BEFORE THE

WORLD TRADE ORGANIZATION

EUROPEAN COMMUNITIES - SELECTED CUSTOMS MATTERS

(WT/DS315)

ANSWERS OF THE UNITED STATES OF AMERICA TO THE PANEL'S QUESTIONS IN CONNECTION WITH THE SECOND SUBSTANTIVE MEETING

December 7, 2005

QUESTION 124: *In its replies to Panel question Nos. 1, 3, 5 and 114, the United States submits that it is not challenging specific areas of customs administration under Article X:3(a) of the GATT 1994. Rather, it is challenging the absence of uniformity in the administration of EC customs laws as a whole/overall.*

(a) Please make specific reference to the terms of the United States' request for establishment of a panel WT/DS315/8 to support the United States' submission that such a challenge is within the Panel's terms of reference.

(b) Please confirm that the United States is only requesting the Panel to make findings on the conformity or otherwise of the European Communities' system of customs administration as a whole and not on the specific areas of customs administration to which the United States has referred to in its submission to substantiate its claim of violation of Article X:3(a) by the European Communities.

1. The first sentence of the United States' request for establishment of a panel states that "the manner in which the [EC] administers its laws, regulations, decisions and rulings of the kind described in Article X:1 . . . is not uniform, impartial and reasonable and therefore is inconsistent with Article X:3(a) of the GATT 1994."[1] The request then proceeds to identify the laws and regulations that make up "EC customs laws as a whole." That is, first, it identifies the Community Customs Code ("CCC"), the CCC Implementing Regulation ("CCCIR"), and the Community Customs Tariff ("Tariff Regulation"). These are the principal elements of EC customs law as a whole.[2] The request then identifies several related instruments.

2. In the third paragraph, the request makes clear that the lack of uniform administration that forms the basis for the U.S. complaint is "manifest in differences among member States in a number of areas, including but not limited to" those that are enumerated. This text, too, reflects

[1]Since first making its request for establishment of a panel, the United States has focused its complaint on non-uniform administration (as opposed to partial or unreasonable administration). *See* U.S. First Written Submission, para. 33 n.15.

[2]*See* EC First Written Submission, para. 63 (describing Community Customs Tariff, CCC, and CCCIR as "[t]he three main instruments of EC customs legislation").

the approach of the panel request as a challenge to the absence of uniformity of administration of EC customs law overall and demonstrates that a challenge based on administration of EC customs law as a whole is within the Panel's terms of reference.

3. With respect to part (b) of the Panel's question, it is correct that the principal finding that the United States is asking the Panel to make is that the EC's system of customs administration as a whole is inconsistent with Article X:3(a) of the GATT 1994. At the same time, making such a finding does not preclude findings on the specific areas of customs administration to which the United States has referred in its submissions and interventions to substantiate its claim of violation of Article X:3(a) by the European Communities. While such findings on specific areas of EC customs administration are not strictly necessary to make the finding requested with respect to the EC's system of customs administration as a whole, they would tend to support the overall finding requested. Accordingly, the United States would welcome findings on the specific areas, while recognizing that it may be appropriate to exercise judicial economy for findings in these specific areas in light of a finding of a breach concerning the EC's administration as a whole.

4. In particular, the evidence the United States has presented supports subsidiary findings that the EC fails to meet its GATT Article X:3(a) obligation of uniform administration with respect to the administration of:

- the Tariff Regulation;
- CCC Article 32(1)(c) (regarding treatment of royalty payments for customs valuation purposes);
- CCCIR Article 147 (regarding customs valuation on a basis other than the last

sale that led to introduction of a good into the customs territory of the EC);

- CCC Article 29 and CCCIR Article 143(1)(e) (regarding circumstances under which parties are to be treated as related for customs valuation purposes);
- all valuation provisions in the CCC and CCCIR (*i.e.*, CCC, Articles 28 to 36, and CCCIR, Articles 141 to 181a and Annexes 23 to 29), to the extent that different member State authorities employ different audit procedures (with only some providing binding valuation guidance, for example[3]), making "individual customs authorities . . . reluctant to accept each others decisions;"[4]
- all classification and valuation provisions in the Tariff Regulation, CCC, and CCCIR, to the extent that different member State authorities have at their disposal different penalties to ensure compliance with those provisions; and
- CCC Article 133 and CCCIR Articles 502(3) and 552 (regarding assessment of the economic conditions for allowing processing under customs control); and
- CCCIR Article 263-267 (regarding local clearance procedures).

5. To be clear, the Panel does not need to make the foregoing findings in order to make the overall finding of non-conformity with Article X:3(a) requested by the United States. The systemic breach that the United States has established – the administration of the customs laws by 25 independent, territorially limited customs authorities, coupled with the lack of any

[3]*See* U.S. First Written Submission, paras. 98-99.

[4]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, para. 37 (Mar. 14, 2001) ("Court of Auditors Valuation Report") (Exh. US-14); *see* U.S. First Written Submission, paras. 96-97.

effective, binding EC procedures or institutions to ensure these authorities administer EC customs laws uniformly – applies to all aspects of customs administration within the EC. The United States believes that non-conformity with Article X:3(a) can be found on the basis of the design and structure of the EC's system of customs administration.[5] Nevertheless, the divergences in specific areas of customs administration that the United States has identified corroborate what necessarily results from the design and structure of the system. Accordingly, the United States would welcome findings on these specific areas of divergence.

> **QUESTION 125**: *With respect to its claim under Article X:3(a) of the GATT 1994, is the United States only challenging non-uniformity of decisions/action taken by the member States or is the United States also challenging non-uniformity of decisions/action taken at the EC-level (e.g. by EC institutions)? If the latter, please elaborate.*

6. The United States is challenging non-uniformity in the administration of EC customs law. That law is administered principally by authorities located in each of the EC's 25 member States.[6] As the EC states, "[T]he Commission is not normally directly involved with the administration of EC customs law."[7]

7. Decisions and actions taken by the Commission and other EC institutions have a role in the administration of EC customs law. But, it is the administration of EC law by the authorities located in each of the EC's 25 member States that is the focus of the U.S. claim.

8. EC institutions are relevant to the U.S. claim, inasmuch as they do not step in to ensure

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[5] *Cf.* Panel Report, *Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, para. 4.601 (adopted Sep. 27, 2004 with Appellate Body report) (EC as third party arguing that violation of GATT obligation may be found on the basis of "structural shortcomings") ("*Canada - Wheat*").

[6] *See, e.g.*, EC First Written Submission, paras. 78-79.

[7] EC First Written Submission, para. 79.

uniform administration among the separate authorities spread throughout the territory of the EC. In other words, the absence of action by EC institutions is relevant. The absence of such action refutes the argument that even though the administration of EC customs law is carried out by 25 independent, regionally limited authorities, it nonetheless becomes uniform by virtue of the existence of various EC procedures and institutions.

> **QUESTION 126**: *Is the United States' case essentially that the design and structure of the European Communities' system of customs administration necessarily results in violation of Article X:3(a) of the GATT 1994? If so:*
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> > *(a) Please specifically identify the aspects of the European Communities' system that necessarily result in a breach of Article X.3(a).*

9. In answering this question, it is first important to be clear about what the United States understands "design and structure of the European Communities' system of customs administration" to mean. The United States understands that term to refer to the following:

- Customs law in the EC is prescribed by EC institutions: the Council and the Commission.
- EC customs law is administered by 25 different authorities, each responsible for a different part of the territory of the EC.
- The EC has in place certain procedures and institutions which it contends secure uniform administration among the 25 different authorities. These include a general duty of cooperation among member States, guidelines on various matters (*e.g.*, the conduct of customs audits), discretionary mechanisms (*e.g.*, referral of questions to the Customs Code Committee), and the opportunity for traders to appeal customs administrative action to member State courts, with the possibility

of such courts eventually referring questions of EC law to the ECJ.

10. If the design and structure of the EC system of customs administration consisted of nothing more than customs laws prescribed by the Council and Commission and administered by 25 independent, regionally limited authorities, without any mechanism or other means even ostensibly present to ensure that the different authorities acted uniformly, then the EC undeniably would not fulfil its Article X:3(a) obligation. Indeed, the EC evidently does not dispute this point, as it contends that it is "the procedures and institutions of the EC legal system [that] provide for a uniform application and interpretation of EC law, including EC customs law."[8] That is, the very fact of 25 separate, independent authorities having to 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* would constitute lack of uniform administration, in breach of Article X:3(a).

11. Therefore, it is necessary to examine the "procedures and institutions of the EC legal system" that the EC identifies to determine whether they do, as the EC alleges, "provide for a uniform application and interpretation of . . . EC customs law." The United States submits that the procedures and institutions identified by the EC do not do this. Those procedures and institutions consist of very general obligations (*e.g.*, the obligation of cooperation under Article 10 of the EC Treaty) that are not operationalized in the customs context, non-binding guidelines, and discretionary instruments (*e.g.*, referrals to the Customs Code Committee). The only instrument of a binding character that the EC has identified is the right to appeal to a member

[8]EC Second Written Submission, para. 76.

State court, with the possibility of a referral to the ECJ. However, the possibility of eventually gaining redress before a review tribunal (which the EC is required to provide pursuant to GATT Article X:3(b)) is not a substitute for administering laws in a uniform manner in the first instance (as the EC is required to do pursuant to GATT Article X:3(a)). In addition, an appeal to a member State court is hardly an effective procedure for ensuring uniform administration, given the discretion a court has to *not* refer a question to the ECJ, even when confronted with a direct conflict in different authorities' administration of EC law,[9] and given the "expensive and time-consuming" nature of the procedure.[10]

12. In short, it is the *absence* of a critical feature from the design and structure of the EC's system of customs law administration that *necessarily* results in non-uniform administration in breach of GATT Article X:3(a). The missing critical feature is a procedure or institution that ensures that divergences of administration among the 25 different customs authorities do not occur or that promptly reconciles them as a matter of course when they do occur. The procedures and institutions that the EC identifies (even under the EC's characterization of those procedures

[9] *See* U.S. Second Oral Statement, paras. 31, 35-37.

[10] U.S. Second Oral Statement, para. 38 (quoting Edwin A. Vermulst, *EC Customs Classification Rules: Does Ice-Cream Melt?*, p. 21, posted at http://www.vvg-law.com/publications.htm ("Vermulst, *EC Customs Classification Rules*") (Exh. US-72)). In this regard, a remark by the EC in its closing statement at the second Panel meeting is revealing. With respect to the blackout drapery lining illustration, the EC noted "that both importers concerned by the German decisions, the Bautex GmbH and the Ornata GmbH, have not appealed the decisions. For this reason, the United States cannot now claim there to be a lack of uniformity attributable to the EC system." EC Second Closing Statement, para. 16. This observation actually reinforces the U.S. point with respect to appeals as a tool of securing uniform administration. Given the time and expense required to pursue an appeal – especially if one hopes eventually to reach the ECJ and obtain a judgment with EC-wide effect – a small importer may well find that option not to be cost-effective. In the EC's view, any non-uniformity that persists as the result of such a decision to refrain from pursuing an appeal cannot be the basis for a claim of "lack of uniformity attributable to the EC system." Thus the EC turns GATT Article X:3(a) on its head. It converts it from a provision focused on the obligations of a Member (in this case, the EC) to a provision that imposes a burden on traders to pro-actively seek out uniform administration.

and institutions) cannot and do not result in uniform administration of EC customs law by 25 independent, regionally limited customs authorities. Rather, the EC's institutions and procedures constitute a loose network within which various responses to non-uniform administration *may* occur but need not necessarily occur.[11]

13. This point is well illustrated in paragraph 99 of the EC's opening statement at the second Panel meeting. There, the EC stated that

> if a customs agency or a court in a[n] EC Member State does not share the interpretation of the EC legislation given by a court of another Member State, it *will* take the initiatives that are proper to its respective position in the system: the customs agency *shall* consult and discuss the issue with the Commission and the other Member States, the court in another Member State *will* or *shall* refer to the EC Court of Justice.[12]

Nowhere does the EC state the basis for its predictions as to what "will" or "shall" happen when a divergence in administration comes to light, and that is precisely the point. The design and structure of the EC system of customs administration lack procedures or institutions to ensure first, that divergences do not occur or, second, that when divergences that necessarily result from the EC's system come to light they "will" or "shall" be reconciled promptly and as a matter of course. As the system lacks any such procedures or institutions, it necessarily results in non-uniform administration in breach of GATT Article X:3(a).

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[11]*See* U.S. Closing Statement at Second Panel Meeting, paras. 5-6; U.S. Second Written Submission, paras. 48-52 (discussing various instances in which EC acknowledges general, non-binding, or discretionary nature of procedures and institutions held out as securing uniform administration); *see also* EC Second Opening Statement, paras. 51 ("What matters is not that the duty of cooperation is a general obligation, but that it exists. Moreover, its is legally binding and *can* be sanctioned by the Court of Justice.") (emphasis added), 61 ("*If* a question is referred to the Court of Justice, the normal situation will be that other procedures in which the same question is relevant *can* be suspended until the Court has given judgment.") (emphasis added).

[12]EC Second Oral Statement, para. 99 (emphases added); *see also* EC Replies to First Panel Questions, paras. 47-48, 58; EC First Written Submission, para. 86.

> *(b) Please explain why those aspects necessarily result in non-uniform administration in violation of Article X:3(a) in respect of each and every area of customs administrations in the European Communities.*

14. With respect to part (b) of the Panel's question, the aspects of the design and structure of the EC customs administration system to which the United States has referred – *i.e.*, administration by 25 separate, independent authorities and lack of procedures or institutions that can ensure against divergences or promptly reconcile them as a matter of course when they occur – result in non-uniform administration with respect to *all* areas of customs administration for the same reason. That is, the administration of classification rules, valuation rules, and customs procedures is subject to the same flawed regime.

15. In each of these areas, the only procedures or institutions that allegedly secure uniform administration are general, non-binding, discretionary procedures and institutions, with the exception of court review. But, as has been mentioned above, court review does not secure uniform administration, given the discretion that courts have in whether or not to refer matters to the ECJ, the lack of an obligation on the part of the customs authority in a given member State to follow the decisions of courts in other member States, and indeed, the lack of any mechanism to inform the customs authorities in the various member States of relevant customs decisions by courts in other member States.[13]

16. Finally, it is important to recognize that the U.S. argument does not end with the U.S. demonstration that the design and structure of the EC system necessarily results in non-uniform administration. In addition, the United States has shown throughout its submissions and

[13]*See* Answer to Question 126, *supra*; *see also* U.S. Second Opening Statement, paras. 31, 35-38; U.S. Second Written Submission, paras. 63-71.

interventions that the EC and senior EC officials have recognized an absence of uniform administration; it has shown examples of non-uniform administration; and it has shown that practitioners who actually must work within the system understand administration to be non-uniform. In short, while demonstrating that the design and structure of the EC system necessarily results in non-uniform administration is an important part of the U.S. argument, it is not the only part of the U.S. argument.

> **QUESTION 127**: *With respect to paragraph 10 of the United States' oral statement at the second substantive meeting, please specifically identify the "procedures" and "institutions" to which the United States refers in support of its claim of violation of Article X:3(a) of the GATT 1994 on the part of the European Communities.*

17. The reference to "procedures" and "institutions" in paragraph 10 of the U.S. oral statement at the second substantive meeting is a quotation from paragraph 76 of the EC's second written submission. As noted in the U.S. response to the Panel's Question 126, the EC evidently recognizes that, taken by itself, the administration of EC customs law by 25 separate, independent customs authorities would not fulfil the EC's obligation of uniform administration under GATT Article X:3(a). There would have to be procedures or institutions to ensure that the 25 separate, independent authorities administered the law in a uniform manner. Recognizing this point, the EC has identified various procedures and institutions which it claims perform that function, and which the United States has demonstrated do not perform that function, for reasons discussed in response to Question 126 and in prior submissions and interventions.

18. Those procedures and institutions are:

- the general obligation of cooperation among member States set forth in Article 10 of the EC Treaty;

- the possibility, under Article 226 of the EC Treaty, of the Commission bringing an action against a member State for infringing an obligation under EC law;
- the possibility of a question being referred to the Customs Code Committee, at the discretion of a Commission or member State representative;
- the issuance of regulations, non-binding explanatory notes, non-binding opinions by the Customs Code Committee, non-binding guidance and information (as, for example, the compendium on customs valuation, the guidelines on audit procedures, and the Administrative Guidelines on the European Binding Tariff Information System);
- the issuance of BTI by customs authorities in individual member States, which need not be followed in other member States except with respect to the individual holder of the BTI;
- general provisions, including guidance by the ECJ providing that penalty provisions be "effective, proportionate and dissuasive"; provisions on information sharing among member States set forth in Regulation (EC) 515/97; the Customs 2007 action program, which aspires to attain a greater degree of cooperation among customs authorities by the end of 2007; and Council Regulation (EC/Euratom) No 1150/2000 on collection of the EC's "own resources"; and
- the option for an affected party to appeal an adverse customs action to a member State court, with the possibility of eventual referral of relevant questions of EC law to the ECJ.

19. What is notable, from the perspective of the U.S. GATT Article X:3(a) claim, is that *not*

one of the foregoing procedures or institutions ensures against divergences that inevitably result when the 25 independent, regionally limited customs authorities are confronted with the myriad of day-to-day choices in administering the EC's customs law, and *not one* of the foregoing procedures or institutions provides for prompt reconciliation as a matter of right of such divergences that do occur. As explained in the U.S. response to Question 126 and in prior U.S. submissions,[14] these procedures and institutions are distinguished by their very general, non-binding, and discretionary qualities. Of all of these procedures and institutions, the only one that a trader can access as a matter of right when it encounters non-uniform administration is the option of appealing an adverse decision to a member State court and urging that court or, eventually, a superior court to exercise its power to refer a question to the ECJ. The existence of that single procedure of a binding nature does not fulfil the EC's Article X:3(a) obligation, as previously discussed.

> **QUESTION 128**: *In its reply to Panel question No. 3, the United States explains that, while it is principally challenging Council Regulation (EEC) No. 2913/92 of 12 October 1992; Commission Regulation (EEC) No. 2454/93 of 2 July 1993; and the Integrated Tariff of the European Communities established by Council Regulation (EEC) No. 2658/87 of 23 July 1987, these measures are supplemented by miscellaneous Commission regulations and other measures pertaining to customs classification and valuation and customs procedures. Please specifically identify these supplementary measure(s).*

20. First, the United States wishes to make clear that it is not challenging the measures referred to in this question *per se* but, rather, the *administration* of those measures.

21. The measures identified represent the principal substance of EC customs laws.[15] There

[14]*See, e.g.*, U.S. Second Written Submission, paras. 48-52; U.S. First Oral Statement, paras. 32-45.

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

are, as the EC has indicated, related regulations and other measures pertaining to customs classification and valuation and customs procedures.[16] As the same system of administration that applies to the three identified measures also applies to the miscellaneous related measures, the problem of non-uniform administration applies equally to those other measures.

22. The United States has referred to some supplementary measures. For example, the United States has referred to the Council regulation suspending duties on a subset of LCD monitors.[17] The United States also has referred to the explanatory note on the classification of certain camcorders.[18] These are supplementary measures that the EC does not administer in a uniform manner. Like these supplementary measures, other supplementary measures pertain to specific products or groups of products in ways that elaborate on provisions set forth in the three core customs laws. Because of their specificity and the diverse range of issues covered, it would be impossible to identify all such measures.

> **QUESTION 129**: *With respect to the United States' argument that certain laws can be considered as "administrative in nature" and/or as "tools of administration" for the purposes of Article X:3(a) of the GATT 1994:*
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> > *(a) Please list all laws/substantive provisions in the EC customs administration regime enacted by the European Communities or by the member States other than penalty laws that the United States classifies as "administrative" in nature and/or that qualify as a "tool of administration".*

[16] *See, e.g.*, EC First Written Submission, paras. 92-96.

[17] *See* U.S. First Written Submission, para. 74 (referring to Council Regulation (EC) No 493/2005 of 16 March 2005, *Official Journal of the European Union* L82/1 (Mar. 31, 2005) (Exh. US-28)).

[18] U.S. Second Oral Statement, para. 28 (referring to Uniform Application of the Combined Nomenclature (CN), *Official Journal of the European Communities*, July 6, 2001, p. C 190/10 (Exh. US-61), and Explanatory Notes to the Combined Nomenclature of the European Communities, *Official Journal of the European Communities*, July 13, 2000, p. 316 (Exh. US-62)).

(b) Referring to the terms of Article X:3(a), would such "tools of administration" have to qualify as laws "of general application" within the meaning of Article X:1 of the GATT 1994?

23. In addition to penalty laws, other provisions the United States has referred to that are administrative in nature are binding tariff information, member State audit provisions, member State guidelines on applying the economic effects test for deciding whether to allow processing under customs control, and guidelines issued by EC institutions (such as the Community Customs Audit Guide (Exh. EC-90)). The features common to these various provisions that make them administrative in nature are the very features identified by the panel in *Argentina - Hides* at paragraph 11.72 of its report. In particular, none of these provisions establish substantive customs rules. The substantive customs rules are set forth in other provisions (notably, the Tariff Regulation, the CCC, and the CCCIR). Furthermore, each of the foregoing provisions simply "provides for a certain manner of applying those substantive rules."[19]

24. These tools of administration need not necessarily qualify as laws of general application within the meaning of Article X:1 of the GATT 1994. For purposes of Article X:3(a), it is the object of administration – the thing being administered – as opposed to the provision doing the administering, that must be a law of general application within the meaning of Article X:1. This is evident from the grammatical structure of Article X:3(a), in which the phrase "laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article" is the

[19]Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, para. 11.72 (adopted Feb. 16, 2001) ("*Argentina - Hides*").

object of the phrase "shall administer in a uniform, impartial and reasonable manner."[20]

> **QUESTION 130**: *The panel in its report in Argentina – Hides and Leather stated in paragraphs 11.71 and 11.75 that laws that are "administrative in nature" may be considered for their substance under Article X:3(a) of the GATT 1994. Assuming a distinction between laws that are "administrative in nature" and those that are not is justified under Article X:3(a), what criteria should be applied in determining whether or not a measure is "administrative in nature"?*

25. The panel in *Argentina – Hides* referred to certain criteria for determining whether a measure is administrative in nature. At paragraph 11.72 of its report, it found that the measure at issue there – Argentina's Resolution 2235 – was administrative in nature. In reaching that conclusion, it noted that "Resolution 2235 does not establish substantive customs rules for enforcement of export laws." It noted that the substantive rules were contained in other laws. It also noted that Resolution 2235 "provide[d] for a certain manner of applying those substantive rules."

26. These criteria take account of the ordinary meaning of "administrative." A measure is administrative if it is executive in nature, that is, if it has "the function of putting something into effect."[21] Thus, the ordinary meaning of "administrative" suggests a distinction between the thing being put into effect and the thing that does the work of putting it into effect. The criteria identified by the panel in *Argentina - Hides* are premised on that distinction and enable an observer to determine on which side of that distinction a given measure falls in view of the

[20]This does not mean that measures that are tools of administration *do not* qualify as laws of general application within the meaning of Article X:1 of the GATT 1994. In other analytical contexts, such measures may constitute the objects of administration, in which case it would be relevant to consider whether they are laws of general application within the meaning of Article X:1. *See* U.S. Second Oral Statement, paras. 76-77.

[21]*See* U.S. Answers to First Panel Questions, para. 158.

applicable analytical framework.[22] The United States submits that they are appropriate criteria for this Panel to apply in determining whether penalty provisions and audit provisions, in particular, are administrative in nature. For reasons the United States has discussed in previous submissions, the answer is that they are administrative in nature.[23]

27. Penalty and audit provisions do not establish substantive customs rules. Rather, they provide for a manner of applying substantive rules that are set forth in other measures (*e.g.*, the Tariff Regulation, CCC, and CCCIR). In a system that relies heavily on traders making truthful declarations about their imports, penalty and audit provisions ensure compliance with the substantive rules. Accordingly, they qualify as "administrative in nature" under the criteria in *Argentina – Hides*.

28. As penalty and audit provisions are administrative in nature, differences in their terms evidence differences in the way that the EC's 25 independent customs authorities administer substantive EC customs rules in different parts of the EC's territory. As the EC itself has acknowledged, the differences among penalty provisions are dramatic, such that for the same infraction a customs authority may impose imprisonment in one part of the EC and a minor fine in another.[24] Similarly, as the EC Court of Auditors observed, auditing practices are sufficiently

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[22]As the United States has discussed (*see* U.S. Second Oral Statement, paras. 76-77), the fact that a given measure may qualify as administrative in one context does not mean that it cannot be characterized as substantive in another context. One mistake the EC makes is to assume that a given measure must be either substantive or administrative for *all* purposes. *See* EC Second Written Submission, para. 193; EC Second Oral Statement, paras. 67, 72. But this simply is not so.

[23]*See, e.g.*, U.S. Answers to First Panel Questions, paras. 118-120, 156-160; U.S. Second Written Submission, paras. 72-98; U.S. Second Oral Statement, paras. 78-81.

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

different as to cause some EC member States not to accept valuation determinations made by other member States.[25] The existence of these significant differences in the terms of the measures that are the tools for administering substantive EC customs laws means that the substantive EC customs laws are not administered in a uniform manner, and this is inconsistent with the EC's obligation under GATT Article X:3(a).

> **QUESTION 131**: *In its reply to Panel question No. 113, the United States notes that, in US – Shrimp, the Appellate Body described the standards contained in Article X:3(a) of the GATT 1994 as pertaining to "transparency and procedural fairness in the administration of trade regulations." The United States submits that, accordingly, beneficiaries of the standards pertaining to transparency and procedural fairness are traders. Can this submission be reconciled with the United States' reply to Panel question No. 8 and paragraph 23 of its second written submission, where the United States appears to question the meaning of and relevance to Article X:3(a) of the "minimum standards" referred to by the Appellate Body in US – Shrimp? If so, please explain how.*

29. The U.S. response to Question 113 addresses a different point from the U.S. response to Question 8 and the statements at paragraph 23 of the U.S. second written submission. In its response to Question 113, the United States was noting that the Appellate Body's statement in *US – Shrimp* supports the proposition that Article X:3(a) should be understood as an obligation intended to benefit traders. In its response to Question 8 and in paragraph 23 of its second written submission, the United States was noting that the phrase "minimum standards" in the operative passage in *US – Shrimp* was not elaborated on by the Appellate Body and did not need to be elaborated on, as the Appellate Body found that the measure at issue clearly fell below the relevant standards. The United States sees no inconsistency between these two observations. They are not mutually exclusive.

[25]Court of Auditors Valuation Report, para. 37 (Exh. US-14).

30. With respect to "minimum standards" the point the United States has stressed is that the passing use of this phrase by the Appellate Body is the only alleged support for the EC's view that Article X:3(a) should be interpreted as a minimum standards provision. In fact, the reference does not support the EC's view. Article X:3(a) must be interpreted in accordance with the ordinary meaning of its terms, in light of their context and the object and purpose of the GATT 1994. Neither the terms, nor the context, nor the object and purpose support the EC's characterization of Article X:3(a) as a minimum standards provision. The Appellate Body's reference to "minimum standards" is not at odds with this.

> ***QUESTION 132****: In its reply to Panel question No. 2, the United States recognizes that, in the course of administration of customs laws, inconsistencies may occur from time to time between authorities in different regions within a WTO Member's territory. The United States further notes that it does not argue that the emergence of an inconsistency automatically and necessarily evidences a breach of Article X:3(a) provided that a mechanism – such as a central authority – exists to cure such inconsistencies.*
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> *(a) Does the United States mean that a certain number and/or level of inconsistencies should be tolerated under Article X:3(a) provided that a central mechanism exists to cure such deficiencies?*
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> *(b) If so, please specifically explain how the number and/or level of inconsistencies that should be tolerated can be identified.*
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> *(c) If not, please explain in further detail what the United States means by its submission.*

31. The U.S. reply to Question 2 does not mean that a certain number and/or level of inconsistencies should be tolerated provided that a central mechanism exists to cure such deficiencies. Under a system that provides for uniform administration, any differences that may emerge in administration from one region to another should be resolved promptly and as a matter of right. If that happens, then there will be no inconsistencies to be tolerated.

32. The point the United States was making in response to Question 2 was that even where

customs laws are administered uniformly, as a practical matter, there may be momentary inconsistencies between regions, which are promptly resolved as a matter of right. This may be a function, for example, of lapses in communication. Officials at a port in one part of the Member's territory may not be immediately aware of a classification ruling issued by the customs authority at the request of an importer at a different port. To the extent that this may give rise to a momentary inconsistency, uniform administration requires that the inconsistency be eliminated promptly and as a matter of right. This is not the same as saying that a threshold level of inconsistencies is tolerable under a system in which the customs laws are administered in a uniform manner.

33. In the EC, however, there is an absence of any procedures or institutions to resolve differences among materially similar – or even identical – cases promptly and as a matter of right. The ability to go to court to challenge a given administrative action as inconsistent with EC law is not such a procedure or institution. That is, review tribunals (as required by GATT Article X:3(b)) are not a substitute for uniform administration in the first instance (as required by GATT Article X:3(a)). Moreover, as was discussed in the U.S. opening statement at the second Panel meeting, courts in the EC are not compelled to refer questions to the one forum capable of rendering judgments with EC-wide effect, the ECJ, even when they are confronted with direct divergences in the administration of EC law.[26] Even if an appeal eventually brings about uniformity, non-uniformity may persist during the pendency of what may be a long, drawn-out

[26]U.S. Second Oral Statement, paras. 35-38.

proceeding.[27] And, appellate review as a means of obtaining uniform administration impermissibly puts the onus on the trader to attain a state of affairs that the Member itself is required to provide under GATT Article X:3(a).

34. The EC has referred, from time to time, to cases in which particular differences in administration emerged and were eventually resolved.[28] However, the divergences at issue resulted precisely from the structure and design of the EC's system of customs administration, and these divergences are further evidence of the EC's failure to administer its customs laws uniformly. Moreover, what is remarkable about these cases is the haphazard way in which differences were resolved and the time it took to resolve them. In each of the cases at issue there was a clearly identified divergence in administration of EC law from region to region, but in none of them was there a clearly identified path for resolving the divergences promptly and as a matter of right. Nor does the fact that particular divergences may have been resolved in an *ad hoc* manner constitute evidence that administration is uniform. Solving one particular problem identified between two authorities is not the same as saying that administration among 25 authorities is uniform, even with respect to that particular issue.

> **QUESTION 133**: *In its reply to Panel question No. 90, the United States submits that measures that are "administrative in nature" are examined under Article X:3(a) of the GATT 1994 for their "substance" whereas measures that do not administer other measures are examined under Article X:3(a) not for their "substance" but to see whether they are being administered in a uniform manner. Please explain in practical terms the difference(s) in the tests applied under Article X:3(a) to determine whether or not non-uniform administration exists with respect to measures that are "administrative in nature" and those that are not administrative in nature.*

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[27] *See* U.S. Second Oral Statement, para. 38 (quoting Vermulst, *EC Customs Classification Rules* (Exh. US-72)).

[28] *See, e.g.*, EC Second Written Submission, paras. 136, 141, 156.

35. The point the United States has made in response to Question 90 and elsewhere[29] is not that different tests apply under Article X:3(a) to determine whether non-uniform administration exists with respect to measures that are "administrative in nature" and those that are not administrative in nature. If a measure is the object of administration – if it is the thing being administered – then Article X:3(a) requires that it be administered in a uniform manner.

36. Some measures are administrative in nature in the sense that they give effect to other measures. Penalty provisions are one example. A penalty provision exists as a tool for administering some other measure by compelling compliance with that other measure. It would be difficult, if not impossible, to analyze a penalty measure separate from the measure with which compliance is sought.[30]

37. Where a WTO Member employs very different administrative measures in different parts of its territory to give effect to its customs laws – as is the case in the EC – that Member is administering its customs laws differently in different regions. The different tools the EC uses to administer its customs laws in different parts of its territory constitute non-uniform administration of its customs laws.

38. This is not a question of different tests for different types of laws. For purposes of this dispute, the object of administration – the thing being administered – is the EC's customs laws.

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[29] *See, e.g.*, U.S. Second Written Submission, paras. 72-98.

[30] *See* U.S. Answers to First Panel Questions, para. 158. The EC mischaracterizes the U.S. argument in stating that "[l]aws may very well complement one another without for that reason becoming 'administration.'" EC Second Closing Statement, para. 23. The U.S. argument is not that penalty provisions in the EC simply "complement" substantive customs rules. Rather, penalty provisions are instruments for giving effect to those substantive rules, much the same way that the measure at issue in *Argentina - Hides* was an instrument for giving effect to Argentina's substantive customs rules.

The absence of uniform administration of the EC's customs laws is evidenced in part by the indisputable fact that different customs authorities in the EC use different penalty tools to give effect to the EC's customs laws.

39. In stating (in response to the Panel's Question 90) that "measures that are administrative in nature are examined . . . for their substance," the point the United States was making was that where the substance of measures that administer customs laws differs from region to region then, logically, administration of the customs laws is non-uniform. The differences among the tools of administration is *evidence* of the non-uniformity of administration of the underlying customs laws.

40. The U.S. response to Question 90 referred to paragraph 11.70 of the panel report in *Argentina – Hides*. The panel in that dispute explained that where a measure is a tool of administration of another measure, the substance of the first measure may result in administration of the second in a manner inconsistent with GATT Article X:3(a).

41. In *Argentina – Hides*, the measure being administered was Argentina's rules on classification and export duties. Resolution 2235 was a separate measure that was a tool for administering those rules. As the panel put it, Resolution 2235 provided "a means to involve private persons in assisting Customs officials in the application and enforcement of the substantive rules. . . ."[31] To the extent that Resolution 2235 administered the substantive rules in a manner inconsistent with Article X:3(a), Resolution 2235 was a legitimate target of a challenge under GATT Article X:3(a). Likewise, here, as penalty provisions and audit procedures in the

[31]Panel Report, *Argentina - Hides*, para. 11.72.

EC administer EC customs law in a non-uniform manner, inconsistent with Article X:3(a), they are legitimate targets of the U.S. claim under that article.

> **QUESTION 134**: *In its reply to Panel question No. 118, the United States submits that it is unlikely that rules governing the operational procedures of bodies that oversee or are somehow involved in the administration of customs laws – such as, for example, the EC Customs Code Committee – would qualify as laws, regulations, judicial decisions and administrative rulings of general application "pertaining to" the classification or the valuation of products for customs purposes. In light of this reply, please clarify whether or not the United States is challenging the manner in which the Customs Code Committee operates.*

42. The manner in which the Customs Code Committee operates is not itself an instance of non-uniform administration of EC customs law. Therefore, the United States is not challenging the manner in which the Committee operates, *per se*. However, the way in which the Committee operates is relevant to the U.S. Article X:3(a) claim, because the Committee is one of the institutions that the EC holds out as ensuring the uniform administration of EC customs law.

43. As discussed in the U.S. response to Question 126, even the EC does not claim that it would fulfil its obligation of uniform administration absent certain procedures and institutions alleged to prevent divergences or reconcile them promptly. The ultimate question is whether the procedures and institutions identified by the EC in fact do this. The answer is that they do not.

44. One of the key institutions identified by the EC is the Customs Code Committee. Accordingly, it is important to understand how this committee operates. In particular: Does it operate such that when a trader encounters what it believes to be a divergence in administration between two different EC customs authorities, the trader can bring the allegation to the Committee as a matter of right and have the Committee resolve the question within a relatively brief time certain? That answer is, No. Rather, questions get put before the Committee at the

discretion of the Commission or member State representatives. Where a trader asks to have a question put on the Committee's agenda, the Commission or member State representative may or may not acquiesce. Even if the matter does get put on the Committee's agenda, the trader has no right to plead its case before the Committee. And, there is no limit on the time the Committee may take to consider the matter.[32] These observations about how the Committee operates are relevant, because they contradict the EC's assertion that the Committee is a key institution in ensuring uniform administration.

> **QUESTION 135**: *In its reply to Panel question No. 7, in defining the term "administer", the United States emphasises the treatment of "products" and "transactions" but makes no reference to the treatment of "traders". Does this mean that the United States considers that the Panel should focus on the treatment of products and transaction rather than on the treatment of traders when determining whether or not there has been a violation of Article X:3(a)?*

45. The U.S. response to the Panel's Question 7 focused on use of the word "treatment" in the two statements from the U.S. first written submission referred to in that question. The two statements addressed treatment accorded to products and transactions. Accordingly, the U.S. response elaborated on what the United States had meant by "treatment" in those two contexts. This does not mean that the Panel should focus on the treatment of products and transactions *rather* than on the treatment of traders when determining whether or not there has been a violation of Article X:3(a). The Panel should focus on *both* treatment of products and transactions *as well as* treatment of traders, recognizing that there is a high degree of overlap between the two types of focus.

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[32] *See generally* U.S. First Written Submission, paras. 121-132; Exhibit EC-103 (indicating that section of Customs Code Committee dealing with BTI has met only two to three times in each of the past three years); EC Answer to Panel Question 58(i) (iv) (indicating that average time to resolve cases involving alleged divergences in BTI that get referred to Customs Code Committee has been about 13 months).

46. From a customs point of view, how a trader's goods are classified and valued and, consequently, what duty is assessed on them necessarily will be important to the trader. To the extent that different customs authorities within the EC treat these matters differently they are, by extension, according different treatment to the trader. Different treatment accorded to the classification and valuation of goods will affect how the trader plans its transactions. For example, anticipating a certain classification of its goods in one region of the EC and a different classification in a different region, the trader may be expected to plan its shipments accordingly. It is in this sense that a focus on the treatment of goods and transactions overlaps with a focus on the treatment of traders.

47. However, according treatment to goods and transactions is not the only means by which a customs authority may accord treatment to a trader. A customs authority also accords treatment to a trader when, for example, it imposes a penalty, performs an audit, or permits a trader to clear its goods through a simplified procedure, such as the local clearance procedure. This point bears emphasis, given the EC's suggestion that a Member administers its customs laws in a non-uniform manner only when it imposes different duties on identical goods with identical value.[33]

48. The EC's narrow understanding of what it means for a Member to administer its customs laws in a non-uniform manner is at odds with the context of Article X:3(a) which, as the EC

[33]*See, e.g.*, EC Second Written Submission, para. 123 (arguing that LCD monitor case does not show non-uniform administration in breach of GATT Article X:3(a), because regardless of classification, monitors covered by temporary duty suspension regulation all are subject to 0% tariff rate); EC Replies to First Panel Questions, para. 16; EC Second Closing Statement, para. 24 (arguing that despite significant differences in penalties from member State to member State, uniform administration is "ensured" because "traders will normally respect the substantive provisions of customs law").

acknowledges, indicates a focus on the treatment accorded to traders.[34] As the panel in *Argentina - Hides* explained, "Article X:3(a) requires an examination of the real effect that a measure might have on traders operating in the commercial world."[35] Moreover, "every exporter and importer should be able to expect treatment of the same kind, in the same manner both over time and in different places and with respect to other persons."[36]

49. The treatment that exporters and importers expect to be of the same kind in different places within the territory of a Member is not limited to the duty assessed on particular goods. It includes, for example, the penalties they may face in different places. The United States emphasizes this point in particular, because the EC has suggested that differences in penalties from region to region do not constitute non-uniform administration, as long as the diverse penalties all dissuade traders from violating EC customs law.[37]

50. As the United States explained at the second Panel meeting, a trader may fully intend to comply with the law and still be affected by differences in penalties from region to region. Traders tend to be risk averse and plan their transactions by taking into account a variety of factors, including their potential liability for sanctions. It simply is incorrect for the EC to assert that its customs laws are administered uniformly even though different authorities have at their disposal dramatically different tools for ensuring compliance with those laws. Contrary to this

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[34]*See, e.g.*, EC Replies to First Panel Questions, para. 14; EC Second Oral Statement, para. 18 (urging that "due consideration" be given to "real-world implications of the U.S. claims").

[35]Panel Report, *Argentina - Hides*, para. 11.77.

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

[37]*See, e.g.*, EC Second Oral Statement, paras. 78-79; EC Second Closing Statement, para. 24.

assertion, a general level of compliance across regions does not equate to uniform administration. The EC ignores the fact that differences in administration of the laws, including differences in the penalties that may be applied, affect the way traders plan their shipments. In short, the EC ignores the trader-oriented focus of Article X:3(a).

> **QUESTION 136**: *In paragraph 101 of its second written submission, the European Communities submits that, in the United States, binding tariff information is specific to the holder of such information, as is the case in the European Communities.*
>
> *(a) Please comment.*
>
> *(b) What measures does the United States have in place to prevent BTI-shopping?*

51. The United States notes, first, that U.S. institutions and procedures are not at issue in the present dispute. Nevertheless, in the interest of illuminating the issues that are in dispute, the United States answers as follows.

52. In the United States, a person can seek what U.S. Customs and Border Protection ("U.S. Customs") refers to as a ruling under part 177 of the U.S. Customs regulations. The regulations state that the ruling is the "official position of the Customs Service with respect to the particular transaction or *issue* described therein."[38] Accordingly, the ruling creates rights and responsibilities on the part of the holder of the ruling. However, other persons who are importing merchandise that is identical in all material respects to the merchandise covered by the ruling also have the right to cite an existing ruling as authority for the principle enunciated therein with respect to their merchandise. It is for this reason that prior to modifying or revoking a ruling that has been in effect for at least 60 days, U.S. Customs publishes notice of its intention to modify or

[38] 19 C.F.R. § 177.9(a) (Exh. EC-129) (emphasis added).

revoke the ruling and considers comments from the public on the merits of its proposed action. Thus, the modification and revocation procedure demonstrates that persons whose merchandise is within the ambit of the principle that is enunciated in the ruling can enjoy the benefits of the ruling.

53. By contrast, the operation of the BTI system in the EC is a dramatic illustration of how the EC fails to administer its customs laws uniformly. Under the EC system, where the EC authority in one region issues BTI to an importer, the EC authority in another region is under no obligation to follow that BTI with respect to identical goods, unless the person invoking the BTI happens to be the very same importer – *i.e.*, the "holder" of the BTI. Even if the person invoking the BTI is an affiliate of the holder of the BTI, the EC authority in the second region is under no obligation to follow the BTI issued by the EC authority in the first region. Thus, the EC customs authority in one member State is free to classify the identical product differently than the EC customs authority in another member State – or, indeed, than the EC customs authorities in any of the other 24 member States.

54. With respect to part (b) of the Panel's question, it should be noted that BTI shopping occurs when there is non-uniform administration across regions within the territory of a Member. In the United States, as a practical matter, BTI shopping cannot really occur, due to the fact that there is a central office from which to obtain rulings, and, for any given commodity there is a single team of experts – National Import Specialists within the National Commodity Specialist Division ("NCSD") of U.S. Customs and Border Protection – responsible for their issuance. For classification, initial rulings generally are issued by the NCSD specialist in New York. NCSD rulings are subject to review and correction by U.S. Customs headquarters in Washington, DC.

For matters other than classification, rulings are issued centrally by U.S. Customs in Washington, DC. Thus, "BTI shopping" is precluded precisely due to the presence in the United States of what is absent in the EC, a central authority.

> **QUESTION 137**: *Please comment on and respond to the following submissions by the European Communities:*
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> *(a) With respect to the classification of blackout drapery lining by the Main Customs Office of Bremen, in paragraphs 108 – 109 of its second written submission, the European Communities submits that the letter of the Main Customs Office Hamburg relied upon by the United States contained in Exhibit US-50 relates to an administrative appeal that is not related in any way to the administrative appeal which was the subject of the decision by the Main Customs Office Bremen.*

55. The United States refers the Panel to paragraphs 60 to 64 of its opening statement at the second Panel meeting, wherein this matter is discussed, as well as to the affidavit of Mr. Mark R. Berman (Exh. US-79), which is discussed in that part of the U.S. opening statement.[39] As explained there, the letter from the Main Customs Office Bremen (Exh. US-23) and the letter from the Main Customs Office Hamburg (Exh. US-50) both concern blackout drapery lining produced by Rockland Industries. The Main Customs Office Bremen decided to exclude Rockland's product from classification under Tariff heading 5907 on a ground evidently not applied by other EC customs authorities – *i.e.*, on the ground that the product had plastic in its coating, regardless of whether textile flocking or other elements were mixed into that coating. In its discussion of this case, the EC purported to cast doubt on the proposition that this was the

[39]In its closing statement at the second Panel meeting, the EC questioned the probative value of Mr. Berman's affidavit of Mr. Berman on the theory that Mr. Berman has "a clear interest in the classification of BDL." EC Second Closing Statement, para. 16. However, the EC's argument relies on the patently absurd assumption that Mr. Berman somehow has an interest in the outcome of this WTO dispute. Of course, the outcome of this dispute will have no effect whatsoever on classification of blackout drapery lining in Germany. Neither Mr. Berman nor his company stands to gain anything by this dispute. Accordingly, the basis for the EC's questioning the credibility of Mr. Berman's affidavit is entirely unfounded.

ground for the decision by the Main Customs Office Bremen.[40] The letter from the Main Customs Office Hamburg confirms that this indeed is the approach taken by the customs authority in Germany.

> *(b) In paragraph 123 of its second written submission, the European Communities argues that Article X:3(a) of the GATT 1994 can only be held to be violated where a variation of practice has a significant impact on traders. The European Communities submits that, in the case of liquid crystal display monitors with digital video interface, even if there were differences in tariff classification for the monitors at issue in this dispute, this would have no financial impact on traders since, pursuant to EC Regulation No. 493/2005, the tariff rate for such monitors would be 0% whether classified under tariff heading 8528 or under 8471.*

56. The United States refers the Panel to paragraphs 52 to 59 of its opening statement at the second Panel meeting, wherein this matter is discussed, as well as to Exhibits US-75 through US-78, which are discussed in that part of the U.S. opening statement. As explained there, four key observations are relevant to this issue. First, EC Regulation No. 493/2005 is a temporary duty suspension regulation which does not actually resolve the underlying classification issue. The EC states that "[b]efore its expiration, the EC institutions will obviously review the situation and adopt the measures which will be necessary then."[41] While this may be obvious to the EC, the United States is aware of no provision that compels this outcome. Moreover, as was discussed at the second Panel meeting, the fact that the regulation temporarily suspends duties but does not resolve the underlying classification issue is significant. Traders organize their business affairs with a long-term view, and in making their shipping decisions they are likely to take account of which customs authorities will accord the more favorable tariff treatment after the temporary

[40] *See* EC First Written Submission, paras. 336-337.

[41] EC First Written Submission, para. 357.

regulation expires.

57. Second, the duty suspension regulation addresses the duty treatment of only monitors below a specified size threshold. It has no relevance whatsoever to monitors above that size threshold.[42]

58. Third, the EC's suggestion that the temporary duty suspension regulation has garnered a general degree of satisfaction within the affected industry is belied by recent communications to the Commission from the major affected industry association in the EC.[43] That association ("EICTA") describes "an unacceptable situation were [sic] various Member States are applying classification rules in an inconsistent manner, causing competitive disadvantage for some importers and making the consequences of sourcing and routing decisions almost impossible to predict."[44]

59. In its closing statement at the second Panel meeting, the EC asserted that "the classification of the relevant monitors is an issue which is currently under review, and relevant measures will be submitted to the Customs Code Committee in the very near future."[45] However, as recently as December 6, 2005, EICTA advised the Commission of its profound concerns regarding this matter. EICTA noted not only its substantive disagreement with the Commission's proposed regulation, but also its dismay at the Commission's lack of consultation

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[42]*See* U.S. First Written Submission, para. 74.

[43]*See* U.S. Second Oral Statement, para. 52 (discussing Letter from Mark MacGann, Director General, EICTA, to Manuel Arnal Monreal, Director International Affairs and Tariff Matters, European Commission, p. 1 (Sep. 2, 2005) ("EICTA September 2005 Letter") (Exh. US-75)).

[44]EICTA September 2005 Letter, p. 1 (Exh. US-75).

[45]EC Second Closing Statement, para. 15.

with the trade association, including its lack of response to the association's September 2, 2005 letter on this matter (Exh. US-75).[46]

60. Finally, as was summarized in the U.S. opening statement at the second Panel meeting, there is a high degree of disarray among customs authorities in the EC over how to deal with the classification of LCD monitors with DVI. The United States pointed to one customs authority (in the UK) that appears to be following the opinion of the Customs Code Committee and classifying all such monitors under heading 8528, regardless of sole or principal use; another customs authority (in the Netherlands) that has abandoned the guidance of the Customs Code Committee for fear of adverse commercial impact and is now applying its own set of criteria for deciding whether to classify monitors under heading 8528 and 8471; and yet another customs authority (in Germany) that has just recently issued BTI classifying an LCD monitor with DVI under heading 8471, based on a finding that it is *principally* for use with computers (*i.e.*, notwithstanding the conclusion of the Customs Code Committee that classification under heading 8471 is appropriate only when a monitor is *solely* for use with computers).[47]

> *(c) In paragraphs 392 – 393 of its first written submission, the European Communities submits that it is not correct to state that different member States apportion royalties differently to the customs value of identical goods imported by the same company since the examples referred to by the Court of Auditors in its valuation report mostly involved different subsidiaries established in various member States. The European Communities adds that, following the report of the Court of Auditors, the Commission and the Customs Code Committee worked through the cases examined by the Court of Auditors in order to clarify the issues and establish whether there had been a lack of uniformity. According to the European Communities, in most cases, it was confirmed that the questions involved were purely factual issues concerning the establishment of the conditions of Article 32(2)(e) of the Community Customs Code. The European Communities argues that, since no systematic lack of uniformity was found, it was concluded that no*

[46]*See* Letter from Mark MacGann, Director General, EICTA, to Manuel Arnal Monreal, Director International Affairs and Tariff Matters, European Commission (Dec. 6, 2005) (Exh. US-81).

[47]U.S. Second Oral Statement, paras. 54-56.

amendment to the Customs Code Committee nor the Implementing Regulation was required.

61. Even if the EC's assertions were correct, they still would not rebut the broader findings of the Court of Auditors report. For example, the Court of Auditors found "weaknesses" in the EC's administration of customs valuation rules to include, among others, "the absence of common control standards and working practices"; "the absence of common treatment of traders with operations in several member States"; and "the absence of Community law provisions allowing the establishment of Community-wide valuation decisions."[48] The EC's assertions regarding the treatment of royalties do not address any of these broader observations, all of which demonstrate a lack of uniform administration as required by GATT Article X:3(a).

> *(d) In paragraphs 394 – 396 of its first written submission, the European Communities submits that, with respect to the conditions under which a sale other than the last sale may be used as the basis for establishing the transaction value for customs valuation purposes, Article 147 (1) of the Implementing Regulation provides that, where a price is declared which relates to a sale taking place before the last sale on the basis of which the goods were introduced into the customs territory of the Community, it must be demonstrated to the satisfaction of the customs authorities that this sale of goods took place for export to the customs territory in question. The European Communities submits that, whereas the United States claims that the Court of Auditors "found that authorities in some member States required importers to obtain prior approval for valuation on a basis other than the transaction value of the last sale", the Court of Auditors merely stated that "in practice, some customs authorities do impose a form of prior approval". The European Communities submits that, contrary to the impression created by the United States, there is no form of legal requirement of prior approval in order to be able to rely on an earlier sale. Moreover, according to the European Communities, given the potential complexity of the issue involved, it is not unreasonable for a customs authority to encourage traders who want to rely on the possibility of establishing the transaction value on the basis of an earlier sale to have this issue settled in advance. The European Communities submits that, in any event, such a practice constitutes a minor variation in administrative practice, which does not amount to a lack of uniformity incompatible with Article X:3(a) of the GATT 1994.*

62. In response to these EC statements, the United States makes three key observations.

[48]Court of Auditors Valuation Report, para. 86 (Exh. US-14).

First, the EC appears to see a distinction between "requir[ing] importers to obtain prior approval" and "in practice . . . impos[ing] a form of prior approval." The United States fails to see the relevant distinction the EC would make between its characterization of what certain (though not all) EC customs authorities do and the U.S. characterization of what those customs authorities do. The EC evidently attaches significance to its assertion that "there is no form of legal requirement of prior approval in order to be able to rely on an earlier sale." It thus appears to distinguish between a "legal requirement" and something that is "impose[d]" "in practice."[49] It is not clear to the United States what the relevant distinction is nor, more importantly, how it could possibly matter to a trader who must submit to the prior approval at issue, whether as a matter of "legal requirement" or as a matter of "practice."

63. Significantly, the Court of Auditors found that "in practice, *some* customs authorities do impose a form of prior approval."[50] The EC does not deny that such differences in administration of CCCIR Article 147(1) exist. The EC states that "it is not unreasonable for a customs authority to encourage traders who want to rely on the possibility of establishing the transaction value on the basis of an earlier sale to have this issue settled in advance." The United States does not disagree. The existence of this practice *per se* is not problematic from the point of view of GATT Article X:3(a). What is problematic is the fact that some customs authorities within the

[49]Curiously, this position appears to be at odds with the EC's position with respect to penalty provisions, where the EC argues that precisely because differences in administration from one authority to another are a matter of different *legal requirements* in different member States, they are beyond the scope of an examination into whether or not the EC is complying with its GATT Article X:3(a) obligation. Here, the EC seems to concede that differences in legal requirements (as opposed to practices) regarding prior approval for valuation on a basis other than last sale would constitute differences in administration cognizable under Article X:3(a). By that logic, differences in legal requirements with respect to penalties are evidence of non-uniform administration of the customs laws whose compliance is ensured through those penalties, as the United States has argued.

[50]Court of Auditors Valuation Report, para. 64 (Exh. US-14) (emphasis added).

territory of the EC impose a form of prior approval while others do not. Therefore, this is yet another example of non-uniform administration by the EC in breach of Article X:3(a).

64. Second, it is significant not only that some EC customs authorities administer CCCIR Article 147(1) by imposing a form of prior approval, while others do not, but also that the prior approval obtained from an EC customs authority in one region has no binding force in other parts of the territory of the EC. If an importer obtained prior approval from a customs authority in one EC member State to establish transaction value on the basis of a sale other than the last sale, it would have no assurance that the prior approval would be honored by customs authorities in other EC member States even with respect to identical transactions involving identical goods.

65. Finally, the EC asserts that the non-uniformity of administration of CCCIR Article 147(1) represents a "minor variation." The United States fails to see the basis for this characterization. To the contrary, from the trader's point of view, whether it must get prior approval in order to base customs value on a sale other than the last sale would be quite material to deciding where to enter its goods into the EC. The EC's characterization of this divergence as a "minor variation" is another example of the EC adopting an erroneous, exceedingly narrow view of non-uniform administration, wherein the only divergences that make a difference from the perspective of Article X:3(a) are the ones that affect the ultimate customs debt owed. In the EC's view, divergences in administration that merely affect the burden on the trader or risk to the trader – whether divergences affecting how a trader gets the right to base transaction value on a sale other than the last sale, the penalty-related risks a trader must take into account, or the ability to obtain reliable, long-term assurance as to the classification of goods even though the goods may be temporarily subject to an EC-wide duty suspension regulation (as in the case of LCD monitors) –

are not relevant.

66. The United States takes a very different view. The United States finds no basis for the proposition that Article X:3(a) is breached only by non-uniform administration that affects the ultimate customs debt owed by the trader but not by non-uniform administration that affects the burden borne or risk faced by the trader. Indeed, it is notable that the panel in *Argentina - Hides* found that Argentina's Resolution 2235 breached Article X:3(a), even though that provision did not affect the financial debt owed by traders. Rather, that provision subjected traders to a certain risk, inasmuch as domestic competitors for the purchase of raw hides were entitled to be present at the port along with customs officials inspecting hides prior to their exportation to foreign purchasers.[51]

67. In sum, Article X:3(a) requires that a Member's customs laws be administered in a uniform manner. That obligation is not limited by the conditions that the EC suggests, such that it is breached only when administration in a non-uniform manner affects the customs debt ultimately owed by the trader.

> *(e) Regarding local clearance procedures, in paragraph 423 of its first written submission, the European Communities submits that the fact that, at the frontier, anti-smuggling and admissibility checks are made electronically does not mean that there is no involvement of customs prior to release of goods for free circulation. Moreover, if the goods do not fulfil these checks, there will be a customs action (physical check, seizure…). The European Communities' argues that, therefore, it is wrong to state that there is no customs involvement prior to release in the United Kingdom. In paragraphs 422 – 426, concerning the requirements prior to release in the framework of the local clearance procedures, the European Communities submits that shipping manifest data is not required; rather a simplified declaration containing certain data must be submitted. The European Communities adds that the use of both electronic clearance systems and paper-based systems is possible. As regards supporting document requirements, the*

[51] *See, e.g.*, Panel Report, *Argentina - Hides*, paras. 11.91 to 11.93.

European Communities submits that all EC member States apply identical rules. In particular, all member States allow operators having regular trade flows with the same suppliers to submit only once the relevant DV1 together with the initial application to benefit from local clearance procedures. Concerning document retention requirements, the European Communities submits that the retention period in the Netherlands is 7 years. The European Communities submits that, besides, Article 16(1) of the Community Customs Code provides that the requisite documents shall be retained for a minimum period of three years, but leaves member States the possibility to stipulate longer periods taking into account their general administrative and fiscal needs and practices.

68. The EC's statements regarding local clearance procedures identify the outer parameters in which different customs authorities in the EC must operate. The United States does not dispute the EC's characterization of what those outer parameters are. What the United States has argued is that different EC customs authorities administer the local clearance procedures differently within those parameters. For a discussion of how they do so, the United States refers the Panel to paragraphs 109-117 of its first written submission.

QUESTION 138: *With respect to the comments made by the United States in paragraph 67 of its oral statement at the second substantive meeting, does the United States now accept the European Communities' contention that audit procedures are part of valuation rules rather than constituting customs procedures?*

69. The United States does not accept the EC's characterization of audit procedures as part of valuation rules rather than customs procedures. Audit procedures are more accurately described as customs procedures that verify compliance with valuation rules.

70. The United States calls to the Panel's attention the discussion at paragraph 83 of the second written submission of the United States. As explained there, the EC's view that audit procedures do not constitute customs procedures is based on its erroneous understanding of the term "customs procedures" as encompassing only "the procedures referred to in Article 3(16)

CCC."[52] While "customs procedures" is indeed a term of art under the CCC (referring to several defined categories of treatment that a customs authority may assign to a particular good), that specialized use of the term has no relevance to the present dispute. In this dispute, the United States has used the term "customs procedures" to refer to the diverse array of rules, other than classification and valuation rules, that govern how goods are treated for customs purposes on importation into the EC. In fact, the EC itself acknowledges that how the concept of "customs procedures" is defined for purposes of EC law, and whether given procedures fall within the scope of Article X:3(a) of the GATT 1994 "are independent questions."[53] As audit procedures are tools for administering substantive rules that indisputably are within the scope of Article X:3(a), differences among audit procedures from region to region within the EC are evidence of non-uniformity in the administration of EC customs laws, regardless of whether they fall within the specialized definition of "customs procedures" in the Community Customs Code.

QUESTION 139: *With respect to the United States' arguments concerning processing under customs control, is the United States arguing that the substance of French law implementing EC law that applies in this area is different from the substance of law in other member States (such as the United Kingdom)? Additionally or alternatively, is the United States arguing that the application of French law in this area differs from the application by other member States? If the latter, does the United States have any evidence to support its claim?*

71. The U.S. argument is that the substance of French law implementing EC law (CCC Article 133 and CCCIR Articles 502(3) and 552) identifies a one-prong economic effects test for

[52]EC Replies to First Panel Questions, para. 105.

[53]EC Replies to First Panel Questions, para. 103.

deciding whether to permit processing under customs control.[54] Other member States – for example, the United Kingdom – identify a two-prong test.[55] A straightforward comparison between the French guidance and the UK guidance demonstrates that France and the United Kingdom are administering CCC Article 133 and CCCIR Articles 502(3) and 552 non-uniformly.

72. The United States has not made an argument with respect to the application of the French law. There is no need to, as the French law and the UK law – both tools for the administration of the EC law – are facially divergent. The application of each of those laws will thus *necessarily* diverge from each other.

QUESTION 140: *In paragraph 75 of the United States' oral statement at the second substantive meeting, the United States submits that it is alleging a lack of uniformity on the European Communities' part in the area of processing under customs control. Please specifically identify the acts/omissions on the part of European Communities that are alleged to result in a violation of Article X:3(a) of the GATT 1994 in this area.*

73. Article X:3(a) of the GATT 1994 requires the EC to administer certain laws in a uniform manner. Among the laws that it must administer in a uniform manner are CCC Article 133 and CCCIR Articles 502(3) and 552, which pertain to processing under customs control. The EC law on processing under customs control provides that with respect to certain goods, the customs authority must undertake an economic assessment in order to decide whether to permit processing under customs control.

74. There is some internal ambiguity within EC law on this issue. CCC Article 133 states that authorization for processing under customs control shall be granted only where, *inter alia*,

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[54]Bulletin officiel des douanes no. 6527 at para. 83 (Aug. 31, 2001, as modified by BOD no. 6609, Nov. 4, 2004) (Exh. US-35).

[55]HM Customs & Excise, Notice 237, "Processing Under Customs Control (PCC)," § 15 (June 2003) (emphasis added) (Exh. US-34).

"the necessary conditions for the procedure to help create or maintain a processing activity in the Community without adversely affecting the essential interests of Community producers of similar goods (economic conditions) are fulfilled." Thus, this article sets out a two-part test: The proposed processing activity (1) must "help create or maintain a processing activity in the Community," and (2) must not "adversely affect[] the essential interests of Community producers of similar goods."

75. On the other hand, CCCIR Article 502(3) states, "For the processing under customs control arrangements (Chapter 4), the examination shall establish whether the use of non-Community sources enables processing activities to be created or maintained in the Community." CCCIR Article 502(3) makes no reference to the second part of the economic effects test described in CCC Article 133 – the requirement that the proposed activity not "adversely affect[] the essential interests of Community producers of similar goods."

76. The EC asserts that CCCIR Article 502(3) "has to be considered as an abbreviated reference to the requirements laid down in Article 133(e) CCC."[56] The EC gives no basis for this assertion, which seems unusual given that, in general, the 680-page CCCIR gives a more detailed elaboration of the provisions in the 77-page CCC and not a shorter paraphrase of the latter provisions. In any event, the internal ambiguity within the substantive law itself evidently has given rise to non-uniformity of administration. Thus, one EC customs authority (in the United Kingdom) tells applicants for authorization to engage in processing under customs control: "There are therefore two aspects to the economic test and you must provide evidence to show

[56]EC First Written Submission, para. 413.

both the impact upon your business *and* the impact upon any other community producers of the imported goods."[57] This customs authority then goes on to specify different types of evidence that applicants should provide to substantiate both prongs of this economic test.

77. By contrast, another EC customs authority (in France) tells applicants for authorization to engage in processing under customs control: "With regard to processing under customs control, block 10 of the model request must be completed with information showing that use of this customs regime will create or maintain a processing activity in the Community. . . ."[58] It does not tell applicants that the information they provide also must show that the proposed processing activity will not adversely affect the essential interests of Community producers of similar goods. Nor does it indicate types of evidence that applicants should provide to satisfy such a second prong to the economic test.

78. The foregoing material difference between the evidence that one EC customs authority tells applicants they must provide and the evidence that a different EC customs authority tells applicants they must provide amounts to a non-uniformity in administration of the EC law providing for processing under customs control. Not only has no EC institution (such as the Commission) stepped in to reconcile this glaring divergence, but the EC denies that there is a divergence at all, despite clear documentary evidence to the contrary. The EC asserts that even though the instructions one EC customs authority gives to traders are materially different from

[57]HM Customs & Excise, Notice 237, "Processing Under Customs Control (PCC)," § 15 (June 2003) (emphasis added) (Exh. US-34).

[58]Bulletin officiel des douanes no. 6527 at para. 83 (Aug. 31, 2001, as modified by BOD no. 6609, Nov. 4, 2004) ("En ce qui concerne la transformation sous douane, la rubrique 10 du modèle de demande doit être complétée des informations démontrant que le recours à ce régime douanier crée ou maintient une activité de transformation dans la communauté. . . .") (Exh. US-35).

the instructions that another EC customs authority gives to traders, the difference should not be accorded any significance. The United States fails to see how this difference can *not* be accorded significance. It is this divergence that is inconsistent with the EC's obligation of uniform administration under GATT Article X:3(a), with respect to processing under customs control.

QUESTION 141: *In paragraph 215 of its second written submission, the European Communities argues that, with respect to its claim under Article X:3(b) of the GATT 1994, the United States does not make any allegations regarding the scope of review demanded under Article X:3(b). Please comment.*

79. The EC's assertion that the United States does not make any allegations regarding the scope of review demanded under Article X:3(b) is based on an analytical framework that the EC has proposed for examining that provision. Under that framework, the EC suggests that Article X:3(b) can be examined in terms of four issues: "the material scope of the control, its nature, its purpose and the time requirement."[59] The United States has not used this same framework for examining the EC's obligation under Article X:3(b). Therefore, the comments the United States makes on the EC's assertion with respect to scope of review are without prejudice to the U.S. view of the appropriate analytical framework under which to consider Article X:3(b).

80. Article X:3(b) requires the EC as a WTO Member to have in place certain "judicial, arbitral or administrative tribunals or procedures." It then defines certain qualities that these tribunals or procedures must have, as follows:

(1) They must provide for the "review and correction of administrative action relating to customs matters";

(2) Such review and correction must be "prompt";

[59]EC Second Written Submission, para. 215.

(3) The tribunals or procedures must be "independent of the agencies entrusted with administrative enforcement"; and

(4) The decisions of the tribunals or procedures must be

(a) "implemented by" and

(b) "govern the practice of"

the agencies entrusted with administrative enforcement "unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers."

81. The U.S. Article X:3(b) allegations in this dispute relate to the fourth of the above-enumerated qualities that tribunals or procedures must have – in particular, the "govern the practice" requirement. The tribunals or procedures for review and correction of administrative action relating to customs matters that the EC provides – in particular, the courts in each of the EC's 25 member States – do not have the fourth quality set out in Article X:3(b) because the decisions that they render do not govern the practice of "*the* agencies entrusted with administrative enforcement." The decisions of any given court govern the practice of only a subset of the agencies entrusted with administrative enforcement. Therefore, the EC does not provide tribunals or procedures that satisfy all of the requirements of Article X:3(b). Not only is this inconsistent with the ordinary meaning of the text of Article X:3(b), this conclusion is reinforced when that provision is read in its context as set forth in Article X:3(a). To the extent that the decisions of review courts govern the practice of only *certain* agencies entrusted with administrative enforcement, the EC's system of review undermines rather than complements the uniform administration required by Article X:3(a). Since Article X:3(b) should be read in this context, this is an additional reason to find that the review courts provided by the EC fail to meet

the EC's obligation under Article X:3(b).[60]

QUESTION 142: *In light of the United States' argument in its reply to Panel question No. 121 that the obligation of prompt review and correction under Article X:3(b) of the GATT 1994 applies to the first tribunal or procedure that a Member provides following the taking of an administrative decision, if the Panel were to assume for the sake of argument that the European Communities is not obliged to establish a central review body(ies) with authority to make decisions with EC-wide effect under Article X:3(b), please respond to the following:*

(a) Does the United States consider that the review by bodies in each of the EC member States responsible for undertaking first instance review of customs decisions taken by member States authorities is in violation of Article X:3(b)?

(b) If so, please explain which aspect(s) of review by these bodies are in violation of Article X:3(b), making reference to the relevant requirements of Article X:3(b) and providing all relevant evidence in support.

(c) With regard to paragraph 86 of the European Communities' oral statement at the second substantive meeting, does the United States consider that review is not "prompt" in violation of Article X:3(b) of the GATT 1994 with respect to the following:

(i) first instance review by national courts of EC member States where there has been no reference to the ECJ for a preliminary ruling; and/or

(ii) first instance review by national courts of EC member States where there has been reference to the ECJ for a preliminary ruling.

82. The U.S. complaint in this dispute is not about the review bodies provided by each of the EC's member States. The United States has not argued, for example, that review at the member State level breaches member States' obligations under GATT Article X:3(b). The thrust of the U.S. claim is that existing review at the member State level *alone* lacks features that would enable it to satisfy the *EC's* Article X:3(b) obligation. In particular, a member State court issues

[60] *See generally* U.S. First Written Submission, paras. 134-139; U.S. Second Written Submission, paras. 102-109.

decisions whose effects are confined to the territory of that member State. No court within the territory of the EC that provides prompt review and correction of customs administrative actions issues decisions that govern the practice of *the* agencies (as opposed to a subset of the agencies) entrusted with administrative enforcement of EC customs law.

83. The EC asserts that the customs authorities located in each of its 25 member States are EC customs authorities. The EC concedes that the decisions of the courts in one member State do not bind the authorities in other member States. Therefore, the decisions of the courts in one member State do not govern the practice of the EC agencies in the other 24 member States. This is a clear breach of the plain language of Article X:3(b).

84. In discussing parts (a) and (b) of the Panel's question at the second substantive meeting with the parties, the Panel explained that it was interested in knowing how the United States understands the word "decisions" as used in Article X:3(b). In particular, the Panel asked whether the decisions that must both be implemented by and govern the practice of the agencies entrusted with administrative enforcement are simply the ultimate mandates or orders issued by the review courts, or whether they encompass the courts' reasoning as well. Since, based on the discussion at the second Panel meeting, the United States understands Question 142 to be addressed to this issue too, the United States offers the following observations.

85. Article X:3(b) must be interpreted according to the ordinary meaning of its terms, in context, and in light of the object and purpose of the GATT 1994. The terms of Article X:3(b) plainly provide that the decisions rendered by review tribunals or procedures must meet two independent requirements: They must be implemented by the agencies entrusted with administrative enforcement, and they must govern the practice of those agencies. These two

independent requirements cannot simply be merged into one, which is what the EC does in arguing that "govern the practice of" simply means "implement in fair terms."[61] For decisions to govern the practice of the agencies entrusted with administrative enforcement, they must be given effect beyond simple implementation of the order in the case at hand.[62] This is consistent with the context of Article X:3(b) – in particular, the uniform administration requirement – as discussed above.

86. This then leads to the question of what "decisions" means. In other words: Which statements by a review court must govern the practice of the agencies entrusted with administrative enforcement – simply the final mandate or order, or the mandate or order coupled with the court's reasons? At the second Panel meeting, it was pointed out that in some legal systems the term "decision" might be understood as limited to the final mandate or order, while in others it might also encompass the court's reasons. The United States submits that whether "decisions" is understood to have a narrower or broader meaning does not affect the "govern the practice" requirement. That is, even in a legal system in which a decision is understood as pertaining only to the court's mandate or order and not to its reasons, Article X:3(b) still requires that the decision both be implemented by *and* govern the practice of the agencies entrusted with administrative enforcement. In fact, a Member need not have a legal system that looks generally to judicial precedent as a source of law in order to satisfy this requirement.

[61]EC Second Written Submission, para. 230.

[62]*See* U.S. Second Written Submission, paras. 104-106.

87. A simple example will illustrate this point. Consider a case in which a review court has overruled a Member's customs authority on a question of classification. The court finds that the customs authority erred in classifying a good under heading "X" and that it should have classified the good under heading "Y." Implementation of the court's decision entails the customs authority revising the classification of the particular merchandise in the administrative action that gave rise to the court review. It may be that in reaching its decision, the court explained its reasons in a way that may have broad applicability to other classification questions (or even to other areas of law). In some legal systems, the court's reasons might be accorded a certain weight, such that they should be deferred to as precedent. However, the court's reasoning need not be treated as precedent in this sense in order for its decision to govern the practice of the agencies entrusted with administrative enforcement. In between the extremes of simple implementation in the case at hand and treatment as general precedent is the possibility that the court's decision – its conclusion with respect to the correct classification of the good at issue – will be applied to other cases involving identical goods. This is what the United States understands by the concept of a decision governing the practice of the agencies entrusted with administrative enforcement, as that concept is described in Article X:3(b).

88. Thus, in the foregoing illustration, if the court found that the customs authority had erred in classifying the good at issue under heading "X" and that it should have classified it under heading "Y," the "govern the practice" aspect of Article X:3(b) would require that in other cases the authority follow the court's decision and classify identical goods under heading "Y," even if those goods are imported by a party other than a party to the original court proceeding. It would not, however, require that the court's decision be given a broader precedential effect, applicable

not only to identical goods but also to other goods and perhaps even to other areas of law. In the view of the United States, under this understanding of the "govern the practice" aspect of Article X:3(b), it does not make a difference whether a given Member's legal system treats a "decision" as consisting of only the court's order or mandate, or including the court's reasons.

89. In sum, even if a Member's legal system treats a court's decision as consisting only of the court's final mandate or order, GATT Article X:3(b) still requires that the decision govern the practice of the agencies entrusted with administrative enforcement and that this effect mean something distinct from simple implementation of the decision. As discussed above, the decisions issued by review courts in the EC fail to satisfy this requirement, as they govern the practice of only some of the agencies entrusted with administrative enforcement in the EC.

90. With respect to part (c) of the Panel's question, the United States does not take a position in this dispute as to whether review is "prompt" within the meaning of Article X:3(b) in the case of first instance review by member State courts where there is no reference to the ECJ for a preliminary ruling. This is not to say that the United States concedes that such review is prompt. In this regard, the United States recalls the observation of the EC's advisor, Mr. Vermulst, that "judicial review in classification matters and, more in general, all customs issues is not only expensive and time-consuming for affected parties, it also may lead to inconsistent judgments by national courts, at least in first instance."[63]

91. The United States has referred to the time it takes for a question to be referred to and decided by the ECJ in cases in which courts choose to exercise their discretion to refer to the

[63]*See* U.S. Second Oral Statement, para. 38 (quoting Vermulst, *EC Customs Classification Rules*, p. 21 (Exh. US-72)).

ECJ.[64] The United States has done so on the supposition that the ECJ is the one tribunal that the EC provides that appears to meet the other requirements of Article X:3(b). In particular, unlike the courts of the EC member States, the ECJ issues decisions that govern the practice of the agencies entrusted with administrative enforcement of the EC's customs laws. Thus, if the ECJ were the tribunal maintained by the EC to satisfy its Article X:3(b) obligation (a proposition that the EC rejects[65]), then it would be important to examine whether the review provided by that tribunal is prompt. In fact, it is not prompt. Just to get a preliminary question put before the ECJ a trader may have to go through an administrative appeals process (at which stage referral to the ECJ is not even possible),[66] followed by multiple layers of court review, which itself may take years. Even then, the trader has no assurance that a question will get referred to the ECJ, even where it concerns a clear divergence among different authorities' administration of the law.[67] If the question should happen to get referred to the ECJ, it will take 19 to 20 months on average for the question to be decided.[68] The United States submits that the time it takes for a question to get decided by the ECJ following referral, coupled with the time it takes for a question to reach the

[64]*See, e.g.*, U.S. Second Written Submission, para. 109.

[65]*See, e.g.*, EC Second Oral Statement, para. 85.

[66]*See* EC Replies to First Panel Questions, paras. 117 ("Most of the EC Member States require the trader to lodge a request for an administrative review before appealing to the relevant court."), 122 ("Decisions to refer for a preliminary ruling are taken by the Member States *courts*. . . .) (emphasis added).

[67]*See* U.S. Second Oral Statement, paras. 35-38.

[68]*See* EC Replies to First Panel Questions, para. 124.

ECJ in the first place, would fail to satisfy the requirement of promptness if the EC were contending that review by the ECJ satisfies its obligation under Article X:3(b).[69]

QUESTION 143: *In light of the United States' argument in its reply to Panel question No. 121 that the obligation of prompt review and correction under Article X:3(b) of the GATT 1994 applies to the first tribunal or procedure that a Member provides following the taking of an administrative decision and with respect to its claim under Article X:3(b) of the GATT 1994, does the United States challenge review by the ECJ pursuant to Article 230 of the EC Treaty of decisions taken by EC institutions? If so, please explain which aspect(s) of review by the ECJ under Article 230 of the EC Treaty is in violation of Article X:3(b), making reference to the relevant requirements of Article X:3(b) and providing all relevant evidence in support.*

92. Article 230 of the EC Treaty pertains to review by the ECJ of the legality of acts adopted by EC institutions, including the Commission and Council. In this dispute, the United States has not raised any issue with respect to ECJ review pursuant to Article 230. The U.S. discussion of the role of the ECJ has focused on the possibility of review pursuant to Article 234 of the EC Treaty – the preliminary ruling mechanism. The EC asserts that through the preliminary ruling process, the ECJ plays an important role in ensuring uniform administration of EC customs law.[70] The United States has demonstrated that this is not the case. In particular, in its oral statement at the second Panel meeting, the United States showed that the courts in the various member States are under no obligation to refer a question to the ECJ, even when they are confronted with

[69]*See generally* U.S. Answers to First Panel Questions, paras. 152-154. As part (c) of the Panel's question refers to paragraph 86 of the EC's oral statement at the second substantive meeting, the United States makes an additional observation about that part of the EC's statement. There, the EC compares the time it takes for an appeal to make its way through member State court and ECJ review to the time it takes for an appeal in the United States to be decided by the U.S. Court of International Trade ("CIT"). The EC provides an entirely misleading description of the time it takes for a request for review to be decided in the United States. The United States refers the Panel to paragraph 142 of the U.S. Answers to the First Set of Panel Questions. Most significantly, the EC simply ignores the extent to which the timing of review by the CIT is largely in the hands of the party seeking review. *See* U.S. Answers to First Panel Questions, paras. 150-151.

[70]*See, e.g.*, EC First Written Submission, para. 185.

evidence of an undeniable divergence in the administration of EC customs laws.[71]

93. In its statement at the second Panel meeting, the EC stated that "if . . . a court in a[n] EC Member State does not share the interpretation of the EC legislation given by a court of another Member State, it will take the initiatives that are proper to its respective position in the system: . . . the court in another member State will or shall refer to the EC Court of Justice."[72] These statements as to what "will" or "shall" happen are without basis. And, as the illustrations the United States discussed at the second Panel meeting make clear, the use of the preliminary ruling mechanism to which the EC alludes does *not* happen, even in cases posing a stark divergence of administration among customs authorities.

QUESTION 144: *In its reply to Panel question No. 74, the European Communities submits that, although the Community Customs Code does not contain any provisions requiring that review by national courts be prompt, there are a number of Community-wide measures (such as the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union), which have the effect of requiring member States' tribunals to provide prompt review. Please comment.*

94. The United States notes that the EC's reply to Panel Question 74 is yet another example of the EC making reference to a due-process type obligation of a very general nature, which it admits is not operationalized in the customs context, as the source of fulfillment of its Article X:3 obligation. The United States fails to see how such a general provision, not operationalized in the customs context, can ensure that the tribunals the EC provides for review of customs administrative actions in fact provide prompt review. That said, in this dispute, the United States does not argue that the review provided by particular member State tribunals is not prompt.

[71]U.S. Second Oral Statement, paras. 31, 35-38.

[72]EC Second Oral Statement, para. 99.

Rather, these tribunals are not tribunals that satisfy the requirements of Article X:3(b).

QUESTION 145: *In its reply to Panel question No. 36, the United States submits that first instance review is undertaken by the Office of Regulations and Rulings, which is part of US Customs and Border Protection. Please indicate whether or not all review decisions issued by the Office of Regulations and Rulings have effect throughout the United States.*

95. The United States notes, first, that U.S. institutions and procedures are not at issue in the present dispute. Nevertheless, in the interest of illuminating the issues that are in dispute, the United States answers as follows.

96. The first instance review by the Office of Regulations and Rulings referred to in the U.S. reply to Panel Question 36 is known in the United States as "further review" of determinations on protests. Decisions issued under the further review procedure have the same force and effect as advance ruling decisions. That is, they are binding as to the transactions described and cannot be modified or revoked without going through the same modification process as is applicable to rulings. The recipient of the further review decision would be able to employ it at any port throughout the United States. Other persons whose goods are identical in all material respects would be able to invoke the decision as authority for the disposition of their goods.

QUESTION 173: *Making reference to the relevant terms of Article X:3(a) of the GATT 1994 and any other supporting material, please explain whether or not the design and structure of a customs administration system as a whole, or relevant components thereof, can be considered* ***as such*** *in determining whether or not Article X:3(a) has been violated for want of uniform administration. Additionally or alternatively, is it necessary to have regard to specific instances of non-uniform administration in order to demonstrate a violation of Article X:3(a)?*

97. Article X:3(a) has some unusual aspects that need to be considered when looking at it under the traditional "as such/as applied" framework. It is true that Article X:3(a) is concerned with administration. However, one can conceive of a Member establishing a system of customs

administration that as such necessarily results in non-uniform administration in breach of Article X:3(a) (as is the case in the EC). By way of analogy, in the *Canada - Wheat* dispute, the panel found the United States to have made "a *per se* challenge to the [Canadian Wheat Board] Export Regime viewed in its entirety."[73] Canada did not object to the U.S. claim (concerning a breach of GATT Article XVII) on this ground, and the panel agreed to entertain the U.S. claim.[74] In fact, the EC as third party in that dispute argued that the GATT article at issue could be breached by virtue of "structural shortcomings" affecting the way the state trading enterprise under consideration acts.[75] Analogously, in the present dispute the United States contends that structural shortcomings in the EC's system of customs administration result in non-uniform administration of EC customs law, in breach of Article X:3(a).

98. What is essential to an "as such" claim is the obligation alleged to have been breached and whether the object of the challenge necessarily results in a breach of that obligation. For the reasons described in the U.S. response to Question 126, the design and structure of the EC system of customs administration necessarily result in non-uniform administration in breach of GATT Article X:3(a).

99. Moreover, as also explained in response to Question 126, the U.S. argument under Article X:3(a) has not relied exclusively on demonstrating that the design and structure of the EC system of customs administration necessarily results in non-uniform administration. The United States

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[73]Panel Report, *Canada - Wheat*, para. 6.28.

[74]Panel Report, *Canada - Wheat*, para. 6.28.

[75]Panel Report, *Canada - Wheat*, para. 4.601; *see also id.*, para. 4.603 ("The European Communities also considers that Canada's explanation of the CWB's institutional structure does not provide for sufficient assurances that the CWB actually acts in accordance with the obligations under Article XVII:1(a) and (b) GATT.").

also has supported its argument with evidence that the EC and senior EC officials have recognized an absence of uniform administration; examples of non-uniform administration; and evidence practitioners who actually must work within the system understand administration to be non-uniform.[76] The Panel asks whether it is necessary to have regard to specific instances of non-uniform administration in order to demonstrate a violation of Article X:3(a). While it is difficult to answer that question in the abstract, it need not be answered in the context of the present dispute, as the support for the U.S. claim under Article X:3(a) includes evidence of *both* the design and structure of the EC system of customs administration *and* specific instances of non-uniform administration.

QUESTION 174: *Please comment on the practical relevance, if any, of the following comment made by the panel in Argentina – Hides and Leather at paragraph 11.77 of its report: "Article X:3(a) [of the GATT 1994] requires an examination of the* ***real effect*** *that a measure might have on traders operating in the commercial world" (emphasis added).*

100. In the context of *Argentina – Hides*, the reference to "the real effect on traders" was in contradistinction to the suggestion that the obligation of uniform administration under Article X:3(a) is breached only when a Member treats exports to one Member differently from exports to another.[77] In determining whether Article X:3(a) has been breached, a panel should ask not whether one WTO Member has been treated differently from other WTO Members. It should ask whether traders have been treated differently based, for example, on the part of the Member's territory through which they import their goods. If the manner in which a Member administers

[76] *See* Answer to Question 126, *supra*.

[77] Panel Report, *Argentina - Hides*, para. 11.76.

its customs law might encourage a trader to prefer importation through one region rather than another, this would be probative of non-uniform administration, in breach of Article X:3(a).

101. Significantly, in the last sentence of paragraph 11.77 of its report, the *Argentina - Hides* panel noted that an examination of the real effect that a measure might have on traders "can involve an examination of whether there is a possible impact on the competitive situation. . . ." In other words, an examination of the real effect that a measure might have on traders is not confined to an examination of whether traders in similar situations are required to pay different customs duties. The concept of "a possible impact on the competitive situation" encompasses more than just liability for customs duties. Notably, it includes the effect that non-uniform administration has of causing traders to divert shipments from one region of a Member's territory to another region due, for example, to relative certainty as to favorable classification or valuation, less risk of liability for penalties, or likelihood of receiving authorization to engage in a specialized activity (*e.g.*, processing under customs control).[78]

QUESTION 175: *In paragraph 11.77 of the report in Argentina – Hides and Leather, the panel stated that "trade damage" need not be demonstrated in order to prove a violation of Article X:3(a). Please comment.*

102. To prove a violation of Article X:3(a), all the United States is required to show is that the EC administers its customs law in a non-uniform manner. The United States does not need to show harm to the United States or to particular traders to support its Article X:3(a) claim. In particular, the United States is under no obligation to show that particular instances of non-uniform administration caused importers to pay higher tariffs than they would have paid under a

[78] *See* Answers to Questions 135, 137(b), and 137(d), *supra*.

system of uniform administration. It may well be that non-uniform administration causes traders to divert their trade in ways that would make no sense where uniform administration prevailed, precisely to avoid having to pay higher tariffs. As the United States discussed in its opening statement at the second Panel meeting, this has been the case with respect to imports of LCD monitors into the EC.[79] Despite the EC's protestations to the contrary,[80] whether such response to non-uniform administration yielded a particular measure of trade damage is not relevant to establishing an Article X:3(a) breach.

QUESTION 176: *In paragraph 15 of its oral statement at the second substantive meeting, the European Communities notes that it invokes Article XXIV:12 of the GATT 1994 to support the view that GATT commitments, including Article X:3(a) of the GATT, were undertaken by Contracting Parties in full respect of their constitutional systems. What significance, if any, should be attached to the fact that a customs union akin to the European Communities did not exist at the time the text of the GATT was concluded in 1947?*

103. The EC's statement at paragraph 15 of its second oral statement, and similar statements elsewhere,[81] wrongly suggest that Article X:3(a) of the GATT 1994 ought to be interpreted in light of the constitutional structures of individual Members, including the EC. By the EC's logic, the Panel should start with the EC's constitutional structure as a fixed point and interpret Article X:3(a) around that fixed point. Any interpretation that might result in the EC having to change its system of customs administration and review, according to this argument, must be rejected.

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[79]*See* U.S. Second Opening Statement, para. 52 (discussing EICTA September 2005 Letter, p. 1 (Exh. US-75)).

[80]*See, e.g.*, EC Second Oral Statement, para. 54 ("the EC also wonders wherein precisely would lie the nullification or impairment of benefits to the US"); EC Second Written Submission, para. 35 ("it is for the US, as the complaining party, to show that variations of administrative practice, even where they existed, have a significant impact on traders").

[81]*See, e.g.*, EC Second Oral Statement, para. 12; EC Second Closing Statement, para. 3; EC First Written Submission, para. 220; EC Replies to First Panel Questions, para. 113.

104. As the United States explained in its closing statement at the second Panel meeting, the EC has it exactly backwards.[82] It is not the EC's constitutional structure that should inform the meaning of Article X:3(a); rather, it is the ordinary meaning of the terms of Article X:3(a) in context and in light of the object and purpose of the GATT 1994 that should inform the EC's obligation under that article.[83] Article XXIV:12 does not change this. Paragraph 13 of the *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994* makes it clear that Article XXIV:12 does not excuse or alter a Member's obligations. Thus, it provides that "[e]ach Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994."[84]

105. Whether or not a customs union "akin to" the EC existed when the GATT was concluded in 1947 is therefore not relevant to the analysis of the EC's obligations under Article X.[85] What is important is that Article X:3(a) is drafted in a way that makes no special accommodation for a Contracting Party with multiple, independent, regionally limited customs authorities and no procedures or institutions to ensure that those various authorities administer the Contracting Party's customs laws uniformly. Nor does Article XXIV:12 make any such accommodation. As the United States has explained, Article XXIV:12 is not a general excuse from or limitation on

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[82]*See* U.S. Second Closing Statement, paras. 12-16.

[83]Where the negotiators of the WTO agreements wanted to take Members' constitutional structures into account, they knew how to do so. *See, e.g.*, *General Agreement on Trade in Services*, Art. VI:2(b); *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, Art. 4.2; *see also* U.S. Second Written Submission, para. 16 (discussing GATS, Art. VI:2(b)).

[84]*See* U.S. Second Written Submission, paras. 12-17.

[85]The United States notes that it is not certain what precisely the Panel means by a customs union "akin to" to the EC.

the applicability of Article X:3(a).[86]

106. When the EC joined the WTO in 1994 it accepted the text of, and the obligations under, the GATT. There is nothing in the GATT 1994 or the WTO Agreement that suggests that the EC has different rights or obligations from any other Member, nor is there anything in the WTO Agreement that suggests that the fact of the EC's having become a Member affects the meaning of any provision of the GATT 1994. Indeed, if the logic of the EC's argument were accepted here, there is a very serious question as to where it would end. That is, what other GATT obligations would have to be specially interpreted in light of the EC's (or any other Member's) constitutional structure?

107. There is no basis for arguing that an interpretation of Article X:3(a) that gives its terms their ordinary meaning in context and in light of the GATT's object and purpose should be rejected because that interpretation might require the EC to make changes to its system of customs administration and review of customs decisions. The text of Article X did not change in 1994 when the EC became a WTO Member. Rather than assume that the Contracting Parties' acceptance of the EC as a WTO Member constituted acceptance that the EC's system of customs administration conformed with Article X:3(a), the Panel should assume that the EC chose to become a Member of the WTO aware of the obligations it would have under GATT Article X:3(a) and committed to conform its system of customs administration accordingly.

[86] *See* U.S. Answers to First Panel Questions, para. 188.