EUROPEAN COMMUNITIES – SELECTED CUSTOMS MATTERS

WT/DS315

EXECUTIVE SUMMARY OF OPENING STATEMENT OF THE UNITED STATES OF AMERICA SECOND MEETING OF THE PANEL

November 30, 2005

I. Introduction

1. This dispute is about two things: *first*, the fact that the EC, through its 25 different customs authorities, does not administer EC customs law in a uniform manner; and, *second*, the fact that the EC fails to provide tribunals and procedures for the prompt review and correction of customs administrative actions as required by Article X:3(b) of the GATT 1994.

2. With respect to Article X:3(a), the United States has shown that EC customs law is administered by 25 separate, independent customs authorities. Absent some process or institution to prevent divergences among these authorities or reconcile them when they occur, such a system plainly would not satisfy the EC's obligation of uniform administration. And, indeed, such a process or institution does not exist.

3. The EC asserts that such processes and institutions do exist. However, the processes and institutions that the EC holds out as securing uniform administration do nothing of the sort. They are either extremely general (*e.g.*, the overarching duty of cooperation in EC Treaty Article 10), non-binding (*e.g.,* explanatory notes, guidance, and other "soft law" instruments to which the EC has referred), or discretionary in nature (*e.g.*, the possibility that a question may or may not be referred to the Customs Code Committee). The one process of a binding nature that the EC holds out as securing uniform administration – appeals to member State courts with the possibility of referral to the ECJ – in effect puts a heavy burden on the trader to seek out uniform administration, rather than providing for uniform administration in the first instance, as GATT Article X:3(a) requires. And, even this process does not actually secure uniform administration.

4. The EC and individual EC officials acknowledge that the instruments purported to secure uniform administration do not in fact do so. Traders share this view. In some areas (*e.g.*, penalties and audit procedures) the tools of administration differ from member State to member State such that administration of EC customs law is undeniably non-uniform. The U.S. has supported its arguments with illustrations of particular instances in which member States have administered EC customs law in a non-uniform way and the EC has failed to effectively and timely reconcile the divergences.

5. Moreover, the only tribunals or procedures available for the prompt review and correction of customs administrative action in the EC are member State courts. The decisions of these courts govern only the actions of the customs authorities in the member States concerned. As

there is no tribunal for the prompt review and correction of customs administrative actions whose decisions govern the practice of customs authorities throughout the EC, the EC fails to meet its obligation under Article X:3(b) of the GATT 1994.

6. It is important to keep in mind that this dispute stems from the fact that the EC is a Member of the WTO in its own right. This dispute could not have been brought under the GATT 1947, as the EC itself (as distinct from individual member States) was not a Contracting Party to the GATT 1947. EC arguments ranging from the timing of the U.S. claim to the intentions of the drafters of Article X:3 need to be understood with this fact in mind.

II. The EC Fails To Rebut Evidence Supporting U.S. Claims

7. The EC mistakenly asserts that there is a lack of evidence to support the U.S. claims. In fact, the U.S. claims are amply supported by un-rebutted evidence of: the manner of operation of the very "procedures and institutions of the EC legal system" that the EC claims "provide for a uniform application and interpretation of EC law"; admissions by the EC and EC officials; statements of traders; and illustrations of particular cases of non-uniform administration.

A. *EC admissions of non-uniform administration.*

8. Somewhat awkwardly, the EC attempts to distance itself from its own past admissions or admissions by senior EC officials. In some cases, the EC dismisses such statements as irrelevant on the theory that the speaker was not addressing the consistency of EC actions with Article X:3 *per se*. In the EC's view, it seems that an admission is relevant evidence only if the speaker actually draws the legal conclusion that the action or inaction in question breaches Article X:3.

9. Thus, even though the EC Court of Auditors made a number of critical findings demonstrating lack of uniform administration of EC customs valuation rules, the EC dismisses those findings because "the Court of Auditors did not in any way make judgments as to whether the EC was in compliance with Article X:3(a) GATT." Likewise, even though the explanatory note accompanying the EC's draft Modernized Customs Code observed that "[s]pecific offences may be considered in one Member State as a serious criminal act possibly leading to imprisonment, whilst in another Member State the same act may only lead to a small – or even no – fine" (Exh. US-32, p. 13) the EC asserts that acknowledgment to be irrelevant because it did not draw a legal conclusion with respect to GATT Article X:3(a).

10. An admission by the EC or an EC official need not state a legal conclusion in order to constitute relevant evidence. What matters is that the representations concerning factual matters tend to support a legal conclusion relevant to the dispute.

11. Similarly, the Panel should decline the EC's suggestion that it pay no heed to the statements of individual officials simply because they were not speaking officially on behalf of the EC. The point that the EC consistently misses is that in each of these cases, a senior official

with extensive knowledge of the administration of EC customs law – whether the Commission's Head of Customs Legislation Unit or an Advocate General of the Court of Justice, for example – was speaking authoritatively on that subject.

12. Yet another instance of the EC distancing itself from its own admissions is its discussion of the *EC - Chicken* dispute. In that dispute, where it was convenient to its immediate interests, the EC asserted an absence of uniform administration (*i.e.*, lack of consistent classification of the product at issue under one Tariff heading). And now, where a lack of uniform administration does *not* serve the EC's immediate purpose, it latches onto the panel's finding of consistent classification and disavows its earlier statements.

B. *There is no requirement to show a "pattern" of non-uniform administration.*

13. In addition to distancing itself from its own admissions, the EC responds to U.S. evidence in support of its Article X:3(a) claim by arguing that the evidence does not exhibit a "pattern." However, such a "pattern" requirement has no basis in Article X:3(a). Nor is it supported by the panel report in *US - Hot-Rolled Steel*, on which the EC heavily relies.

C. *Difficulty of certain customs administration questions does not counter evidence of non-uniform administration and, in fact, highlights the problem.*

14. A further line of EC argument asserts that the cases identified by the United States as illustrating non-uniform administration concerned "difficult" or "complex" matters of customs administration and that U.S. Customs, too, has encountered problems in grappling with these matters. But Article X:3(a) does not excuse non-uniform administration in difficult or complex cases. In fact, it is precisely the difficult or complex cases that highlight most prominently the lack of uniform administration in the EC.

15. In dealing with simple, commodity-type products, for example, the risk of non-uniform administration of classification rules would seem to be less than for more sophisticated products. But, when confronted with more sophisticated products or products embedding new technologies, the fact that classification decisions are being made by 25 different authorities increases the likelihood of divergent administration.

16. Moreover, far from supporting the EC's argument, its assertion that U.S. Customs has encountered difficulty in grappling with certain issues actually underscores the difference between non-uniform administration of EC customs law and uniform administration of U.S. customs law. Whatever challenges U.S. Customs may have encountered in dealing with difficult-to-classify products, its decisions applied throughout the customs territory of the U.S.

D. *Resolution of divergences among member States after months or years does not counter evidence of non-uniform administration.*

17. Another EC line of argument is that illustrations of non-uniform administration identified by the U.S. are inapposite, because the non-uniformities at issue were resolved. This argument does not rebut evidence of non-uniform administration, because in each instance non-uniform administration existed and, moreover, was allowed to persist for months or years.

18. It cannot be the case that a Member fulfills its obligation of uniform administration under Article X:3(a) as long as it reconciles instances of non-uniform administration eventually, even if it takes many months or years to do so. Such a construction would deprive Article X:3(a) of any meaning, as a Member could respond to any instance of non-uniform administration simply by asserting that it was in the process of resolving it.

III. Recent Cases Confirm That Processes EC Holds Out As Securing Uniform Administration Fail To Do So

19. The EC accuses the United States of basing its claims on "theoretical" scenarios. A poignant rebuttal of that critique is evident in the presentation made by a seasoned EC customs law practitioner, Mr. Philippe De Baere, at a recent forum sponsored by the American Bar Association (ABA). (Exh. US-59).

20. The EC has referred to explanatory notes and conclusions of the Customs Code Committee as instruments to secure the uniform administration of EC customs law. In fact, what Mr. De Baere's presentation shows (p. 14) is just the opposite. In some member States, an explanatory note may be treated the same as a regulation and given prospective effect only. In others, an explanatory note may be treated as a clarification and given retrospective effect.

21. In particular, Mr. De Baere describes a recent case involving the classification of video camera recorders (*i.e.*, camcorders) which demonstrates not only differences among member States in the treatment of EC explanatory notes, but also the problem of non-recognition of BTI from member State to member State, the problem of non-uniform administration of the EC law (CCC Article 221(3)) prescribing the period following importation during which a customs debt may be collected, and the problem of recourse to member State courts as a supposed tool of securing uniform administration. At issue in this case is the question whether certain camcorders should be classified under Tariff heading 8525.40.91 or 8525.40.99. A camcorder qualifies under the former heading if it is "[o]nly able to record sound and images taken by the television camera." (Exh. US-60). "Other" camcorders qualify under heading 8525.40.99.

22. In July 2001, the Commission adopted an amendment to an explanatory note covering heading 8525.40.99. The amendment provided that this heading includes "'camcorders' in which the video input is obstructed by a plate, or in another way, or in which the video interface can be subsequently activated as video input by means of software." (Exh. US-61). The amended note led to non-uniform administration of customs laws in at least three respects.

23. First, in view of the amended explanatory note, two member States (France and Spain)

reached back to collect additional duty on certain camcorders imported prior to the amendment and classified under heading 8525.40.91. By contrast, other member States (in particular, the United Kingdom and Germany) have expressly declined to give retroactive effect to explanatory notes. (Exhs. US-63 and US-64).

24. Second, subsequent to issuance of the amended note, in June 2004, the Spanish customs authority issued BTI classifying 19 camcorder models produced by a particular company under heading 8525.40.91. (Exh. US-65). In July 2004, the French affiliate of the Spanish importer informed the French customs authority of the existence of these BTI during the course of an audit by the French authority. Notwithstanding this information, in November 2005, the French authority informed the company that it intended to collect additional duty retroactively on certain camcorders, including cameras, that is, models covered by the Spanish BTI.

25. Third, in deciding to give retroactive effect to the July 2001 explanatory note, the French authority followed an interpretation of EC rules not followed by other member States on the period after importation during which a customs debt may be collected. Article 221(3) of the CCC (Exh. US-5) sets that period as three years. The only exception to this rule is the lodging of an appeal, which suspends the three-year period. However, beginning with a 1998 judgment of the French Cour de Cassation (Exh. US-66) concerning the predecessor to Article 221(3), the French customs authority has taken the position that any administrative proceeding (procès-verbal) investigating a possible customs infraction also has the effect of suspending the three-year period. In appeals from decisions following that position, litigants have consistently failed to persuade the French court to refer to the ECJ the question of whether this position is consistent with CCC Article 221(3). (Exhs. US-67 & US-68.) And, indeed, as of December 2002, France's national interpretation of Article 221(3) has become entrenched through an amendment to France's customs law. (Exh. US-69.) The refusal of even France's court of last instance to refer this question to the ECJ, even in the face of evidence that other member States interpret Article 221(3) differently, is further demonstration that the availability of appeals to member State courts is not the instrument of securing uniform administration that the EC claims.

26. A second illustration in the De Baere presentation reinforces the point that, contrary to the EC's argument, the opportunity to appeal customs administrative decisions to member State courts, with the possibility of eventual referral to the ECJ, does not secure uniform administration. The case involves classification of the Sony PlayStation2 (PS2). The UK customs authority had issued BTI for a good and then revoked it based on an EC Commission regulation adopting a different classification for the good. When that regulation was annulled by the EC Court of First Instance, rather than restore the BTI, the authority kept it revoked based on a reevaluation of its original classification decision. It confirmed the BTI's continued revocation on new, national grounds only weeks after the ECJ's *Timmermans* decision. But for that action, the PS2 would have been subject to classification instruments with (in theory) uniform EC-wide effect continuously, beginning with issuance of the UK BTI, continuing with issuance of the Commission regulation, and continuing after the annulment of that regulation with restoration of the BTI. The *Timmermans* judgment permitted the UK to disrupt that presumably continuous

uniformity by keeping the BTI revoked on grounds other than the Commission regulation that had led to its revocation in the first place. Compounding this disruption of uniform administration is the fact that the UK High Court of Justice declined to refer to the ECJ the question of whether the customs authority could do this.

27. A third recent case that calls into question the effectiveness of appeals to member State courts with the possibility of referral to the ECJ as a tool of uniform administration is the judgment of the ECJ in *Intermodal Transports*. (Exh. US-71.) That case concerned the classification of certain tractors by the Dutch customs authority. Contrary to the importer's request, the authority had classified the tractors under heading 8701 rather than heading 8709. In its appeal, the importer called to the Dutch court's attention the fact that the Finnish customs authority had classified similar goods under heading 8709. Despite the apparent divergence, the court declined to refer the matter to the ECJ. When the appeal reached the Supreme Court of the Netherlands, that court referred to the ECJ the question of whether a member State court should make a preliminary reference to the ECJ when a party brings to its attention conflicting BTI for similar goods issued by another member State authority to a third party and the court believes that the BTI wrongly classified those goods.

28. The ECJ found that a national court is under no such obligation to refer. With respect to courts other than courts of last instance, the ECJ said that evidence of divergent BTI "cannot limit the freedom of assessment thus vested in [the national] court under Article 234 EC." (Exh. US-71, paras. 32 & 45.) Moreover, it said that even a court of last instance is under no obligation to refer if, for example, it finds correct classification of the goods in question to be "so obvious as to leave no scope for any reasonable doubt." (Paras. 33 & 45.) It went on to note that the national court has "sole responsibility" for determining whether the correct classification of goods is "so obvious as to leave no scope for any reasonable doubt." (Para. 37.)

29. Perhaps the EC's advisor, Mr. Vermulst, put it best in his article, "EC Customs Classification Rules: Does Ice-Cream Melt?" (Exh. US-72, p. 21) when he said:

> The EC system with respect to 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. This problem is exacerbated by the fact that courts of certain Member States are much less likely to request preliminary rulings than those of other Member States.

IV. It Is Appropriate For The Panel To Exercise Its Authority Under DSU Article 13

30. With respect to the U.S. suggestion that the Panel exercise its authority under Article 13.1 of the DSU, the United States was not asking the Panel to make its *prima facie* case. The United States has already done that with the evidence and arguments it has put before the Panel. Rather, the United States was suggesting that if an understanding of the statistical incidence of non-

uniform administration of EC customs law would help the Panel to evaluate the evidence, it should exercise its authority under Article 13.1 to obtain certain information, which is exclusively in the hands of the EC or EC member States. As the panel in *United States - Cotton Subsidies* recently explained, "Any suggestion that a panel 'makes the complainant's case', when it merely exercises its powers under the *DSU*, is entirely inaccurate." (Para. 7.633.)

V. The EC Fails to Rebut Evidence That Classification Rules Are Administered in a Non-Uniform Manner

A. *BTI does not secure uniform administration.*

31. With respect to U.S. arguments showing that BTI does not secure uniform administration, the EC first denies that the ability of an importer to obtain BTI from any of 25 different member State customs authorities, without any centralized control, encourages "BTI shopping." In particular, it contends that its acknowledgment in the *EC - Chicken* dispute that "it is possible under EC law to withdraw an application for BTI where the outcome is considered unfavourable by the importer" (para. 7.261) does not indicate that BTI shopping occurs. But that contention is illogical. In a system in which the administration of customs law was uniform, there would be little point in an importer's withdrawing a request for a classification ruling upon learning the authority's proposed decision.

32. The EC also contends that the heavy skewing of BTI issuance in favor of certain member States does not indicate BTI shopping, but merely differences in various commercial factors from member State to member State. Such factors might be a logical explanation if the skewing were not as dramatic as it actually is. However, it seems remarkable that in a system which, according to the EC, does not encourage BTI shopping, a single member State (Germany), representing just over 19% of imports into the EC by value in 2004, issued about 37% of all BTI with a start date in 2004, while, for example, another member State (Italy), representing about 11% of imports, issued less than 1% of all BTI with a start date in 2004, and a member State representing almost 2% of imports into the EC (Greece), issued only a single BTI with a start date in 2004 (and only 10 with a start date in 2003 and 17 with a start date in 2002).

33. As the EC's advisor, Mr. Vermulst, has remarked (Exh. US-74, pp. 1314-15):

> Unfortunately, the same disparity with respect to the origin of preliminary rulings is reflected in the requests for BTI, with several times more rulings issued by Germany than by any other country. Such a disparity of numbers of proceedings has several regrettable consequences. It implies that Germany has proportionally too much influence in this part of customs law. Moreover, the authority of a procedure is not enhanced if most Member States barely apply it.

34. Moreover, it is not just the opportunity to shop for a favorable classification that makes BTI an inadequate instrument for securing uniform administration of customs classification rules.

The lack of narrative explanation in BTI makes it difficult to see how a given member State authority came to its classification decision and thus for other authorities to determine whether they should follow that decision in classifying similar goods.

35. Further limiting the utility of BTI as a means of securing uniform administration is the very narrow sense in which BTI issued by one member State authority governs the actions of other member State authorities. BTI issued by one member State authority is binding on other member State authorities only to the extent that the person invoking the BTI is the person to whom it was issued (the "holder") and the goods at issue are identical to those described in the BTI. But for such cases, there is no obligation on the part of one member State authority to take account of BTI issued by other member State authorities for similar goods when such BTI is brought to its attention. This problem is evident in the EC's response to the U.S. discussion of the *Chicken* dispute. Despite the EC's acknowledgment there that different customs offices classified the identical goods differently, the EC now states that "[n]owhere in the Panel Report in *EC - Chicken Cuts* has the EC said that BTI was not recognised when presented by the holder."

36. The point is illustrated again by the EC's discussion of the blackout drapery lining case. In response to evidence that the EC customs office in Germany failed to explain why it was not following the classification decisions reflected in other offices' BTI, the EC simply states that "BTI is binding on the customs authorities only as against the holder of the BTI."

37. The EC attempts to draw a comparison to the practice of U.S. Customs. However, the very regulation that the EC cites as evidence of U.S. practice illustrates the difference between the U.S. advance ruling system, which promotes uniformity, and the EC BTI system, which does not. Thus, section 177.9(a) of the regulation (Exh. EC-129) states that where U.S. Customs issues a ruling letter with respect to a particular transaction or issue, "the principle of the ruling set forth in the ruling letter . . . may be cited as authority in the disposition of transactions involving the same circumstances." The EC BTI system contains no such provision.

B. <u>LCD monitors.</u>

38. With respect to evidence showing that the LCD monitors case is an important example of the lack of uniform administration of EC rules on customs classification, the EC first asserts that the duty suspension regulation concerning LCD monitors with DVI has resolved the lack of uniformity of administration with respect to this particular classification question and that the trading community is satisfied with the outcome. In fact, this assertion simply glosses over the fact that the suspension regulation applies only to monitors below a certain size threshold, that it does not actually resolve the underlying classification question, and that, for monitors above the size threshold, a state of non-uniformity with serious financial consequences remains. Moreover, the implication that the trading community is satisfied is belied by recent statements from the very industry concerned with this classification question. (Exh. US-75.)

39. The EC next contests the U.S. argument that an EC Customs Code Committee conclusion that conflicts with an applicable chapter note in the Combined Nomenclature detracts from rather than promotes uniform administration. The Committee's conclusion stated that a monitor should not be classified under Tariff heading 8471 unless an importer can show that it is "*only* to be used with an ADP machine," whereas the applicable chapter note states that a monitor is classifiable under heading 8471 if "it is of a kind solely *or principally* used in an automatic data-processing system." The Committee's conclusion has put member State authorities in the quandary of having to decide what weight to give the conclusion in view of an apparently conflicting chapter note.

40. For example, in a Tariff Notice issued in 2004, the UK authority, evidently following the Customs Code Committee's conclusion, stated that "from October 2004, LCD/TFT Monitors that incorporate a DVI connector are to be classified in Combined Nomenclature (CN) code 8528 21 90." (Exh. US-76.) The Netherlands, by contrast, has taken a very different approach. In a decree of July 2005, the Dutch customs authority explained that since April 2004 it had been classifying LCD monitors with DVI under Tariff heading 8528, in view of a Commission regulation concerning plasma monitors. It then went on to state (Exh. US-77) that

> [n]ot all member states are following this policy. The result is a diverted flow of business, which is harmful to the competitiveness of Dutch industry in the logistics and services sector. For this reason, The Netherlands is making the policy as regards classification of certain LCDs in the Combined Nomenclature more precise.

Accordingly, the decree set forth criteria that the Netherlands follows as of November 22, 2004.

41. Moreover, despite the Customs Code Committee's conclusion, the German authority, too, appears to have continued classifying LCD monitors with DVI under heading 8471, even where they are principally though not solely for use with computers. (Exh. US-78.)

42. Finally, the EC once again tries to divert the focus from its own practice to the practice of U.S. Customs. However, unlike the EC, where U.S. Customs found LCD monitors difficult to classify, its rulings still applied throughout the territory of the United States.

C. *Blackout drapery lining.*

43. Similarly, the EC fails to rebut evidence demonstrating that the blackout drapery lining case is yet another example of non-uniform administration of customs classification rules. The EC erroneously calls into question whether the lining produced by Rockland Industries at issue in the decision by the Main Customs Office in Bremen, which was classified under Tariff heading 3921, was materially identical to lining that other member States had classified under heading 5907. In particular, the EC asserts that the product before the Bremen Customs Office lacked a textile flocking, while the product at issue in other classification decisions contained flocking. In

fact, however, as Rockland's President and Chief Executive Officer attests under oath (Exh. US-79), "All coated products produced by Rockland incorporate textile flocking as part of the coating process. Rockland has never produced a coated product that does not incorporate textile flocking. . . . Textile flocking is required to prevent the fabric from sticking together."

44. Moreover, in context it appears that the Bremen Customs Office did not find an absence of flocking *per se* but, rather, that flocking did not constitute a distinct layer in the Rockland product at issue. What was relevant to the Bremen Customs Office was the existence of plastic in the coating, regardless of whether textile flocking or other elements were mixed into that coating. That the German customs authority takes this approach, contrary to the approach taken by other member State authorities, is confirmed by the letter from the Hamburg customs office concerning Rockland's lining product. (Exh. US-50.)

45. Having ruled out classification of the lining under heading 5907, apparently based on its view that the existence of plastic in the coating precluded such classification, the German authority then looked to a German interpretive aid, which the EC states was derived by analogy to an EC regulation classifying ski trousers. Though the EC states that the interpretive aid was "without any legally binding character," the German authority relied on it in a way that turned out to be determinative. In any event, it is not consistent with uniform administration for the German authority to classify a textile product based on the selection of one prong from a three-prong test for the classification of an apparel item, where no other member State authority has done this.

46. Finally, the EC asserts without any basis that density of weave, the key criterion under Germany's interpretive aid, is relevant to determining whether textile fabric is present merely for reinforcing purposes. In fact, the notes pertaining to Chapter 39 of the Tariff make no reference to density of weave as a relevant criterion, and the notes to Chapter 59 expressly provide that classification under that chapter is to be determined *regardless* of weight per square meter. The EC asserts without basis that the reference to weight per square meter is different from density of weave. In fact, however, weight per square meter necessarily is a function of density of weave.

VI. <u>The EC Fails To Rebut Evidence That Valuation Rules Are Administered In A Non-Uniform Manner</u>

47. Nor does the EC succeed in rebutting evidence that EC valuation rules are administered in a non-uniform manner. In addition to the EC's failure to explain away the findings of non-uniformity in the Court of Auditors report, two other points should be noted.

48. First, as previously noted, one of the ways in which member States administer the EC's customs valuation rules non-uniformly is through different auditing practices. In response, the EC states that "under Article 76(2) CCC, every Member State may proceed to all necessary verifications in order to satisfy themselves of the accuracy of the particulars contained in the declaration." But, the fact that member States "may" do this proves nothing. It does not change the fact that member States' audit practices in fact vary dramatically such that, as the EC Court of

Auditors put it, "individual customs authorities are reluctant to accept each other's decisions." (Exh. US-14, para. 37.)

49. The EC also claims that the EC Customs Audit Guide "ensures a uniform practice across" the EC. However, given that the Guide was only "recently finalised," and, in any event, given that it is merely "intended as an aid to Member States," rather than a binding obligation on them, there is no basis for this assertion.

50. Second, with respect to the Reebok case, the EC fails to rebut that this is a stark illustration of non-uniform administration of valuation rules. The EC states that RIL's appeals to Spanish courts show that there is indeed a forum to which this trader can go to seek uniform administration. But, the EC cannot seriously contend that, from the point of view of uniform administration, the right to appeal a dispute to a member State court is comparable to a right to take a matter directly to an institution with authority to give an answer that is definitive for the entire EC – a right which does not now exist. GATT Article X:3(a) does not concern a trader's right to appeal adverse customs decisions; it concerns a Member's requirement to administer specified laws uniformly, whether or not traders appeal administrative actions in particular cases.

51. Further, the EC mistakenly suggests that because RIL withdrew its complaint to the EC Ombudsman the problem with respect to non-uniform administration has been resolved. That simply is not so. RIL's decision to withdraw its complaint does not change the Commission's evident avoidance of the non-uniformity for over three years. Nor does it change the fact that there is a divergence between the Spanish authority's administration of EC valuation rules and other member States' administration of those rules.

VII. The EC Fails To Rebut Evidence That Customs Procedures Are Administered In A Non-Uniform Manner

A. *Processing under customs control.*

52. With respect to processing under customs control, the United States has shown that certain member States approach the economic conditions assessment in very different ways. The United Kingdom, for example, makes a two-prong assessment, looking first at whether processing under customs control will enable processing activities to be created or maintained in the EC, and second at whether it will harm essential interests of Community producers of similar goods. In contrast, France applies only the first prong.

53. The EC's response to this evidence is that the United States mis-reads the customs bulletin explaining how France applies the economic conditions assessment. The EC asserts that the bulletin in fact makes reference to harm to Community producers. However, that reference is merely an introductory paraphrase of the CCC provision on processing under customs control. The operative text of the French bulletin sets forth a one-prong test, referring only to the creation or maintenance of processing activity in the EC.

54. The EC replies with a circular argument. It says that "the French guidance . . . has to be interpreted in the context of the EC legislation." In other words, even though the text of the French guidance plainly says something different from the text of the UK guidance, the EC contends that in fact it should not be read as diverging from the UK guidance because that would be inconsistent with EC law. However, the EC fails to substantiate its assertion that inconsistency with the applicable EC regulation automatically causes non-uniformity in member State administration of that regulation to disappear.

55. The EC also faults the United States for not providing "evidence on the application of the guidance issued by the French authorities." However, there was no need for the United States to do so. This is not a case in which the United States is alleging that either the French guidance or the UK guidance is itself inconsistent with WTO obligations and therefore, according to the EC, "has the burden of proving that the measure in question has the alleged content or meaning." Rather, the inconsistency with WTO obligations that the United States is alleging is a lack of uniform administration on *the EC's* part and, in the case of processing under customs control, the lack of uniformity is evident on the face of divergent guidance from two different member States.

B. *Penalties.*

56. With respect to penalties, the EC first asserts that the GATT Article X:3(a) obligation of uniform administration does not apply to penalties because penalties "are not among the matters referred to in Article X:1 GATT." Contrary to the EC's claim, the United States does not concede this point. On the contrary, the terms of Article X:1 plainly encompass penalty provisions. For example, a law imposing a penalty for negligence in mis-declaring a good's classification or valuation certainly "pertain[s] to the classification or valuation of products for customs purposes." A penalty also may be considered an "other charge[] . . . on imports." Or, considered as a consequence for failing to make a truthful declaration, for example, a penalty pertains to "requirements . . . on imports."

57. A key flaw in the EC's argument is that it assumes that a law or regulation must either be the thing being administered or a tool of administration. But, according to the EC, it cannot have one aspect or the other, depending on one's perspective. That contention is groundless.

58. Further, although the EC appears to admit that penalties "ensur[e] compliance with EC law," which is another way of saying that they administer EC law by giving effect to that law, the EC goes on to avoid the U.S. argument, which is that the diversity of member State penalty laws for giving effect to EC customs law is an important instance of non-uniform administration of EC customs law. Instead, the EC responds to an argument that the United States does not make. It contends that "Article X:3(a) GATT does not create an obligation to harmonise laws which may exist within a WTO Member at the subfederal level." The U.S. asserts no such generic requirement. It simply argues that Article X:3(a) requires that the EC's customs law be administered uniformly. Since different member States deploy different tools – that is, different

penalty provisions – to give effect to EC customs law, the EC does not administer its customs law uniformly.

59. Additionally, the EC errs in arguing that penalties are outside the scope of Article X:3(a) because they apply to actions that violate customs laws. Article X:3(a) does not make the distinction between "illegitimate actions" and "legitimate trade" that the EC posits. In any event, contrary to the EC's assertion, penalty provisions *do* "establish the conditions for legal trade." In a system that relies heavily on the actions of traders at every step of the way, penalty provisions administer the customs laws – that is, they give effect to those laws – by setting consequences for the breach of those laws. The problem is that in the EC those consequences vary dramatically from member State to member State.

60. The EC argues in the alternative that while penalty provisions vary from member State to member State, this does not mean that there is a lack of uniform administration. Its basis for this statement is the proposition that to the extent member State penalty laws must meet the test of being "dissuasive and effective," pursuant to ECJ "guidelines," they administer EC customs law uniformly, regardless of differences among them. The EC's theory seems to be that as long as two different penalty provisions both secure compliance with EC customs laws, any differences between them simply are irrelevant.

61. But, the possibility that traders generally comply with the customs laws in two different member States, despite differences in penalties, is beside the point. It does not change the fact that a trader must take such difference into account, much the same way that it takes into account the likelihood that an authority will interpret classification or valuation rules in a favorable way.

VIII. Member State Courts, Whose Decisions Govern Only The Customs Authorities In Their Respective Territories, Do Not Fulfill The EC's Obligation Under Article X:3(b) Of The GATT 1994

62. The EC fails to meet its Article X:3(b) obligation, because the decisions of member State courts "govern the practice" of only a subset of the agencies entrusted with enforcement of EC customs laws, and because the fragmentation of review is inconsistent with the context of Article X:3(b), which includes the requirement of uniform administration of EC customs law.

63. The EC argues that "govern the practice" means nothing more than "implement in fair terms." However, Article X:3(b) already contains a separate requirement that agencies "implent[]" the decisions of review tribunals or procedures. The EC's construction of "govern the practice" would make it redundant with the separate "implement[]" requirement.

64. The decisions of an EC member State court govern the practice only of agencies within that member State. Even where a court is presented with a clear divergence between practice within its member State and practice in other member States – as was the case in *Intermodal Transport* and the French cases on CCC Article 221(3) – there is no obligation to make a

reference to the ECJ. Moreover, as the EC has acknowledged, there is no mechanism in the EC for courts to be kept apprised of customs review decisions of other member State courts, much less a mechanism for customs authorities to be kept apprised of the decisions of courts other than those in their respective member States.

65. The EC also argues incorrectly that Article X:3(b) should not be read in the light of Article X:3(a) as context. In the EC's view, the absence of an "explicit link" or a "chapeau" means the latter is not context for the former, even though the two provisions are adjoining subparagraphs. This position is in stark contrast to the EC's invocation of Article XXIV:12 as context for the interpretation of Article X:3(a). And, while no rule of treaty interpretation requires an "explicit link" or a "chapeau" for one provision to constitute context for the interpretation of another, there is in fact an explicit link between the provisions at issue here.

66. Article X:3(a) requires a Member to administer its customs laws in a uniform manner. Article X:3(b) requires that the decisions of review tribunals or procedures "govern the practice" of the agencies entrusted with administrative enforcement. The "govern the practice" requirement means that review court decisions must control the way agencies administer the customs laws. In this sense, the two provisions are linked.

67. The EC rejects the proposition that review of customs decisions by member State courts whose decisions govern only certain customs agencies is inconsistent with the obligation of uniform administration. However, its argument in this respect is in conflict with its Article X:3(a) argument. It states that review by member State courts "is perfectly compatible with the obligation of uniform administration, *provided that the latter is ensured by other means that are appropriate to this aim*." Yet, in its Article X:3(a) argument the EC itself contends that review by member State courts is a key means to achieving the aim of uniform administration. Now it is arguing that that aim must be achieved by "other means" and that review by member State courts is merely "compatible" with that aim.

68. Additionally, the EC wrongly purports to draw from the U.S. argument an implicit requirement for "the establishment of a central court of first instance with jurisdiction over the whole territory of any WTO Member." However, that is not the logical implication of the U.S. argument. The logical implication of the U.S. argument is that under Article X:3(b), every WTO Member must give effect throughout its territory to the decisions of its review tribunals. Where a Member has a single customs administration it may well be able to do this even though it provides for multiple regional customs courts. In the EC, perhaps uniquely, fragmented administration is coupled with fragmented review, and the result is inconsistent with Article X:3(b).

69. The EC also wrongly accuses the United States of "interpreting Article X:3(b) through the glass of its own legal system." Ironically, in the very next breath the EC urges an interpretation of Article X:3(b) through the glass of *its* own legal system. It asserts that establishing an EC customs court – assuming that this would be the only way for the EC to

comply with its Article X:3(b) obligation – would "run[] contrary to one of [the EC's] fundamental constitutional principles."

70. Finally, while the EC has consistently professed that creating an EC customs court would breach "fundamental constitutional principles," it should be noted that the Treaty of Nice (inserting Article 225a into the EC Treaty) in fact laid the groundwork for the establishment of new EC courts. Also, its amendment of EC Treaty Article 220 contemplates that "judicial panels may be attached to the Court of First Instance under the conditions laid down in Article 225a." In light of the authority to create special courts established by the Treaty of Nice, it seems that establishment of a court as one option that would bring the EC into compliance with its GATT Article X:3(b) obligation would not breach "fundamental constitutional principles."