

European Communities - Selected Customs Matters

WT/DS315

Opening Statement of the United States First Meeting of the Panel

September 14, 2005

1. Mr. Chairman and members of the Panel, the United States welcomes this opportunity to meet with the Panel to discuss the issues raised in this dispute. In our first written submission, we demonstrated that the European Communities fails to administer its customs laws in the uniform manner required by Article X:3(a) of the GATT. We also demonstrated that the EC fails to provide the tribunals or procedures for the prompt review and correction of administrative action relating to customs matters that Article X:3(b) of the GATT requires.

2. In its first written submission, the EC responded to our claims in part by re-casting them, incorrectly, as either broad-based attacks on European federalism or narrow complaints about the particular outcomes of specific cases. To the extent that the EC confronted our arguments directly, its responses appeared to fall into five categories:

- that Article X:3(a) is a narrow provision setting out “minimum” obligations;
- that material divergences in member State administration of customs laws do not occur or are systematically reconciled when they do occur;
- that various principles, instruments, and institutions in the EC ensure the uniform administration that Article X:3(a) requires;
- that where certain material differences admittedly exist among member State practices, these differences do not concern administration of customs law at all but, rather, matters of general member State administrative law; and

- that, with respect to Article X:3(b), the EC fulfills its obligation by virtue of the fact that each member State provides a separate forum for review of customs administrative decisions.

3. In our statement today, we will show why the Panel should reject each of the EC's arguments and find that the EC fails to comply with GATT Articles X:3(a) and X:3(b). We will have further reaction to the EC's arguments in our second submission.

The U.S. Claims

4. The claims of the United States are straightforward. Both claims stem from the fact that the EC, as a Member of the WTO in its own right – as distinct from its constituent member States – is bound by the obligations set forth in Articles X:3(a) and X:3(b). With respect to Article X:3(a), the EC provides for the administration of its customs law by each of its 25 member States while failing to ensure that the member States administer that law uniformly. That divergences among the member States occur is undeniable. Although the EC faults the United States for so asserting,¹ this fact is admitted by the EC even in its own written submission.² Outside the context of this dispute, it has been acknowledged by EC officials³ and has been a constant complaint of traders.⁴ The claim of the United States is that no EC institution systematically provides for the reconciliation of such divergences, so as to achieve the

¹See EC First Written Submission, para. 245.

²See, e.g., EC First Written Submission, paras. 144, 238, 396, 401, 426.

³See, e.g., U.S. First Written Submission, paras. 2, 44, 101.

⁴See, e.g., U.S. First Written Submission, paras. 66-72, 73-76, 90-92; see also Third Party Submission of the Republic of Korea, paras. 16-17.

uniformity of administration required by Article X:3(a).

5. Our Article X:3(b) claim is closely related to our Article X:3(a) claim. The two provisions complement one another. Indeed, the EC itself argues that review of administrative actions by courts and uniform administration are inherently intertwined, such that the former, in its view, is a key tool for achieving the latter.⁵

6. Our Article X:3(b) claim is that the EC fails to provide any forum for the prompt review and correction of administrative action by member State customs authorities. While review is provided for under the laws of individual member States, that review does not meet the EC's obligation under Article X:3(b). Fragmentation of review, on a member State-by-member State basis, is not consistent with Article X:3(b). That obligation must be interpreted in light of its context, which includes Article X:3(a). Thus, the provision of a forum for prompt review and correction must be accomplished in a manner consistent with the uniform administration of customs laws. The provision of a forum for review and correction of administrative action that hinders rather than supports uniform administration – as is the case in the EC – is not consistent with Article X:3(b).

7. The issues raised by these claims are not new. Contrary to the EC's suggestion,⁶ this dispute is not the first time the United States has raised these issues with the EC. In fact, the United States has raised these issues routinely in the context of EC trade policy reviews since

⁵See, e.g., EC First Written Submission, para. 185.

⁶EC First Written Submission, para. 8.

1997.⁷ The United States also has raised these issues in other WTO and bilateral settings. The United States has decided to pursue its claims through dispute settlement precisely because the underlying problems persist despite our efforts to address them in other fora.

What This Dispute is *Not* About

8. At the outset, it is important to make clear what this dispute is *not* about. From the EC's first written submission, one might suppose that the complaint of the United States amounts to either an extremely broad challenge to the entire EC system of federal governance or an extremely narrow challenge to the particular administrative actions of particular member State authorities. It is neither. The EC's suggestion otherwise is a distraction from the real issues at hand.

9. The United States does not challenge the EC's choice of what it calls an "executive federalist" model for allocating the functions of government, including the customs function. Our complaint is not that the very decision to retain competence over customs administration in the hands of member State authorities is per se inconsistent with the obligation of uniform administration under Article X:3(a). Our complaint is that because the retaining of competence over customs administration in the hands of member State authorities is not coupled with the systematic reconciling of divergences among member State authorities, it is inconsistent with the obligation of uniform administration under Article X:3(a).

⁷See Trade Policy Review, European Union, Minutes of Meeting, Addendum, WT/TPR/M/102/Add.2, pp. 36-37 (Mar. 31, 2003); Trade Policy Review, European Union, Minutes of Meeting, Addendum, WT/TPR/M/72/Add.1, pp. 5-6 (Oct. 26, 2000); Trade Policy Review, European Union, Minutes of Meeting, WT/TPR/M/30, para. 37 (Jan. 26, 1998) (collectively, Exh. US-44); see also Trade Policy Review, European Communities, Minutes of Meeting, Addendum, WT/TPR/M/136/Add.2, p. 17 (Jan. 24, 2005) (India raising same issue) (Exh. US-45).

10. The EC is not subject to a lower requirement of uniform administration than every other WTO Member simply by virtue of its “executive federalist” structure. Article X:3(a) does not contain one standard for the EC and another standard for every other WTO Member. Nor can any Member, including the EC, escape its obligations under Article X:3(a) by partitioning its administration of its laws among various authorities.

11. Just as this dispute is not about the EC’s right to adopt an executive federalist form of government, it also is not about the particular decisions of individual member State authorities in particular cases. In its first submission, the United States set forth a number of illustrations to demonstrate the lack of uniform administration of customs law in the EC. In its first submission, the EC treats these cases not as illustrations but as actual matters in dispute. For example, in discussing the case of divergent classification of LCD monitors, the EC states that absent certain information, “a definitive judgment as to whether a specific monitor is correctly to be regarded as a computer monitor or a video monitor is not possible.”⁸

12. Statements such as this miss the point entirely. The U.S. argument in this dispute is not that a particular LCD monitor, or any other good for that matter, should be classified or valued one way or another. Rather, the argument is that the system for administering customs law in the EC does not ensure the uniformity that Article X:3(a) requires. In referring to cases such as the classification of LCD monitors or blackout drapery lining our purpose is not to argue for a particular classification. Our purpose is to illustrate from a practical, real-world perspective the ramifications of the lack of uniformity we have identified.

13. We turn now to the EC responses to the claims the United States actually makes, as

⁸EC First Written Submission, paras. 355; see also id., paras. 358, 408.

opposed to its responses to the arguments that it wrongly attributes to the United States.

The EC Erroneously Minimizes The Article X:3(a) Obligation Of Uniform Administration.

14. In our first submission, we identified the obligation of uniform administration in Article X:3(a) and explained the scope of that obligation applying customary rules of treaty interpretation of public international law. In particular, we considered the ordinary meaning of the operative terms in Article X:3(a) in their context and in light of the object and purpose of the GATT 1994. Applying this rule, we identified the relevant question as whether the EC manages, carries on, or executes its customs law in a manner that is the same in different places or circumstances, or at different times.⁹ We also discussed the report of the panel in *Argentina - Hides*, which confirmed this understanding of the concept of uniform administration.¹⁰

15. In its first submission, the EC entirely avoids the ordinary meaning of the operative terms of Article X:3(a). Tellingly, its discussion under the heading “The meaning of ‘uniform administration’” does not actually discuss the meaning of “uniform administration.”¹¹ Instead, it discusses supposed limitations on the obligation of uniform administration. Thus, the EC asserts that the obligation of uniform administration must be qualified by “practical realities,”¹² that “a minimum degree of non-uniformity is *de facto* unavoidable,”¹³ and that “uniformity can be

⁹U.S. First Written Submission, paras. 32-39.

¹⁰U.S. First Written Submission, paras. 35-38.

¹¹EC First Written Submission, paras. 235-241.

¹²EC First Written Submission, para. 235.

¹³EC First Written Submission, para. 238.

assessed only on the basis of an overall pattern of customs administration.”¹⁴

16. Not only does the EC’s explanation of “uniform administration” fail to come to grips with the ordinary meaning of those words, but the limitations that it posits would effectively render the obligation of uniform administration meaningless. For example, the EC suggests a limitation of “practical realities,” but identifies no standard by which that limitation might be assessed. Similarly, while it asserts that “a minimum degree of non-uniformity is *de facto* unavoidable,” it offers no standard for judging the degree of non-uniformity that may exist without running afoul of Article X:3(a).

17. Moreover, the EC’s contention that non-uniformity is impermissible only when it amounts to a pattern of non-uniformity is entirely misplaced. The EC draws this proposition from two reports that are not at all on point. First, it purports to rely on the Appellate Body’s report in *EC - Poultry*.¹⁵ However, the relevant issue there was not the meaning of “uniform administration,” but rather, the applicability of Article X at all to a particular import license issued with respect to a particular shipment.¹⁶

18. Similarly, in the panel report in *US - Hot-Rolled Steel* on which the EC relies,¹⁷ the panel did not reach the question of what “uniform administration” means. As is clear from the sentence immediately preceding the extract on which the EC relies, the relevant issue was “whether the final anti-dumping measure before [the panel] in [that] dispute can be considered a

¹⁴EC First Written Submission, para. 241.

¹⁵EC First Written Submission, para. 239.

¹⁶Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, paras. 109-116 (adopted July 23, 1998).

¹⁷EC First Written Submission, para. 240.

measure of ‘general application.’”¹⁸

19. More importantly, neither of the reports from which the EC seeks support concerned the issue presented by this dispute, which is lack of geographical uniformity in administration of a Member’s customs laws. Whatever the relevance of showing a pattern of non-uniformity may be in other contexts – such as establishing a breach of Article X:3(a) with respect to application of the customs laws to a particular good or group of goods – the EC has failed to demonstrate its relevance to establishing a breach of Article X:3(a) based on geographical non-uniformity. Indeed, the logical implication of the EC’s interpretation is that where a lack of geographical uniformity is widespread and unpredictable – that is, where there is no pattern to the lack of uniformity – there is no breach of Article X:3(a). This simply makes no sense and has no basis in Article X:3(a) itself.

20. The EC’s other arguments attempting to narrow the obligation of uniform administration are similarly flawed. For example, the EC characterizes as “highly important for the present case” the distinction between the substance of customs laws and their administration.¹⁹ The significance the EC apparently attaches to this distinction is that differences among member States’ laws – as, for example, in the area of penalties – are beyond the purview of Article X:3(a), as they are differences of substance rather than differences of administration.

21. The problem with this argument is that it ignores the different forms that administration can take. It assumes that laws cannot be instruments that administer other measures. That

¹⁸Panel Report, *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, para. 7.268 (adopted Aug. 23, 2001).

¹⁹EC First Written Submission, paras. 216-217.

assumption, however, is plainly incorrect. Customs laws may be administered through instruments which are themselves laws. This is the case with respect to penalty laws, which are instruments for administering customs laws by enforcing compliance with those laws. To the extent different EC member States use different penalty measures to enforce compliance with EC customs laws, they administer EC customs laws non-uniformly. The fact that different penalty measures happen to take the form of laws does not put them beyond review as evidence of non-uniform administration in breach of Article X:3(a).

22. This latter observation is supported by the panel report in *Argentina - Hides*. In that dispute, the EC had challenged as inconsistent with Article X:3(a) an Argentinian measure that provided for private persons to be present during the customs clearance for export of certain goods. Argentina defended in part on the ground that the EC really was complaining about the substance of a measure rather than its administration.²⁰ In rejecting Argentina's argument, the panel stated:

“Of course, a WTO Member may challenge the substance of a measure under Article X. The relevant question is whether the substance of such a measure is administrative in nature or, instead, involves substantive issues more properly dealt with under other provisions of the GATT 1994. . . . If the substance of a rule could not be challenged, even if the rule was administrative in nature, it is unclear what could ever be challenged under Article X. . . .”²¹

23. Likewise, in the present dispute, the line the EC draws between substance and administration would render Article X:3(a) meaningless. By characterizing all laws, regulations, and rules pertaining to customs matters as substantive measures, the EC would put all laws,

²⁰Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, para. 11.69 (adopted Feb. 16, 2001) (“*Argentina – Hides*”).

²¹Panel Report, *Argentina - Hides*, paras. 11.69 - 11.70.

regulations, and rules that are instruments of customs administration beyond the reach of the disciplines Members have agreed to in Article X:3. It defies logic to suggest that a GATT obligation can be eliminated simply by virtue of such characterization.

The EC Fails to Rebut Evidence That Divergences Occur and Are Not Systematically Reconciled.

24. In its second line of argument, the EC challenges the proposition that in the administration of customs law, divergences among member State authorities occur and are not systematically reconciled by the EC. In our first submission, we demonstrated this point through evidence of the EC's own admissions, statements by traders, and illustrations of particular cases in which divergences have occurred. The EC's response does not rebut this evidence.

25. When it comes to admissions by the EC or EC officials, the EC does not deny the truth of the statements asserted. At most, it belittles them. For example, a statement by the EC's Commissioner for Taxation and Customs Union recognizing that the Community Customs Code "may result in divergent application of the common rules"²² is summarily dismissed by the EC as "reflect[ing] the ongoing process of reform and review of EC customs law."²³ Statements by the EC's Court of Auditors identifying systemic problems in reconciling divergent administration of customs valuation laws are similarly tossed aside as "the expression of the views of one EC institution."²⁴ Admissions by the EC in the context of another recent dispute – *European*

²²U.S. First Written Submission, para. 2.

²³EC First Written Submission, para. 163.

²⁴EC First Written Submission, para. 387.

Communities - Customs Classification of Frozen Boneless Chicken Cuts – regarding institutional difficulties in monitoring divergences in binding tariff information issued by different member States²⁵ are not acknowledged at all.

26. Unlike the EC, the United States finds statements by EC institutions and officials highly relevant to the matter at hand. These statements are blunt acknowledgments of how the system of customs law administration operates by persons who are in positions to have the information and experience to know. The cumulative message that there is a problem of divergent administration and no mechanism to systematically reconcile divergences is undeniable.

27. Nor is the EC’s treatment of the illustrative cases cited by the United States any more effective at rebutting this point. For example, in our first submission, we laid out an illustrative case concerning divergent classification of LCD monitors. We noted that a regulation by the Council of the European Union suspended duties on a subset of such monitors, but that member States continued to apply different classifications to other monitors. In particular, we noted that the Netherlands continues to classify monitors with a diagonal measurement of greater than 19 inches as video monitors, whereas other member State classify them as computer monitors.²⁶ The EC’s terse response is that the classification by the Dutch authorities “is in line with the CN, as confirmed by the Customs Code Committee.”²⁷

28. That response is quite revealing for at least three reasons. First, it does not deny the divergence among member State authorities on this matter. Second and relatedly, by

²⁵U.S. First Written Submission, paras. 44 & 58 n.50.

²⁶U.S. First Written Submission, para. 74.

²⁷EC First Written Submission, para. 354.

characterizing the Dutch classification as “in line” with the CN, the EC suggests that more than one classification may be “in line” with the CN. But this is precisely the point of the illustration: Where more than one classification is “in line” with the CN, the EC does not provide a mechanism for systematically reconciling different classifications adopted by different member State authorities. Third, the Customs Code Committee conclusion with which the Dutch classification supposedly is “in line” is not itself in line with the relevant Chapter Note from the Common Customs Tariff. Specifically, the Committee conclusion would prohibit a monitor from being classified as a computer monitor (under Tariff heading 8471) unless an importer can demonstrate that it is “only to be used with an ADP machine”²⁸ – a computer machine. However, under the relevant Tariff chapter notes, a monitor may be classified as a computer monitor if “it is of a kind solely or principally used in an automatic data-processing system.”²⁹ This difference highlights the problem with relying on the Customs Code Committee to ensure uniform administration. It hardly is conducive to uniform administration for member State authorities to have to reconcile notes to the Common Customs Tariff that say one thing and a Customs Code Committee conclusion that says something entirely different.

29. To take another example, in our first submission, we described the illustrative case of differential administration of EC valuation rules with respect to Reebok International Limited. We described a situation in which different member State authorities have reached different conclusions as to whether RIL’s contracts with non-EC suppliers establish a control relationship

²⁸EC First Written Submission, para. 353 (emphasis added).

²⁹Commission Regulation 1810/2004 of 7 September 2004 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, *Official Journal of the European Union*, Oct. 30, 2004 at 504 (Chapter 84, note 5(B)(a)) (emphasis added). (Exh. US-46).

for customs valuation purposes, and EC institutions have not reconciled the divergence.³⁰ The EC dismisses this case as “relatively complex” and states without explanation that, upon its consideration of the matter, the Customs Code Committee “did not establish any incompatibility with EC law, or lack of uniformity between EC Member States.”³¹ Then, the EC goes on to state that “the Customs Code Committee is not a substitute for the normal appeals mechanisms before the national courts.”³²

30. This response is notable for at least two reasons. First, the EC does not deny the essential facts as described in the U.S. first submission. It merely calls them “complex” and states that the Customs Code Committee found no lack of uniformity. But, it does not deny the essential facts that establish a divergence of administration. Second, in stressing that “the Customs Code Committee is not a substitute for the normal appeals mechanisms before the national courts” the EC in effect reinforces the crux of the U.S. argument: There is no EC mechanism for ensuring uniform administration. If a trader receives different treatment in one member State as compared with another, the only recourse is to appeal the adverse treatment through the courts of the appropriate member State. There is no EC institution before which the trader has a right to obtain uniform treatment.

31. In any case, in numerous other parts of its first submission, the EC readily acknowledges that divergences among member States exist.³³

³⁰U.S. First Written Submission, paras. 90-92.

³¹EC First Written Submission, para. 407.

³²EC First Written Submission, para. 410.

³³See, e.g., EC First Written Submission, paras. 144, 238, 396, 401, 426.

The EC Fails to Rebut the U.S. Demonstration That There is an Absence of Any Mechanism to Ensure the Uniform Administration of EC Customs Law.

32. In its third line of argument, the EC challenges the proposition that there is no EC mechanism to ensure uniform administration of EC customs law. In our first submission, we demonstrated that customs law in the EC is administered by 25 different member State authorities, that this results in divergences of administration, and that no EC institution exists to systematically reconcile those divergences. To demonstrate this last point, we focused on the role of the Commission and the Court of Justice in matters of customs administration. We focused on these two institutions, because the EC had asserted to the DSB that it was through the operation of these two institutions that uniform administration is enforced.³⁴ We showed that neither institution functions in a way that results in uniform administration.

33. Our discussion of the role of the Commission logically led us to focus on the Customs Code Committee which, as the EC acknowledges, “is an integral part of the Community’s regulatory process.”³⁵ Both the Community Customs Code and the Common Customs Tariff provide for the adoption of implementing measures by the Commission in accordance with procedures that include mandatory participation by the Committee.³⁶

34. Because of the integral part played by the Committee, it is important to understand how the Committee functions. We demonstrated that various aspects of the Committee’s operation

³⁴See U.S. First Written Submission, para. 120 (citing EC statement from Mar. 21, 2005 DSB meeting).

³⁵EC First Written Submission, para. 85.

³⁶See EC First Written Submission, paras. 82-84.

make it ineffective as a mechanism to systematically bring uniformity to the administration of customs law. These include the absence of any right for a trader affected by a member State's administration of the law to petition the Committee and the difficulty of obtaining answers to technical questions of divergence in member State customs administration where those answers require the support of qualified majorities of 25 member State representatives.³⁷

35. With respect to the ECJ, we demonstrated that limitations on the ability to get questions reviewed by the ECJ, procedural hurdles that must be passed before doing so, and the time it takes to get questions answered by the ECJ make this institution, too, an ineffective mechanism to systematically bring uniformity to the administration of customs law.³⁸

36. The EC challenges our understanding of the operation of EC law and institutions. As we understand it, the EC contends that in seeking to identify EC mechanisms that ensure uniformity of administration we have focused inappropriately on the Customs Code Committee and given inadequate attention to certain principles of EC law as well as EC institutions and instruments of administration.

37. The main problem with this argument is that, on closer inspection, 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.

38. For example, the EC refers to the existence of detailed substantive laws. But, detailed substantive laws surely do not themselves ensure uniform administration. Indeed, the EC itself

³⁷See U.S. First Written Submission, paras. 121-132.

³⁸U.S. First Written Submission, paras. 133-153.

stresses the distinction between substance and administration.³⁹ Moreover, the cataloging of divergent administration in the EC Court of Auditors report on customs valuation (Exh. US-14) demonstrates that detailed laws are not themselves a substitute for uniform administration.

39. In other instances, the mechanisms the EC identifies represent an ideal of uniform administration to which the EC aspires. For instance, the EC refers to the “duty of cooperation” in Article 10 of the EC Treaty.⁴⁰ It also attaches importance to the principles of supremacy and direct effect as doctrines that are “essential for the effective and uniform application of Community law.”⁴¹ However, it cannot be assumed that by virtue of the duty of cooperation or the doctrines of supremacy and direct effect uniformity of administration necessarily is achieved. Indeed, these principles do not answer the question of what happens when EC law itself permits more than one manner of administration.

40. Another instrument for achieving uniform administration that the EC describes is the ability of traders to address matters of concern to the Commission or to member State representatives, which may or may not, in turn, address them to the Customs Code Committee.⁴² The EC notes that Commission staff are bound by principles of good administrative behavior, which require them to address all enquiries as quickly as possible.⁴³ Yet, as the EC itself acknowledges, the Commission and member State representatives are under no obligation to

³⁹See, e.g., EC First Written Submission, paras. 216-217.

⁴⁰EC First Written Submission, paras. 44, 261.

⁴¹EC First Written Submission, paras. 38, 261.

⁴²EC First Written Submission, para. 275.

⁴³EC First Written Submission, para. 49.

bring any given matter before the Committee. The decision whether a matter “requires consideration by the Committee” is entirely within the discretion of the Commission or the member State with which it is raised.⁴⁴

41. The EC also emphasizes the role of appeals to national courts, with the possibility of preliminary references to the ECJ, as a means of ensuring uniform administration. Thus, it states that “[i]t is through preliminary references that divergences within and between the Member States can be avoided and the effective application of Community law be assured.”⁴⁵ In other words, a principal means to achieve uniform administration of customs law in the EC, according to this assertion, is through litigation. Where a trader encounters a lack of uniform administration, its recourse is to appeal one or more of the divergent actions to a national court which (unless it is a court from which there is no recourse) may or may not make a preliminary reference to the ECJ. Even if the court does make a preliminary reference to the ECJ, the matter still may take years to decide.

42. In short, where a trader detects a lack of uniform administration it has no right to appeal to an EC institution to correct the lack of uniformity. Instead, it must proceed through “the normal appeals mechanisms before the national courts”⁴⁶ in the hope that this may lead eventually to an elimination of the non-uniformity. The proposition that the normal appeals mechanism is a key instrument of uniform administration is notable for at least three reasons. First, litigation is a particularly cumbersome tool to achieve the day-to-day operational uniformity of administration

⁴⁴EC First Written Submission, para. 275.

⁴⁵EC First Written Submission, para. 185; see also id., paras. 379, 410.

⁴⁶EC First Written Submission, para. 410.

that Article X:3(a) contemplates. Second, the EC's contention in this regard is at odds with its separate contention – in discussing the U.S. Article X:3(b) claim – that the obligation of uniform administration and the obligation to provide remedies from administrative action are discrete obligations without any inherent link to one another.⁴⁷ Here, the EC suggests that they are inherently intertwined. Third, the EC's emphasis on the normal appeals mechanisms leaves open the critical question of what happens if a national court or, eventually, the ECJ finds that both the administrative action appealed and the divergent administrative action to which it is compared are consistent with the applicable provision of EC customs law. In other words, the EC does not, and cannot, contend that lack of uniformity itself is grounds for appeal from and correction of administrative action. Thus, the emphasis the EC places on a trader's right to pursue the "normal appeals mechanisms" does not really answer the question of how non-uniformity is eliminated when EC law permits two or more non-uniform measures to co-exist.

43. In a similar vein, the EC's reference to the Commission's power to bring infringement proceedings against member States that violate EC law⁴⁸ is of little relevance. It may be that there are instances in which a divergence in administration of EC law is so extreme as to give rise to an infringement proceeding. But, this extraordinary tool hardly serves to achieve uniformity of administration where divergent practices do not give rise to breaches of EC law.

44. In short, a large part of the EC's argument is devoted to painting a picture of customs law administration in the EC in which various instruments combine to ensure uniformity. But, when looked at closely, the elements of that picture do not add up to a mechanism that provides for the

⁴⁷EC First Written Submission, para. 461.

⁴⁸EC First Written Submission, paras. 46, 261.

systematic reconciliation of divergences among member State customs authorities. In the event of non-uniform administration, the only element of this picture that actually constitutes a right for a trader to pursue a course of action that may eliminate the non-uniformity is the right to appeal particular administrative actions through member State courts. But that right goes to violations of substantive law, as opposed to divergent administration of substantive law. The availability of that right surely does not discharge the EC's obligation of uniform administration.

45. What is glaringly absent from this picture is any EC mechanism to systematically reconcile divergences in member State administrative actions. There simply is no EC institution to which a trader can turn when it encounters a lack of uniformity in administration – whether or not one of the non-uniform acts is itself consistent with EC law – and be entitled to an elimination of the non-uniformity.

Member State Divergences That the EC Does Acknowledge Evidence Lack of Uniform Administration in Breach of Article X:3(a).

46. The EC's fourth line of argument is that certain divergences in member State practice are not really matters of administration of EC customs law at all. The EC applies this argument, in particular, to penalty provisions and audit procedures.⁴⁹ It characterizes such matters as part of the general administrative law of individual member States. It follows, according to the EC's reasoning, that the EC has no Article X:3(a) obligation with respect to these matters. The only Article X:3(a) obligation applies to the particular member States in which the laws at issue apply,

⁴⁹It applies the argument to other matters as well, such as time frames for the retention of documents related to customs clearance. See EC First Written Submission, para. 426.

according to the EC.⁵⁰ That is, the only obligation is that each member State administer its own penalty or audit laws uniformly within its own territory.

47. The implications of this line of argument are quite astounding. By the EC's logic, one could define away almost any obligation under Article X:3(a). Where a divergence in administration takes the form of different measures applicable in different regions within a Member's territory, the Member could label the measures as substantive law rather than instruments of administration of customs law and thus avoid the obligation of Article X:3(a) entirely. As we discussed earlier, the panel in *Argentina - Hides* saw through and rejected a similar argument. As it correctly observed, "If the substance of a rule could not be challenged, even if the rule was administrative in nature, it is unclear what could ever be challenged under Article X. . . ." ⁵¹

48. The EC's argument in this dispute is even more troubling than the argument that the panel rejected in *Argentina - Hides*, because the EC is suggesting that the obligation of uniform administration does not necessarily extend to the limits of each WTO Member's territory. The obligation is mutable, according to the EC. For any given law being administered, it applies only to the limits of the territory covered by that law. By this logic, there is no obligation of uniform administration from region to region or even from locality to locality. The only obligation is uniform administration within each region or locality.

49. This argument has no basis in Article X:3(a). That article applies to "each Member." Like other GATT obligations, the obligation of uniform administration is an obligation on the

⁵⁰See EC First Written Submission, paras. 219, 434.

⁵¹Panel Report, *Argentina - Hides*, paras. 11.69 - 11.70.

Member. It is not a separate obligation on each individual region or locality within the Member's territory. Were it otherwise, any instance of geographical non-uniform administration could be argued away simply by sub-dividing the Member's territory and treating each sub-division separately for purposes of Article X:3(a).

50. Moreover, it is especially puzzling that the EC characterizes penalty provisions and audit procedures as outside the scope of Article X:3(a). Those instruments go to the heart of the way substantive customs rules are administered. Indeed, the character of penalties as a critical tool for the administration of other laws is expressly acknowledged in the Council Resolution on penalties set forth in Exhibit EC-41. There, it is recognized that “the absence of effective, proportionate and dissuasive penalties for breaches of Community law could undermine the very credibility of joint legislation. . . .”⁵² Standards for penalty provisions also are addressed in the International Convention on the Simplification and Harmonisation of Customs Procedures (the Kyoto Convention). We therefore find it remarkable that the EC would assert that penalty provisions are beyond the purview of an obligation pertaining to the administration of customs laws.

51. The EC also asserts that penalties fall outside the scope of Article X:3(a) because they pertain to “illegitimate actions rather than legitimate trade.”⁵³ That argument mischaracterizes both Article X and the concept of penalties. Article X does not make the distinction between legitimate and illegitimate trade that the EC posits. Even if it did make such a distinction, it is not the case that penalties apply only to illegitimate trade. The *de Andrade* case cited in the U.S. first

⁵²Council Resolution of 29 June 1995 on the effective and uniform application of Community law and on the penalties applicable for breaches of Community law in the internal market, p. 1 (Exh. EC-41).

⁵³EC First Written Submission, para. 432.

submission is a perfect example of the application of a penalty in the context of legitimate trade. The only offense at issue there was a failure to clear goods through customs within the time period specified in the Community Customs Code. Article 53(1) of the Code required the Portuguese customs authorities to “take all measures necessary” to address this situation, which they did by putting the goods up for auction under procedures provided in national law. In that case, a penalty was used as a tool to administer customs laws as applicable to legitimate trade – to ensure the efficient flow of goods through the customs process.

52. The EC argues in the alternative that even if Article X:3(a) does apply to penalties, fundamental principles of EC law ensure that penalties meet the requirements of uniform administration. The fundamental principles to which the EC refers are requirements that penalties be “effective, proportionate, and dissuasive.”⁵⁴ But, these very general principles permit a wide range of member State practices. As the EC itself acknowledges, “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.”⁵⁵ The EC cannot seriously suggest that it discharges its obligation of uniform administration where the applicable legal doctrines permit such dramatic divergences in administration. Accepting that argument would effectively render Article X:3(a) meaningless.

53. The same flaws attach to the EC’s discussion of customs audits. In our first submission, we called attention to significant divergences in auditing practices identified in the EC Court of

⁵⁴EC First Written Submission, para. 440.

⁵⁵European Commission, Directorate-General for Taxation and Customs Union, TAXUD/447/2004 Rev 2, *An Explanatory Introduction to the Modernized Customs Code*, p. 13 (Feb. 24, 2005). (Exh. US-32).

Auditors report.⁵⁶ As with penalties, the EC summarily dismisses this point by asserting that “questions of auditing are not part of customs procedures, and therefore do not concern the administration of customs law as such.”⁵⁷ Nowhere does the EC state its basis for this assertion, which is entirely incorrect. Like penalties, audits are essential tools in administering substantive customs laws. The EC itself apparently recognizes this in its regional trade agreements. Thus, for example, its regional trade agreement with Chile includes an obligation that the Parties’ “respective trade and customs provisions and procedures shall be based upon . . . the application of modern customs techniques, including . . . company audit methods. . . .”⁵⁸

54. In our first submission, we also discussed the fact that, in connection with audits, some member State authorities provide traders with binding valuation guidance that may be relied upon in future transactions, while others do not.⁵⁹ The EC dismisses this observation by stating that “[w]hether such advice might be legally binding is a question of general administrative law of the Member States.”⁶⁰ Once again, by a simple act of characterization, the EC purports to remove a matter from review under Article X:3(a). It may be the case that the legally binding nature of valuation advice is a question of general administrative law of the member States. But, this does not change the fact that the variations from member State to member State amount to variations in the way different member States administer EC customs law. The EC cannot avoid this fact

⁵⁶See U.S. First Written Submission, paras. 96-99.

⁵⁷EC First Written Submission, para. 400.

⁵⁸Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, Art. 79(3)(c) (concluded Apr. 26, 2002). (Exh. US-47).

⁵⁹See U.S. First Written Submission, paras. 98-99.

⁶⁰EC First Written Submission, para. 401.

simply by labeling valuation guidance as a matter of substantive member State law.

55. Further, we see no basis for the EC’s assertion that different member State approaches to valuation guidance are not “significant from the point of view of Article X:3(a) GATT.”⁶¹

Whereas some member States provide traders with legal certainty as to how specified transactions will be treated going forward, others do not.

Prompt Review and Correction

56. We turn, finally, to the EC’s argument regarding Article X:3(b). In our first submission, we demonstrated that the EC does not provide tribunals or procedures for the prompt review and correction of administrative action relating to customs matters. The individual member States provide fora for review of customs decisions, but the existence of these fora does not fulfill the obligation of the EC, as a WTO Member in its own right. We argued that the Article X:3(b) obligation must be interpreted in light of its context, which includes Article X:3(a), and that a fragmentation of review of customs decisions across the territory of a Member runs contrary to that provision’s obligation of uniform administration.

57. The EC counters that use of the plural form in Article X:3(b) means that it is permissible for a Member to have several different review tribunals, “each of them covering a part of its geography.”⁶² The EC also maintains, in effect, that member State courts are EC courts for purposes of application and interpretation of EC law.⁶³ Finally, the EC asserts that there is no link

⁶¹EC First Written Submission, para. 401.

⁶²EC First Written Submission, para 454.

⁶³EC First Written Submission, paras. 456-457.

between subparagraphs (a) and (b) of Article X:3 and, therefore, there is no obligation to interpret the latter in light of the former.⁶⁴

58. This last argument is especially surprising, given the EC's explanation of how uniformity of customs law administration is achieved in the EC. A theme repeated throughout the EC's first submission is that appeals of customs decisions to national courts, coupled with the possibility of national courts making preliminary references to the ECJ, constitutes a critical instrument of ensuring uniform administration of customs law. In other words, in its Article X:3(a) argument, the EC effectively contends that reviews of customs decisions and administration of customs laws are closely intertwined. That position supports interpreting the obligation to provide reviews of customs decisions in light of the obligation to administer customs laws uniformly. The EC's summary disavowal of any link between the two obligations when it comes to discussion of Article X:3(b) is unavailing.

59. Moreover, the EC simply is wrong to assert that Article X:3 "does not make any link" between subparagraphs (a) and (b). The second sentence of subparagraph (b) expressly states that the decisions of the tribunals or procedures maintained or instituted in accordance with that subparagraph "shall govern the practice of" "the agencies entrusted with administrative enforcement." Administrative enforcement, in turn, is the subject of subparagraph (a). That is the link.

60. The EC's contention that use of the plural form in Article X:3(b) "clearly allows"⁶⁵ the provision of separate review tribunals covering different parts of a Member's territory is equally

⁶⁴EC First Written Submission, para. 461.

⁶⁵EC First Written Submission, para. 454.

flawed. Use of the plural form could indicate the permissibility of multiple fora for review of customs decisions, but it does not follow logically that separate and independent fora may be provided for each of several different regions within a Member's territory. Use of the plural form in Article X:3(b) might allow for the possibility that a Member may provide different fora for different types of review. For example, a Member might provide an administrative tribunal for reviews of classification and valuation decisions and a separate judicial tribunal for reviews of penalty decisions. This interpretation gives effect to use of the plural form in Article X:3(b) without running afoul of the obligation to interpret that provision in light of the context of Article X:3(a).

61. Finally, the EC asserts that it fulfills its Article X:3(b) obligation, because member State courts are EC courts when it comes to the application and interpretation of EC law.⁶⁶ To support this assertion, the EC refers to the panel report in *EC - Trademarks and Geographical Indications (US)*. There, the panel found that in the exercise of certain executive functions, member State authorities “act *de facto* as organs of the Community.”⁶⁷ Without any explanation at all, the EC asserts that the panel's reasoning in that dispute applies with equal force to member State judicial authorities exercising adjudicatory functions.⁶⁸

62. The conclusion the EC asserts does not, in fact, flow from the statement it quotes from the *Trademarks and Geographical Indications* report. First, the issue presented there was

⁶⁶EC First Written Submission, paras. 456-457.

⁶⁷EC First Written Submission, para. 456 (quoting Panel Report, *European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by the United States*, WT/DS174/R, para. 7.725 (adopted Apr. 20, 2005)).

⁶⁸EC First Written Submission, para. 457.

substantially different from the one presented here. The issue there had absolutely nothing to do with obligations of the EC; it had to do with obligations of particular member States. The question was whether an individual member State executing an EC regulation in a manner that discriminated between persons of other EC member States, on the one hand, and persons of non-EC member States, on the other, violated a most-favored-nation obligation. This very different context makes it impossible to extrapolate from the finding in that dispute to the issue presented in this dispute.

63. Second, as we have discussed, the nature of the Article X:3(b) obligation is such that it cannot be carried out in a geographically fragmented way in a single Member, such as the EC. It cannot be assumed that one panel's recognition of member State *executive* authorities as *de facto* EC authorities for one particular purpose in the context of one particular WTO obligation means that another panel must recognize member State *judicial* authorities as *de facto* EC authorities for a different purpose in the context of an entirely different WTO obligation.

64. In short, the fact that the EC may consider member State courts to be acting as *de facto* EC courts when they interpret and apply EC law does not mean that the EC itself provides the tribunals or procedures required by Article X:3(b). It remains the fact that member State tribunals interpret and apply the law within the territory of their respective member States. They can bind administrative agencies only within their respective member States. For the reasons we have set out in our first submission, this arrangement does not meet the EC's obligation under Article X:3(b).

Conclusion

65. Mr. Chairman, members of the Panel, this concludes the oral statement of the United States. We thank you for your attention. We would be pleased to receive any questions you may have.