European Communities – Selected Customs Matters

(AB-2006-4)

APPELLANT SUBMISSION OF THE UNITED STATES OF AMERICA

August 21, 2006

BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

European Communities – Selected Customs Matters

(AB-2006-4)

SERVICE LIST

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Argentina - Footwear	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000.
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.
Australia - Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998.
Australia - Salmon 21.5	Panel Report, *Australia – Measures Affecting Importation of Salmon: Recourse to Article 21.5 of the DSU by Canada*, WT/DS18/RW, adopted 20 March 2000.
Brazil - Aircraft 21.5	Panel Report, *Brazil – Export Financing Programme for Aircraft: Recourse to Article 21.5 of the DSU by Canada* , WT/DS46/RW, adopted 4 August 2000 (with Appellate Body report).
Canada - Aircraft 21.5	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft: Recourse to Article 21.5 of the DSU by Brazil*, WT/DS70/AB/RW, adopted 4 August 2000.
Canada - Dairy	Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R – WT/DS113/R, adopted 27 October 1999 (with Appellate Body report).
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EC - Computer Equipment	Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R – WT/DS67/AB/R – WT/DS68/AB/R, adopted 22 June 1998.
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 - Tariff Preferences	Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004.
Guatemala - Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998.
India - Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R, adopted 5 April 2002 (with Appellate Body Report).
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Japan - Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999.
Korea - Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000.
Panel Report	Panel Report, *European Communities – Selected Customs Matters*, WT/DS315/R, circulated 16 June 2006.
Thailand - Steel Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001.

US - Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002.
US - FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000.
US - FSC 21.5 II	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations": Second Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 14 March 2006.
US - Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996.
US - Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998.
US - Superfund	GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances*, L/6175 - 34S/136, adopted 17 June 1987.
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.

Table of Abbreviations

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).

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).

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The United States is appealing issues of law and legal interpretation in three aspects of the report of the Panel in *European Communities – Selected Customs Matters* ("*Panel Report*").[1] In particular, the United States seeks review of:

(1) (a) the Panel's erroneous conclusion that the measure at issue in a dispute involving Article X:3(a) of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") is the "manner of administration" of laws, regulations, decisions and rulings, rather than the laws, regulations, decisions and rulings themselves – thus confusing measures with claims;

(b) the Panel's erroneous finding that examples in the U.S. panel request of areas in which the European Communities ("EC") administers its customs law in a non-uniform manner were exhaustive rather than illustrative and therefore limited the U.S. identification of the specific measures at issue – thus confusing additional *description* of the claims with the *measures* at issue;

(c) the Panel's erroneous finding, based on a selective reading of the U.S. panel request, that its terms of reference did not include the U.S. claim that the EC's system of customs administration is inconsistent with Article X:3(a) of the GATT 1994;

(2) the Panel's erroneous finding that penalty provisions and audit procedures that give effect to EC customs law by enforcing and verifying compliance with the law do not "administer" the law within the meaning of Article X:3(a) of the GATT 1994, and that undisputed differences among such provisions and procedures, therefore, do not breach Article X:3(a); and

(3) the Panel's erroneous finding that the tribunals and procedures the EC provides for the review of customs administrative actions comply with Article X:3(b) of the GATT 1994, even though none of them issues decisions that govern the practice of "the agencies entrusted with administrative enforcement," rather than just a subset of those agencies.

2. Before the Panel, the United States challenged customs law administration and the review and correction of customs administrative action in the EC as being inconsistent with Articles

[1] WT/DS315/R, circulated June 16, 2006.

X:3(a) and (b), respectively, of the GATT 1994. The United States claimed, first, that the administration of EC customs law by 25 separate, independent customs authorities without any EC-level institutions or procedures to reconcile promptly and as a matter of right the divergences that inevitably occur among these different authorities amounts to a breach of the EC's Article X:3(a) obligation to "administer in a uniform . . . manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of [Article X]." The U.S. Article X:3(a) claims encompassed a challenge to the EC's failure to administer uniformly its laws, regulations, decisions and rulings that pertain to the classification and valuation of products for customs purposes and to requirements, restrictions or prohibitions on imports, as a whole, including in particular instances.

3. If the United States were to administer U.S. customs law through separate, independent customs authorities in each of its 50 States, without any institution or mechanism like its U.S. customs headquarters to ensure against divergences or to promptly reconcile them as a matter of right when they occurred, the United States unquestionably would be challenged for failing to meet its obligation to administer U.S. customs law uniformly. The EC, as a WTO Member in its own right, subject to the requirements of GATT 1994 Article X:3(a) in the same way as every other WTO Member, should be held to no less a standard in administering EC customs law.

4. Second, the United States claimed that the problem of the EC's geographically fragmented administration of EC customs law is compounded by the problem of geographically fragmented review of customs administrative action. Not only is EC customs law administered by a different, independent authority in each of the 25 member States of the EC, but the administrative actions of any given authority are reviewable by member State tribunals whose

decisions govern the practice only of that authority. Thus, when the decisions of different tribunals diverge in their interpretation of EC customs law, given that each decision governs the practice of a different authority, the result is to entrench non-uniform administration. This, the United States claimed, amounts to a breach of the EC's GATT 1994 Article X:3(b) obligation to have in place "tribunals or procedures for . . . the prompt review and correction of administrative action relating to customs matters," which tribunals or procedures must be empowered to render decisions that "shall be implemented by, and shall govern the practice of" "the agencies entrusted with administrative enforcement."

5. None of the EC's tribunals or procedures renders decisions that govern the practice of "*the* agencies entrusted with administrative enforcement." Each tribunal or procedure renders decisions that govern the practice of a subset of such agencies. However, none renders decisions that govern the practice of all such agencies, which is what the terms of Article X:3(b), interpreted according to their ordinary meaning, in context, and in light of the object and purpose of the GATT 1994, require.

A. The Panel Report

6. The Panel improperly excluded from its terms of reference the U.S. claim under Article X:3(a) regarding the EC's customs laws, regulations, decisions and rulings as a whole, finding that the U.S. claims were limited to claims regarding the application of EC customs law in particular instances, within particular areas of administration it found to have been identified in the U.S. panel request.[2] As part of its analysis, the Panel also excluded from its terms of

[2] *See generally Panel Report*, paras. 7.46 - 7.54, 7.63.

reference any claim that these EC measures necessarily result in a breach of the EC's obligations under Article X:3(a).[3] Rather, it misconstrued the U.S. panel request[4] as limited to the manner of administration of the EC customs legislation referred to in the request in the particular areas that the request referred to as examples of areas in which the non-uniform administration of EC customs law is manifest.[5]

7. Having thus narrowed its terms of reference, the Panel examined particular instances of administration of EC customs law to determine whether the manner of administration in those instances was uniform or not. It found that in three instances, the EC currently administers its customs law in a non-uniform manner, in breach of Article X:3(a).[6] Among its other findings was an erroneous finding (relevant to this appeal) that the EC does not breach its obligation of uniform administration to the extent that it has in place divergent penalty provisions and audit procedures for putting EC customs law into practical effect.[7]

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[3] The Panel couched its discussion of this issue in terms of an "as such" or "per se" claim. See, for example, paragraph 7.63 of the *Panel Report*.

[4] WT/DS315/8.

[5] *See generally Panel Report*, paras. 7.20, 7.33.

[6] *Panel Report*, para. 7.276, 7.355(d), 8.1(b)(iv), 8.2(a) (in the classification of the product known as "blackout drapery lining," "reliance by one EC customs authority on an interpretive aid not relied on by other EC customs authorities, and the lack of any obligation on that authority "to make reference to the decisions of other customs authorities . . . even in cases where there is a possibility that the products the subjects of those decisions are the same or similar"); *id.*, paras. 7.305, 7.355(e), 8.1(b)(v), 8.2(b) (tariff classification of liquid crystal display monitors with digital video interface); *id.*, paras.7.385; 7.419(b), 8.1(c)(ii), 8.2(c) ("imposition by customs authorities in some member States of a form of prior approval" in order to establish the customs value of imported goods on a basis other than the last sale that led to introduction of the goods into the customs territory of the EC).

[7] *See generally Panel Report*, paras. 7.444 (penalty provisions), 7.434 (audit procedures); *see also id.*, paras. 7.106, 7.113 - 7.119 (explaining Panel's rationale for its approach to penalty provisions and audit procedures).

8. In addressing the U.S. Article X:3(b) claim, the Panel erroneously concluded that there is no obligation for a Member's first instance independent review tribunals and bodies to have the authority to issue decisions that govern the practice of all agencies entrusted with administrative enforcement throughout the territory of a Member.[8] Rather, for the Panel it is sufficient if a Member limits its tribunals' authority so that the decisions of any given tribunal govern the practice only of agencies within a small part of the Member's territory and leave agencies free to pursue practices throughout the vast majority of the Member's territory that are divergent or directly contrary to the decisions of that tribunal.

B. The Panel Erred in Construing Its Terms of Reference

9. In this submission, the United States will first discuss three basic errors made by the Panel in construing its terms of reference. The United States seeks review of each of these errors.

10. First, as an initial matter (one that did not in the end affect the Panel's ultimate conclusion concerning the scope of its terms of reference), the Panel mistakenly found that for purposes of Article 6.2 of the DSU, the "measure[] at issue" in a dispute involving Article X:3(a) of the GATT 1994 is "the manner of administration that is allegedly non-uniform, partial and/or unreasonable."[9] By finding "manner of administration" to be the measure at issue, the Panel confused the measure at issue in an Article X:3(a) dispute with the obligation under that provision (that is, the description that the measure is inconsistent with Article X:3(a) because administration is not uniform, impartial, and reasonable).

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[8] *Panel Report*, para. 7.538.
[9] *Panel Report*, para. 7.20.

11. The Panel's finding regarding "manner of administration" did not itself lead the Panel to narrow its terms of reference to exclude the U.S. challenge to the EC's system as a whole; indeed, the U.S. request refers to the EC's "manner of administration." However, the Panel made a second error regarding its terms of reference by reading a discussion in the panel request of examples of areas in which non-uniform administration of EC customs law is evident to be a narrowing of "manner of administration." The Panel appeared to reason that the United States had listed "some, but not all, areas of customs administration," and that its doing so meant that the specific measures at issue consisted of the manner of administration in those areas but not others.[10]

12. Thus, in addition to confusing the specific measures at issue in this dispute with the legal basis of the U.S. complaint under Article X:3(a), the Panel confused a discussion of areas in which non-uniform administration occurs with a comprehensive identification of the specific measures at issue themselves (which the panel request had already provided). In referring to areas in which non-uniform administration of EC customs law is manifest, the United States was illustrating its point. The Panel erred in reading this illustration as a limitation on the identification of the specific measures at issue.

13. In fact, in connection with the U.S. claim against the EC's system as a whole, the U.S. panel request identified the specific measures whose administration was at issue in this dispute as the EC's "laws, regulations, decisions and rulings of the kind described in Article X:1 of the [GATT 1994]." To avoid any doubt, the United States listed those measures in the first

[10] *Panel Report*, paras. 7.33 & 7.47.

paragraph of its panel request. The measures that the United States listed are indeed the very measures that the EC confirmed constitute the "main instruments of EC customs legislation."[11]

14. Separate from and independent of its errors in defining the measures at issue in this dispute, the Panel committed its third error in construing its terms of reference by finding those terms to exclude the U.S. claim that the EC system of customs administration as a whole results in the non-uniform administration of EC customs law, in breach of Article X:3(a) of the GATT 1994. The essence of that claim involved the absence of EC institutions or mechanisms to secure the uniform administration of EC customs law.

15. The EC defended against the U.S. Article X:3(a) claim with respect to its system of customs administration by asserting that uniform administration of EC customs law is guaranteed by a network of EC-level institutions and other mechanisms. It cited, for example, the Customs Code Committee (a committee made up of representatives of each of the 25 member States and chaired by a representative of the EC Commission), Article 10 of the EC Treaty (a provision that the EC described as setting forth a general duty of cooperation among member States), and the mechanism that allows for the preliminary referral by member State courts of questions of EC law to the Court of Justice of the European Communities ("the ECJ"). The Panel examined each of the institutions and mechanisms the EC held up as guaranteeing uniform administration because they provided "important context for the examination of the particular instances of alleged violations of Article X:3(a) of the GATT 1994 in respect of which such aspects have been raised."[12]

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[11] EC First Written Submission, para. 63.

[12] *Panel Report*, para. 7.155; *see also id.*, para. 7.489.

16. The Panel rejected the EC's argument that these institutions and mechanisms in fact provide uniform administration. It found, for example, that "the Customs Code Committee has limited power to impose uniform administration on customs authorities of the member States;"[13] that "the extent to which Article 10 of the EC Treaty contributes to uniform administration of EC customs law is unclear;"[14] and that "the use of the preliminary reference system to secure uniform administration by the customs authorities of the member States in the area of customs administration during the period of 1995-2005 appears low, especially in the light of the European Communities assertion that literally millions of customs decisions are taken by customs authorities in the member States each year in the European Communities."[15]

17. In summing up its findings regarding the institutions and mechanisms that the EC held out as "ensur[ing]" the uniform administration of EC customs law,[16] the Panel stated:

> [I]n its consideration of the EC system of customs administration as a whole, the Panel found the system complicated and, at times, opaque and confusing. We can imagine that the difficulties we encountered in our efforts to understand the EC system of customs administration would be multiplied manifold for traders in general and small traders in particular who are trying to import into the European Communities.[17]

That finding, in fact, is entirely consistent with the finding of the EC's own Commissioner in charge of customs matters.[18]

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[13] *Panel Report*, para. 7.160.

[14] *Panel Report*, para. 7.164.

[15] *Panel Report*, para. 7.168.

[16] *See* EC First Written Submission, para. 52; *see also id.*, para. 284 (referring to "the system that the EC has put in place in order to *guarantee* uniform administration of customs law" (emphasis added)).

[17] *Panel Report*, para. 7.191.

[18] *See* U.S. First Written Submission, para. 2 (quoting László Kovács, Commissioner for Taxation and Customs Union, Speech delivered at the International Conference on the

18. Notwithstanding the Panel's rejection of the EC's defense that EC institutions and mechanisms "ensure" uniform administration, the Panel declined to conclude that the EC's system of customs administration puts the EC in breach of its GATT 1994 Article X:3(a) obligation of uniform administration. The Panel avoided that conclusion by construing its terms of reference to exclude a claim with respect to the EC system of customs administration either as a whole or in the specific areas the Panel found to have been identified in the panel request. The Panel construed its terms of reference as limited to individual instances of administration of EC customs law alleged to be non-uniform.

19. This construction of the Panel's terms of reference as excluding a challenge to the EC's system as a whole was in error. The Panel missed the fundamental point, clearly identified in the panel request, that the absence of mechanisms or institutions in the EC's system as a whole results in non-uniform administration of EC customs law. Instead, the Panel read individual phrases in the U.S. request for the establishment of a panel in isolation from one another and in a manner that cannot be reconciled with the ordinary meaning of the request or with the EC's own understanding of the request. For example, it referred to a description of certain areas in which the non-uniform administration of EC customs law is manifest and found that lack of a reference to *all* areas of customs administration showed that the request did not state a claim with respect to the EC system of customs administration overall or as a whole.[19]

Modernised Customs Code, p.1 (Mar. 9-11, 2005) (Exh. US-1)).

[19] *Panel Report*, paras. 7.46 - 7.50.

20. The Panel also focused on the word "manner" in the panel request as supposedly indicating that the U.S. complaint "relates to application in practice."[20] In fact, it is difficult to imagine a Member making a claim under Article X:3(a) of the GATT 1994 without using the word "manner," given that the very subject of the provision is the "manner" in which a Member administers certain measures.

21. Additionally, the Panel noted that "the request places emphasis on the actions of customs authorities of the member States whereas, in contrast, there is no mention of actions taken and/or procedures and institutions existing at the EC level."[21] In the Panel's view, that aspect of the request undercuts a characterization of the U.S. claim as a claim with respect to the EC customs administration system as a whole. In fact, it does just the opposite. The very aspect of the design and structure of the EC system that is problematic from the point of view of Article X:3(a) of the GATT 1994 is the *absence* of EC-level actions and/or procedures and institutions. Therefore, it is entirely logical that an Article X:3(a) complaint about the design and structure of the EC system of customs administration would address "the actions of customs authorities of the member States" because that is the *only* system of administration which the EC provides. Indeed, this is entirely consistent with the Panel's own findings regarding the design and structure of the EC system of customs administration.[22]

22. Read as a whole, it is unmistakable that the panel request challenged the EC system of customs law administration as a whole as being inconsistent with the EC's GATT 1994 Article

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[20] *Panel Report*, para. 7.59.

[21] *Panel Report*, para. 7.60.

[22] *See, e.g.*, *Panel Report*, para. 7.156 ("administration of EC customs law is primarily the responsibility of the member States").

X:3(a) obligation of uniform administration. That the EC itself never was in doubt that the United States had asserted this claim was evident from the EC's response to the panel request itself, even before it saw the first written submission of the United States,[23] and was confirmed in subsequent submissions and statements.[24]

23. Had the Panel construed the U.S. panel request correctly, it should have found the EC to be in breach of its GATT 1994 Article X:3(a) obligation with respect to the EC's system of customs administration as a whole. That conclusion follows logically from the Panel's findings of fact with respect to the institutions and procedures that the EC held out as guaranteeing uniform administration.[25] Therefore, the Appellate Body should complete the Panel's analysis and find the EC to be in breach of Article X:3(a) with respect to its system of customs administration as a whole.

C. The Panel Erred in Declining to Find That the EC Breaches Article X:3(a) of the GATT 1994 by Putting EC Customs Law Into Practical Effect Through Divergent Penalty Provisions and Audit Procedures

24. In addition to erring in the construction of its terms of reference, the Panel erred in its interpretation and application of the term "administer" in Article X:3(a) as it relates to differences in the penalty provisions and audit procedures in place in different regions of the EC

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[23] *See* WT/DSB/M/182, para. 31 (EC characterizing U.S. claims as "questions regarding the distribution of competences in the administration of customs rules within the internal legal order of a WTO Member"); *see also* WT/DSB/M/186, para. 29.

[24] *See, e.g.*, EC First Written Submission, para. 260; EC First Oral Statement, para. 5 (asserting that "[f]or the first time, a WTO Member challenges the entire system of another WTO Member based on an alleged lack of uniform administration contrary to Article X:3(a) GATT"); EC Second Written Submission, para. 71 (asserting that "the EC has set out in detail how the EC legal system ensures the uniform interpretation and application of EC law through the EC"); EC Second Oral Statement, para. 43.

[25] *See Panel Report*, paras. 7.156 - 7.192.

that put EC customs law into practical effect in those regions. It was undisputed that customs penalty laws vary across the territory of the EC – sometimes quite dramatically.[26] It also was undisputed that audit procedures vary across the EC.[27] The United States demonstrated that these differences amount to a lack of uniform administration of EC custom law, which is given effect in part through these penalty provisions and audit procedures. The Panel dismissed the U.S. claim with respect to penalty provisions by stating simply that "the substantive content of penalty laws of the member States used to enforce EC customs law cannot be viewed as acts of administration with respect to laws, regulations, decisions and rulings covered by Article X:1 of the GATT."[28] It made a similar finding with respect to audit procedures.[29] Its approach to differences among penalty provisions and audit procedures amounted to an erroneous interpretation of the term "administer" in Article X:3(a), whereby only individual "acts of administration" show how a measure of general application is being administered and, therefore, only a comparison between individual acts can demonstrate a breach of the obligation to administer in a uniform manner – even where the individual acts in question are dictated by law. In effect, the Panel concluded that Members can immunize themselves against claims of non-uniform administration by legislating the non-uniformity.

25. The Panel justified its approach by reasoning that Article X:3(a) calls for an analysis of the manner in which measures are administered rather than their substance. In its view, Article

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[26] *See, e.g., Panel Report*, para. 7.444.

[27] *See Panel Report*, para. 7.420 (summarizing U.S. evidence with respect to differences among audit procedures) and para. 7.421 (summarizing EC's response, in which EC defended on various grounds but did not deny the existence of differences among audit procedures).

[28] *Panel Report*, para. 7.444.

[29] *Panel Report*, para. 7.434.

X:3(a) makes no distinction between measures that are "administrative in nature" (such as penalty provisions and audit procedures), in the sense that they give effect to other measures and measures that are not administrative in nature (such as substantive rules regarding customs classification and valuation).[30]

26. The problem with this reasoning is that it misunderstands the relevance to this dispute of differences in the substantive content of penalty laws and audit procedures. The United States never argued for examination of the substance of penalty provisions and audit procedures as an end in itself but, rather, as a means to determining how EC customs law is administered.

27. The Panel assumed without basis that only individual "acts of administration" can demonstrate the manner in which measures of the kind described in Article X:1 are administered, and only differences between "acts of administration" constitute non-uniform administration. It ignored the ordinary meaning of the term "administer" – to "put into practical effect"[31] – and the fact that individual acts of administration are not the only means through which measures of the kind described in Article X:1 may be put into practical effect. Specifically, it ignored the fact that if divergences between individual acts of administration constitute non-uniform

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[30] *Panel Report*, paras. 7.114 - 7.119. On this point, the Panel made no attempt to distinguish the report of the panel in *Argentina – Hides*, even though that report had been the subject of much discussion in this dispute. *See, e.g.*, U.S. First Written Submission, paras. 35-38; U.S. First Oral Statement, paras. 22-23, 47-48; U.S. Answers to First Set of Panel Questions, paras. 156-160 (answer to Question No. 90); EC Replies to First Set of Panel Questions, paras. 181-185 (reply to Question No. 90); U.S. Second Written Submission, paras. 90-95; EC Second Oral Statement, para. 74; U.S. Answers to Second Set of Panel Questions, paras. 23-24 (answer to Question No. 129), 25-28 (answer to Question No. 130), 40-41 (answer to Question No. 133); EC Replies to Second Set of Panel Questions, paras. 38-39 (reply to Question No. 154), 79 (reply to Question No. 167(b)). The Panel did nothing more than take note of the U.S. reliance on that panel report. *Panel Report*, para. 7.114 n.256.

[31] *See Panel Report*, para. 7.104.

administration then, *a fortiori*, divergences between the penalty and audit regimes that govern the individual acts of administration that different customs authorities carry out also must constitute non-uniform administration.

28. The Panel drew support from the possibility that penalty provisions and audit procedures may be measures of general application which, under circumstances other than those presented by this dispute, could themselves be the object of an Article X:3(a) claim. In the Panel's view, examining the substance of penalty provisions and audit procedures would amount to taking a "two-track, differential approach" to different measures covered by Article X:3(a).[32]

29. In so concluding, the Panel failed to appreciate that the United States was not asking the Panel to examine the administration of member State penalty and audit provisions, but, rather, their role in administering the specific measures at issue in this dispute; more specifically, the United States pointed out that divergences in the penalty provisions and audit procedures provided for by the member States demonstrate non-uniform administration by the EC in breach of Article X:3(a). Moreover, the Panel's approach was inconsistent not only with the ordinary meaning of the term "administer," but also with the Panel's own logic. In parts of its report discussing issues other than penalty provisions and audit procedures, the Panel recognized that showing the existence of differences between particular "acts of administration" is not the only way to demonstrate a failure of uniform administration. In these other contexts, the Panel correctly found that the very existence in different parts of the EC of different regimes for giving effect to EC customs law itself amounts to non-uniform administration.[33]

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[32] *Panel Report*, para. 7.118.

[33] *See Panel Report*, paras. 7.271, 7.275 n.517, 7.304 n.579, 7.380 - 7.383, 7.445.

30. Had the Panel construed the term "administer" correctly, it should have found the EC to be in breach of Article X:3(a) because EC customs law is given effect – *i.e.*, administered – differently through different penalty provisions and audit procedures. Given the undisputed fact that penalty provisions and audit procedures for giving effect to EC customs law do vary across the territory of the EC, the Appellate Body should complete the Panel's analysis and find the EC to be in breach of Article X:3(a).

D. The Panel Erred in Finding the Tribunals and Procedures the EC Provides for Review of Customs Administrative Action to be Consistent With Article X:3(b) of the GATT 1994 Even Though None of Them Issues Decisions That Govern the Practice of "the Agencies Entrusted With Administrative Enforcement"

31. The final error by the Panel for which the United States seeks review concerns the Panel's interpretation and application of Article X:3(b) of the GATT 1994. Article X:3(b) requires the EC to provide independent tribunals or procedures for the prompt review and correction of administrative action relating to customs matters. It further requires that the decisions of such tribunals or procedures be "implemented by" and "govern the practice of" "the agencies entrusted with administrative enforcement." The United States claimed that the EC is in breach of Article X:3(b) because the decisions of its review tribunals or procedures govern the practice of only a subset of agencies entrusted with administrative enforcement. Specifically, the EC's review tribunals or procedures consist of the courts of the various member States, each of which is empowered to issue decisions that govern the practice only of the agency in its respective member State. No tribunal or procedure that the EC provides for the prompt review and correction of customs administrative action is authorized to issue decisions that govern the

practice of "*the* agencies" entrusted with administrative enforcement – rather than *some of* those agencies – contrary to what Article X:3(b) requires.

32. The Panel erred in concluding that:

> Article X:3(b) of the GATT 1994 does not necessarily mean that the decisions of the judicial, arbitral or administrative tribunals or procedures for the review and correction of administrative action relating to customs matters must govern the practice of *all* the agencies entrusted with administrative enforcement *throughout the territory* of a particular Member.[34]

Its reasoning in support of that conclusion ignores the ordinary meaning of the terms of Article X:3(b) as well as the immediate context supplied by the obligation of uniform administration in Article X:3(a). It relies ultimately on the Panel's consideration that it would not be:

> [R]easonable to infer that first instance independent review tribunals and bodies, whose jurisdiction in most legal systems is normally limited in substantive and geographical terms, should have the authority to bind all agencies entrusted with administrative enforcement throughout the territory of a Member.[35]

33. That assessment of what is "reasonable" in light of "most legal systems" ignored entirely the feature that makes the EC different from *any* other legal system as relevant to Article X:3(b). The EC does not merely provide for geographically fragmented *review* of administrative action. It also provides for geographically fragmented *administration* of its customs law. Thus, while "most legal systems" may limit the jurisdiction of their review tribunals and bodies in terms of geography or substance, those tribunals and bodies nevertheless issue decisions addressed to a customs authority that is the sole customs authority within the territory of the Member. In governing the practice of the agency whose action was under review, such decisions necessarily

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[34] *Panel Report*, para. 7.539 (emphasis in original).
[35] *Panel Report*, para. 7.538.

govern the practice of "the agencies entrusted with administrative enforcement" throughout the Member's territory. In the EC (perhaps uniquely among WTO Members), decisions of geographically limited review tribunals are addressed to customs authorities whose practice is limited to particular geographical regions.

34. Neither the text nor the context of Article X:3(b) supports the Panel's finding of what amounts to one rule for Members with a single customs authority and a different rule for Members with multiple customs authorities. Accordingly, the Panel's interpretation of Article X:3(b) should be rejected, and the Appellate Body should find that the ordinary meaning of the terms of Article X:3(b), in their context, requires that the decisions of review tribunals govern the practice of the agencies entrusted with the administrative enforcement of a Member's customs laws, not merely a subset of those agencies within a particular region. Moreover, as it is undisputed that no tribunal or procedure that the EC provides for the prompt review and correction of customs administrative action is empowered to issue decisions that govern the practice of "*the* agencies entrusted with administrative enforcement," the Appellate Body should complete the Panel's analysis and find the EC to be in breach of its obligation under Article X:3(b).

35. The United States will elaborate on these errors in the remainder of this submission.

II. ARGUMENT

A. The Panel Misconstrued Its Terms of Reference

36. The U.S. panel request, which formed the basis for the Panel's terms of reference, unmistakably challenged the EC's failure to administer in a uniform manner its customs laws as a whole. In the very first sentence of its request, the United States stated that it was challenging

"the manner in which the [EC] administers its laws, regulations, decisions and rulings of the kind described in Article X:1 of the [GATT 1994]." It then enumerated the specific measures whose manner of administration was at issue, identifying the very measures that the EC itself acknowledges to be the "main instruments of EC customs legislation."[36] Finally, the United States set forth, by way of illustration, certain areas in which the non-uniform administration being challenged is manifest.

37. Throughout the panel request, administration of the specific measures at issue was treated collectively, leaving no doubt that the United States had stated a claim with respect to the EC system of customs administration. Submissions and statements by the United States throughout the panel proceeding confirmed the systemic nature of its complaint. The EC's own submissions and statements leave no doubt that it understood the nature of the complaint and was able to respond.

38. Nevertheless, the Panel found that the panel request failed to identify a claim with respect to the EC system of customs administration either overall or in particular areas. Its finding was a misconstruction of its terms of reference. Before reaching the specific question of whether its terms of reference included a claim with respect to the EC system of customs administration, the Panel made two errors regarding the specific measures at issue. First, the Panel erroneously found that, as a general matter, for purposes of DSU Article 6.2, the "measure[] at issue" in a claim under Article X:3(a) of the GATT 1994 is "manner of administration." Second, the Panel erroneously found that the illustrative delineation in the panel request of areas in which non-

[36] EC First Written Submission, para. 63.

uniform administration is manifest had the effect of limiting "manner of administration." The Panel then reached the question of whether its terms of reference included a claim with respect to the EC system of customs administration and found, again, erroneously, that they did not. The Panel narrowed its terms of reference improperly, confining itself to the consideration of particular instances of alleged non-uniform administration of EC customs law.

1. Legal Provisions Governing the Panel's Determination of Its Terms of Reference

39. The panel was established with standard terms of reference.[37] The principal legal provision pertaining to the Panel's determination of its terms of reference was Article 7.1 of the DSU, which sets forth standard terms of reference. Under those standard terms, a panel is called upon to examine "the matter referred to the DSB" in the request for panel establishment.[38]

40. The requirements for a panel request are set forth, in turn, in Article 6.2 of the DSU. Article 6.2 requires that a panel request "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." The Appellate Body has explained that the panel request thus must (1) "identify the specific measures at issue," and (2) "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." The specific measures at issue and the legal basis of the complaint ("the claims") together constitute "the matter referred to the DSB" for purposes of Article 7.1.[39]

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[37] WT/DSB/M/186, para. 30.

[38] *See, e.g.*, AB Report, *United States - Carbon Steel*, para. 124; AB Report, *Guatemala - Cement I*, para. 72.

[39] *See* AB Report, *United States - Carbon Steel*, para. 125; AB Report, *Guatemala - Cement I*, para. 72.

41. While a panel request must set forth "the specific measures at issue" and the claims asserted, it need not set forth arguments. The Appellate Body has emphasized repeatedly that claims are distinct from arguments and that only the former need be contained in a panel request.[40] The Appellate Body also has emphasized the importance of distinguishing measures from claims. This issue was discussed, notably, in *Guatemala - Cement I*, in which the Appellate Body faulted the panel for "read[ing] the term 'measure' as synonymous with allegations of *violations* of the GATT 1994 and the other covered agreements" and thus "blur[ring] the distinction between a 'measure' and 'claims' of nullification or impairment of benefits."[41]

42. Prior Appellate Body discussions of Article 6.2 have also clarified that the obligation to identify the specific measures at issue, together with the legal basis of the complaint, should put the defending party on notice as to what is being alleged, "so that it can begin preparing its defence."[42] Where the responding party's statements during the course of a dispute settlement proceeding demonstrate that it in fact had notice in the panel request of what was being alleged and was able to prepare its defense, that would tend to confirm that the complaining party met its obligation under DSU Article 6.2 to identify the measures at issue and the claims with the requisite specificity.

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[40] *See, e.g.*, AB Report, *Thailand - Steel Beams*, para. 88 n.36; AB Report, *Korea - Dairy*, para. 123; AB Report, *India - Patents (US)*, para. 88; AB Report, *EC - Bananas III*, para. 143.

[41] AB Report, *Guatemala - Cement I*, para. 69 (emphasis in original).

[42] AB Report, *Thailand - Steel Beams*, para. 88; *see also* AB Report, *US - Carbon Steel*, para. 126; AB Report, *Korea - Dairy*, paras. 125-127; AB Report, *EC - Computer Equipment*, para. 69; AB Report, *EC - Bananas III*, para. 143.

43. A further clarification articulated in the Appellate Body's prior analysis of DSU Article 6.2 is that a panel must construe a panel request as a whole. This point was emphasized most recently in the Appellate Body's report in *US - FSC 21.5 II*. In that dispute, the panel found a provision to be within its terms of reference, even though it was not specifically identified at all in the panel request. It inferred that the provision was within its terms of reference because a section of the request – though not the section entitled "The Subject of the Dispute" – made reference to a broader measure of which that provision was a part. Agreeing with the panel that the panel request should be read as a whole, the Appellate Body found this reference to satisfy the DSU Article 6.2 requirement to identify the provision as a specific measure at issue.[43]

44. In light of the foregoing clarifications of Articles 6.2 and 7.1 of the DSU, the Panel in this dispute plainly erred in determining its terms of reference. As discussed in the following sections, the Panel confused the measures at issue with the claim concerning those measures, much like the panel in *Guatemala - Cement I* did. It took statements in the nature of argument, illustrating areas in which the EC fails to administer its customs law in a uniform manner, and turned those statements into a limitation on the measure at issue. Moreover, while it professed to have considered the panel request as a whole, its identification of the measures at issue and its exclusion of the U.S. claim concerning the EC system of customs administration as a whole show that it read particular statements in isolation from one another. Finally, the Panel paid no regard to evidence demonstrating that the EC understood the systemic nature of the complaint in the panel request against it.

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[43] AB Report, *US - FSC 21.5 II*, paras. 66-68; *see also* AB Report, *US - Carbon Steel*, para. 127.

2. The Panel Erred in Finding "Manner of Administration" to be the Measure at Issue in the Context of a Claim Under Article X:3(a) of the GATT 1994

45. The Panel's determination of its terms of reference as based on the U.S. panel request began with a finding that, as a general matter, in the context of a claim under Article X:3(a) of the GATT 1994, the "measure at issue" for purposes of Article 6.2 of the DSU is "the manner of administration that is allegedly non-uniform, partial and/or unreasonable."[44] In making that finding, the Panel appears to have relied primarily on what it described as "an inter-linkage between the reference to the term 'measure' in Article 19.1 of the DSU and to the term 'measures at issue' in Article 6.2 of the DSU."[45] The Panel understood that "inter-linkage" to require interpretation of the term "measure at issue" in Article 6.2 "in light of the specific WTO obligation that is allegedly being violated by that measure in a particular dispute."[46] It explained that, in its view, this approach is necessary "because the 'measure at issue', which has been referred to in a request for establishment of a panel in accordance with Article 6.2 of the DSU, will be the subject of a recommendation to be brought into conformity pursuant to Article 19.1 of the DSU . . . if the measure is found to be in violation of a WTO obligation."[47]

46. If a Member is found to be in breach of Article X:3(a) of the GATT 1994, then, pursuant to a recommendation under Article 19.1 of the DSU, "the Member would need to alter the *manner* in which the relevant laws, regulations, decisions and/or rulings are being *administered*

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[44] *Panel Report*, para. 7.20.
[45] *Panel Report*, para. 7.14.
[46] *Panel Report*, para. 7.17.
[47] *Panel Report*, para. 7.17.

in order to abide by that recommendation."[48] Since it is the manner of administration that would have to be altered, the Panel reasoned, it must be the manner of administration that is the measure at issue in the first place.

47. The Panel's reasoning is flawed for several reasons. "Manner of administration" is not a "measure." As the Panel uses the term, it is a *description* of how a measure operates so as to breach an Agreement provision. Although the Panel professed to recognize that the distinct requirements in Article 6.2 should not be "merged and assessed as a single requirement,"[49] its finding does exactly that. By treating "manner of administration" as the "measure at issue," the Panel "blur[red] the distinction between a 'measure' and 'claims,'"[50] just as the panel in *Guatemala - Cement I* did when it found the "measure at issue" to consist of allegations that the initiation and conduct of an antidumping investigation were inconsistent with the Antidumping Agreement. Tellingly, the Panel never explained what, in its view, would constitute the distinct "legal basis of the complaint" (*i.e.*, claim) for purposes of Article 6.2 if "manner of administration" constituted the "measure at issue."

48. Moreover, the Panel's error appears to have been based on an unsupported assumption that, because DSU Article 19.1 requires that the breaching "measure" be brought into conformity, the measure in the case of Article X:3(a) must be the "manner of administration" of "laws, regulations, judicial decisions or administrative rulings," rather than the laws, regulations, judicial decisions, or administrative rulings themselves. This is not a necessary implication of

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[48] *Panel Report*, para. 7.21 (emphasis in original).
[49] *Panel Report*, para. 7.17.
[50] AB Report, *Guatemala - Cement I*, para. 69.

the language of Article 19.1. The mere fact that a breach of Article X:3(a) may be removed by changing a law's administration is not a basis for concluding that the law is not the measure at issue. Article 19.1 simply contemplates a recommendation that a Member bring a measure into conformity with a covered agreement; it is silent as to how this is to be done.

49. Indeed, following the Panel's reasoning would lead to illogical consequences not only for complaints under Article X:3(a) of the GATT 1994, but for complaints under other WTO provisions as well. Thus, for example, in a complaint under Article III:4 of the GATT 1994, the "measure at issue" under the Panel's approach presumably would not be the laws and regulations themselves, but rather, the "treatment" that establishes a breach of that provision. Yet, if "treatment" were the measure at issue, as the Panel's reasoning suggests, it is entirely unclear how the measure at issue would be distinguishable from the legal basis of the complaint for purposes of DSU Article 6.2. Similarly, under the Panel's approach, in a complaint under Article 63.2 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* that a Member had failed to notify certain laws and regulations to the Council for TRIPS, the "measure at issue" presumably would not be the laws and regulations themselves, but rather, "absence of notification." Yet, if "absence of notification" were the measure at issue, as the Panel's reasoning suggests, it is entirely unclear how the measure at issue would be distinguishable from the legal basis of the complaint for purposes of DSU Article 6.2. And the Member would be entitled to maintain the non-notified measure since there would be no obligation to bring that measure into conformity.

3. The Panel Erred in Finding the Specific Measure at Issue in This Dispute to Be Limited by an Illustration in the U.S. Panel Request

50. The Panel's finding regarding "manner of administration" did not itself lead the Panel to narrow its terms of reference to exclude the U.S. challenge to the EC's system as a whole; indeed, the U.S. request refers to the EC's "manner of administration." However, having found "manner of administration" to be the "measure at issue" in a dispute involving Article X:3(a) of the GATT 1994, in general, the Panel proceeded to consider the U.S. panel request in particular and how it satisfied the specificity requirement in Article 6.2 of the DSU (*i.e.*, the requirement to identify "the *specific* measures at issue"). It found this requirement to be satisfied in part by the delineation in the panel request of measures of the kind described in Article X:1 of the GATT 1994 alleged to be administered in a manner that is in violation of Article X:3(a) of the GATT 1994.[51] However, it found that delineation of these measures was not sufficient. It stated that "[t]hese measures cumulatively 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." Accordingly, drawing an analogy to the circumstances in the *EC - Computer Equipment* dispute,[52] it found that, in this dispute, "the specificity requirement in Article 6.2 of the DSU additionally requires the identification of the customs areas in the context of which the obligation contained in Article X:3(a) of the GATT 1994 is alleged by the United States to be violated."[53]

51. The Panel then referred to the part of the U.S. panel request that provided, by way of illustration, a list of areas in which lack of uniform administration of EC customs law "is manifest in differences among member States." It understood this list to limit the panel request's

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[51] *Panel Report*, para. 7.27.
[52] *Panel Report*, para. 7.31 (discussing AB Report, *EC - Computer Equipment*, para. 67).
[53] *Panel Report*, para. 7.30.

identification of the measure at issue. Accordingly, it concluded that the specific measure at issue for purposes of DSU Article 6.2 was:

> [T]he manner of administration by the national customs authorities of the member States of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff, the TARIC and related measures in the areas of customs administration specifically identified in the United States' request for establishment of a panel – namely, the classification and valuation of goods, procedures for the classification and valuation of goods, procedures for the entry and release of goods, procedures for auditing entry statements after goods are released into free circulation, penalties and procedures regarding the imposition of penalties for violation of customs rules and record-keeping requirements.[54]

a. Failure to construe panel request as a whole

52. The Panel erred in finding the specific measures at issue to be confined to areas of customs administration referred to illustratively in the panel request because the Panel failed to construe the panel request as a whole, and it confused arguments with measures and claims.

53. As noted above, an important clarification from the Appellate Body's prior reports discussing DSU Article 6.2 is that a panel must construe a panel request as a whole. A panel must consider how the different parts of a panel request relate to one another, rather than focusing on individual parts separately.[55] When this was called to the Panel's attention following issuance of the interim report, the Panel modified its report by inserting assertions that it had considered the panel request as a whole. But, materially, its analysis remained unchanged.[56]

i. Meaning of panel request construed as a whole

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[54] *Panel Report*, para. 7.33.

[55] AB Report, *US - FSC 21.5 II*, paras. 66-68; *see also* AB Report, *US - Carbon Steel*, para. 127.

[56] *See, e.g.*, *Panel Report*, paras. 6.12, 7.23, 7.50.

54. Had the Panel construed the panel request as a whole, it could not have avoided the conclusion that the specific measures at issue were the EC's "laws, regulations, decisions and rulings of the kind described in Article X:1 of the [GATT 1994]," and that the legal basis of the complaint was the administration of those measures in a manner inconsistent with Article X:3(a) of the GATT 1994. This identification of the specific measures at issue and legal basis of the complaint was introduced in the very first sentence of the panel request. The request then went on to specify the measures at issue in more detail. It made clear that the measures at issue "pertain to the classification and valuation of products for customs purposes and to requirements, restrictions or prohibitions on imports."[57] In other words, the measures at issue were a subset of the universe of possible measures described in Article X:1.[58]

55. The panel request than specified the measures at issue with additional precision by listing the measures that the EC acknowledges to be the "main instruments of EC customs legislation"[59] and providing a legal citation for each. Thus, the request identified the Community Customs Code, the Commission Regulation implementing the Code, the Tariff Regulation, the TARIC, and, for each of the foregoing measures, "all amendments, implementing measures and other related measures."

56. Having identified the measures at issue with the specificity required by Article 6.2 of the DSU, the panel request then elaborated on the legal basis of the complaint. As stated at the

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[57] WT/DS315/8.

[58] At issue were customs measures relating to importation, not other measures described in Article X:1, such as measures pertaining to exports or measures affecting "sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use."

[59] EC First Written Submission, para. 63.

outset, the claim was that the EC administers the specific measures at issue in a manner inconsistent with Article X:3(a) of the GATT 1994. In the second paragraph, the request went on to explain that the EC administers its customs law through "the national customs authorities of EC member States" and noted that there were "myriad forms of administration" of the specific measures at issue.[60]

57. Having identified the specific measures at issue and the legal basis of its complaint, the United States had satisfied the "minimum standard" of DSU Article 6.2.[61] In the interest of further clarity, however, the United States set forth additional detail, indicating how it would substantiate its claim. Thus, in the third paragraph of the request, by way of illustration, it noted certain areas in which administration of the measures at issue in a manner inconsistent with Article X:3(a) "is manifest in differences among member States." This additional detail gave an indication of the argument underlying the U.S. claim, but did not constitute the claim itself or the specific measures at issue.

ii. Panel's selective reading of the panel request

58. Notwithstanding the inter-relationship among the first three paragraphs of the panel request as just summarized, the Panel focused on particular text from the panel request taken out of its context. As already discussed, the Panel began with the premise that, since this dispute involved Article X:3(a) of the GATT 1994, the measure at issue was "manner of administration," and it found the statements just summarized to be statements specifying "manner of

[60] WT/DS315/8.
[61] AB Report, *India - Patents (US)*, para. 91; AB Report, *EC - Bananas III*, para. 141.

administration." Aside from a passing quotation,[62] it ignored entirely the second paragraph of the panel request, which served to underscore that the specific measures at issue were the EC measures listed in the first paragraph and that the legal basis of the complaint focused on the "numerous different forms" of administration of those measures "by the national customs authorities of EC member States."

59. The Panel's understanding rested significantly on the way it read the third paragraph's illustrative list of certain areas of customs administration. Its characterization of that list as a specification of the measures at issue ignored the introduction to the list, which stated that "[l]ack of uniform, impartial and reasonable administration of the above-identified measures is manifest in differences among member States in a number of areas, including, but not limited to, the following." Thus, the third paragraph began by recalling the specific measures at issue ("the above-identified measures") and the legal basis of the complaint ("[l]ack of uniform, impartial and reasonable administration") as set forth in the first two paragraphs and proceeded to illustrate some areas in which administration of the measures at issue in a manner contrary to Article X:3(a) can be observed.

60. Yet, in reading the third paragraph, the Panel focused exclusively on the list. It ignored the explanation that the list amounted to "a number of areas" in which administration of the measures at issue in a manner inconsistent with Article X:3(a) of the GATT 1994 "is manifest in differences among member States."

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[62] *Panel Report*, para. 7.24.

61. Moreover, in determining the specific measures at issue identified in the panel request, the Panel gave no consideration to the fact that the request included a claim that the absence of mechanisms or institutions in the EC system of customs administration as a whole results in the non-uniform administration of the measures at issue, in breach of Article X:3(a) of the GATT 1994.[63] This was evident from the Panel's observation that the EC measures the United States identified "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."[64] The Panel missed the fundamental point that nowhere in those "thousands of different provisions" or elsewhere – that is, nowhere in the system as a whole – are there mechanisms or institutions which achieve the uniformity in administration which Article X:3(a) requires. Indeed, one would expect such a challenge to a system as a whole to be broad in nature.

62. The Panel drew an analogy to the *EC - Computer Equipment* dispute that actually serves to illustrate this point. At issue in that dispute was whether the application of tariffs to imports of certain goods was consistent with the EC's tariff schedule. By definition, the scope of the measures at issue depended on the identity of the products subject to the measures. In that context, it would have been impossible to identify the specific measures at issue without also identifying the products covered. The United States in that dispute was not making a claim with respect to a system as a whole. It was not alleging, for example, an inconsistency with a covered agreement arising from the manner in which the EC applies tariffs, regardless of product. Had it

[63] This issue is discussed in more detail in part II.A.4, below.
[64] *Panel Report*, para. 7.30.

been making such a systemic claim, it would have been pointless to require the specificity with respect to product coverage that in fact was required in the context of the claim actually alleged.

63. The Panel in the present dispute "consider[ed] that, in the context of this case, identification of the areas of customs administration at issue is necessary to *specifically* identify the 'measures at issue' *in the same way* suggested by the Appellate Body in *EC - Computer Equipment*."[65] However, it failed to explain why this should be so despite the differences in the types of claims alleged in *EC - Computer Equipment* and in the present dispute.

64. In short, in identifying the specific measures at issue, the Panel erred by focusing selectively on some statements from the panel request while ignoring others and disregarding the nature of the claim evident in the panel request, even though it professed to have construed the panel request as a whole. This approach was directly contrary to the approach indicated by the Appellate Body in its reports in *US - FSC 21.5 II* and *US - Carbon Steel*. In *US - FSC Article 21.5 II*, notably, the Appellate Body found that the fact that the EC had titled part of its panel request as "The Subject of the Dispute" did not restrict the scope of the measures identified by the EC to the measures listed in that part of the panel request. Even looking beyond that request's discussion of "The Subject of the Dispute," the Appellate Body found a provision to be within the panel's terms of reference by virtue of a mention of the broader instrument in which the provision was contained. Following that guidance, the Panel in this dispute should have taken a similar approach to reading the U.S. panel request as a whole. Its failure to do so was legal error.

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[65] *Panel Report*, para. 7.31 (second emphasis added).

b. Confusion of arguments with measures and claims

65. Moreover, the Panel's approach amounted to a confusion of claims and measures, on the one hand, with arguments on the other. As discussed above, in construing Article 6.2 of the DSU, the Appellate Body has consistently confirmed that "there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims."[66] While a panel request must set forth the claims being asserted, it need not set forth the arguments supporting those claims.[67]

66. In the present dispute, the United States did not need to list areas in which administration of the specific measures at issue in a manner inconsistent with Article X:3(a) of the GATT 1994 is manifest. Doing so made the panel request more transparent, as it anticipated certain arguments the United States would make in its submissions and statements to substantiate its claims. However, rather than understand the discussion this way, the Panel mischaracterized it as an elaboration of what it understood to be the measure at issue (which, as discussed above, it already had confused with the claim being asserted). In this way, the Panel blurred the distinction between claims and measures, on the one hand, and arguments, on the other, thus compounding its error in construing the panel request.

4. The Panel Erred by Construing the Panel Request to Exclude a Claim that the EC System of Customs Administration as a Whole Results in

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[66] AB Report, *EC - Bananas III*, para. 141.

[67] *See, e.g.*, AB Report, *Thailand - Steel Beams*, para. 88 n.36; AB Report, *Korea - Dairy*, para. 123; AB Report, *India - Patents (US)*, para. 88; AB Report, *EC - Bananas III*, para. 143.

Non-Uniform Administration of EC Customs Law in Breach of Article X:3(a) of the GATT 1994

67. The Panel's third error in construing the panel request was to find that the request did not contain a claim that the EC system of customs administration as a whole results in the non-uniform administration of EC customs law, in breach of Article X:3(a) of the GATT 1994. The Panel therefore found such a claim to be outside its terms of reference. This finding was the result of several flaws in reasoning.

a. The Panel mistakenly relied on its finding that the specific measures at issue were limited to certain areas of customs administration

68. In considering whether the panel request contained a claim with respect to the EC system of customs administration as a whole, the Panel initially relied on its earlier finding that the "specific measure at issue" was limited by reference to the particular areas of customs administration discussed in the panel request. Thus, it noted certain "[a]reas that are part of the EC system of customs administration but which have not been referred to in the United States' request" and found that "their absence . . . is notable and supports the Panel's finding . . . that, on the basis of its request for establishment of a panel, the United States is precluded from challenging the EC system of customs administration overall or as a whole under Article X:3(a) of the GATT 1994 in this dispute."[68]

69. This explanation is flawed for two reasons. First, it misunderstands what it means to make a claim regarding the EC's system of customs administration as a whole. This U.S. claim was about the EC laws, regulations, decisions and rulings, including those features that are absent

[68] *Panel Report*, para. 7.48.

from the EC system of customs administration, which result in the EC administering its customs law in a non-uniform manner, contrary to Article X:3(a) of the GATT 1994. Specifically, the EC administers its customs law through 25 separate, independent customs authorities and does not provide any institution or mechanism to reconcile divergences automatically and as a matter of right when they occur. The absence of those features is common to all areas of customs administration in the EC. Accordingly, contrary to the Panel's explanation, identification of a claim with respect to the EC's system did not depend on a listing of "the entire spectrum of areas that comprise the totality of the EC system of customs administration."[69]

70. Second, while the Panel acknowledged the permissibility of challenging "a responding Member's system as a whole or overall,"[70] its reasoning would seem to make it virtually impossible to do so. By the Panel's reasoning, to challenge the EC's system as a whole, the United States would have had to separately list each and every area of customs administration in "the entire spectrum of areas that comprise the totality of the EC system of customs administration." Leaving out even one area would preclude challenging the system as a whole.

71. Under the Panel's view, even referring to a list of examples of customs areas in which non-uniform administration is manifest while stating explicitly that the list is non-exclusive – as the United States did in its panel request – would not be sufficient to state a challenge with respect to the system of customs administration as a whole. According to the Panel, such a reference "would undermine an important due process objective of the requirements of Article

[69] *Panel Report*, para. 7.48.
[70] *Panel Report*, para. 7.44.

6.2 of the DSU – namely, to provide sufficient notice and information to the responding party and third parties to a dispute of the nature of the complainant's case."[71]

72. The Panel failed to appreciate that making clear that the object of a challenge is indeed the system of customs administration as a whole can be accomplished through means other than enumerating each and every one of the areas covered by the system. As discussed in the next section, identifying the measures that constitute the "main instruments of EC customs legislation"[72] and addressing their manner of administration collectively was an alternative and equally effective way of making clear that the United States was indeed challenging the system as a whole.[73]

b. The Panel misconstrued the panel request as not making clear that the U.S. claim concerned the EC system of customs administration as a whole

73. An additional rationale the Panel gave for excluding the U.S. claim with respect to the EC system of customs administration as a whole was that "there is nothing in the text of the United

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[71] *Panel Report*, para. 7.49.

[72] EC First Written Submission, para. 63.

[73] The Panel relied on the Appellate Body report in *India - Patents (US)*. However, that reliance was misplaced. The issue in *India - Patents (US)*, as relevant here, was whether the United States had stated a claim under Article 63 of the TRIPS Agreement when it alleged breaches of "obligations of the TRIPS Agreement, including but not necessarily limited to Articles 27, 65 and 70." AB Report, *India - Patents (US)*, para. 89. That the Appellate Body found the phrase "including but not necessarily limited to" inadequate in that context does not make it inadequate in the present context. *India - Patents (US)* involved use of that phrase in connection with *claims* not explicitly identified in the panel request. Here, the question is not whether the phrase brings within a panel's terms of reference a claim not otherwise explicitly identified. Rather, the phrase "including but not limited to" introduced a list of examples relevant to the U.S. *argument* in support of claims that were explicitly identified earlier in the panel request. For that reason, the Appellate Body report in *India - Patents (US)* does not support the Panel's finding that the list of areas in the panel request limited the measures at issue.

States' request for establishment of a panel that could be construed as clearly suggesting that the United States' challenge under Article X:3(a) of the GATT 1994 relates to the design and structure of the EC system of customs administration."[74] Like the Panel's analysis of the specific measure at issue, that statement reflects a failure to consider the panel request as a whole.

74. As already discussed, the panel request identified as "the specific measures at issue" the measures that the EC itself recognized as constituting the "main instruments of EC customs legislation."[75] As stated in the request, it is those measures that the EC fails to administer in a uniform manner. Throughout the panel request, those measures were discussed collectively, which is precisely what one would expect in a panel request challenging a system of customs administration as a whole.

75. The collective treatment of the specific measures at issue, evidencing a complaint about the system of customs law administration as a whole, was evident, for example, from the second paragraph of the request, which stated that administration of the identified measures "is carried out by the national customs authorities of EC member States" and "takes numerous different forms." This explanation made clear that the United States was addressing a fundamental aspect of the EC system of customs administration – *i.e.*, the existence of separate, independent authorities, resulting in "numerous different forms" of administration. The second paragraph continued by discussing "the myriad forms of administration of *these measures*" (*i.e.*, the specific measures at issue collectively). Likewise, the third paragraph discussed areas in which

[74] *Panel Report*, para. 7.58.
[75] EC First Written Submission, para. 63.

administration of "the above-identified measures" in a manner inconsistent with Article X:3(a) of the GATT 1994 is manifest, again addressing those measures collectively.

c. The Panel misconstrued the panel request's references to customs authorities in the member States and to "manner" of administration

76. According to the Panel, its construction of the panel request is supported by what it understood to be the U.S. concern "with the way in which administration is undertaken by member State customs authorities rather than with the design and structure of the customs administration system at the EC level 'as such.'" Relatedly, the Panel focused on the word "manner" as used in the request and stated that "there is nothing in the ordinary meaning of the term 'manner' to suggest that it relates to the design and structure of something. Rather, the ordinary meaning of that term suggests that it relates to application in practice."[76]

77. This aspect of the Panel's reasoning is problematic for two reasons. First, it is illogical to assume that use of the word "manner" in a claim involving Article X:3(a) of the GATT 1994 necessarily suggests that the claim does not relate to a Member's system of customs administration as a whole. The very essence of the Article X:3(a) obligation is the manner of administration of certain types of measures. The word "manner" appears in the article itself. Indeed, it would be unusual for a panel request stating an Article X:3(a) claim *not* to use the word manner. The fact of using the word "manner" in a panel request stating an Article X:3(a) claim cannot preclude the claim being with respect to a system of administration as a whole.

[76] *Panel Report*, para. 7.59.

78. Second, the Panel seemed to assume that a challenge to the design and structure of the EC system of customs administration must refer to "actions taken and/or procedures and institutions existing at the EC level."[77] Yet, that assumption ignores the defining characteristic of the design and structure of the *EC* system of customs administration, which is the *absence* of procedures and institutions at "the EC level."[78] Given this defining characteristic, a challenge to the design and structure of the EC system of customs administration necessarily must address "administration undertaken by member State customs authorities."

79. What is especially surprising about the Panel's reasoning that an "emphasis on the actions of customs authorities of the member States" is inconsistent with a challenge to "the design and structure of aspects of the EC system of customs administration 'as such'" is that it is directly contrary to its own description, later in the report, of the EC system. Thus, in introducing its discussion of "[r]elevant aspects of the EC system of customs administration," the Panel stated that it "ha[d] been informed by the European Communities that the administration of EC customs law is primarily the responsibility of the member States."[79] Later in this same section, in discussing the EC's assertion that the European Ombudsman is a mechanism that contributes to the uniform administration of EC customs law, the Panel expressed doubt on this score because, among other reasons, "the European Ombudsman's jurisdiction is limited to consideration of

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[77] *Panel Report*, para. 7.60.

[78] *See, e.g.*, EC First Written Submission, para. 17 ("[W]ith the exception of some limited policy fields, the EC itself does not administer Community law through an EC-level administration.").

[79] *Panel Report*, para. 7.156 (citing EC reply to Panel question No. 146).

complaints of maladministration on the part of the institutions and bodies of the European Union."[80]

80. It is incongruous for the Panel to have suggested that the United States did not state a challenge to the design and structure of the EC system of customs administration because its panel request did not make reference to "procedures and institutions existing at the EC level," while, at the same time, questioning the relevance of the EC's reference to a mechanism of administration because the mechanism's jurisdiction is confined to "institutions and bodies of the European Union." Similarly, in reviewing each of the areas of customs administration discussed in the U.S. submissions and statements – classification, valuation, and customs procedures – the Panel noted that administration in that area is "the responsibility of the customs authorities of the member States."[81]

d. The Panel erred in finding the United States to have been unclear about the nature of its claim

81. A further argument by the Panel in support of its conclusion that its terms of reference did not include the U.S. claim with respect to the EC system of customs administration was that "the United States' purported challenge of the design and structure of the EC system 'as such' is not obviously linked to the essence of the obligation contained in Article X:3(a) of the GATT 1994," and, therefore, "it was all the more necessary for the United States to have been clear about the nature of its challenge in its request for establishment of a panel."[82] That statement is not an

[80] *Panel Report*, para. 7.172.
[81] *Panel Report*, paras. 7.179, 7.183, 7.188.
[82] *Panel Report*, para. 7.61.

argument so much as an assertion that the United States was not "clear about the nature of its challenge."

82. However, as discussed above, the United States clearly articulated a challenge to the EC system of customs administration. Indeed, the very first sentence of the U.S. panel request provided it clearly and succinctly: "The United States considers that the manner in which the European Communities ('EC') administers its laws, regulations, decisions and rulings of the kind described in Article X:1 of the General Agreement on Tariffs and Trade 1994 ('GATT 1994') is not uniform, impartial and reasonable, and therefore is inconsistent with Article X:3(a) of the GATT 1994." The Panel's suggestion that the United States was less than clear is based on its own misreading of the panel request – including, for example, its view that the lack of a reference to each and every conceivable area of customs administration precluded a challenge to the system of customs administration as a whole and its view that references to customs authorities in the member States and to "manner" of administration indicated an intent to challenge something other than the EC's system of customs administration.

e. Lack of the words "as such" or "per se" from the panel request did not preclude a claim with respect to the EC system of customs administration

83. Finally, the Panel faulted the United States for making "no explicit reference to the terms 'as such' or *per se*" in its panel request.[83] However, the response to that argument is indicated in the very next sentence in the report, in which the Panel acknowledged the absence of any requirement to use particular words in order to advance an as-such claim. What is important, the

[83] *Panel Report*, para. 7.62.

Panel correctly observed, is that the responding party be aware of the claim against it.[84] Remarkably, while the Panel recognized this to be the key question in determining whether the United States had effectively made a claim with respect to the EC's system of customs administration, nowhere did it analyze evidence either supporting or detracting from the conclusion that the EC understood the claims against it to include a claim concerning its system of customs administration as a whole. As is shown in the next section, the EC unquestionably was aware that the United States had stated such a claim.

5. The EC's Understanding of the Claim Against it Confirms that the Panel Request Stated a Claim With Respect to the EC System of Customs Administration as a Whole

84. As discussed in part II.A.1, above, and as the Panel itself recognized, the specificity requirement in DSU Article 6.2 performs an important due process function. Accordingly, in determining whether a complaining party identified the measures and claims at issue with the requisite specificity, the Appellate Body has found it important to consider whether "the ability of the [responding party] to defend itself was . . . prejudiced by a lack of knowing the measures at issue."[85] Submissions and statements by the responding party would therefore be relevant to that determination.[86]

85. In this dispute, in determining its terms of reference, the Panel gave no consideration to evidence of the EC's understanding of the claims against it. An examination of those materials

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[84] *Panel Report*, para. 7.62.

[85] AB Report, *EC - Computer Equipment*, para. 70.

[86] *See* AB Report, *EC - Computer Equipment*, para. 68; *see also* AB Report, *US - FSC 21.5 II*, para. 65; AB Report, *Korea - Dairy*, paras, 127-131.

confirms the Panel's error in construing its terms of reference as excluding the U.S. claim with respect to the EC system of customs administration.

a. The EC understood that the U.S. claims included a challenge to the EC's system of customs administration as a whole

86. The EC made clear early in this dispute that it understood that the U.S. claims against it include a claim with respect to its system of customs administration as a whole. Indeed, it made this understanding evident from the first U.S. request for the establishment of a panel. At the January 25, 2005, meeting of the Dispute Settlement Body (DSB), in response to the U.S. request for establishment of a panel, the EC stated that "the United States seemed to allege that the EC should establish a single centralized customs administration in order to ensure uniformity in customs treatment across the EC."[87] While that statement inferred without any basis that the United States was insisting on the establishment of "a single centralized customs administration," it reflected a correct understanding that the U.S. had stated a claim about the EC system of customs administration as a whole. Later in the same intervention the EC asserted that it "had in place harmonized customs rules and institutional and administrative measures – enforced by the EC Commission and the European Court of Justice – to prevent divergent practices."[88] That assertion again reflected an understanding that the United States was making a claim about the EC's system of customs administration.

87. Likewise, at the March 21, 2005, DSB meeting, at which the United States repeated its request for the establishment of a panel and at which the Panel was established, the EC stated

[87] WT/DSB/M/182, para. 31.
[88] WT/DSB/M/182, para. 31.

that it "remained confident that a WTO panel would confirm the compatibility of *the EC customs regime* with the WTO provisions."[89] Again, this leaves no doubt that the EC well understood that the U.S. panel request had asserted a claim regarding "the EC customs regime."

88. This understanding was confirmed by the EC's submissions and statements during the panel proceeding itself. For example, in connection with its first written submission, the EC put before the Panel (as exhibit EC-72) a press release issued by the Office of the United States Trade Representative announcing the submission of the U.S. panel request in this dispute. The title of that press release is "U.S. Requests WTO Panel Against EU Over *European Customs System*" (emphasis added). Statements throughout the press release underscore the systemic nature of the U.S. claim. For example, it notes that "[a]lthough the Commission has tried to help with individual problems, it has become clear that the allocation of authorities within the EU and even the Commission has precluded achieving the necessary *systemic solutions*" (emphasis added). Further on, the press release notes that "[s]ix other WTO Members . . . asked to join the consultations as third parties, demonstrating the level of concern about the *EU system*" (emphasis added).

89. Additionally, during the first substantive meeting of the Panel with the parties, the EC called to the Panel's attention the fact that, during consultations, the United States had provided to the EC a document entitled "Elements of Potential EC Customs Reform." The parties consented to provide that document to the Panel by way of background, and each did so in

[89] WT/DSB/M/186, para. 29 (emphasis added).

connection with its responses to the written questions of the Panel following the first meeting.[90] That document further highlights the systemic aspect of the U.S. claim and the EC's understanding of that claim. Thus, in the document's very first sentence, it states that "[t]he EC should adopt mechanisms that provide for the uniform administration of laws, regulations, judicial decisions and administrative rulings pertaining to the classification, valuation, and origin of products for customs purposes and to requirements, restrictions or prohibitions on imports." It goes on to propose the establishment of mechanisms that are systemic in nature, including a centralized authority to issue advance rulings on certain customs matters and mechanisms to provide for harmonization of importation procedures.

90. Like the documents exchanged during consultations to which the Appellate Body referred in finding that the EC understood the measures and claims at issue in the *EC - Computer Equipment* dispute, the document the United States provided in consultations here, "Elements of Potential EC Customs Reform," shows that "the ability of the European Communities to defend itself was not prejudiced by a lack of knowing the measures at issue."[91] This fact is further confirmed by references throughout the EC's submissions and statements.

91. Starting with the introduction to its first submission, the EC recognized that "the focus of the United States case is . . . on the EC system of customs administration."[92] Its defense as laid out in that submission was built largely around its recognition that this was the focus of the U.S. complaint. Thus, it provided what it considered to be "[a] detailed description of the EC

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[90] *See* Exhibits EC-122 and US-49, each submitted in response to the Panel's Question No. 91.

[91] AB Report, *EC - Computer Equipment*, para. 70.

[92] EC First Written Submission, para. 4.

system"[93] and argued that it had put before the Panel "a wide range of . . . instruments which equally contribute to the uniform interpretation and application of EC customs law."[94] The EC sounded similar themes throughout the panel proceeding.[95] In light of the EC's own acknowledgment that the claims against it included a claim with respect to the EC system of customs administration as a whole, the Panel's finding that such a claim was outside its terms of reference is particularly puzzling.

b. U.S. submissions and statements confirmed that the panel request had set forth a claim with respect to the EC system of customs administration system

92. The Panel asserted that "the United States only clearly indicated its intention to make an 'as such' challenge regarding the design and structure of the EC system of customs administration at a late stage in the Panel's proceedings."[96] However, this is patently incorrect. That the United States had asserted such a claim was clear from the panel request itself (as already discussed) and was made even clearer over the course of the panel proceeding.

93. In the introduction to its first written submission, for example, the United States recalled that in responding to its panel request, the EC had referred to the European Commission and the ECJ as institutions securing the uniform administration of EC customs law. Previewing the argument to come, the United States said that it would show that "*[a]s a systemic matter*, the EC

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[93] EC First Written Submission, para. 261.

[94] EC First Written Submission, para. 260.

[95] *See, e.g.*, EC First Oral Statement, para. 5 (asserting that "[f]or the first time, a WTO Member challenges the entire system of another WTO Member based on an alleged lack of uniform administration contrary to Article X:3(a) GATT"); EC Second Written Submission, para. 71 (asserting that "the EC has set out in detail how the EC legal system ensures the uniform interpretation and application of EC law through the EC"); EC Second Oral Statement, para. 43.

[96] *Panel Report*, para. 7.62 n.182.

does not afford traders access to either entity so as to ensure uniform administration of customs laws and prompt review and correction of customs decisions. In short, the problem is an *absence of mechanisms* to achieve what Articles X:3(a) and (b) require the EC to achieve."[97]

94. Reinforcing the systemic aspect of its complaint, the United States observed in the first submission, at the conclusion of its initial overview of the EC customs administration system, that "[i]n practical terms, what the EC system of customs law administration means to traders is that when they bring goods into the EC, they do so through one of 25 different customs regimes."[98] The argument in the first submission then laid out various ways in which non-uniform administration of EC customs law is exhibited as a result of its application by 25 different customs regimes. The United States then posed the question of what institutions could conceivably bring about uniformity of administration in a system characterized by 25 different customs regimes. Recalling the EC's assertion that the Commission and ECJ perform that function, the United States examined that assertion and showed it to be false.[99]

95. In short, the U.S. first written submission confirmed what already was clear from the face of its panel request – *i.e.*, that the United States had made a claim with respect to the EC system of customs administration as a whole. Subsequent submissions and statements served as yet further confirmation of this meaning.

96. In its oral statement at the first panel meeting, the United States stated succinctly that, in view of the divergences that occur when 25 separate, independent customs authorities administer

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[97] United States First Written Submission, para. 5 (first emphasis added; second emphasis in the original).

[98] United States First Written Submission, para. 18.

[99] *See* United States First Written Submission, paras. 120-132, 148-154.

the customs law, its claim "is that no EC institution systematically provides for the reconciliation of such divergences, so as to achieve the uniformity of administration required by Article X:3(a)."[100] In rebutting arguments that the EC had laid out in its first written submission the United States showed, among other things, that "the individual elements that the EC describes as contributing to uniform administration do not add up to a mechanism that systematically leads to uniform administration where administration in the first instance is the responsibility of 25 different member State authorities."[101] This was a theme that the United States continued to present throughout the panel proceeding.[102]

97. Indeed, in light of the questions that the Panel itself posed after its first meeting with the parties and the U.S. responses to those questions, it is particularly surprising that the Panel found that it was only "at a late stage" that the United States made clear that it was making a claim with respect to the EC system of customs administration as a whole. For example, in response to the Panel's Question No. 4, the United States confirmed that it was "challenging the absence of uniformity overall with respect to the administration of the EC customs system," and it demonstrated how "various instances of non-uniform administration . . . underline that the systemic problem at the heart of the present dispute manifests itself in three principal areas of

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[100] U.S. Oral Statement at First Panel Meeting, para. 4; *see also id.*, para. 12 ("the argument is that the system for administering customs law in the EC does not ensure the uniformity that Article X:3(a) requires"), para. 30 (statement by EC "in effect reinforces the crux of the U.S. argument: There is no EC mechanism for ensuring uniform administration"), paras. 32-45.

[101] U.S. Oral Statement at First Panel Meeting, para. 37; *id.*, paras. 38-45.

[102] *See, e.g.*, U.S. Answers to First Set of Panel Questions, para. 8 (response to Question No. 3) ("While the substance of the various measures differs . . . the problem of non-uniform administration is the same."); U.S. Second Written Submission, paras. 45-71; U.S. Second Oral Statement, paras. 3-6.

customs administration."[103] In Question No. 5, when the Panel asked whether the United States was challenging the EC's administration of only certain specified rules on customs valuation, the United States again clarified that "the United States claim concerns the system for customs law administration in the EC," and that the areas referred to in the question are areas in which "[t]he EC's failure to achieve uniform administration manifests itself."[104]

98. In short, far from waiting until "a late stage" to reveal the true nature of its claim with respect to the EC's customs administration system, the United States articulated that claim consistently, beginning with its panel request and continuing with each of its statements and submissions. This consistent articulation of the U.S. claim is "a strong indication . . . that [the EC] did not suffer any prejudice on account of any lack of clarity in the panel request."[105] The U.S. elaboration on its claim in its submissions and statements, as well as the EC's understanding of that claim as evidenced in *its* submissions and statements, confirm what was already clear from the face of the panel request – that the United States was asserting a challenge to the EC system of customs administration as a whole. The Panel's conclusion that the United States was precluded from advancing such a claim "on the basis of the language and content of its request for establishment of a panel"[106] was, therefore, in error and should be reversed.

6. The Appellate Body Should Complete the Panel's Analysis and Find That the EC System of Customs Administration as a Whole is Inconsistent With the EC's Obligation Under Article X:3(a) of the GATT 1994 to Administer its Customs Law in a Uniform Manner

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[103] U.S. Answers to First Set of Panel Questions, paras. 9, 29 (response to Question No. 4).

[104] U.S. Answers to First Set of Panel Questions, paras. 30 (response to Question No. 5).

[105] AB Report, *Thailand - Steel Beams*, para. 95.

[106] *Panel Report*, para. 7.63.

99. If the Appellate Body reverses the Panel's finding that "the United States is precluded from making an 'as such' challenge with respect to the design and structure of the EC system of customs administration as a whole and with respect to the design and structure of the EC system in the areas of customs administration that have been specifically identified in the United States' request"[107] – then the Appellate Body will be confronted with the question whether to complete the Panel's analysis. It should complete the Panel's analysis and, in doing so, it should find that the design and structure of the EC system of customs administration as a whole is inconsistent with the EC's obligation of uniform administration under Article X:3(a) of the GATT 1994.[108]

a. Completing the Panel's analysis is appropriate

100. In a number of prior disputes, the Appellate Body has recognized that when it reverses a panel's findings it may be appropriate to complete the panel's analysis in order "to secure a positive solution to [the] dispute," as required by Article 3.7 of the DSU.[109] In its third participant submission in another recent appeal, the EC itself took the position that, under Article 3 of the DSU, the Appellate Body must complete the panel's analysis "where possible," "where it

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[107] *Panel Report*, para. 7.63.

[108] The Appellate Body should not confine its finding to "the design and structure of the EC system in the areas of customs administration that have been specifically identified in the United States' request" because, as already discussed, the areas of customs administration referred to in the U.S. request were not limitations on the specific measures at issue. They were illustrations of areas in which non-uniform administration of the specific measures at issue is manifest. For the purpose of completing the analysis of the U.S. claims on appeal, the United States refers the Appellate Body to its submissions and other filings with the Panel.

[109] *See, e.g.*, AB Report, *US – Wheat Gluten*, paras. 80 ff and 127 ff; AB Report, *Canada – Aircraft 21.5*, paras. 43 ff; AB Report, *US – FSC*, paras. 133 ff; AB Report, *Japan – Agricultural Products II*, paras. 112 ff; AB Report, *US – Shrimp*, paras. 123 ff; AB Report, *Australia – Salmon*, paras. 117 ff, 193 ff and 227 ff; AB Report, *EC – Poultry*, paras. 156 ff; AB Report, *EC – Hormones*, paras. 222 ff; AB Report, *Canada – Periodicals*, at p. 24 ff; and AB Report, *US – Gasoline*, at p. 18 ff.

reverses findings of the Panel in such a way that the resulting recommendations and rulings of the DSB would not contribute to a prompt and satisfactory resolution of the dispute."[110] The ability of the Appellate Body to complete a panel's analysis depends on the sufficiency of the facts on the record of the panel proceeding.[111]

101. In this dispute, a reversal of the Panel's findings without a completion of the Panel's analysis would fail "to secure a positive solution to [the] dispute." A reversal would mean that the Panel should have considered within its terms of reference the U.S. claim that the EC customs administration system as a whole is inconsistent with the EC's obligation under Article X:3(a) of the GATT 1994 to administer EC customs law in a uniform manner. Since the Panel erroneously considered that claim to be outside its terms of reference, a reversal would leave that key claim unanswered and thus would leave the dispute without a "positive solution."[112] Thus, a completion of the Panel's analysis would be appropriate.

b. Completing the Panel's analysis can be done on the basis of the Panel's findings of fact and undisputed facts

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[110] Third Participant's Submission by the European Communities, *United States - Investigation of the ITC in Softwood Lumber from Canada: Recourse to Article 21.5 of the DSU by Canada* (AB-2006-1), para. 28 (Feb. 7, 2006).

[111] *See, e.g.*, AB Report, *US - Shrimp*, para. 124 (noting that "the facts on the record of the panel proceedings permit us to undertake the completion of the analysis required to resolve this dispute").

[112] At the end of its analysis of the U.S. Article X:3(a) claims, the Panel did make the conclusory statement that even if it had found a claim with respect to the EC system of customs administration as a whole to be within its terms of reference, "the United States did not demonstrate that the design and structure of the EC system of customs administration, including components thereof necessarily result in a violation of Article X:3(a) of the GATT 1994." *Panel Report*, para. 7.490. The Panel failed to support that assertion. Moreover, the assertion was contradicted by the Panel's own findings about the EC system earlier in its report. *See id.*, paras. 7.156 - 7.192, 7.489.

102. It also would be possible, in view of undisputed facts and the Panel's findings of fact regarding the EC system of customs administration. The crux of the U.S. claim that the Panel found to be outside its terms of reference was that the existence of a system of customs administration in which 25 separate, independent authorities exercise judgment in interpreting and applying EC customs law, without any procedures or institutions to ensure against divergences or to reconcile them promptly and as a matter of right when they occur necessarily constitutes a lack of uniform administration, in breach of Article X:3(a).[113] The EC's response was to argue that there are in fact procedures and institutions to ensure against divergences or to reconcile them when they occur.[114] The EC put before the Panel evidence of how various EC procedures and institutions operate to bring about uniform administration. The Panel thoroughly rejected the EC's argument that these procedures and institutions accomplish what the EC said they accomplish.

103. For example, the EC had referred to the Customs Code Committee "as an important institution that helps to ensure uniform administration of EC customs law among the customs authorities of the member States."[115] However, upon careful examination, the Panel rejected that assertion. It noted, in particular, that "not all matters entailing divergence in the administration

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[113] *See, e.g.*, U.S. Oral Statement at First Panel Meeting, para. 4; *see also id.*, para. 12 ("the argument is that the system for administering customs law in the EC does not ensure the uniformity that Article X:3(a) requires"), para. 30 (statement by EC "in effect reinforces the crux of the U.S. argument: There is no EC mechanism for ensuring uniform administration"), paras. 32-45; U.S. Answers to Second Set of Panel Questions, paras. 9-16 (response to Panel Question No. 126).

[114] *See generally* EC Second Written Submission, para. 76 ("[T]he EC maintains that the procedures and institutions of the EC legal system provide for a uniform application and interpretation of EC law, including EC customs law.").

[115] *Panel Report*, para. 7.157 (citing EC First Written Submission, para. 85).

of EC customs law between the customs authorities of the member States are brought before the Customs Code Committee for consideration"; that matters can be put before the Committee only if raised by the chairperson or a member State representative; that the Committee "will not substitute itself for the individual customs authorities nor the competent courts of the member States"; that the Committee "will not usually examine individual cases"; that the Commission has no specific "power to ask customs authorities of the member States to provide specific information" to the Committee; that "there are no specific time limits for how long a matter can remain on the agenda of the Customs Code Committee"; that the need to make decisions by qualified majority among member State representatives may result in "difficulties in coming to agreement and delays"; and that, ultimately, "the opinions of the Customs Code Committee are not legally binding on the customs authorities of the member States."[116]

104. The EC also argued that Article 10 of the EC Treaty "makes an important contribution to the uniform administration of EC customs law."[117] That provision sets forth what the EC referred to as a "duty of cooperation" among member States. The EC insisted that the utility of Article 10 towards securing uniform administration comes from its legally binding character and the ability of the Commission to enforce the duty of cooperation through infringement proceedings.[118] However, as the Panel found, "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

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[116] *Panel Report*, paras. 7.159 - 7.160 & n.322.

[117] *Panel Report*, para. 7.161.

[118] *See* EC Replies to Second Set of Panel Questions, paras. 8-9 (reply to Question No. 147).

law."[119] It thus found that "the extent to which Article 10 of the EC Treaty contributes to the uniform administration of EC customs law is unclear."[120]

105. The Panel cast similar doubt on the contribution to uniform administration of customs law made by another institution on which the EC relied, the system of preliminary reference of questions of EC law to the ECJ. The EC had asserted that "it is through preliminary rulings issued by the ECJ . . . that divergences within and between the member States can be avoided and the effective application of Community law be assured."[121] However, the Panel correctly found that a question of non-uniform administration of EC customs law will reach the ECJ only if "a trader disgruntled by the decision of a customs authority in a member State . . . appeal[s] to a national court of the member State in question," a process that entails "cost and time"; that even then the member State court must decide, at its discretion, whether to refer the question to the ECJ, unless it is a court from which there is no further recourse (in which case it may be obliged to refer); and that even for courts from which there is no further recourse "there are exceptions to this obligation."[122] Even to the extent that the preliminary reference mechanism might in theory be helpful in securing uniform administration of customs laws, the Panel found its use in the customs area to be "low."[123]

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[119] *Panel Report*, para. 7.164.
[120] *Panel Report*, para. 7.164.
[121] *Panel Report*, para. 7.166 (citing EC First Written Submission, para. 185).
[122] *Panel Report*, para. 7.167.
[123] *Panel Report*, para. 7.168.

106. The Panel's factual findings with respect to each of the other institutions and provisions cited by the EC were similarly doubtful about the EC's assertions that they secure uniform administration. Notably, the Panel found:

- "low" use of "infringement proceedings" by the EC Commission "to secure uniform administration by the customs authorities of the member States" (para. 7.170);

- factors casting doubt on the "extent to which the European Ombudsman is effective in ensuring uniform administration," including the fact that the Ombudsman's jurisdiction "is limited to consideration of complaints of maladministration on the part of the institutions and bodies of the European Union," which does not include the authorities that enforce EC customs law (para. 7.172);

- an inability by the EC to explain action taken in response to direct petitions to the EC Commission, even though the EC had identified such petitions as a tool of securing uniform administration (para. 7.174);

- an absence of any obligation for customs authorities to consult with one another when there is disagreement regarding tariff classification (para. 7.180);

- an absence of any obligation for a customs authority to consult the database of Binding Tariff Information (BTI) (*i.e.*, the database containing written advice issued to particular importers on how particular customs authorities will classify specified goods) when deciding how to classify a good (para. 7.181);

- where one customs authority revokes BTI pertaining to a good, there is no obligation for other customs authorities to revoke BTI that had used the same classification for same goods, thus allowing "the customs authorities in other member States [to] continue classifying under the heading formerly used by the revoking customs authority" (paras. 7.182, 7.340);

- opinions of the Customs Code Committee on customs valuation matters are not legally binding (para. 7.185);

- "the commentaries contained in the Compendium of Customs Valuation texts [a document issued by the EC Commission] have no legal status and, therefore, do not have binding effect" (para. 7.186);

- an absence of any "obligation under EC law to consult when there is disagreement among customs authorities of the member States regarding customs valuation in a particular situation" (para. 7.187);

- an absence of any "obligation under EC law to consult when there is disagreement among customs authorities of the member States regarding customs procedures in a particular situation" (para. 7.190);

- an absence of any obligation for different customs authorities to treat in the same way an amendment to an explanatory note issued by the EC Commission, such that one authority in one member State may apply it retrospectively while another in a different member State applies it prospectively (para. 7.350).

107. Thus, in its overall assessment of the EC system of customs administration, it is not surprising that "the Panel found the system complicated and, at times, opaque and confusing."[124] Nor is it surprising that later in its report the Panel said of certain institutions and mechanisms that the EC held out as securing uniform administration that they "would not necessarily enhance uniform administration of EC customs law by the customs authorities of the member States and, at worst, might even cause non-uniform administration."[125]

108. In light of the Panel's factual findings regarding the institutions and mechanisms the EC held out as securing uniform administration of EC customs law, completion of the Panel's analysis should be straightforward. The question for the Appellate Body, upon reversing the Panel's conclusion that the U.S. claim with respect to the EC system of customs administration was outside of its terms of reference, is whether that system as a whole is inconsistent with the obligation of uniform administration in Article X:3(a) of the GATT 1994. The EC's argument that the system as a whole is consistent with that obligation rests upon the role played by various

[124] *Panel Report*, para. 7.191.
[125] *Panel Report*, para. 7.489.

institutions and procedures. The Panel rejected the EC's argument that those institutions and procedures secure the uniform administration of EC customs law. Therefore, the Appellate Body should find that the EC system of customs administration as a whole is inconsistent with the EC's obligation of uniform administration under Article X:3(a) of the GATT 1994.

B. The Panel Erred in Finding That Divergent Penalty Provisions and Audit Procedures for Putting EC Customs Law Into Practical Effect are not Inconsistent With Article X:3(a) of the GATT 1994

109. The second set of errors for which the United States seeks review concerns the Panel's interpretation of the term "administer" as used in Article X:3(a) of the GATT 1994 and its consequent treatment of the different penalty and audit regimes that different EC customs authorities have in place to put EC customs law into practical effect. As the Panel itself acknowledged, the existence of "substantive differences" among penalty regimes for violations of EC customs law "is not disputed between the parties."[126] The same was true with respect to audit procedures.[127] However, the Panel declined to find the undisputed existence of such differences to be a breach of Article X:3(a) on the ground that divergent penalty provisions and audit procedures are not themselves acts of administration and, therefore, cannot constitute a lack of uniform administration of EC customs law.[128]

110. That reasoning reflects a mistaken understanding of the relevance of divergent penalty provisions and audit procedures to the present dispute. Properly understood, the undisputed

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[126] *Panel Report*, para. 7.444.

[127] *See Panel Report*, para. 7.420 (summarizing U.S. evidence with respect to differences among audit procedures) and para. 7.421 (summarizing EC's response, in which EC defended on various grounds but did not deny the existence of differences among audit procedures).

[128] *See Panel Report*, paras. 7.114 - 7.119.

divergences in penalty provisions and audit procedures from member State to member State amount to a lack of uniform administration of EC customs law, in breach of Article X:3(a) of the GATT 1994. Accordingly, the Appellate Body should reverse the Panel's finding of "no violation of Article X:3(a) of the GATT 1994 with respect to the substantive differences in penalty laws between member States,"[129] and its similar finding with respect to substantive differences in audit procedures.[130] In light of the undisputed fact that such differences exist, the Appellate Body should complete the Panel's analysis by finding the EC to be in breach of the Article X:3(a) obligation of uniform administration.

111. In this part of its argument, the United States focuses principally on the Panel's erroneous approach to differences among penalty laws used to administer EC customs law. As explained in part II.B.5, below, the same arguments that call for a reversal of the Panel's findings with respect to penalty laws apply with equal force to its findings with respect to audit procedures.

1. The Panel's Approach to Divergent Penalty Laws

112. The Panel initially alluded to penalties in its discussion of the U.S. argument that "laws or regulations that may be construed as 'tools of administration' or 'administrative in nature' [of which penalties had been the primary exemplar] may be examined under Article X:3(a) of the GATT 1994 for their substance to determine whether or not they evidence non-uniform administration of laws, regulations or other measures."[131] The Panel rejected that argument and,

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[129] *Panel Report*, paras. 7.444 & 8.1(d)(ii).
[130] *Panel Report*, paras. 7.434, 8.1(d)(i).
[131] *Panel Report*, para. 7.114.

therefore, found "no violation of Article X:3(a) of the GATT 1994 with respect to the substantive differences in penalty laws between member States."[132]

113. The Panel appeared to take the view (at least in this context) that a breach of Article X:3(a) can be substantiated only by particular "acts of administration." Thus, the Panel posed the question directly as "whether substantive differences in such tools [*i.e.*, penalty laws] among the member States – the existence of which is not disputed between the parties – mean that administration of EC customs laws is non-uniform within the meaning of Article X:3(a) of the GATT 1994."[133] It answered its own question with the finding that:

> [T]he substantive content of penalty laws of the member States used to enforce EC customs law cannot be viewed as acts of administration with respect to laws, regulations, decisions and rulings covered by Article X:1 of the GATT. Therefore, substantive differences in penalty laws between member States cannot be considered to be in violation of Article X:3(a) of the GATT 1994. Therefore, the Panel finds no violation of Article X:3(a) of the GATT 1994 with respect to the substantive differences in penalty laws between member States.[134]

114. The Panel's finding that substantive differences in penalty laws are not instances of non-uniform administration of EC customs law stems from confusion between the ultimate question in dispute – *i.e.*, whether EC laws, regulations, decisions and rulings of the kind described in Article X:1 of the GATT 1994 are administered in a uniform manner, as required by Article X:3(a) – and an intermediate question – *i.e.*, whether the EC "administers" EC customs law by having in place penalty regimes that specify sanctions for the violation of EC customs law. This confusion is apparent from the way the Panel framed the penalties issue.

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[132] *Panel Report*, para. 7.444; *see also id.*, paras. 7.114 - 7.119.
[133] *Panel Report*, para. 7.444.
[134] *Panel Report*, para. 7.444.

115. According to the Panel, the issue was whether one type of measure (a measure that is administrative in nature) should be examined under Article X:3(a) for its substance, while another type of measure (a measure that is *not* administrative in nature) should be examined under Article X:3(a) for the manner in which it is administered.[135] The United States did, indeed, argue that measures that are administrative in nature (such as penalty provisions) should be examined for their substance, but *not* as an end in itself. Rather, the substance of such measures – which the parties do not even disagree on – is relevant to determining how EC customs law is being administered, which was necessary to answer the ultimate question in dispute.[136]

116. Both the intermediate question and the ultimate question involve "measures," but the similarity between the inquiries ends there. The Panel ignored this distinction.[137] Instead, it considered the issue to be whether its approach to the ultimate question under Article X:3(a) should vary according to the nature of the measure whose manner of administration is being challenged.[138] However, the United States never argued that it should. The United States

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[135] *Panel Report*, para. 7.114.

[136] *See, e.g.*, U.S. First Oral Statement, paras. 46 - 50; U.S. Answers to First Set of Panel Questions, para. 113(response to Question No. 29); *id.*, para. 160 (response to Question No. 90); U.S. Second Written Submission, para. 95; U.S. Answers to Second Set of Panel Questions, para. 28 (response to Question No. 130); *id.*, paras. 35-41 (response to Question No. 133).

[137] In its comments on the interim report, the United States called to the Panel's attention its failure to distinguish (as the United States had in its argument) between the ultimate legal question before it and the intermediate question at issue with respect to divergent penalty laws. *See* Request by the United States for Review of Precise Aspects of the Interim Report, paras. 17-21, 23-27 (Feb. 24, 2006). However, the Panel did not even discuss these comments in its final report, let alone modify the report in light of the comments. *See Panel Report*, para. 6.75 (Panel asserting, with reference to changes requested in the paragraphs at issue, that it "accepted those changes to the extent that they were consistent with what the parties stated in the various submissions they made to the Panel during the Panel proceedings").

[138] *See, e.g.*, *Panel Report*, para. 7.118 (mischaracterizing the U.S. argument as advocating a "two-track, differential approach to the examination of different types of measures

referred to penalty provisions to show one way among many in which EC customs laws are administered in a non-uniform manner; it did not make a claim about the manner in which penalty laws themselves are administered.

117. In short, the Panel analyzed the wrong issue and then, based on its analysis, rejected undisputed differences among penalty laws as an instance of non-uniform administration of EC customs law, in breach of Article X:3(a). The United States will explore this error in more detail below. Before doing so, it is useful to review the argument the United States actually made with respect to divergent penalty laws.

2. The U.S. Argument Regarding Divergent Penalty Laws That Put EC Customs Law Into Practical Effect

118. The U.S. argument concerning penalty laws began with the ordinary meaning of the term "administer" as used in Article X:3(a). As the Panel correctly found, measures are administered when they are "put[] into practical effect."[139]

119. There are various ways in which measures are put into practical effect. Certainly the application of measures in particular instances ("acts of administration," to use the Panel's words) puts them into practical effect. But, there are other ways in which measures are put into practical effect, too.[140]

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of general application under Article X:3(a)).

[139] *Panel Report*, para. 104; *see also* U.S. Answers to First Set of Panel Questions, para. 158 (response to Question No. 90); U.S. Second Written Submission, para. 79.

[140] *See, e.g.*, *Panel Report*, para. 7.126 (recognizing that "the specific form, nature and scale of administration that may be at issue in a dispute concerning the application of Article X:3(a) of the GATT 1994 may vary from case to case"); U.S. Second Written Submission, paras. 78 - 80 (explaining that the term "administer" is not limited to "application in concrete cases").

120. The United States argued that the existence of a penalty regime puts into practical effect the measures subject to that penalty regime as it encourages compliance with (and deters breaches of) those measures. This is especially so in the customs area, where the effective functioning of the system, in view of the large volume of transactions involved, depends heavily on compliance by traders.[141]

121. Different penalty regimes put EC customs law into effect differently. A penalty regime that provides strict punishments for infractions of customs measures makes non-compliance relatively risky as compared with a penalty regime that provides minor or no punishments for the same infractions. The difference between the former and the latter is a difference in the way that EC customs law is put into practical effect – *i.e.*, a difference in the way it is *administered*.[142]

122. It is *not* the case, as the EC argued, that the only way to demonstrate that EC customs law is put into practical effect in a non-uniform manner is by comparing particular instances in which the laws were applied differently in like sets of circumstances.[143] If different regions within a Member's territory administer the Member's customs law differently (whether through use of different penalty regimes, different interpretive aids for applying the Member's classification rules, or other tools), rational traders will alter their behavior accordingly, entering their goods through the region understood to administer the law in the manner most favorable to imported

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[141] *See* U.S. Second Written Submission, para. 81.

[142] *See, e.g.*, U.S. Second Written Submission, para. 95; U.S. Oral Statement at Second Panel Meeting, paras. 78 - 79; U.S. Answers to Second Set of Panel Questions, paras. 25 - 28 (response to Question No. 130); *id.*, paras. 47 - 50 (response to Question No. 135).

[143] *See* EC Replies to First Set of Panel Questions, paras. 188 (reply to Question No. 93), 197 (reply to Question No. 109); U.S. First Oral Statement, para. 21; U.S. Second Written Submission, paras. 76 - 95.

goods, and the absence of comparisons between "acts of administration" involving actual import transactions occurring in that region and like import transactions occurring in other regions does not change the fact that administration is non-uniform.[144] Indeed, in parts of its report, the Panel acknowledged the basic point that comparisons between actual acts of administration are not the only way to demonstrate an absence of uniform administration of EC customs law.[145]

123. There was no disagreement between the parties that different customs authorities in the EC have different customs penalty regimes in place.[146] As the EC Commission itself has acknowledged, "Specific offences may be considered in one Member State as a serious criminal act possibly leading to imprisonment, whilst in another Member State the same act may only lead to a small – or even no – fine."[147] These divergences mean, the United States argued, that EC customs law is put into practical effect differently in different parts of the EC depending on the prevailing penalty regime. In other words, the divergences amount to a failure by the EC to

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[144] *Cf. Panel Report*, para. 7.275 n.517 (noting that where the customs authority in Germany administers EC customs law differently from the customs authorities in other parts of the EC "the impact might be trade diversion to member States other than Germany").

[145] *See, e.g.*, *Panel Report*, paras. 7.154 ("a violation of Article X:3(a) of the GATT 1994 will be demonstrated if the non-uniform administration in question results in an actual *or possible future* adverse impact on the trading environment" (emphasis added)), 7.267 - 7.271 (finding non-uniform administration where one customs authority (in Germany) relied on an interpretive aid not relied on by other EC customs authorities in administering classification rules), 7.300 - 7.301 (finding non-uniform administration based on instruments issued by different customs authorities stating how each would apply classification rules with respect to LCD monitors).

[146] *Panel Report*, para. 7.443.

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

administer its customs law in a uniform manner. Nevertheless, the Panel rejected divergences among penalty provisions as non-uniform administration of EC customs law.

3. The Panel Mistakenly Relied on the Fact That Penalty Provisions are Measures That Could Themselves be the Subject of an Article X:3(a) Claim

124. As noted above, the Panel's error in finding that divergent penalty provisions do not constitute non-uniform administration of the specific measures at issue was the result of its confusion of the intermediate question of what it means to "administer" with the ultimate legal question at issue. The ultimate legal question was whether or not the EC administers the specific measures at issue (as identified in the U.S. panel request) in a uniform manner, as required by Article X:3(a) of the GATT 1994. Answering that question required an examination of the *manner of administration* of the specific measures at issue, as opposed to their *substance*. The United States never disputed that point.[148]

125. The manner of administration of the specific measures at issue was capable of being demonstrated in any number of different ways, in view of the different ways in which those measures may be put into practical effect. Nothing in Article X:3(a) constrained the United States to demonstrate non-uniform administration by comparing individual acts of administration. An alternative way to demonstrate non-uniform administration was to show the existence of different penalty provisions for giving effect to EC customs law in different parts of the territory of the EC. In fact, if divergences between individual acts of administration (*e.g.*, individual impositions of penalties for identical breaches of EC customs law) constitute non-

[148] *See, e.g.*, U.S. Answers to First Set of Panel Questions, paras. 156 - 160 (answer to Question No. 90).

uniform administration then, *a fortiori*, divergences between the penalty provisions that govern the individual acts of administration that different customs authorities carry out also must constitute non-uniform administration. If this is not the case, then a Member effectively can immunize itself against claims of non-uniform administration by legislating the non-uniformity.

126. In finding that substantive differences among customs penalty provisions within the EC do not constitute non-uniform administration of EC customs law, the Panel reasoned as follows: (1) penalty laws are measures of general application that may themselves be subject to the obligation of uniform administration under Article X:3(a); (2) Article X:3(a) requires an examination of the *manner of administration* of measures of general application rather than their *substance*; and (3) therefore, the Panel should ignore the substance of penalty laws as showing how EC customs law is administered.[149]

127. In other words, by the Panel's reasoning, it was not appropriate to consider the undisputed substance of the disparate penalty provisions in the EC, even though their relevance to the present dispute was *not* as the measures being administered, but as provisions that put into practical effect the measures being administered (EC customs law).

a. The Panel's reasoning leads to absurd results

128. Following the Panel's reasoning to its logical conclusion would lead to absurd results. The Panel would exclude entire categories of administration – *i.e.*, the putting into practical effect of laws, regulations, decisions and rulings of the kind described in Article X:1 through the maintenance of measures of general application – from review under Article X:3(a). Its logic is

[149] *See Panel Report*, para. 7.444.

not confined to the penalties area. It would extend, for example, to the case in which different customs authorities within a Member's territory have in place different regulations for giving practical effect to the Member's customs classification rules. For example, such regulations could require different approaches to deciding between alternative tariff chapters for classifying a given good. Under the Panel's logic, a panel could not consider the divergent substance of those regulations to constitute non-uniform administration of the Member's customs classification rules – it could only consider the application of those regulations in particular instances.

129. Nor is the Panel's logic confined to the obligation of uniform administration. It would also extend to the other two obligations under Article X:3(a) – impartial and reasonable administration. Indeed, by the Panel's logic, the EC should not have prevailed on its Article X:3(a) claim in the *Argentina - Hides* dispute, in which Argentina was found to have breached the obligations of impartial and reasonable administration. As relevant here, that dispute involved a claim that Argentina failed to administer its customs law in a manner consistent with Article X:3(a), because it permitted "representatives of the Argentinian tanning industry to be present during the customs export verification procedures of raw hides."[150] That manner of administration of the customs law was specified in a measure of general application (Resolution 2235) that was distinct from the measures of general application whose manner of administration was at issue. Resolution 2235 authorized administration of Argentina's customs laws (specifically, its laws concerning export verification) in a manner that the EC alleged to be non-uniform, partial, and unreasonable.

[150] Panel Report, *Argentina - Hides*, para. 4.162.

130. Following the logic of the Panel in the present dispute, the *Argentina - Hides* panel should have declined to consider the *substance* of Resolution 2235. Since Resolution 2235 was a measure of general application whose administration could itself have been challenged under Article X:3(a), the panel should have confined its examination to its manner of administration. Indeed, Argentina made that very point. It argued that the panel should have rejected the EC's claim because "the European Communities essentially is challenging the substance of a regulation and not its administration."[151] The panel rejected that argument, explaining that:

> Looking only to individual Customs officers' enforcement actions, rather than measures such as Resolution 2235, as Argentina implies, would almost certainly require a review of a specific instance of abuse rather than the general rule applicable. This would effectively write Article X:3(a) out of existence.[152]

131. Unlike the Panel in the present dispute, the *Argentina - Hides* panel did not take the view that the substance of an instrument that puts a Member's customs law into practical effect must be disregarded simply because it is itself a measure of general application. It did not confuse the question of what it means to administer with the ultimate question of whether administration is uniform. Rather, that panel properly recognized the distinction between measures of general application whose manner of administration is at issue in an Article X:3(a) dispute (in that dispute, Argentina's export laws) and measures of general application that "provide[] for a certain manner of applying" the measures whose manner of administration is at issue (in that dispute, Resolution 2235).[153] It then went on to consider the substance of Resolution 2235 as

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[151] Panel Report, *Argentina - Hides*, para. 11.69.
[152] Panel Report, *Argentina - Hides*, para. 11.71 (internal citations omitted).
[153] Panel Report, *Argentina - Hides*, para. 11.72.

showing the manner of administration of Argentina's export laws and found that manner of administration to be unreasonable and partial, and therefore inconsistent with Article X:3(a).[154]

132. The Panel in this dispute should have recognized the distinction that the *Argentina - Hides* panel recognized between measures of general application whose manner of administration is at issue under Article X:3(a) and measures of general application that put the measures at issue into practical effect. In fact, the panel report in *Argentina - Hides* was discussed at length in the present panel proceedings.[155] In view of that discussion, it is remarkable that nowhere in its analysis did the Panel discuss *Argentina - Hides*, let alone attempt to distinguish its own reasoning from the reasoning of the panel in that dispute. In fact, its only material mention of *Argentina - Hides* was a single sentence in a footnote acknowledging "that the United States relies upon comments made by the panel in *Argentina - Hides and Leather*, paras. 11.69-11.72."[156]

133. Of course, a panel is not required to dispose of every argument that the parties put before it.[157] But, what is notable in this instance is that a line of argument that figured prominently in

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[154] Panel Report, *Argentina - Hides*, paras. 11.94, 11.101.

[155] *See, e.g.*, U.S. First Written Submission, paras. 35-38; U.S. First Oral Statement, paras. 22-23, 47-48; U.S. Answers to First Set of Panel Questions, paras. 156-160 (answer to Question No. 90); EC Replies to First Set of Panel Questions, paras. 181-185 (reply to Question No. 90); U.S. Second Written Submission, paras. 90-95; EC Second Oral Statement, para. 74; U.S. Answers to Second Set of Panel Questions, paras. 23-24 (answer to Question No. 129), 25-28 (answer to Question No. 130), 40-41 (answer to Question No. 133); EC Replies to Second Set of Panel Questions, paras. 38-39 (reply to Question No. 154), 79 (reply to Question No. 167(b)).

[156] *Panel Report*, para. 7.114 n.256.

[157] AB Report, *EC - Poultry*, para. 135 (panel's failure to address a particular argument "will not, *in and of itself*, lead to the conclusion that the panel has failed to make the 'objective assessment of the matter before it' required by Article 11 of the DSU").

the panel proceedings received no discussion at all in the Panel's report. That omission highlights the Panel's error.

b. The Panel's reasoning on penalty laws is contradicted by other parts of the report

134. Moreover, the Panel's reasoning with respect to penalty provisions is contradicted by its own reasoning in other parts of its report. In those other contexts, the Panel recognized that showing differences between particular acts of administration is not the only way to demonstrate a breach of the obligation of uniform administration. It also recognized that a measure of general application may be put into practical effect through the maintenance of an instrument that happens also to be a measure of general application, and that it is appropriate to consider the substance of that instrument to determine how the measure at issue is being administered.

135. For example, in considering the question of administration of the EC's Common Customs Tariff with respect to classification of the specialty textile product known as "blackout drapery lining," the Panel referred to the fact that one customs authority (in Germany) relied on an interpretive aid not relied on by other EC customs authorities.[158] That interpretive aid focused on the criterion of fabric density to determine whether the product at issue should be classified under one chapter or another. The Panel found that"

> [T]he German interpretative aid apparently has in the past and may continue in the future to have an impact upon the tariff classification of blackout drapery lining in the European Communities. These factors demonstrate that the German customs authorities' reliance upon the interpretative aid in question amounts to non-uniform administration in violation of Article X:3(a) of the GATT 1994.[159]

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[158] *Panel Report*, paras. 7.267 - 7.271.
[159] *Panel Report*, para. 7.271.

136. In other words, in the Panel's view, it was appropriate to consider the substance of a measure of general application – in this case, an interpretive aid used by the customs authority in one member State but not in others – to determine how one of the specific measures at issue (the Common Customs Tariff) is being administered. There is no reason that same rationale should not have applied to penalty provisions.

137. Moreover, in discussing the administration of EC classification rules with respect to blackout drapery lining, the Panel noted "the apparent failure on the part of German customs authorities to seriously consider classification decisions for blackout drapery lining of other customs authorities."[160] It found that this "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." It noted, for example, that "the impact might be trade diversion to member States other than Germany."[161]

138. This very same statement could be made with respect to penalty provisions. Like different administrative processes for classification, different penalty provisions could result in trade diversion.[162] Just as the possibility of trade diversion led the Panel to find a lack of uniform

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[160] *Panel Report*, para. 7.275.

[161] *Panel Report*, para. 7.275 & n.517; *see also id.*, para. 7.383 (noting with respect to administration of Article 147(1) of the Community Customs Code Implementing Regulation, which concerns circumstances in which customs valuation may be based on a transaction other than the last sale that led to introduction of goods into the EC, that "the practice [employed by some EC customs authorities but not others] of imposing a form of prior approval with respect to the successive sales provision results in an actual or possible adverse impact on the trading environment in that it might affect the member State into which a trader decides to import").

[162] *See generally* U.S. Answers to Second Set of Panel Questions, para. 50 ("Traders tend to be risk averse and plan their transactions by taking into account a variety of factors, including their potential liability for sanctions.").

administration with respect to the different administrative processes applied to the classification of blackout drapery lining, it should have led the Panel to find a lack of uniform administration with respect to the different penalty provisions in existence in different parts of the EC.

139. Similarly, in considering the question of the manner of administration of the Common Customs Tariff with respect to classification of liquid crystal display (LCD) monitors with digital video interface (DVI), the Panel examined measures of general application in different member States giving practical effect to EC classification rules. Thus, it referred to the substance of a Tariff Notice issued by the UK customs authority and a decree issued by the Dutch customs authority as showing a lack of uniform administration of the EC classification rules at issue.[163] It was not necessary to point to particular acts of administration in which the EC customs authority in the UK had classified an LCD monitor with DVI one way while the EC customs authority in the Netherlands had classified an identical product in a different way. The measures of general application setting forth how the different customs authorities give practical effect to the classification rules themselves amounted to non-uniform administration. Likewise, in the penalties context, the Panel should have considered measures of general application in the different EC member States as non-uniform administration, rather than confining its examination to particular acts of administration.

4. The Error in the Panel's General Approach to Penalty Laws is Evident From its Observation That Substantive Differences in Penalty Laws Could Indicate Non-Uniform Administration of a Particular ECJ Decision and a Particular EC Council Resolution

[163] *Panel Report*, paras. 7.300 - 7.301.

140. Finally, the United States calls attention to the last paragraph in the Panel's discussion of penalty provisions. There, the Panel referred to the ECJ decision in the case of *Jose Teodoro de Andrade* v. *Director da Alfândega de Leixões*, which concerned a penalty imposed by the EC customs authority in Portugal for an importer's failure to clear goods through customs within the time-period provided by the Community Customs Code. The Panel also referred to the EC Council Resolution of 29 June 1995 on the effective uniform application of Community law and on the penalties applicable for breaches of Community law in the internal market.[164] The Panel noted that:

> [T]he acknowledgement by the European Communities in the context of this dispute of substantive differences in penalty laws among member States could indicate that the judicial decision issued by the ECJ in *Jose Teodoro de Andrade* v. *Director da Alfândega de Leixões* and EC Council Resolution of 29 June 1995 on the effective uniform application of Community law and on the penalties applicable for breaches of Community law in the internal market are not being administered in a uniform manner by the member States in violation of Article X:3(a) of the GATT 1994.[165]

However, the Panel declined to make a definitive finding, "given that the United States did not allege a violation of Article X:3(a) of the GATT 1994 in this regard."[166]

141. This discussion highlights the incoherence in the Panel's general approach to penalty provisions. Here, the Panel recognized that divergent penalty provisions could well constitute a breach of Article X:3(a) with respect to the administration of what it understood to be two EC measures of general application – an ECJ decision and an EC Council resolution. The Panel thus

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[164] *Panel Report*, para. 7.445. The *Jose Teodoro de Andrade* decision to which the Panel referred was set forth in Exhibit US-31. The EC Council Resolution was set forth in Exhibit EC-41.

[165] *Panel Report*, para. 7.445.

[166] *Panel Report*, para. 7.445.

appeared to draw a distinction between those two instruments and the specific measures at issue in the dispute (*i.e.*, the EC customs laws, regulations, decisions and rulings of the kind described in Article X:1 of the GATT 1994 referred to in the U.S. panel request). However, this is a distinction without a difference.

142. The Panel never explained why "substantive differences in penalty laws among member States" could indicate non-uniform administration of two particular EC measures of general application but not other EC measures of general application. It appeared to rely on the fact that those two measures deal directly with penalties whereas the specific measures at issue in this dispute deal with substantive customs rules. Yet, it is not at all apparent why that difference should matter. Recalling the ordinary meaning of the term "administer," what matters is whether substantive differences in penalty laws are differences in the manner in which laws, regulations, decisions and rulings of the kind described in Article X:1 of the GATT 1994 are "put[] into practical effect."[167] The Panel's analysis is devoid of reasons that substantive differences in penalty laws could constitute differences in the manner in which two particular instruments are put into practical effect, but not in the manner in which other measures are put into practical effect.

143. In fact, closer examination of the *de Andrade* decision and the 1995 EC Council Resolution makes even more perplexing the Panel's general approach to penalty laws in light of its observations about penalty laws as they relate to those two instruments. Both the *de Andrade* decision and the 1995 EC Council Resolution concern the manner in which *other* measures are

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

administered. Thus, in *de Andrade*, the Court recalled general principles of EC law that apply when EC legislation is silent on the penalty for the legislation's infringement. With respect to customs offences in particular, the Court stated that "the Member States are empowered to choose the penalties which seem appropriate to them," provided that such choice accords with "Community law and its general principles," notably the "general principles" of effectiveness, proportionality, and dissuasiveness.[168]

144. The import of the 1995 EC Council Resolution is similar. That instrument begins with a preamble recognizing, *inter alia*, that member State penalty laws put EC legislation (which includes EC customs laws) into practical effect, thus noting that:

> [T]he absence of effective, proportionate and dissuasive penalties for breaches of Community law could undermine the very credibility of joint legislation and affect the situation of citizens of the Union, in certain cases possibly harming conditions of competition and the general interests referred to in the common rules.[169]

145. The Resolution goes on to recall, as the Court did in *de Andrade*, that when EC legislation is silent on the penalty in case of infringement, it is for the member States "to take any appropriate measures to guarantee the scope and effectiveness of Community law by, *inter alia*, making the chosen penalty effective, proportionate and dissuasive."[170]

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[168] *Jose Teodoro de Andrade* v. *Director da Alfândega de Leixões*, Case C-213/99, 2000 ECR I-11083 (Dec. 7, 2000), paras. 19-20 (Panel Exhibit US-31).

[169] Council Resolution of 29 June 1995 on the effective and uniform application of Community law and on the penalties applicable for breaches of Community law in the internal market, p. 1 (Panel Exhibit EC-41) (fifth "whereas" clause).

[170] Council Resolution of 29 June 1995 on the effective and uniform application of Community law and on the penalties applicable for breaches of Community law in the internal market, pp. 1-2 (Panel Exhibit EC-41) (seventh "whereas" clause).

146. If, as the Panel found may be the case, the ECJ's decision in *de Andrade* is being put into practical effect in a non-uniform manner due to the existence of substantive differences in penalty laws among member States, then it must also be true that the EC legislation whose administration was at issue in *de Andrade* – customs legislation – is being put into practical effect in a non-uniform manner due to the existence of such differences. The same is true of the 1995 EC Council Resolution.

147. The particular question at issue in *de Andrade* illustrates the point. As relevant here, the question before the ECJ concerned the administration of Article 53 of the Community Customs Code by the EC customs authority in Portugal. Article 53(1) states that "[t]he customs authorities shall without delay take all measures necessary, including the sale of the goods, to regularize the situation of goods in respect of which the formalities necessary for them to be assigned a customs-approved treatment or use are not initiated within the periods determined in accordance with Article 49."[171] The question referred to the ECJ was whether this provision of EC customs law is administered consistently with the general principle of proportionality where, in a given member State, the penalty for failure to clear goods within the specified time period is that the goods are put up for sale or are subject to an *ad valorem* surcharge. The Court found that this penalty scheme "is not in itself contrary to the principle of proportionality."[172]

148. Following *de Andrade*, different member States remain free to "choose the penalties which seem appropriate to them" in order to administer Article 53 of the Community Customs

[171] Community Customs Code, Art. 53(1) (Panel Exhibit US-5).

[172] *Jose Teodoro de Andrade* v. *Director da Alfândega de Leixões*, Case C-213/99, 2000 ECR I-11083 (Dec. 7, 2000), para. 25 (Panel Exhibit US-31).

Code, which expressly requires customs authorities to "take all measures necessary" to ensure the timely clearance of goods through customs. The ECJ's decision did not require all member States to have in place the exact same penalty laws to put Article 53 into practical effect. To the contrary, it expressly confirmed the absence of such a requirement. Therefore, if different member States administer the *de Andrade* decision in a non-uniform manner by keeping in place substantively different penalty laws (a possibility that the Panel acknowledged), they necessarily are also administering Article 53 in a non-uniform manner.

149. Moreover, this logic is not limited to Article 53 of the Community Customs Code. It applies to all of the provisions of EC customs law referred to in the U.S. panel request to the extent that they are put into practical effect – *i.e.*, administered – through penalty provisions. Accordingly, the Panel's statements at paragraph 7.445 of its report reinforce the conclusion that the Panel erred in finding that substantive differences in penalty laws used by the different customs authorities in the EC do not constitute a lack of uniform administration of EC customs law, in breach of Article X:3(a) of the GATT 1994.

5. The Panel's Error in its Approach to Substantive Differences Among Penalty Laws Extends to its Approach to Substantive Differences Among Audit Procedures

150. In addition to showing substantive differences in the customs penalty laws from EC member State to member State, the evidence before the Panel showed substantive differences in the audit procedures used to verify compliance with EC customs law. In particular, the United States put before the Panel a report by the EC Court of Auditors, which found that, as the Panel summarized:

> [S]ome member States (Belgium and the Netherlands) routinely provide the importer with a written binding valuation decision[] at the conclusion of each audit, others only issue such decisions when there are specific adjustments that have to be made (France, Ireland, Portugal, the United Kingdom), yet others rarely make such written decisions (Denmark, Spain, Italy, Luxembourg) and, finally, in Germany, the valuation decision does not exist as a separate written document.[173]

The EC did not dispute the existence of these substantive differences.[174]

151. The United States demonstrated to the Panel that, like penalty laws, audit procedures put EC customs law into practical effect. They are tools that ultimately can be used to verify and enforce compliance with EC customs law and, as such, their very existence helps to secure compliance with EC customs law. To the extent that audit procedures differ, they put EC customs law into practical effect in a non-uniform manner.[175]

152. As was the case with penalty laws, the Panel declined to consider audit procedures to be instruments that put EC customs law into practical effect. Accordingly, it declined to consider differences among audit procedures to constitute the non-uniform administration of EC customs law.[176]

153. Specifically, in the case of audit procedures, the Panel identified a single provision in the Community Customs Code, Article 78(2), that happens to deal expressly with audits. That

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[173] *Panel Report*, para. 7.433; *see also* 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, paras. 44 - 46 (Mar. 14, 2001) (Panel Exhibit US-14).

[174] The EC did contend that one member State whose customs authority did not have the power to perform audits at all at the time of the Court of Auditors Report subsequently attained that power. *See Panel Report*, para. 7.421. However, it did not dispute the other substantive differences noted in the Court of Auditors Report.

[175] *See, e.g.*, U.S. Answers to First Set of Panel Questions, para. 109 (response to Question No. 28); U.S. Second Written Submission, paras. 79-84.

[176] *See Panel Report*, para. 7.426.

provision states that "[t]he customs authorities may, after releasing the goods and in order to satisfy themselves as to the accuracy of the particulars contained in the declaration, inspect the commercial documents and data relating to the import or export operations in respect of the goods concerned or to subsequent commercial operations involving those goods."[177] The Panel assumed, without any basis, that the U.S. claim with respect to substantive differences among audit procedures must be a claim of non-uniform administration of Article 78(2) in particular and exclusively.[178] The Panel then observed that Article 78(2) "is discretionary rather than prescriptive in nature."[179] That is, it permits customs authorities to conduct audits but does not require them to do so. The Panel observed that "by definition, discretionary provisions may be applied in different ways," and, therefore, concluded that divergences resulting from the implementation of this discretionary provision do not breach Article X:3(a).[180] Having reached this conclusion, the Panel considered that it had addressed the U.S. claim with respect to audit procedures, thus effectively dismissing the claim that the EC breaches its Article X:3(a) obligation to the extent that different audit procedures used by different customs authorities put EC customs law – not Article 78(2) exclusively, but *all* EC customs laws, regulations, decisions and rulings for which compliance is verified and enforced through audit procedures – into practical effect in a non-uniform manner.

154. The error in the Panel's analysis is essentially the same as the error in its analysis of penalty provisions, as discussed above. Both analyses rest on an interpretation of the word

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[177] Community Customs Code, Article 78(2) (Panel Exhibit US-5).
[178] *Panel Report*, paras. 7.426 - 7.427.
[179] *Panel Report*, para. 7.429.
[180] *Panel Report*, para. 7.431; *see also id.*, para. 7.434.

"administer" in Article X:3(a) that ignores its ordinary meaning. A measure of general application is administered when it is "put into practical effect."[181] Penalty provisions put EC customs law into practical effect by deterring breaches and encouraging compliance. Audit procedures do the same thing. Nevertheless, just as the Panel declined to find that penalty provisions put EC customs law into practical effect and that substantive differences among penalty provisions constitute non-uniform administration of EC customs law, so it declined to make that finding with respect to audit procedures.

155. In the case of audit procedures, the Panel took a slight detour by considering whether substantive differences among audit procedures constituted non-uniform administration of Article 78(2) of the Community Customs Code in particular. But, administration of that particular provision was never the issue when it came to audit procedures. Rather, the issue was administration of *all* of the provisions of EC customs law that are put into practical effect at least in part through the existence of audit procedures and that are put into practical effect in a non-uniform manner because those audit procedures differ from customs authority to customs authority.

156. Even if the Panel had been correct in limiting its examination to Article 78(2) of the Community Customs Code, the Panel's logic does not withstand scrutiny. It is precisely because a Member's authorities have discretion under municipal law in how to administer a law that the law may (or may not) be administered in a non-uniform manner. Yet, instead of examining whether the acknowledged variations in audit procedures among EC member States constituted

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

non-uniform administration under Article X:3(a) of the GATT 1994, the Panel dismissed any possibility of a breach of that provision – based on the EC granting *its own* authorities discretion in the execution of audits. Under the Panel's logic, a Member can opt out of its WTO obligations through an act of municipal law. Yet, it is well established that this is not possible.[182]

157. Moreover, as the United States noted in its second written submission to the Panel, the EC itself recognizes that audit procedures put EC customs law into practical effect. Thus, in its Customs Audit Guide, which the EC provided to the Panel as Exhibit EC-90, the EC cited as "a legal basis for the undertaking of audits" Article 13 of the Community Customs Code, which authorizes customs authorities to "carry out all the controls they deem necessary to ensure that customs legislation is correctly applied."[183] As "controls . . . to ensure that customs legislation is

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[182] *Vienna Convention on the Law of Treaties*, done at Vienna, May 23, 1969, 1155 U.N.T.S. 331, 8 ILM 679 (Jul. 1969), Article 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."); *see* Panel Report, *Brazil - Aircraft 21.5*, para. 6.16 n.23; Panel Report, *Australia - Salmon 21.5*, para. 7.12 n.146; Panel Report, *Canada - Dairy*, para. 7.73 n.424.

[183] U.S. Second Written Submission, para. 84. It should be noted that the Panel's analysis of Article 78(2) of the Community Customs Code would seem to apply with equal force to Article 13. Like Article 78(2), Article 13 is discretionary in nature. It states that customs authorities "*may* . . . carry out all the controls they deem necessary to ensure that customs legislation is correctly applied" (emphasis added). By the Panel's logic, Article X:3(a) of the GATT 1994 would not constrain the administration of this measure of general application that expressly authorizes customs authorities to exercise discretion. Yet, if that were correct, then, by virtue of its very breadth, Article 13 of the Community Customs Code would seem to excuse the EC from much of its Article X:3(a) obligation to administer its customs law in a uniform manner. To the extent that divergences in administration may be characterized as differences in "controls" that different customs authorities "deem necessary to ensure that customs legislation is correctly applied," the divergences would elude Article X:3(a), according to the Panel's logic. The absurdity of this result is obvious: The Panel's logic effectively empowers a Member to determine the extent of its obligation of uniform administration under Article X:3(a) simply by stating that different customs authorities have discretion with respect to various aspects of administration.

correctly applied," audit procedures administer that customs legislation. The Panel erred in declining to so find and, for the same reasons that the Appellate Body should reverse the Panel's finding of no breach of Article X:3(a) of the GATT 1994 with respect to substantive differences among penalty laws in the EC, it should reverse the Panel's finding of no breach of Article X:3(a) with respect to substantive differences among audit procedures.

6. The Appellate Body Should Complete the Panel's Analysis and Find That the EC Breaches its Obligation Under Article X:3(a) of the GATT 1994 to the Extent That it Administers its Customs Law Through Divergent Penalty Laws and Audit Procedures

158. If the Appellate Body reverses the Panel's findings with respect to the existence of divergent penalty laws and audit procedures, then it will be confronted with the question whether to complete the Panel's analysis. The Appellate Body should complete the Panel's analysis and, in doing so, it should find that the EC administers its customs law in a non-uniform manner, in breach of Article X:3(a) of the GATT 1994, because different customs authorities have in place divergent penalty laws and audit procedures to put EC customs law into practical effect.

159. As discussed in part II.A.6, above, when the Appellate Body reverses a panel's finding, it may be appropriate to complete the panel's analysis "to secure a positive solution to [the] dispute."[184] Here, a reversal of the Panel's findings with respect to penalty laws and audit procedures without a completion of its analysis would fail "to secure a positive solution to [the] dispute." If the Appellate Body agrees with the United States that the Panel erred in interpreting the term "administer" in Article X:3(a) to exclude the putting of EC customs law into practical effect through penalty provisions and audit procedures, then the question will remain whether

[184] DSU, Art. 3.7.

divergences in penalty provisions and audit procedures in the EC amount to non-uniform administration in breach of Article X:3(a). Therefore, a completion of the Panel's analysis would be appropriate.

160. It also would be straightforward, given undisputed facts on the record before the Panel. As discussed above, and as the Panel itself found, it was undisputed that different member States within the EC have in place different penalty laws for breaches of EC customs law.[185] Indeed, the undisputed evidence shows that the differences can be dramatic.[186] It also was undisputed (as discussed in part II.B.5, above) that different customs authorities have in place different audit procedures for verifying and enforcing compliance with EC customs laws.

161. In view of the undisputed facts regarding divergences in penalty provisions and audit procedures, if the Appellate Body reverses the Panel's findings on these issues, then it should complete the Panel's analysis and find that the EC administers its customs law in a non-uniform manner, in breach of Article X:3(a) of the GATT 1994, because different customs authorities have in place different penalty provisions and audit procedures for putting EC customs law into practical effect.

C. The Panel Erred in Finding the Tribunals and Procedures the EC Provides for Review of Customs Administrative Actions to be Consistent With Article X:3(b) of the GATT 1994, Even Though None of Them Issues Decisions That

[185] *See Panel Report*, para. 7.444 (finding existence of substantive differences among penalty laws "not disputed between the parties").

[186] *See* European Commission, Directorate-General for Taxation and Customs Union, TAXUD/447/2004 Rev 2, *An Explanatory Introduction to the modernized Customs Code*, p. 13 (Feb. 24, 2005) (Panel Exhibit US-32) ("Specific offences may be considered in one Member State as a serious criminal act possibly leading to imprisonment, whilst in another Member State the same act may only lead to a small – or even no – fine.").

Govern the Practice of "the Agencies Entrusted With Administrative Enforcement"

162. The third category of error for which the United States seeks review concerns the Panel's interpretation and application of Article X:3(b) of the GATT 1994. That provision requires the EC to have in place "tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters." It further requires that the decisions of such tribunals or procedures "shall be implemented by, and shall govern the practice of" "the agencies entrusted with administrative enforcement." The Panel erred by finding that the decisions of an EC tribunal or procedure need not govern the practice of "the agencies entrusted with administrative enforcement" in the case of the EC, but rather it is sufficient if the decisions of the tribunal or procedure govern the practice of only one agency entrusted with administrative enforcement. There was no dispute that the EC tribunals and procedures are geographically isolated, being limited to each member State. The EC concedes, for example, that the decisions of a tribunal in France do not govern the practice of any other EC agency outside of France, nor does the EC contest that the agencies outside of France are free to follow practices directly opposed to the decisions of the tribunal in France. Indeed, nothing prevents the tribunals in each member State from reaching 25 radically divergent decisions concerning the same practice of the EC customs agencies, and in no case are the agencies in 24 of the member States governed by the decision of the tribunal in the 25th member State. For the Panel, this satisfied the EC's obligation to have tribunals and procedures whose decisions govern the practice of the EC agencies entrusted with administrative enforcement.

163. In reaching its conclusion, the Panel made a number of interpretive errors. In essence, the Panel's analysis misconstrued the ordinary meaning of "such agencies," confused the concepts of "implement" and "govern the practice of," and failed to take into account the context of Article X:3(a).

1. The Panel Failed to Give Meaning to the Terms "the Agencies Entrusted With Administrative Enforcement" and "Such Agencies"

164. The Panel disregarded the ordinary meaning of the terms "the agencies entrusted with administrative enforcement" and "such agencies." The customary rules of interpretation of public international law, as reflected in the Vienna Convention on the Law of Treaties, require that a treaty be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[187] Yet, here, the Panel effectively disregarded the ordinary meaning of the terms at issue, ending its analysis with the conclusion that "it is difficult to know what significance should be attached, if any, to the reference to agencies in the plural."[188]

165. In fact, it should not have been difficult at all to know what significance to attach to the use of the plural form "the agencies" and "such agencies." The ordinary meaning of the plural in this case is unmistakable. It encompasses "the agencies" – without limitation – entrusted with administrative enforcement, as opposed to only one such agency or just "some of" or a subset of "the agencies."

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[187] *Vienna Convention on the Law of Treaties*, done at Vienna, May 23, 1969, 1155 U.N.T.S. 331, 8 ILM 679 (Jul. 1969), Article 31(1).

[188] *Panel Report*, para. 7.528.

166. When it came to construing the use of the plural form "tribunals" and "procedures" in the same sentence of Article X:3(b), the Panel had no difficulty concluding that the provision "expressly contemplates that there may be multiple tribunals or procedures in place in a single WTO Member for the review of administrative action."[189] It is not clear then, why the Panel should have had difficulty concluding that the use of the plural form "the agencies" and "such agencies" contemplates multiple agencies and that, given the absence of any basis in the text for distinguishing among the multiple agencies that may be entrusted with administrative enforcement, it must contemplate *all* of the agencies entrusted with administrative enforcement. Analogously, in its recently issued report in *United States - Final Dumping Determination on Softwood Lumber from Canada: Recourse to Article 21.5 of the DSU by Canada*, the Appellate Body found that "the reference to 'export prices' in the plural, without further qualification" in Article 2.4.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* must be understood as comprising "all" export prices.[190]

167. The Panel speculated that it may be that use of the plural "agencies" in Article X:3(b) "merely flows from the fact that the review tribunals and procedures required under Article X:3(b) of the GATT 1994 are also referred to in the plural."[191] However, that theory makes no sense. Nothing about use of the plural form "tribunals" and "procedures" compelled the drafters of Article X:3(b) to use the plural form "agencies." Had the drafters of Article X:3(b) intended

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[189] *Panel Report*, para. 7.524.

[190] Appellate Body Report, *United States - Final Dumping Determination on Softwood Lumber from Canada: Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, para. 88 (circulated 15 August 2006 and not yet adopted).

[191] *Panel Report*, para. 7.527.

that the decision of a review tribunal or procedure govern the practice of only the particular agency whose administrative action was under review, they easily could have drafted the second sentence to read: "Such tribunals or procedures shall be independent of the *agency* entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such *agency* . . . ."

168. The Panel also stated that use of the singular "agency" in the *proviso* to Article X:3(b) contributed to its difficulty in determining the significance of the reference to "agencies" in the plural in the text preceding the *proviso*.[192] However, the reference to "agency" in the singular in the *proviso* should not have caused the Panel to ignore the ordinary meaning of the plural "the agencies" and "such agencies" in the preceding text.

169. The use of "agency" in the singular in the *proviso* to Article X:3(b) clearly results from the function of the *proviso*, which reads in full:

> *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

170. The *proviso* concerns action taken by the central administration of an agency after a review tribunal or procedure has rendered a decision that ordinarily is required to govern the practice of "the agencies entrusted with administrative enforcement." It makes clear that the binding character of that decision does not preclude the central administration from asking a tribunal to revisit the legal question at issue in the decision "in another proceeding." The action contemplated by the *proviso* is "a review" (in the singular) in "another proceeding" (in the

[192] *Panel Report*, para. 7.528.

singular). Logically, such action would be undertaken by a single entity, which explains the reference to "the central administration of such agency." However, this has no bearing on the fact that Article X:3(b) requires the decision of a review tribunal or procedure to govern the practice of "*the agencies* entrusted with administrative enforcement" – not merely *some of* such agencies.

171. This point is confirmed by the preparatory work of the GATT 1947, in which the text that would become Article X:3(b) of the GATT 1994 first appeared. The text that became the *proviso* was originally proposed by the United States as an amendment to text proposed by Canada consisting of the main part of what has become Article X:3(b) of the GATT 1994. As originally proposed by the United States on May 13, 1947, the *proviso* referred only to steps to obtain a review taken by "such agency."[193] The summary record of a working group meeting on May 22, 1947, states that "[s]everal delegates raised doubts regarding the meaning of the word 'agency' in the American proposal, contending that remedial action should only lie with a superior authority." This then led the United States to propose adding the words "the central administration of," as is reflected in the text that now appears in Article X:3(b) of the GATT 1994.[194]

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[193] *See* United Nations Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Chapter V – General Commercial Policy, E/PC/T/W.24/Add.1 (May 13, 1947).

[194] United Nations Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Working Group on "Technical Articles," Summary Record of the Meeting of the ad hoc Sub-Committee appointed for the discussion of Article 21, paragraph 2, E/PC/T/WP.1/AC/SR/3 (May 22, 1947).

172. The preparatory work demonstrates that the drafters of the text that would become Article X:3(b) of the GATT 1947, and later Article X:3(b) of the GATT 1994, recognized that the *proviso* contemplated exceptional action and that the persons authorized to take such action should be limited. Thus, the addition of the words "the central administration of" emphasized that only one entity within the Member should be permitted to pursue the review that is the exception to the rule that the decisions of review tribunals or procedures govern the practice of "the agencies entrusted with administrative enforcement." This emphasis underscores the difference between the central administrative entity (singular) that may seek review and the entities (plural) whose actions must be governed by the decisions of review tribunals and procedures and confirms that use of the singular "agency" in the *proviso* does not alter the ordinary meaning of the plural "agencies" in the text preceding it.

2. The Panel Confused the Concept of "Implement" and the Concept of "Govern the Practice of"

173. Perhaps at least part of the Panel's difficulty in interpretation comes from the fact that it appeared to confuse the concept of an agency "implementing" a decision and the concept of that decision "governing the practice of" a Member's agencies. For the Panel, "govern" appears to mean the same thing as "implement." The Panel found that "govern" means "have binding effect."[195] The Panel's reading apparently would render the reference to "implemented by" redundant.

174. It is important to note that Article X:3(b) requires that decisions of review tribunals or procedures be effectuated in two distinct ways. They must be "implemented by" "the agencies

[195] *Panel Report*, para. 7.529.

entrusted with administrative enforcement," and they must also "govern the practice of . . . such agencies." Significantly, the "govern the practice" requirement looks beyond the immediate subject of review and concerns the manner in which "the agencies entrusted with administrative enforcement" administer the customs laws going forward. The Panel recognized this.[196] The manner in which those agencies administer the customs law(s) at issue prospectively must conform to the decisions of the review tribunals or procedures.[197] In that light, it is clear that "govern the practice of . . . such agencies" has a broader meaning and effect than the requirement that tribunals' decisions be "implemented by" such agencies. For the decisions of the tribunals to "govern the practice of" a Member's "agencies entrusted with administrative enforcement," those agencies' practices must conform to those decisions. It may well be that where a Member entrusts administrative enforcement to multiple agencies, as the EC does, the "implementation" requirement in Article X:3(b) can be effectuated by the particular agency that happened to have been before a tribunal in a given case. However, the distinct "govern the practice" requirement cannot be effectuated by that agency alone. It must be effectuated by "the agencies entrusted with administrative enforcement." The Panel's analysis did not give meaning to the two distinct requirements in Article X:3(b). Instead, it assumed, incorrectly, that if a decision can be implemented by a single agency then the decision need govern the practice of only that agency.

175. There is no dispute that the practice of numerous agencies of the EC are not "governed by" the decisions of the EC's tribunals and procedures. There is no dispute that the practice of the agencies in 24 member States are not governed by the decisions of the tribunal of the 25th

[196] *Panel Report*, para. 7.531.
[197] *See* U.S. Second Written Submission, para. 104.

member State. For example, there is no dispute that the practice of the customs agencies in Germany, Spain, Estonia, and Italy are not governed by the decisions of the tribunals in the Netherlands, Sweden, Portugal, and Greece. This is inconsistent with the plain language of Article X:3(b).[198]

3. The Panel Erred in Ignoring the Context Provided by Article X:3(a) of the GATT 1994

176. In addition to ignoring the ordinary meaning of the text of Article X:3(b), the Panel took an erroneous approach to its context. Specifically, as noted above, it discounted the relevance of Article X:3(a) as context given the lack of a textual link to Article X:3(b).[199]

177. The only rationale the Panel gave for its approach to the question of context was that "Article X:3(b) of the GATT 1994 itself does not contain an express textual link between that Article and the obligation of uniform administration in Article X:3(a) of the GATT 1994," which it contrasted to the relationship between Article X:3(b) and Article X:3(c).[200] The Panel's approach in fact is not one that involves looking at "context" to help understand the meaning of a term, but instead appears to have been one that looked for actual incorporation of an obligation into Article X:3(b) through an express cross reference. The Panel should have recognized that Article X:3(a) was context, even though the words relating Article X:3(a) to Article X:3(b) were not the same as the words relating Article X:3(b) to Article X:3(c).

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[198] This contrasts with the obligation for agencies to "implement" decisions of the tribunals. If the tribunal in the Netherlands, for example, only has jurisdiction in the Netherlands, it is not surprising that only the agencies with authority for administrative enforcement in the Netherlands would be a party to a proceeding before that tribunal and thus would be the only agencies that would need to "implement" a decision of that tribunal.

[199] *Panel Report*, para. 7.534.

[200] *Panel Report*, para. 7.533.

178. In fact, customary rules of interpretation of public international law do not require that there be an "express textual link" for one article of a treaty to provide context for the interpretation of another article of the same treaty. Article 31(2) of the *Vienna Convention on the Law of Treaties* states:

> The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Thus, "the text" of a treaty in its entirety constitutes one source of context for the interpretation of any given provision in the text, regardless of the existence of an "express textual link" between the provision being interpreted and the provision(s) referred to for context. This understanding is confirmed by the International Law Commission's commentary on the *Vienna Convention*, which cites with approval a Permanent Court of Justice Advisory Opinion for the proposition that "the context is not merely the article or section of the treaty in which the term occurs, but the treaty as a whole."[201]

179. In interpreting an article of a covered agreement, it is not at all uncommon for panels or the Appellate Body to refer to articles in other parts of the agreement or in other agreements as context, regardless of whether there is an "express textual link."[202] Indeed, in another part of its

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[201] Report of the International Law Commission, *Yearbook of the International Law Commission*, 1966, Vol. II, p. 221.

[202] *See, e.g.*, AB Report, *EC - Tariff Preferences*, para. 161 (relying on WTO Agreement Preamble as context for interpreting the Enabling Clause); AB Report, *EC - Asbestos*, para. 93

report, the Panel considered the entirety of Article X to be context for its interpretation of the term "administer" in Article X:3(a). Thus, it referred to "[t]he title as well as the content of the various provisions of Article X of the GATT 1994" in finding a "due process theme, which would appear to be reflected in each of [the] sub-paragraphs of Article X of the GATT 1994."[203]

180. In any event, contrary to the Panel's assertion, there are in fact textual links between Article X:3(a) and Article X:3(b). Not only are they immediately proximate subparagraphs within the same paragraph within the same article of the GATT 1994, but the terms actually used in the two subparagraphs establish a link. Thus, while Article X:3(a) concerns the manner in which Members "shall administer" certain measures, Article X:3(b) concerns the review and correction of "administrative action."

181. The *proviso* in Article X:3(b) also contains a link to Article X:3(a). One of the obligations under Article X:3(a) – indeed the obligation that is particularly relevant as context here – is the obligation to administer in a uniform manner. The *proviso* in Article X:3(b) also is concerned with uniform administration, inasmuch as it contemplates the pursuit of review of a decision by a tribunal or procedure when "there is good cause to believe that the decision is

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(relying on Article III:1 of the GATT 1994 as context for interpretation of Article III:4 of the GATT 1994); AB Report, *Argentina - Footwear*, para. 93 (relying on Article 11.1(a) of the Agreement on Safeguards as context for interpreting Article XIX:1(a) of the GATT 1994); AB Report, *Canada - Periodicals*, p. 34 (relying on Articles III:2 and III:4 of the GATT 1994 as context for interpretation of Article III:8(b) of the GATT 1994); AB Report, *US - Gasoline*, p. 18 (relying on Articles I, III and XI of the GATT 1994 as context for interpreting Article XX(g) of that agreement); Panel Report, *EC - Commercial Vessels*, para. 7.190 (relying on the DSU in its entirety as context for interpretation of Article 23.1 of the DSU); Panel Report, *India - Autos*, para. 7.260 (relying on Ad note to Article III of the GATT 1994 as context for interpretation of Article XI:1 of the GATT 1994); GATT Panel Report, *US - Superfund*, para. 5.2.2 (relying on Article XI of the GATT 1947 as context for interpretation of Article III of the GATT 1947).

[203] *Panel Report*, para. 7.107.

inconsistent with established principles of law or the actual facts." In other words, if the central administration has "good cause to believe" that a decision may result in a disruption in uniform administration because it "is inconsistent with established principles," it may seek review in order to avoid non-uniform administration.

182. In short, even if the Panel were correct (which it is not), that there must be a textual link between two provisions – even two proximate subparagraphs within the same paragraph within the same article – for one to serve as context for interpretation of the other, that link exists between Article X:3(b) and Article X:3(a) of the GATT 1994.

183. Moreover, the preparatory work of the GATT 1947, in which Article X is identical to Article X of the GATT 1994, confirms that it is appropriate to interpret Article X:3(b) in light of the context of Article X:3(a). What the preparatory work shows is that the text that became subparagraphs (a) and (b) of Article X:3 originally was contained in a single subparagraph. Thus, in the August 6, 1947, Report of the Legal Drafting Committee on Articles 16-23 and 37, paragraph 3(a) of Article 21 contains an iteration of the text that became Articles X:3(a) and X:3(b) of the GATT 1947 (and, later, the GATT 1994). Paragraph 3(b) of that same article contained the text corresponding to what became Article X:3(c) of the GATT 1947, pertaining to existing procedures that in fact provide for objective review of administrative action, even though not fully or formally independent of the agencies entrusted with administrative enforcement.[204]

[204] *See* United Nations Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Legal Drafting Committee on Articles 16 - 23 and 37, E/PC/T/154, pp. 37-39 (Aug. 6, 1947).

184. At an August 15, 1947, meeting the Belgian delegate offered an amendment to Article 21 to address what was perceived to be a drafting inconsistency between paragraphs 3(a) and 3(b). The amendment divided paragraph 3(a) into two sub-paragraphs – 3(a) and 3(b) – and redesignated the former paragraph 3(b) as 3(c). The new paragraph 3(a) corresponded to what would become Article X:3(a) of the GATT 1947, and the new paragraph 3(b) corresponded to what would become Article X:3(b) of the GATT 1947. This division evidently was motivated by a further aspect of the Belgian amendment, consisting of an insertion of a cross-reference to the new paragraph 3(a) at the end of paragraph 3(c). Dividing the former paragraph 3(a) into 3(a) and 3(b) made clear that the cross-reference pertained only to the text concerning the obligation to administer certain measures in a uniform, impartial and reasonable manner.[205]

185. What the preparatory work thus shows is that the text that would become Articles X:3(a) and X:3(b) of the GATT 1947 (and then the GATT 1994) was treated by the drafters as one coherent piece. The text was divided not because the drafters understood one part as not being linked to the other. Rather, the division was necessary to make clear the import of a cross-reference in another subparagraph.

186. This negotiating history supports the view that the text now contained in Article X:3(a) is linked to the text now contained in Article X:3(b) of the GATT 1994 and that it is appropriate to

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[205] United Nations Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Summary Record of the 40th (2) Meeting of Commission A held on Friday, 15th August, 1947, at 10.30 a.m. in the Palais des nations, Geneva, E/PC/T/A/SR/40 (2), pp. 1-2 (Aug. 15, 1947); *see also* United Nations Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Thirty-Fourth Meeting of Commission A, Held on Friday, 8 August 1947, at 2:30 p.m. in the Palais des Nations, Geneva, E/PC/T/A/PV/34, pp. 62-63 (Aug. 8, 1947).

understand the latter in light of the context provided by the former. The Panel's contrary approach was, therefore, in error.

187. In sum, the Panel should have interpreted Article X:3(b) of the GATT 1994 in light of the context provided by Article X:3(a) and, in particular, the obligation of uniform administration contained in that article. Article X:3(a) as context supports an interpretation of Article X:3(b) that reinforces rather than detracts from uniform administration. Accordingly, considering Article X:3(a) as context would have confirmed the conclusion, already evident from the ordinary meaning of the terms in Article X:3(b), that the EC is in breach of its obligation under that article because the decisions of its review tribunals and procedures do not govern the practice of "the agencies entrusted with administrative enforcement."

4. The "Reasonable" Inference on Which the Panel Relied to Interpret Article X:3(b) of the GATT 1994 was not Reasonable

188. Having erroneously found the text and context of Article X:3(b) to be inconclusive with regard to the question before it, the Panel ultimately based its interpretation of that article on what it considered "would be reasonable to infer." Specifically, it found that it would *not* be reasonable to infer "that first instance independent review tribunals and bodies, whose jurisdiction in most legal systems is normally limited in substantive and geographical terms, should have the authority to bind all agencies entrusted with administrative enforcement throughout the territory of a Member."[206]

189. The problem with this inference is that it ignores entirely the feature that makes the EC different from "most legal systems." It ignores the fact that unlike most legal systems (perhaps

[206] *Panel Report*, para. 7.538.

unlike any other legal system), the EC combines *review* by tribunals that are limited in geographical terms with *administration* by separate, independent agencies that also are limited in geographical terms.

190. It may well be the case that in "most legal systems" first instance independent review "is normally limited in substantive and geographical terms." However, it is equally the case that in most legal systems there is only one agency "entrusted with administrative enforcement [of customs law] throughout the territory of [the] Member." Therefore, in "most legal systems," if the decisions of independent review tribunals and bodies govern the practice of the agency entrusted with administrative enforcement, they necessarily govern the practice that applies throughout the Member's territory.

191. This is so even if the jurisdiction of the review tribunals and bodies is geographically limited. That is because their decisions will be directed towards a customs authority that is the sole customs authority within the Member's territory and whose practice necessarily applies throughout the territory. Even if the Panel were correct (which it was not) in finding that Article X:3(b) requires only that a decision "govern the practice of the agency whose action was the subject of review by a tribunal or procedure in a particular case,"[207] it would not be the case that in a Member with only one customs agency, Article X:3(b) permits the decision to govern the practice of that agency only within the region covered by the tribunal or procedure. In other words, even under the Panel's view, the decision of a review tribunal or procedure must govern the practice of the agency whose action was at issue, even to the extent that such agency's

[207] *Panel Report*, para. 7.528.

practice covers a territory broader than that covered by the tribunal or procedure. Nowhere does Article X:3(b) contemplate a geographical limitation on the "govern the practice" requirement.

192. This point is reinforced by the separate obligation of uniform administration in Article X:3(a). In the case of a Member with a single customs agency, if the decision of a regional tribunal governed the practice of the agency only within a particular region, failure by the agency to conform its practice in other regions (or, as Article X:3(b) contemplates, lodge an appeal or have the central administration obtain review in another proceeding) would put the Member in breach of Article X:3(a).

193. Yet, under the Panel's view of what is "reasonable," an entirely different rule would apply in Members in which different review tribunals cover different regions *and* different agencies are entrusted with administrative enforcement in different regions. In that situation, according to the Panel, it is permissible for the decision of a review tribunal to govern the practice of only the agency that was before the tribunal and therefore, by definition, govern the manner in which the Member's customs law is administered only within the region covered by that agency.

194. Nothing in Article X:3(b) supports the view that the Members intended one rule for Members with a single customs authority and a different rule for Members with multiple customs authorities. In fact, the use of the plural form "the agencies" and "such agencies," together with the context provided by Article X:3(a), suggests just the opposite.

195. Looked at a different way, if the Panel were correct, then any Member could entrust administrative enforcement of its customs laws to multiple, regional agencies and provide for review by multiple, regional tribunals, thus generating a patchwork of decisions, each governing

how the Member's customs law is enforced (*i.e.*, the practice of the agency entrusted with administrative enforcement) only within a particular region. The United States, for example, could have a separate customs agency entrusted with the enforcement of U.S. customs law at each U.S. port; it could have the administrative action of each agency reviewed by the regional court whose jurisdiction covers that port; and the decisions of each court could govern the practice of only the agency responsible for that port. Under this system – which essentially would be the system presently in existence in the EC – if a party received adverse decisions on the same legal issue from several different courts, its only recourse would be to appeal each decision separately, as no single decision would govern the practice of all of "the agencies entrusted with administrative enforcement."[208]

196. Not only is this approach to the review of administrative action relating to customs matters not supported by the text and context of Article X:3(b) of the GATT 1994, but also, contrary to the Panel's finding, it is not reasonable.

5. The Panel's Explanation That Interpreting Article X:3(b) of the GATT 1994 as the United States Proposed Would go "Beyond What is Demanded" by Due Process is Incorrect

197. In addition to basing its interpretation of Article X:3(b) of the GATT 1994 on what it viewed (incorrectly) to be a reasonable inference about "most legal systems," the Panel asserted that its interpretation was consistent with "the due process theme that underlies Article X of the GATT 1994." It contended that interpreting Article X:3(b) to require that the decisions of review tribunals and procedures govern the practice of *all* of "the agencies entrusted with administrative

[208] *See* U.S. First Written Submission, para. 139.

enforcement" within a Member's territory "would go beyond what is demanded by this due process objective." In the Panel's view, when it comes to Article X:3(b), "the due process theme that underlies Article X of the GATT 1994" requires only that "a trader who has been adversely affected by a decision of an administrative agency has the ability to have that adverse decision reviewed."[209]

198. The Panel offered no support for the proposition that, as it pertains to Article X:3(b), "the due process theme" is limited in this way. In fact, this view of what Article X:3(b) requires in light of the due process theme of Article X ignores the "govern the practice" aspect of Article X:3(b). As the Panel itself acknowledged, the requirement that the decisions of review tribunals or procedures govern the practice of the agencies entrusted with administrative enforcement has a "binding effect" "with respect to identical factual situations that may arise in the future concerning identical legal issues."[210] That requirement unquestionably goes beyond a trader's ability to have an adverse decision reviewed. Rather, much like the uniform administration aspect of Article X:3(a), it goes to "ensur[ing] that traders are treated fairly and consistently when seeking to import from or export to a particular WTO Member."[211]

199. If there were no requirement that (absent appeal or the pursuit of review by an agency's central administration) the decisions of review tribunals or procedures govern the practice of the agencies entrusted with administrative enforcement of a Member's customs law, traders would face constant uncertainty as to the customs treatment they would receive from the Member. They

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[209] *Panel Report*, para. 7.538.
[210] *Panel Report*, para. 7.531.
[211] *Panel Report*, para. 7.108.

would have no way to know whether any given decision by a review tribunal or procedure would be followed in the future, or implemented only in the case at hand. A regime characterized by such uncertainty hardly is consistent with the due process theme of Article X. The same is true of a regime in which the decisions of review tribunals or procedures govern the practice of some of the agencies entrusted with administrative enforcement but not others, as is the case in the EC.

6. The Appellate Body Should Complete the Panel's Analysis and Find That the EC Breaches Article X:3(b) of the GATT 1994 by Failing to Provide Review Tribunals or Procedures Whose Decisions Govern the Practice of "the Agencies Entrusted With Administrative Enforcement"

200. For the reasons set forth above, the Appellate Body should reverse the Panel's finding that:

> [T]he European Communities does not violate Article X:3(b) of the GATT 1994 merely because the decisions regarding review of administration action relating to customs matters, which are taken by authorities in the member States acting as organs of the European Communities, do not apply and have effect throughout the territory of the European Communities.[212]

Upon reversing, the Appellate Body also should complete the Panel's analysis by finding that the EC violates Article X:3(b) of the GATT 1994 by failing to provide review tribunals or procedures whose decisions govern the practice of all of the agencies that the EC entrusts with administrative enforcement of its customs laws.

201. As discussed in part II.A.6, above, when the Appellate Body reverses a panel's finding, it may be appropriate to complete the panel's analysis "to secure a positive solution to [the] dispute."[213] Here, a reversal of the Panel's findings with respect to Article X:3(b) without a

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[212] *Panel Report*, para. 7.554; *see also id.*, paras. 7.539, 7.556, and 8.1(e).
[213] DSU, Art. 3.7.

completion of its analysis would fail "to secure a positive solution to [the] dispute." If the Appellate Body agrees with the United States that the Panel erred in interpreting Article X:3(b) as permitting a Member that entrusts administrative enforcement of its customs laws to multiple agencies to provide review tribunals and procedures whose decisions govern the practice of only some of those agencies, then the question will remain whether the review tribunals and procedures that the EC does provide are consistent with Article X:3(b). Therefore, a completion of the Panel's analysis would be appropriate.

202. It also would be straightforward, given undisputed facts on the record before the Panel. As the Panel correctly found, there was "no dispute between the parties" that the decisions of the review tribunals and procedures that the EC provides "only have effect within the respective member States."[214] Thus, if the Appellate Body reverses the Panel's interpretation of Article X:3(b), it necessarily will follow that the EC is in breach of Article X:3(b), and the Appellate Body should so find.

III. CONCLUSION

203. For the reasons set forth in this submission, the United States requests that the Appellate Body reverse the Panel's findings that:

(a) with respect to its terms of reference:

(i) when a violation of Article X:3(a) of the GATT 1994 is being claimed, the measure at issue that Article 6.2 of the DSU requires to be identified in the request for establishment of a panel is the manner of administration that is allegedly non-uniform, partial and/or unreasonable;

[214] *Panel Report*, para. 7.554; *see also id.*, para. 7.556 ("As a matter of fact, decisions of such member State authorities only have effect within the respective member States.").

(ii) the specific measure at issue identified in the U.S. panel request was the manner of administration of the EC customs laws, regulations, decisions and rulings of the kind described in Article X:1 of the GATT 1994 as specified in the U.S. panel request only in the areas of administration referred to in that request as areas in which non-uniform administration is manifest; and

(iii) the U.S. panel request precluded the United States from advancing its claim with respect to the EC system of customs administration as a whole;

(b) the EC does not violate Article X:3(a) of the GATT 1994 by putting its customs laws, regulations, decisions and rulings of the kind described in Article X:1 of the GATT 1994 into practical effect through penalty provisions and audit procedures that diverge among the different EC customs authorities; and

(c) the EC does not violate Article X:3(b) of the GATT 1994 by failing to have in place a tribunal or procedure for the prompt review and correction of administrative action relating to customs matters whose decisions govern the practice of all of the agencies entrusted with administrative enforcement of EC customs law.

204. Additionally, for the reasons set forth in this submission, the United States requests that the Appellate Body complete the Panel's analysis by finding that:

(a) the EC system of customs administration – in which the EC's customs laws are administered by 25 separate, independent customs authorities, and there are no institutions or mechanisms to secure uniform administration promptly and as a matter of right when the actions of those authorities diverge – is inconsistent with the EC's obligation of under Article X:3(a) of the GATT 1994 to administer its laws, regulations, decisions and rulings of the kind described in Article X:1 of the GATT 1994 in a uniform manner;

(b) the EC administers its customs law in a non-uniform manner, in breach of Article X:3(a) of the GATT 1994, because different customs authorities have in place different penalty provisions and audit procedures for putting EC customs law into practical effect; and

(c) the EC breaches Article X:3(b) of the GATT 1994 by failing to provide review tribunals or procedures whose decisions govern the practice of all of the agencies that the EC entrusts with administrative enforcement of EC customs law.