies to the "observance of the provisions of [the GATT 1994] by the regional and local governments and authorities within [each Member's] territories." This dispute does not concern the observance of Article X:3(a) of the GATT 1994 by regional

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[200] In fact, the EC's invocation of Article XXIV:12 here appears to be a preemptive effort to preclude an eventual compliance proceeding. Thus, the EC refers to the "broad systemic changes" it believes it would have to make if the U.S. appeal were sustained. EC Other Appellant Submission, para. 236. However, issues that may be relevant to an eventual compliance proceeding are not appropriate grounds on which to seek review of the Panel's findings.

[201] *See* EC Replies to First Set of Panel Questions, para. 113 (reply to Question No. 68); *see also* EC First Written Submission, para. 220; EC Replies to Second Set of Panel Questions, para. 49 (reply to Question No. 158) ("EC has not invoked Article XXIV:12 GATT as a primary defence in the present case").

[202] GATT Panel Report, *Canada - Gold Coins*, para. 56; *see also* GATT Panel Report, *US - Beverages*, para. 5.79; U.S. Second Written Submission, para. 17; U.S. Comments on EC Replies to Second Set of Panel Questions, para. 36 (comment on EC reply to Question No. 158).

and local governments. The United States has not claimed that the actions of any given member State customs authority themselves breach Article X:3(a). Rather, the United States has claimed that the EC itself has failed to establish institutions or other mechanisms necessary to ensure administration of its customs law in a uniform manner, as required by Article X:3(a). In this regard, the present dispute is distinguishable from the *Canada - Gold Coins* dispute (referred to at paragraphs 234 and 244 of the EC's Other Appellant Submission), which involved a measure adopted by a provincial government that put Canada in breach of its obligation under Article III of the GATT 1947.[203]

165. The Panel did not reach the question of the applicability of Article XXIV:12 to the EC's obligation under Article X:3(a) in light of its finding that, whether or not it is applicable, it "does not constitute an exception nor a derogation from the obligation of uniform administration in Article X:3(a) of the GATT 1994."[204] Even if the Appellate Body were to reverse that finding (which it should not do), it should find Article XXIV:12 not applicable in this dispute, for the reasons discussed above (*i.e.*, the EC did not invoke it, and the dispute does not concern the observance of Article X:3(a) by regional and local governments).

3. The Panel Correctly Construed Article XXIV:12

166. Regarding the merits of the Panel's finding, the EC argues incorrectly that the Panel's construction of Article XXIV:12 would render that provision inutile.[205] The EC misreads the

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[203] *See* U.S. Comments on EC Replies to Second Set of Panel Questions, para. 34 (comment on EC reply to Question No. 158).

[204] *Panel Report*, para. 7.145 & n.288.

[205] EC Other Appellant Submission, paras. 242-246.

Panel to have construed Article XXIV:12 as simply repeating the general international law principle that states are responsible for the acts of sub-federal and regional governments.[206]

167. To see why the EC's argument is incorrect, it is necessary to recall the question the Panel was addressing when it made its conclusions regarding Article XXIV:12. The question was:

> whether or not Article XXIV:12 of the GATT 1994 has the effect of limiting the European Communities' obligations under Article X:3(a) of the GATT 1994 so that it is only required to take 'reasonable measures' to ensure uniform administration by the customs authorities of the member States.[207]

In other words, in light of arguments the EC had made, the Panel was considering whether Article XXIV:12 qualifies the *applicability* of the obligations of Article X:3(a) to the EC. It was not considering how Article XXIV:12 might affect the way in which the EC is required to *implement* Article X:3(a).

168. In finding that Article XXIV:12 does not qualify the applicability of Article X:3(a), the Panel focused on the fact that Article XXIV:12 "is drafted as a positive obligation rather than a defence," noting the use of the word "'shall.'" The Panel also referred to the *Understanding on the Interpretation of Article XXIV of GATT 1994* ("Understanding on Article XXIV"), which states that "'[e]ach Member is fully responsible under GATT 1994 for observance of all provisions of GATT 1994.'"[208]

169. The EC faults the Panel for having focused on the term "shall" in Article XXIV:12 and not referring to the terms "reasonable measures" and "as may be available to it."[209] However, the

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[206] EC Other Appellant Submission, para. 243.
[207] *Panel Report*, para. 7.142.
[208] *Panel Report*, para. 7.144.
[209] EC Other Appellant Submission, para. 242.

Panel's focus on particular terms was a reflection of the question before it. The terms "reasonable measures" and "as may be available to it" may be relevant to the issue of the effect of Article XXIV:12 on implementation of Article X:3(a), but the Panel did not need to construe those terms to determine whether Article XXIV:12 qualifies the applicability of the obligations of Article X:3(a). Not referring to those terms certainly did not "reduc[e] their practical effect to zero," as the EC contends.[210]

170. Moreover, finding that Article XXIV:12 "cannot be relied upon to attenuate or derogate from the provisions of the GATT 1994" did not render that provision redundant with general principles of international law on state responsibility. The EC's argument that it did again ignores the nature of the question before the Panel. The Panel simply was considering whether Article XXIV:12 qualifies the applicability of the obligations of Article X:3(a), as the EC had argued, and found, correctly, that it does not. The Panel did not find, as the EC now suggests, that Article XXIV:12 merely repeats the general principle that states are responsible for the acts of their sub-federal and regional governments.

171. While Article XXIV:12 does not affect the applicability of GATT 1994 obligations, it may well be relevant to the way in which certain Members "ensure observance" of those obligations by regional and local governments. When applicable, Article XXIV:12 requires a Member to "take such reasonable measures as may be available to it" to ensure such observance. That may distinguish Article XXIV:12 from the general principle of international law to which

[210] EC Other Appellant Submission, para. 242.

the EC referred. But, it does not change the fact that GATT 1994 obligations (including Article X:3(a)) are fully applicable.

172. As the United States explained to the Panel, Article XXIV:12 is a narrow provision concerning the *implementation* of GATT 1994 obligations, which must be construed to avoid "imbalances in rights and obligations between unitary and federal States."[211] That it does not affect the *applicability* of those obligations is confirmed by paragraph 14 of the Understanding on Article XXIV which provides that even if a Member has taken "reasonable measures," "[t]he provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the [DSU] . . . relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance."[212] Article 22.9 of the DSU contains a similar provision. Therefore, even if, pursuant to Article XXIV:12, the EC's only obligation under Article X:3(a) were to take "reasonable measures" to secure uniform administration of EC customs law, its failure to actually administer its customs law in a uniform manner would not excuse it from relevant provisions on compensation and suspension of concessions.[213]

173. This point is confirmed by the GATT panel report in *Canada - Gold Coins*. The EC quotes a general statement from the beginning of the panel's analysis of the Article XXIV:12

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[211] 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).

[212] In this regard, contrary to the EC's assertion at paragraph 245 of its Other Appellant Submission, the Understanding on Article XXIV manifestly does *not* "merely restate[] the content of Article XXIV:12 GATT." Indeed, the EC's reading of the Understanding in a way that would render it inutile is notable in view of its (erroneous) contention that the Panel's reading of Article XXIV:12 itself would render *that* provision inutile.

[213] *See* U.S. Second Written Submission, para. 15; U.S. Comments on EC Replies to Second Set of Panel Questions, para. 35.

issue in that dispute.[214] However, it overlooks the crux of the panel's analysis. The panel in *Canada - Gold Coins* carefully considered and rejected the argument that Article XXIV:12 operates as a limitation on the applicability of GATT obligations.[215] It also found that as the respondent (Canada) was in breach of its obligation under Article III of the GATT 1947, it was obligated to compensate the complainant (South Africa) until such time as the reasonable measures it was taking in accordance with Article XXIV:12 secured its observance of its obligations under Article III.[216] Thus, far from supporting the EC's position, the report in the *Canada - Gold Coins* dispute supports the Panel's conclusion that Article XXIV:12 "does not constitute an exception nor a derogation from the obligation of uniform administration in Article X:3(a) of the GATT 1994."[217]

174. Finally, even if Article XXIV:12 were applicable to this dispute, and even if it could potentially attenuate or permit a derogation from the EC's obligations under Article X:3(a), it would not do so here, as the EC offered no evidence to show that the measures it is taking to ensure observance of Article X:3(a) by the regional and local governments within its territories are "such reasonable measures as may be available to it." The EC "does not contest" that the "safeguards and mechanisms" provided under its system of customs administration constitute such reasonable measures.[218] However, this bald assertion does not amount to evidence, and the

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[214] EC Other Appellant Submission, para. 244 (quoting GATT Panel Report, *Canada - Gold Coins*, para. 53).

[215] GATT Panel Report, *Canada - Gold Coins*, para. 64.

[216] GATT Panel Report, *Canada - Gold Coins*, para. 65.

[217] *Panel Report*, para. 7.145.

[218] EC Other Appellant Submission, para. 235.

question of whether the measures a Member is taking satisfy the requirements of Article XXIV:12 is not self-judging.[219]

III. CONCLUSION

175. For the reasons set forth in this submission, the United States requests that the Appellate Body reject the arguments of the EC in their entirety and uphold the Panel's findings and conclusions in paragraphs 6.6, 7.36 - 7.37, 7.102 - 7.119, 7.140 - 7.145, 7.266 - 7.276, 7.291 - 7.305, 7.376 - 7.385, 8.1(b)(iv), 8.1(b)(v), 8.1(c)(ii), 8.2(a), 8.2(b), and 8.2(c) of its report.

[219] *See, e.g.*, GATT Panel Report, *Canada - 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.").