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## **1 ARTICLE X**

### **1.1 Text of Article X**

#### **Article X**

##### *Publication and Administration of Trade Regulations*

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

2. No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.

3. (a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

(b) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

(c) The provisions of subparagraph (b) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement. Any contracting party employing such procedures shall, upon request, furnish the CONTRACTING PARTIES with full information thereon in order that they may determine whether such procedures conform to the requirements of this subparagraph.

## 1.2 General

### 1.2.1 "administration"

1. In *EC – Poultry*, the Appellate Body described the scope of Article X as follows:

"Article X relates to the *publication* and *administration* of 'laws, regulations, judicial decisions and administrative rulings of general application', rather than to the *substantive content* of such measures. ...

Thus, to the extent that Brazil's appeal relates to the *substantive content* of the EC rules themselves, and not to their *publication* or *administration*, that appeal falls outside the scope of Article X of the GATT 1994."<sup>1</sup>

2. The Panel in *EU – Energy Package* found that Russia had failed to prove that the EU infrastructure exemption measure violated Article X:3(a) of the GATT 1994 because its arguments concerned the substance of the measure, rather than its administration:

"The elements of the infrastructure exemption decisions identified in the parties' argumentation express the implementation of the content of the criteria and determine the substantive legal regime imposed. Our consideration of Russia's arguments leads us to the conclusion that such arguments pertain to the substantive content of the criteria guiding the grant of the infrastructure exemption, which articulate a set of defined, systematic benchmarks guiding the substantive assessment of the merits of an infrastructure exemption application.

To our mind, these are thus substantive, rather than administrative, in nature within the meaning of Article X:3(a). We see that Russia's claim thus concerns the substantive aspects of the criteria set out in Article 36 rather than how they are administered. As the conditions enshrined in the infrastructure exemption criteria in the Directive, and the assessment that occurs thereunder, are substantive rather than administrative in nature, we also consider that the Commission's alleged failure to re-visit the situations in order to assess the existence and impact of any material change in light of allegedly changed circumstances pursuant to these criteria is also substantive, rather than administrative, in nature. Russia's claims pertaining to these elements therefore also fall outside the scope of Article X:3(a) and accordingly, we find that Russia has not demonstrated a violation of Article X:3(a) of the GATT 1994."<sup>2</sup>

### 1.2.2 Due process

3. In *EC – Selected Customs Matters*, the Panel discussed the "due process theme" that underlies Article X and Article X:1 of the GATT:

"The title as well as the content of the various provisions of Article X of the GATT 1994 indicate that that Article, at least in part, is aimed at ensuring that due process is accorded to traders when they import or export. In this regard, we note that Article X:1 of the GATT 1994 requires that customs laws, regulations etc. should be published 'in such a manner as to enable governments and traders to become acquainted with them'. ... This due process theme, which would appear to be reflected in each of sub-paragraphs of Article X of the GATT 1994, has been referred to by the Appellate Body when interpreting that Article."<sup>3</sup>

4. The Panel in *EC – IT Products* examined a claim of violation under Article X:1 of the GATT. In the course of its analysis, the Panel offered the following observations on how this provision reflects due process concerns:

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<sup>1</sup> Appellate Body Report, *EC – Poultry*, para. 115 (also referring to the Appellate Body Report, *EC – Bananas III*, para. 200, referred to in para. 47 below). See also Panel Report, *EU – Energy Package*, para. 7.896.

<sup>2</sup> Panel Report, *EU – Energy Package*, paras. 7.903-7.904.

<sup>3</sup> Panel Report, *EC – Selected Customs Matters*, para. 7.107.

"Article X:1 of the GATT 1994 is primarily concerned with the publication of 'laws, regulations, judicial decisions and administrative rulings of general application' as opposed to the content of such measures. Paragraph 1 also reflects the 'due process' concerns that underlie Article X as a whole. In particular, Article X:1 addresses the due process notion of notice by requiring publication that is prompt and that ensures those who need to be aware of certain laws, regulations, judicial decisions and administrative rulings of general application can become acquainted with them."<sup>4</sup>

5. In *US – Underwear*, the Appellate Body described the policy underlying Article X:2 as pertaining to transparency and due process:

"Article X:2, *General Agreement*, may be seen to embody a principle of fundamental importance – that of promoting full disclosure of governmental acts affecting Members and private persons and enterprises, whether of domestic or foreign nationality. The relevant policy principle is widely known as the principle of transparency and has obviously due process dimensions. The essential implication is that Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures."<sup>5</sup>

6. In *US – Shrimp*, the Appellate Body found that the procedures under which the United States authorities were granting the certification that foreign countries had to obtain to export shrimp into the United States were "informal" and "casual" and not "transparent" and "predictable". In this regard, the Appellate Body referred to Article X, and found that this provision established "certain minimum standards" for transparency and "procedural fairness" in the administration of trade regulations which, in its view, had not been met in this case:

"[T]he provisions of Article X:3 of the GATT 1994 bear upon this matter. In our view, Section 609 falls within the 'laws, regulations, judicial decisions and administrative rulings of general application' described in Article X:1. Inasmuch there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure which purports to be an exception to the treaty obligations of the member imposing the measure and which effectively results in a suspension *pro hac vice* of the treaty rights of other members.

It is also clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations which, in our view, are not met here. The non-transparent and ex parte nature of the internal governmental procedures applied by the competent officials in the Office of Marine Conservation, the Department of State, and the United States National Marine Fisheries Service throughout the certification processes under Section 609, as well as the fact that countries whose applications are denied do not receive formal notice of such denial, nor of the reasons for the denial, and the fact, too, that there is no formal legal procedure for review of, or appeal from, a denial of an application, are all contrary to the spirit, if not the letter, of Article X:3 of the GATT 1994."<sup>6</sup>

### **1.3 Article X:1**

#### **1.3.1 "Laws, regulations, judicial decisions and administrative rulings"**

7. In *Dominican Republic – Import and Sale of Cigarettes*, the Panel examined a claim regarding failure to publish average-price surveys of cigarettes conducted by the Dominican Republic Central Bank, used to determine the retail selling price for cigarettes and the tax base for

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<sup>4</sup> Panel Reports, *EC – IT Products*, para. 7.1015.

<sup>5</sup> Appellate Body Report, *US – Underwear*, p. 21.

<sup>6</sup> Appellate Body Report, *US – Shrimp*, paras. 182-183.

the application of the Selective Consumption Tax on cigarettes. The Panel determined that these surveys were subject to Article X:1:

"[T]he establishment of the tax base for cigarettes, and not the surveys in themselves, may be considered as an administrative ruling of general application. Once the Dominican Republic authorities had determined the tax base for cigarettes at a specific amount, that ruling would be applicable for the importation of all cigarettes within the description, until a new tax base had been set. The Central Bank average-price surveys would be a part of the administrative ruling. Indeed, an essential part, since under the Dominican Republic legislation, the tax base for cigarettes would be obtained through the surveys.

In order to become acquainted with the process of establishing the tax base for the application of the Selective Consumption Tax on cigarettes, governments and traders would be entitled to obtain information on the results of the survey, as well as on the methodology used in order to conduct the survey."<sup>7</sup>

8. The Panel in *EC – IT Products*, in examining a claim under Article X:1 regarding a CNEN (an explanatory note to the EU's Customs Nomenclature), underlined the broad scope of Article X:1 and the range of measures that fall within that scope:

"Substantively, and when read as a whole within the context of Article X:1, the phrase 'laws, regulations, judicial decisions and administrative rulings' reflects an intention on the part of the drafters to include a wide range of measures that have the potential to affect trade and traders.<sup>8</sup> A narrow interpretation of the terms 'laws, regulations, judicial decisions and administrative rulings' would not be consistent with this intention, and would also undermine the due process objectives of Article X[.]

Based on the foregoing, we observe that the ordinary meanings of the terms 'laws, regulations, judicial decisions and administrative rulings' indicates that the instruments covered by Article X:1 range from imperative rules of conduct to the exercise of influence or an authoritative pronouncement by certain authoritative bodies. Accordingly, we consider that the coverage of Article X:1 extends to instruments with a degree of authoritativeness issued by certain legislative, administrative or judicial bodies. This does not mean, however, that they have to be 'binding' under domestic law. Hence, the fact that CNENs are not legally binding under EC law does not preclude them from being contemplated by the terms 'laws, regulations, judicial decisions [or] administrative rulings' under Article X:1. However, whether a particular measure has a degree of authoritativeness such that it would be properly characterised as 'laws, regulations, administrative rulings or judicial decisions' requires a case-by-case assessment of the particular factual features of the measure at issue."<sup>9</sup>

9. The Panel in *EC – IT Products* concluded that CNENs fall within the scope of application of Article X:1 even if they are not legally binding under EU law:

"[I]t is clear that CNENs are important in enabling the European Communities to maintain a uniform application of the Common Customs Tariff within its territory. Although the European Communities has noted that CNENs do not 'preclude the exercise of discretion' by member State customs authorities, it is apparent that there is a clear expectation that such discretion will be exercised in a certain fashion and that infringement proceedings may apply in instances where such discretion is not so exercised. The Panel also finds it relevant that CNENs are issued by the Commission, a body with undisputed authority within the EC for ensuring the uniform application of

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<sup>7</sup> Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.406-7.407.

<sup>8</sup> (footnote original) In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body similarly found that the expression "laws, regulations and administrative procedures" in Article 18.4 of the Anti-Dumping Agreement seemed to encompass the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings. (Appellate Body Report on *US – Corrosion Resistant Steel Sunset Review*, para. 87).

<sup>9</sup> Panel Report, *EC – IT Products*, paras. 7.1026-7.1027.

the Customs Code Tariff, and with the power to challenge interpretations not consistent with its own. ... Moreover, the Panel notes that BTIs will cease to be valid where they are no longer compatible 'at Community level' with 'the explanatory notes [...] adopted for the purposes of interpreting the rules'. In these circumstances, the Panel considers that CNENs have a degree of authoritativeness such that they may be properly characterized as a 'law, regulation, administration ruling or judicial decision' as those terms are used in Article X:1. The fact that CNENs are not 'legally binding' under EC law does not diminish this conclusion.

In our view, the transparency and due process purpose of Article X:1 would be defeated if CNENs, which evidently play a key role in EC classification practice, were not be covered by the obligations in Article X:1[.]<sup>10</sup>

10. In *Thailand – Cigarettes (Philippines)*, the Panel examined claims under Article X:1 regarding publication of rules affecting the effective tax rate on cigarettes. During the panel proceedings the Thai Excise Department explained its methodology for calculating the minimum retail sales prices (MRSPs) for imported and domestic cigarettes; the Panel found that this methodology applied "prospectively and generally" to all potential sales of cigarettes, and therefore fell within the scope of Article X:1.<sup>11</sup> The Panel noted:

"[W]e are not saying that every statement that a party makes in a panel proceeding falls within the scope of Article X:1. The factual circumstances of this case, particularly the absence of written rules and Thailand's detailed explanation of such rules for the first time in this proceeding, confirm that what Thailand itself alleges to be its general methodology for determining the MRSPs must be considered as a rule of general application within the meaning of Article X:1."<sup>12</sup>

11. In *Thailand – Cigarettes (Philippines)*, the Panel rejected a claim under Article X:1 that Thailand was required to publish the methodology and data for determining "ex factory prices", an element for determining the MRSP for cigarettes. The Panel found that:

"The ex factory price, as a general concept, thus can be understood as the price of a good being decided by each individual firm in accordance with its own costs and business strategies. In other words, it is the result of an internal decision-making process, conducted on a firm-by-firm basis. Therefore, unless it can be shown, by supporting evidence, that a government is somehow involved in determining the ex factory price of certain goods, the ex factory price cannot be characterized as an administrative ruling of general application under Article X:1 as it is a business decision made by an individual company.

In Thailand, TTM is the only domestic cigarette manufacturer whose MRSP determination is based on, *inter alia*, the ex factory price figure. While TTM is a state enterprise, that does not in itself constitute a proof that the Thai government determines ex factory prices of TTM's cigarettes. Neither are we presented with evidence suggesting that this is the case or TTM is bound by guidelines or rules imposed by the Thai administration in making its ex factory price *determination*. On the contrary, the role of the Thai administration appears to receive and process ex factory prices declared by TTM."<sup>13</sup>

12. In *Thailand – Cigarettes (Philippines)*, the Panel considered a claim regarding failure to publish the procedures for release of guarantees deposited by importers for excise and other internal taxes. Aside from the laws concerning a right to the release of these guarantees, the Philippines asserted, but did not provide evidence, that separate unpublished procedures for obtaining release of guarantees exist and were not published. The Panel concluded that "the Philippines did not discharge its burden of proving the existence of the specific procedural rules generally applied to the release of guarantees within the meaning of Article X:1",<sup>14</sup> noting that "as

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<sup>10</sup> Panel Report, *EC – IT Products*, paras. 7.1029-7.1030.

<sup>11</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.773.

<sup>12</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.779.

<sup>13</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.826-7.827.

<sup>14</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.849.

the Philippines itself acknowledges, if its own claim pertains to the *absence* of the specific procedural rules generally applicable to the release of guarantees for the internal taxes, such a claim should have been brought more properly under Article X:3(a)."<sup>15</sup>

13. In *China – Raw Materials*, the Panel examined a claim under Article X:1 that China did not publish the total amount of the export quota for zinc; in at least one year, there had been an export prohibition on zinc. The Panel found that China's failure to set a quota amount was a "law, regulation, judicial decision or administrative ruling".<sup>16</sup>

14. In *US – Countervailing and Anti-Dumping Measures (China)*, the Panel confirmed that the term "law" includes an entire piece of legislation, as well as any individual parts or provisions that make up laws:

"Turning to Section 1 of PL 112-99, i.e. the measure at issue, we observe that it is a provision of a law and as such is part of a law. In our view, however, the term 'laws' as it appears in Article X:1 must be construed to include the entire piece of legislation as well as any individual parts or provisions that make up these laws. Were it otherwise, Members could meet their obligations under Article X:1 by promptly publishing laws that do not contain all parts or provisions. It would also lead to the anomalous result that Article X:1 would oblige a Member to promptly publish a law once it has been made effective, but would not oblige that Member to publish any subsequent amendments to that same law. This would run counter to the basic principle of transparency and full disclosure of governmental acts affecting governments or traders that we consider inherent in Article X:1."<sup>17</sup><sup>18</sup>

### 1.3.2 "of general application"

15. In *US – Underwear*, the Appellate Body upheld the Panel's interpretation of the term "of general application"<sup>19</sup>:

"We note that Article X:1 of GATT 1994, which also uses the language 'of general application', includes 'administrative rulings' in its scope. The mere fact that the restraint at issue was an administrative order does not prevent us from concluding that the restraint was a measure of general application. Nor does the fact that it was a country-specific measure exclude the possibility of it being a measure of general application. If, for instance, the restraint was addressed to a specific company or applied to a specific shipment, it would not have qualified as a measure of general application. However, to the extent that the restraint affects an unidentified number of economic operators, including domestic and foreign producers, we find it to be a measure of general application."<sup>20</sup>

16. In *Japan – Film*, the Panel, referring to the finding in *US – Underwear* immediately above, interpreted the term "of general application" as follows:

"[I]nasmuch as the Article X:1 requirement applies to all administrative rulings of general application, it also should extend to administrative rulings in individual cases where such rulings establish or revise principles or criteria applicable in future cases. At the same time, we consider that it is incumbent upon the United States in this case

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<sup>15</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.848.

<sup>16</sup> Panel Report, *China – Raw Materials*, para. 7.803.

<sup>17</sup> (footnote original) The Appellate Body in *US – Underwear* observed that Article X:2 of the GATT 1994 embodies the policy principle of promoting "full disclosure of governmental acts affecting Members and private parties and enterprises" and "transparency" (Appellate Body Report, *US – Underwear*, p. 20). As Article X:1 imposes an obligation to promptly publish the listed types of measure, we consider that the Appellate Body's observation about the policy principle underpinning Article X:2 holds true also for Article X:1. In this respect, see Panel Reports, *EC – IT Products*, fn. 1312.

<sup>18</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.27.

<sup>19</sup> Appellate Body Report, *US – Underwear*, p. 21.

<sup>20</sup> Panel Report, *US – Underwear*, para. 7.65.

to clearly demonstrate the existence of such unpublished administrative rulings in individual matters which establish or revise principles applicable in future cases."<sup>21</sup>

17. In *EC – Poultry*, the Appellate Body upheld the Panel's finding that import licensing of particular shipments by the European Communities was not inconsistent with Article X because "the information which Brazil claims the EC should have made available concerns a specific shipment, which is outside the scope of Article X of GATT."<sup>22</sup>

"Article X:1 of the GATT 1994 makes it clear that Article X does not deal with specific transactions, but rather with rules 'of general application'. It is clear to us that the EC rules pertaining to import licensing set out in Regulation 1431/94 are rules 'of general application'. ...

...

... Although it is true, as Brazil contends, that any measure of general application will always have to be applied in specific cases, nevertheless, the particular treatment accorded to each individual shipment cannot be considered a measure 'of general application' within the meaning of Article X. [Referring to the finding in *US – Underwear* cited immediately above] ... We agree with the Panel that 'conversely, licences issued to a specific company or applied to a specific shipment cannot be considered to be a measure 'of general application' within the meaning of Article X."<sup>23</sup>

18. In *US – Hot-Rolled Steel*, in examining a claim of violation of Article X:3(a), the Panel ruled that the anti-dumping measure at issue did not constitute a measure "of general application" within the meaning of Article X:1:

"[W]e have been presented with arguments alleging violation of Article X:3(a) of GATT 1994 which relate to the actions of the United States in the context of a single anti-dumping investigation. We doubt whether the final anti-dumping measure before us in this dispute can be considered a measure of 'general application'. In this context, we note that Japan has not even alleged, much less established, a pattern of decision-making with respect to the specific matters it is raising which would suggest a lack of uniform, impartial and reasonable administration of the US anti-dumping law. While it is not inconceivable that a Member's actions in a single instance might be evidence of lack of uniform, impartial, and reasonable administration of its laws, regulations, decisions and rulings, we consider that the actions in question would have to have a significant impact on the overall administration of the law, and not simply on the outcome in the single case in question. Moreover, we consider it unlikely that such a conclusion could be reached where the actions in the single case in question were, themselves, consistent with more specific obligations under other WTO Agreements."<sup>24</sup>

19. In *EC – Selected Customs Matters*, the Panel found that:

"'[L]aws, regulations, judicial decisions and administrative rulings of *general application*' described in Article X:1 of the GATT 1994 are laws, regulations, judicial decisions and administrative rulings that apply to a range of situations or cases, rather than being limited in their scope of application".<sup>25</sup>

20. In *EC – IT Products*, examining the measure in paragraph 8 above, the Panel found that "the CNEN amendments at issue in this dispute are of 'general application' within the meaning of Article X:1 of the GATT 1994. This is so because the application of a CNEN is not limited to a single import or a single importer. Rather, the objective of the CNEN is to ensure the uniform application

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<sup>21</sup> Panel Report, *Japan – Film*, para. 10.388.

<sup>22</sup> Panel Report, *EC – Poultry*, para. 269.

<sup>23</sup> Appellate Body Report, *EC – Poultry*, paras. 111 and 113. See also Panel Report, *EU – Energy Package*, para. 7.877.

<sup>24</sup> Panel Report, *US – Hot-Rolled Steel*, para. 7.268.

<sup>25</sup> Panel Report, *EC – Selected Customs Matters*, para. 7.116.



of the Common Customs Tariff to *all* products falling under a specific CN code upon importation into the European Communities."<sup>26</sup>

21. In *Thailand – Cigarettes (Philippines)*, the Panel examined an Article X:1 claim in relation to the data used to calculate the MRSPs, a key factor determining the effective tax rate on cigarettes. The Panel found:

"[D]ata necessary for determining an MRSP, such as the c.i.f. price, customs duties, and internal taxes and marketing costs, are essentially company-specific, rather than generally applicable to all companies. We also note that the Philippines acknowledges that these four specific items are business-derived confidential data, which are by definition company-specific. As such, the data used for such components of the MRSP cannot be considered as rules generally and prospectively applicable."<sup>27</sup>

22. In *China – Raw Materials*, the Panel found that China's Export Quota Administration Measures, including their allocation rules, fell within the scope of Article X:1.<sup>28</sup> The Panel also found that the measure discussed at paragraph 13 (failure to set an export quota amount for zinc) was "of general application" because it affects any enterprise wishing to export zinc quota.<sup>29</sup>

23. In *US – Countervailing and Anti-Dumping Measures (China)*, the Panel set forth its understanding of what constitutes a measure "of general application" for the purpose of Article X:1, after surveying prior jurisprudence:

"These various statements lead us to the view that two aspects are usefully distinguished when assessing whether a law or another relevant measure is of 'general application' within the meaning of Article X:1: (i) its subject-matter or content; and (ii) the persons or entities to whom it applies, or the situations or cases in which it applies. The subject-matter or content of a relevant measure may be narrowly drawn – e.g. it may regulate imports of only one or a few named products from only one or a few named countries – yet this would not preclude it being considered a measure of general application, insofar as it applies to a class of persons or entities, e.g. all those engaged in importing the product(s) concerned. The fact that a relevant measure has a narrow regulatory scope does not demonstrate that this measure is not generally applicable. As regards the second aspect, a relevant measure that applies to a class or category of people, entities, situations, or cases, that have some attribute in common would, in principle, constitute a measure of general application. In contrast, a relevant measure that applies to named or otherwise specifically identified persons, entities, situations, or cases would not be a measure of general application, but one of particular application.

This interpretation accords well with the provisions of Article X:1, in particular the requirement of prompt publication and the principle of transparency that is inherent in Article X:1, as mentioned above. Article X:1 is addressed, fundamentally, to situations of rule-making and, notably in the case of judicial decisions and administrative rulings of general application, rule interpretation or rule clarification. In cases where, for example, a new rule or interpretation applies to an entire class of people or entities, *public* notice in the form of prompt publication of the relevant measure is desirable, but it is understandable that individual members of that class would not require *individual* notice thereof."<sup>30</sup>

### 1.3.3 "made effective"

24. In *EC – IT Products*, the Panel examined the meaning of "made effective" and whether and when the CNEN amendments at issue were "made effective":

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<sup>26</sup> Panel Report, *EC – IT Products*, para. 7.1034.

<sup>27</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.806.

<sup>28</sup> Panel Report, *China – Raw Materials*, paras. 7.732-7.736.

<sup>29</sup> Panel Report, *China – Raw Materials*, para. 7.804.

<sup>30</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 7.35-7.36.

"[W]e are of the view that the term 'made effective' under Article X:1 of the GATT 1994 also covers measures that were brought into effect, or made operative, in practice and is not limited to measures formally promulgated or that have formally 'entered into force'. We see no basis to adopt the more restrictive view proposed by the European Communities, which considers that 'made effective' under Article X:1 refers to measures formally adopted under its domestic system, i.e., adoption by the Commission. This being so, in circumstances where the relevant measure has been 'made effective', the requirement to publish promptly will arise regardless of its formal adoption or whether it remains a 'draft' measure under the Member's municipal legal order."<sup>31</sup>

25. The Panel then found that "in the particular circumstances of this case, the cumulative effect of the votes in the Customs Code Committee, the relevant BTIs [classification rulings] and the Second Statement by the Chair [that 'as soon as an opinion has been voted, Member States can issue BTIs for the products concerned'] are such that the measures at issue were 'made effective' within the meaning of Article X:1"<sup>32</sup>, and that they were made effective at the latest, at the time of the October 2007 statement of the Chair.<sup>33</sup>

26. In *China – Raw Materials*, the Panel found that China's failure to set a quota for zinc had been "made effective" as there were no exports of zinc.<sup>34</sup>

27. In *US – Countervailing and Anti-Dumping Measures (China)*, the Panel rejected China's claim that the measure at issue violated Article X:1 of the GATT.<sup>35</sup> At issue was PL 112-99, a US law enacted on 13 March 2012 that expressly provided for the applicability of US countervailing duty (CVD) law to imports from non-market economy (NME) countries in all US CVD investigations initiated on or after 20 November 2006. The United States had been applying US CVD law to imports from China since 2006. In 2012, a US court decided that US CVD law was not applicable to imports from China and other countries that the United States treated as NMEs under its trade remedy laws. PL 112-99 was enacted before that court decision became final. China claimed that PL 112-99 violated Article X:1 because it had not been "published promptly" in relation to the date on which it was "made effective", as required by Article X:1. The Panel concluded that for the purposes of Article X:1, PL 112-99 was "made effective" on 13 March 2012, and not on 20 November 2006 as argued by China. Accordingly, the Panel found no violation of Article X:1.

#### 1.3.4 "pertaining to ..."

28. In *EC – IT Products*, the Panel determined that the CNEN in paragraph 8 above pertained to the classification of customs products.<sup>36</sup>

29. In *US – Countervailing and Anti-Dumping Measures (China)*, the Panel set forth its understanding of what constitutes a measure "pertaining to ... rates of duty":

"We begin our analysis with the 'rates of duty' category. The term 'rates of duty' is unqualified and therefore capable of encompassing various types of duty. As is apparent from, for example, Article II of the GATT 1994, the GATT 1994 distinguishes such duties as ordinary customs duties, other duties imposed on or in connection with the importation of products, anti-dumping duties and, most pertinent to our analysis of Section 1, countervailing duties. The latter term is defined in Article VI:3 of the GATT 1994 as 'a special duty levied for the purpose of offsetting any bounty or subsidy bestowed directly, or indirectly, on the manufacture, production or export of any merchandise'. Also, the SCM Agreement explicitly uses the term 'countervailing duty rate'. There is therefore no question that the term 'rates of duty' includes rates of countervailing duty.

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<sup>31</sup> Panel Report, *EC – IT Products*, para. 7.1048.

<sup>32</sup> Panel Report, *EC – IT Products*, para. 7.1068.

<sup>33</sup> Panel Report, *EC – IT Products*, para. 7.1069.

<sup>34</sup> Panel Report, *China – Raw Materials*, para. 7.805.

<sup>35</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 7.16-7.89.

<sup>36</sup> Panel Report, *EC – IT Products*, para. 7.1036.

Article X:1 contemplates laws 'pertaining' to rates of duty. The verb 'pertain to' is defined, *inter alia*, as '[h]ave reference or relation to, relate to'. This definition indicates that Article X:1 does not seek to limit the prompt publication requirement to only those relevant measures that directly set or determine particular rates of duty. Indeed, Article X:1 does not refer, narrowly, to laws 'establishing' rates of duty, but uses the broader term 'pertain'. To 'pertain' to rates of duty, a law simply needs to have reference, or relate, to rates of duty."<sup>37</sup>

### 1.3.5 "shall be published"

30. In *Dominican Republic – Import and Sale of Cigarettes*, examining the claim in paragraph 7 above, the Panel found:

"[U]nder its Article X:1 obligations, the Dominican Republic should have either published the information related to the Central Bank average-price surveys of cigarettes or, alternatively, publish[ed] its decision to not conduct these surveys and to resort to an alternative method, in such a manner as to enable governments and traders to become acquainted with the method it would use in order to determine the tax base for the Selective Consumption Tax on cigarettes."<sup>38</sup>

31. In *EC – IT Products*, the Panel found generally regarding publication:

"Article X:1 addresses the due process notion of notice by requiring publication that is prompt and that ensures those who need to be aware of certain laws, regulations, judicial decisions and administrative rulings of general application can become acquainted with them."<sup>39</sup>

32. In *Thailand – Cigarettes (Philippines)*, the Panel considered a claim regarding failure to publish the methodology for determining MRSPs (an element of the tax rate for cigarettes), discussed at paragraph 10 above. Thailand admitted that it did not publish its methodology as such. The Panel rejected Thailand's argument that listing eight elements of the MRSP in each published MRSP notice constituted compliance with Article X:1, finding:

"The listing of the components consisting of the MRSP would not enable importers to become acquainted with the detailed rules pertaining to the general methodology within the meaning of Article X:1. We are of the view that for importers to become acquainted with the methodology for determining the MRSP, it is important for them to become familiar with, for instance, how the information they provide is processed. Also, they need to be informed on how Thai Excise determines the marketing costs where the information provided by importers is not accepted."<sup>40</sup>

### 1.3.6 "promptly"

33. Regarding promptness of publication, the Panel in *EC – IT Products* found:

"the meaning of prompt is not an absolute concept, i.e. a pre-set period of time applicable in all cases. Rather, an assessment of whether a measure has been published 'promptly', that is 'quickly' and 'without undue delay', necessarily requires a case-by-case assessment. Accordingly, we will look at the time span between the moment the CNEN amendments were 'made effective' and the time they were 'published', and assess whether this is prompt in light of the facts of the case."<sup>41</sup>

34. The Panel then found that in the circumstances of the case and in light of the nature of the measures at issue, publication in the EU Official Journal eight months later than the measure was

<sup>37</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 7.51-7.52.

<sup>38</sup> Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.414.

<sup>39</sup> Panel Report, *EC – IT Products*, para. 7.1015. In footnote 1312 to this paragraph, the Panel referred to the Appellate Body Report in *US – Underwear* (DSR 1997:I, p. 29) and stated: "[w]e consider that this statement, although addressing Article X:2, is equally applicable to Article X:1."

<sup>40</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.773.

<sup>41</sup> Panel Report, *EC – IT Products*, para. 7.1074.

made effective was not "prompt", but that the measures were posted on the EU Comitology website prior to the latest date on which they "became effective" in the sense of Article X:1.<sup>42</sup>

**1.3.7 "in such a manner as to enable governments and traders to become acquainted with them": website publication**

35. In *EC – IT Products*, the Panel underlined the difference between the publication obligations under paragraphs 1 and 2 of Article X:

"While Article X:1 requires that measures be 'published', Article X:2 refers to measures having been 'officially published'. The absence of the adverb 'officially' in Article X:1, which is present in Article X:2, clarifies that the publication of the relevant measure does not need to be in an 'official' publication in order to satisfy Article X:1."<sup>43</sup>

36. The Panel in *EC – IT Products* found that publication of the measure at issue on the EU Comitology website did not meet the requirements of Article X:1:

"[I]f measures are to be published 'in such a manner as to enable governments and traders to become acquainted with them', it follows that they must be generally available through an appropriate medium rather than simply making them publicly available."<sup>44</sup>

...

... [I]t is clear from a textual analysis of Article X:1 that it is not any manner of publication that would satisfy the requirement, but only those that would give power to or supply governments and traders with knowledge of the particular measures that is 'adequate' so that traders and Governments may become 'familiar' with them, or 'known' to them in a 'more or less complete' way.

In our view, making the minutes of the Customs Code Committee, with draft CNENs attached, available on the Comitology website does not meet this standard. In particular, we note that there is nothing in the minutes, or the draft CNENs attached, that would supply traders and governments with adequate knowledge of measures that are or would be applied in trading with the EC member States. Indeed, the publication of the respective reports of the Customs Code Committee meetings merely provided the text of the CNEN amendments, specifying that these were 'drafts'. In addition, the documents contain placeholders for the reference number of the measure, e.g. '(2006/C ... ../..)' in the first case and '(2007/C ... ../..)' in the second case. In light of this, the Panel finds that, in the circumstances described above, posting the draft CNEN on the Comitology website does not constitute publication 'in such a manner as to enable governments and traders to become acquainted with them'.<sup>45</sup>

37. In *Thailand – Cigarettes (Philippines)*, the Panel considered a claim regarding failure to sufficiently publish the general rules relating to the right to the release of guarantees deposited by importers for excise and other internal taxes. The Panel evaluated the provisions in the Customs Act and the notices of assessment given to importers, and concluded:

"[D]espite Thailand's acknowledgment that 'in essence, guarantees are to be refunded on the final assessment of the goods', the relevant documents referred to by Thailand in this dispute do not clearly indicate a definite right to the release of guarantees for

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<sup>42</sup> Panel Report, *EC – IT Products*, para. 7.1076-7.1077.

<sup>43</sup> Panel Report, *EC – IT Products*, para. 7.1082.

<sup>44</sup> (footnote original) In other words, if a "medium" makes measures generally available to the public in such a manner as to "enable governments and traders to become acquainted with them", we consider that such medium should be regarded as "appropriate" and that publishing on that medium would fall within "published" as used in Article X:1.

<sup>45</sup> Panel Report, *EC – IT Products*, paras. 7.1084 (also citing the Panel Report, *Chile – Price Band System*, para. 7.127), and 7.1086-7.1087.

the internal taxes upon final assessment of the goods. In such circumstances, importers will not be able to become acquainted with the exact nature of the right they have in respect of the release of guarantees for the internal taxes within the meaning of Article X:1."<sup>46</sup>

38. In *China – Raw Materials*, the Panel found that by failing to publish promptly its decision not to authorize an export quota for zinc in such manner as to enable governments and traders to become acquainted with it, China had violated Article X:1 of the GATT 1994.<sup>47</sup>

#### **1.3.8 "confidential information"**

39. In *Thailand – Cigarettes (Philippines)*, the Panel examined the application of Article X:1 obligations in relation to confidential data used to calculate MRSPs, a key factor determining the effective tax rate on cigarettes. The Panel had found that these data were not within the scope of administrative rulings of general application, but it further found:

"Thailand essentially argues that given that the third sentence of Article X:1 provides that the provisions of Article X:1 shall not require any WTO Member to disclose confidential information, Thailand is not obliged to publish the data used for determining the MRSPs because such data are confidential information. The Philippines also appears to accept Thailand's position as it acknowledges that data such as the c.i.f. price, internal taxes, the marketing costs, even in indexed format, are confidential information. In our understanding, the Philippines' sole remaining argument in this connection is that a non-confidential version of an administrative ruling still must be published. We, however, do not find such an obligation in the text of Article X:1."<sup>48</sup>

#### **1.3.9 Applying judicial economy to claims under Article X:1**

40. The Panel in *Turkey – Pharmaceutical Products (EU)* explained as follows the circumstances under which a panel may consider making findings on claims under Article X:1 rather than applying judicial economy:

"The Panel understands that in some cases, findings on claims under Article X:1 were made in circumstances where it would have been possible to exercise judicial economy. Moreover, the Panel accepts that there may be a good reason to make findings on issues relating to the publication and administration of a measure instead of exercising judicial economy. Notably, a panel may opt to make findings where there is a genuine possibility that the Member concerned could modify or reintroduce the challenged measure in such a way that the substantive content of the measure is brought into conformity with substantive WTO obligations, but without any adjustment to the same alleged shortcomings with respect to the publication and administration of the measure such that they are repeated or otherwise carried over into the modified or reintroduced measure. For example, in *China – Raw Materials*, the panel recognized the scope for applying judicial economy over the claims under Article X, which included a claim under Article X:1, but considered that 'in the event that China were in any instance to impose a quota that was justified pursuant to Article XX, it would be relevant for the parties to know whether the aspects of China's system of quota administration at issue in this dispute comply with the relevant provisions of GATT Article X.'"<sup>49</sup>

### **1.4 Article X:2**

#### **1.4.1 General**

41. In *US – Underwear*, the Appellate Body held that prior publication of a measure, as required under Article X of GATT, could not, in and of itself, justify the retroactive effect of

<sup>46</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.860.

<sup>47</sup> Panel Report, *China – Raw Materials*, paras. 7.806-7.807.

<sup>48</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.819.

<sup>49</sup> Panel Report, *Turkey – Pharmaceutical Products (EU)*, para. 7.255.

applying import quotas with respect to imports during a period starting before the quota's publication date:

"[W]e are bound to observe that Article X:2 of the *General Agreement*, does not speak to, and hence does not resolve, the issue of permissibility of giving retroactive effect to a safeguard restraint measure. The presumption of prospective effect only does, of course, relate to the basic principles of transparency and due process, being grounded on, among other things, these principles. But prior publication is required for all measures falling within the scope of Article X:2, not just ATC safeguard restraint measures sought to be applied retrospectively. Prior publication may be an autonomous condition for giving effect at all to a restraint measure. Where no authority exists to give retroactive effect to a restrictive governmental measure, that deficiency is not cured by publishing the measure sometime before its actual application. The necessary authorization is not supplied by Article X:2 of the *General Agreement*."<sup>50</sup>

42. In *US – Anti-Dumping Measures on Oil Country Tubular Goods*, Mexico claimed that the US Department of Commerce (USDOC) violated Article X:2 because it imposed conditions on a producer of oil country tubular goods (OCTG) for termination of the anti-dumping duty, in advance of the official publication of such conditions. Mexico argued that the use of the commercial quantities threshold requirement constituted a change in the USDOC's practice and administration of the law that was not notified to WTO Members in advance of its application, in violation of Article X:2. After noting that Article X:2 precludes retroactive application of a measure, the Panel commented that compliance with this obligation and subsequent questions of alleged violation, would "depend on the timing of the publication of a measure, and its enforcement in particular circumstances affecting the rights of WTO Members". The Panel concluded that the disputed regulations were published prior to being enforced in the administrative reviews in question:

"As stated above, the legal instrument that introduced the commercial quantities requirement was duly published, and came into effect with respect to administrative reviews initiated on the basis of requests made more than one month subsequent to that publication. As of the date of publication, notice had clearly been given of the substance of the regulation, and of which cases would be affected by the regulation. Thus, exporters, including the Mexican exporters involved in the administrative reviews of OCTG, had notice as to the requirements imposed by USDOC for requests for revocation based on three years of no dumping, including the commercial quantities requirement. In support of its argument, Mexico refers to a case in which the requirement was not applied, without noting that the administrative review in question was initiated based on a request made **prior to** the effective date of the regulation."<sup>51</sup>

#### 1.4.2 "measure of general application"

43. In *EC – IT Products*, the Panel examined a claim that the EC had breached Article X:2 by applying the CNEN amendments described in paragraph 8 above before their publication in the EU Official Journal. Relying on its finding under Article X:1 (see paragraph 20 above), the Panel in *EC – IT Products* found that the CNEN amendments were a "measure of general application" in the sense of Article X:2. Comparing Articles X:1 and X:2, the Panel found:

"Article X:2 refers simply to 'measure' and hence encompasses an even broader category – namely, any act or omission by a WTO Member. It follows therefore that the drafters intended to include a broad range of measures that have the potential to affect trade and traders."<sup>52</sup>

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<sup>50</sup> Appellate Body Report, *US – Underwear*, p. 21.

<sup>51</sup> Panel Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 7.185.

<sup>52</sup> Panel Report, *EC – IT Products*, para. 7.1097.



**1.4.3 "effecting an advance in a rate of duty or other charge on imports under an established and uniform practice"**

44. The Panel in *EC – IT Products*, evaluating a claim under Article X:2 on the CNEN amendments described in paragraph 8 above, found that "Article X:2 of the GATT 1994 covers measures of general application that 'cause' an 'increase' in a rate of duty"<sup>53</sup> and that "the term 'effecting' does not necessarily require that the measures at issue be the sole or single cause for the advance in rate of duty. However, it must be shown that it goes beyond mere influence and there must be a demonstrable link between the measures at issue and the advance."<sup>54</sup> The Panel then found that the CNEN amendments were "of the type that they are intended to have a certain effect, namely, an increase in a rate of duty"<sup>55</sup>, and, hence, were covered by Article X:2.<sup>56</sup> The Panel reasoned as follows:

"[T]he CNEN amendments at issue entailed a change in classification practices for some EC member States with the practical consequence that certain STBCs became dutiable. We therefore consider that, at least in some instances, as a result of the CNEN amendments at issue, some EC member States were required to change their classification practices in such a way that effected an advance in rate of duty."<sup>57</sup>

45. The same Panel interpreted the scope of Article X:2 as applying to circumstances where "the 'advance in a rate of duty' must be 'under an established and uniform practice'".<sup>58</sup> The Panel further found that "'uniform practice', in its context, refers to the similar application of a measure in the customs territory of a Member. Accordingly, 'uniform practice' means that the customs authorities of the EC member States apply the measures at issue similarly and consistently throughout the customs territory of the European Communities."<sup>59</sup> Summing up, the Panel found:

"[U]nder Article X:2, measures must be of a type that effect an advance in a rate of duty under an established and uniform practice, which means that the advance in a rate of duty must be applied ('practice') in the whole customs territory ('uniform') and its application should be on a secure basis ('established')."<sup>60</sup>

46. The Panel in *EC – IT Products* found that these criteria were met in the case of the CNEN at issue because these were designed to ensure uniform tariff treatment throughout the customs territory of the EC.<sup>61</sup>

47. In *US – Countervailing and Anti-Dumping Measures (China)*, the Panel rejected China's claim that the measure at issue violated Article X:2 of the GATT.<sup>62</sup> At issue was PL 112-99, a US law enacted on 13 March 2006 that expressly provided for the applicability of US countervailing duty (CVD) law to imports from non-market economy (NME) countries in all US CVD investigations initiated on or after 20 November 2006. The United States Department of Commerce (USDOC) had been applying US CVD law to imports from China since 2006. In 2012, a US court decided that US CVD law was not applicable to imports from China and other countries that the United States treated as NMEs under its trade remedy laws. PL 112-99 was enacted before that court decision became final. The Panel concluded that PL 112-99 was not a measure "effecting an advance" or "imposing a new or more burdensome requirement" within the meaning of Article X:2, and therefore rejected China's claim.

48. The Appellate Body reversed the Panel's interpretation of Article X:2, but was ultimately unable to complete the analysis of whether PL 112-99 was a measure "effecting an advance" or "imposing a new or more burdensome requirement" within the meaning of Article X:2.<sup>63</sup> The Appellate Body considered that the Panel erred in identifying the USDOC's practice of applying

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<sup>53</sup> Panel Report, *EC – IT Products*, para. 7.1106.

<sup>54</sup> Panel Report, *EC – IT Products*, para. 7.1105.

<sup>55</sup> Panel Report, *EC – IT Products*, para. 7.1107.

<sup>56</sup> Panel Report, *EC – IT Products*, para. 7.1110.

<sup>57</sup> Panel Report, *EC – IT Products*, para. 7.1110.

<sup>58</sup> Panel Report, *EC – IT Products*, para. 7.1116.

<sup>59</sup> Panel Report, *EC – IT Products*, para. 7.1119.

<sup>60</sup> Panel Report, *EC – IT Products*, para. 7.1120.

<sup>61</sup> Panel Report, *EC – IT Products*, para. 7.1121.

<sup>62</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 7.90-7.241.

<sup>63</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 4.53-4.183.

countervailing duties to imports from China as an NME country between 2006 and 2012 as the relevant baseline of comparison to determine whether PL 112-99 effected an "advance" in the rate of duty or imposed a "new or more burdensome requirement". The Appellate Body concluded that instead of proceeding from the agency practice and then addressing the issue of whether that practice was lawful or not, the Panel should have focused on ascertaining the meaning of the prior published US CVD law, in order to determine whether the 2012 law increased duties or imposed new or more burdensome requirements in relation to that pre-existing US law. The Appellate Body elaborated on the "baseline" for comparison under Article X:2:

"In our view, the identification of the baseline of comparison under Article X:2 for both (i) measures effecting an advance in a rate of duty and (ii) measures imposing a new or more burdensome requirement should start with the text of the published measure of general application that existed prior to the measure allegedly effecting an advance in a rate of duty or imposing a new or more burdensome requirement that replaced it or modified it. As discussed above, we consider that Article X:2 reflects the principles of transparency and due process and notice. The relevant baseline of comparison for purposes of Article X:2 should be reflected in norms that traders can rely upon and that accordingly create expectations among them. Published measures create expectations among traders, and changes to such measures trigger the due process and notice obligations of Article X:2, which, for this reason, preclude the enforcement of those changes before publication.

We note, however, that there may be circumstances where the prior measure of general application is either unpublished or there is no measure at all. In the first case, the relevant comparison for the purposes of Article X:2 would need to be conducted with the prior unpublished measure of general application, whose meaning should be ascertained based on its text, as well as other available elements of municipal law, such as practices of administrative agencies, court decisions, writings of recognized scholars, etc. In the second case, the absence of any rate of duty or charge or any requirement, restriction, or prohibition should be the baseline of comparison.

An interpretation of Article X:2 as requiring a comparison of the new measure with the prior published measure is also consistent with the function of ensuring transparency and protecting traders' expectations under Article X:1, which requires the prompt publication of certain measures of general application so as 'to enable governments and traders to become acquainted with them'. Until a new measure is published, traders will normally rely on prior measures that have been published and with which they are acquainted. It is a comparison with those measures that should reveal if the new measure effects an advance in a rate of duty or other charge on imports, or imposes a new or more burdensome requirement, thus triggering the obligation in Article X:2."<sup>64</sup>

#### **1.4.4 Enforcement before official publication**

49. The Panel in *EC – IT Products*, evaluating a claim under Article X:2 on the CNEN amendments described in paragraph 8 above, found that "proof that a measure has been applied would establish that it was enforced"<sup>65</sup> and that "even a single instance of enforcement of a measure before its official publication could amount to a violation of Article X:2, depending on the facts of the case".<sup>66</sup> Based on BTIs (member State classification rulings) issued after (and referring to) a CNEN amendment, and pre-dating the official publication of this CNEN amendment in the Official Journal, the Panel found a breach of Article X:2 because the CNEN amendment was enforced by member States to determine tariff classification prior to official publication.<sup>67</sup>

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<sup>64</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 4.105-4.107.

<sup>65</sup> Panel Report, *EC – IT Products*, para. 7.1129.

<sup>66</sup> Panel Report, *EC – IT Products*, para. 7.1131.

<sup>67</sup> Panel Report, *EC – IT Products*, paras. 7.1132-7.1135.



## 1.5 Article X:3

### 1.5.1 Article X:3(a)

#### 1.5.1.1 "shall administer"

50. In *EC – Bananas III*, the Appellate Body upheld the Panel's finding that the imposition of different import licensing systems on like products imported from different Members was inconsistent with Article X:3(a):

"The text of Article X:3(a) clearly indicates that the requirements of 'uniformity, impartiality and reasonableness' do not apply to the laws, regulations, decisions and rulings *themselves*, but rather to the *administration* of those laws, regulations, decisions and rulings. The context of Article X:3(a) within Article X, which is entitled 'Publication and Administration of Trade Regulations', and a reading of the other paragraphs of Article X, make it clear that Article X applies to the *administration* of laws, regulations, decisions and rulings. To the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994."<sup>68</sup>

51. The Appellate Body in *EC – Poultry* confirmed the above line of interpretation and found:

"[T]o the extent that Brazil's appeal relates to the *substantive content* of the EC rules themselves, and not to their *publication or administration*, that appeal falls outside the scope of Article X of the GATT 1994. The WTO-consistency of such substantive content must be determined by reference to provisions of the covered agreements other than Article X of the GATT 1994."<sup>69</sup>

52. The Panel in *Argentina – Hides and Leather* rejected Argentina's argument that the reference to uniformity in Article X:3(a) merely requires non-discriminatory treatment as between the goods of Members. The Panel stated:

"In our view, there is no requirement that Article X:3(a) be applied only in situations where it is established that a Member has applied its Customs laws and regulations in an inconsistent manner with respect to the imports of or exports to two or more Members.

Furthermore, Article X:3(a), by its terms, calls for a uniform, impartial and reasonable administration of trade-related regulations. Nowhere does it refer to Members or products originating in or destined for certain Members' territories, as is explicitly contained in other GATT 1994 Articles such as I, II and III. Indeed, Article X:1 requires the prompt publication of trade-related regulations 'so as to enable governments and *traders* to become acquainted with them.' Similarly, Article X:3(b) requires Members to provide for domestic review procedures relating to customs matters to which normally only private traders, not Members would have access.<sup>70</sup> These references undercut Argentina's argument that Article X can only apply in situations where there is discrimination between WTO *Members*."<sup>71</sup>

53. In *Argentina – Hides and Leather*, the Panel examined a claim regarding an Argentine measure authorizing representatives of the domestic leather industry to attend pre-export customs checks on raw hides. The Panel found that Article X:3(a) applied to the measure at issue, because it did not contain "substantive Customs rules for enforcement of export laws", but rather "provide[d] for a certain manner of applying those substantive rules":

"If the substance of a rule could not be challenged, even if the rule was administrative in nature, it is unclear what could ever be challenged under Article X. First, there is no

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<sup>68</sup> Appellate Body Report, *EC – Bananas III*, para. 200. See also Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.289.

<sup>69</sup> Appellate Body Report, *EC – Poultry*, para. 115.

<sup>70</sup> (footnote original) In fact, Article X:3(b), in its second sentence, uses the word "importer".

<sup>71</sup> Panel Report, *Argentina – Hides and Leather*, paras. 11.67-11.68.

requirement in Article X:3(a) that it apply only to 'unwritten' rules. Again, this would be contrary to that provision's own language linking it to Article X:1. Second, such an approach would also likely run counter to the other aspect of the Appellate Body's holding in *European Communities – Poultry* regarding Article X, to the effect that it applies to rules of general application and not to specific shipments.<sup>72</sup> Looking only to individual Customs officers' enforcement actions, rather than measures such as Resolution 2235, as Argentina implies, would almost certainly require a review of a specific instance of abuse rather than the general rule applicable. This would effectively write Article X:3(a) out of existence, which we cannot agree with.

Thus, we are left with a situation where we have a written provision, Resolution 2235, and we need to determine whether this Resolution is substantive or administrative. In our view it is administrative in nature and therefore properly subject to review under Article X:3(a). Resolution 2235 does not establish substantive Customs rules for enforcement of export laws. ... Rather, Resolution 2235 provides for a means to involve private persons in assisting Customs officials in the application and enforcement of the substantive rules, namely, the rules on classification and export duties. Resolution 2235 does not create the classification requirements; it does not provide for export refunds; it does not impose export duties. It merely provides for a certain manner of applying those substantive rules. This measure clearly is administrative in nature."<sup>73</sup>

54. In *US – Corrosion-Resistant Steel Sunset Review*, Japan argued that the US's sunset review laws were administrative in nature and consequently could be challenged under Article X:3(a) of the GATT 1994. Japan had asserted that the US's administration of its sunset review laws was inconsistent with Article X:3(a) as the United States legislation mandated self-initiation of sunset reviews without sufficient evidence. Japan also claimed that the US's administration of sunset review laws was not uniform, because it took different approaches with regard to Article 11.2 reviews and sunset reviews. The Panel ruled that Japan's Article X:3(a) claims related to the substance of US laws and regulations rather than their administration, and were therefore outside the scope of Article X:3(a):

"We note that Japan made a substantive claim challenging both the US law as such and its application in this particular sunset review regarding self-initiation of sunset reviews without sufficient evidence. We recall our finding above that self-initiation of sunset reviews under Article 11.3 is not subject to the evidentiary requirements of Article 5.6. This indicates that the substantive content of this aspect of US law, i.e. evidentiary standards applicable to the self-initiation of sunset reviews, can be, and in fact has in this case been, challenged by Japan. Therefore, deriving guidance from the ruling of the Appellate Body, in *EC – Poultry*, we find that this aspect of US law cannot be challenged under Article X:3(a) of GATT 1994 because it relates to the *substance* rather than the administration of US law."<sup>74</sup>

55. In *US – Hot-Rolled Steel*, the Panel pointed out that, for a Member's action to violate Article X:3(a) that action should have a significant impact on the overall administration of that Member's law and not simply on the outcome of the single case in question.<sup>75</sup>

56. The Appellate Body in *EC – Selected Customs Matters* also discussed the difference between substantive and administrative measures, and its impact on proof required for claims under Article X:3:

"The statements of the Appellate Body in *EC – Bananas III* and *EC – Poultry* do not exclude, however, the possibility of challenging under Article X:3(a) the substantive content of a legal instrument that regulates the administration of a legal instrument of

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<sup>72</sup> (footnote original) In *EC – Poultry*, the Appellate Body further stated that Article X is relevant only to measures "of general application" and not to the particular treatment of each individual shipment. See Appellate Body Report on *EC – Poultry*, paras. 111 and 113.

<sup>73</sup> Panel Report, *Argentina – Hides and Leather*, paras. 11.71-11.72.

<sup>74</sup> Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.293.

<sup>75</sup> Panel Report, *US – Hot-Rolled Steel*, para. 7.268. See also, Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.307.

the kind described in Article X:1. Under Article X:3(a), a distinction must be made between the legal instrument being administered and the legal instrument that regulates the application or implementation of that instrument. While the substantive content of the legal instrument being administered is not challengeable under Article X:3(a), we see no reason why a legal instrument that regulates the application or implementation of that instrument cannot be examined under Article X:3(a) if it is alleged to lead to a lack of uniform, impartial, or reasonable administration of that legal instrument.

This distinction has implications for the type of evidence required to support a claim of a violation of Article X:3(a). If a WTO Member challenges under Article X:3(a) the substantive content of a legal instrument that regulates the administration of a legal instrument of the kind described in Article X:1, it will have to prove that this instrument necessarily leads to a lack of uniform, impartial, or reasonable administration. It is not sufficient for the complainant merely to cite the provisions of that legal instrument. The complainant must discharge the burden of substantiating how and why those provisions necessarily lead to impermissible administration of the legal instrument of the kind described in Article X:1."<sup>76</sup>

57. The Panel in *EU – Energy Package* noted that Article X: 3 of the GATT 1994 sets minimum standards for transparency and procedural fairness in the administration of trade regulations. The obligations under Article X:3(a) apply to how the laws, regulations, decisions and rulings within the scope of Article X:1 are administered. In this respect, the Panel recalled the Appellate Body finding in *EC – Selected Customs matters* that a government's act of administration subject to the provisions of Article X:3(a) includes not only acts of administering the laws and regulations but also the legal instruments that regulate the application or implementation of such laws and regulations and this could also include administrative processes leading to administrative decisions. The Panel noted that to the extent that a claim of violation under Article X:3(a) is based on an administrative process, the complainant must demonstrate how and why certain features of the administrative processes necessarily lead to a lack of uniform, impartial, or reasonable administration of a legal instrument of the kind described in Article X:1.<sup>77</sup>

58. The Panel in *Thailand –Cigarettes (Philippines)* summed up the case-law regarding Article X:3(a), and commented:

"In sum, the guidance provided by the Appellate Body suggests that Article X:3(a) dictates the disciplines governing the *administration* of the legal instruments of the kind described in Article X:1. The scope of administration that is subject to a challenge under Article X:3(a) includes both the manner in which the legal instruments of the kind falling under Article X:1 are applied or implemented in particular cases as well as a legal instrument that regulates such application or implementation. Further, administrative processes leading to administrative decisions may also be included in the scope of the term "administer" and hence Article X:3(a). However, to the extent that a claim of violation under Article X:3(a) is based on an administrative process, the complainant must demonstrate how and why certain features of the administrative processes necessarily lead to a lack of *uniform, impartial, or reasonable* administration of a legal instrument of the kind described in Article X:1.

As a final note, we are mindful of the Appellate Body's statement that as allegations that the conduct of a WTO Member is biased or unreasonable are serious under any circumstances, such allegations should not be brought lightly, or in a subsidiary fashion. The Appellate Body therefore cautioned that 'a claim under Article X:3(a) of the GATT 1994 must be supported by solid evidence; the nature and the scope of the claim, and the evidence adduced by the complainant in support of it, should reflect the gravity of the accusations inherent in claims under Article X:3(a) of the GATT 1994'. Overall, our examination of the Philippines' claims under Article X:3 requires us to exercise a balanced judgment between the traders' fundamental right to procedural

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<sup>76</sup> Appellate Body Report, *EC – Selected Customs Matters*, paras. 200-201. See also paragraphs 47-48.

<sup>77</sup> Panel Report, *EU – Energy Package*, paras. 7.862-7.867.

fairness and the sovereign right afforded to the Member governments in managing the manner in which they administer their own laws and regulations."<sup>78</sup>

59. In *Thailand – Cigarettes (Philippines)*, the Panel examined a claim that Thailand administered its customs laws in a partial and unreasonable manner, because the Thai government had appointed government officials (the Director of Excise, the Director of Customs, the Director of Revenue or other Ministry of Finance officials) to the position of Director of the Thai Tobacco Monopoly (TTM), or to the TTM board, and these persons served at the same time in both the Ministry and TTM. The Panel considered whether these appointments constituted "administration" in the sense of Article X:3(a):

"Considered against the standard of 'administration' under Article X:3(a) as set out by the Appellate Body, we understand that the appointment of dual function officials as TTM directors may not be an *application* of the Thai customs and fiscal laws and regulations because it is not an act of *applying* the substance of the customs and tax provisions. Nonetheless the broad scope of administrative processes falling within the scope of Article X:3(a) suggests that the appointment of government officials to the director position of TTM (the only domestic company competing against imported cigarettes in the Thai market) may well be considered as part of the administrative process leading to the application and implementation of the customs and fiscal measures insofar as these government officials are sufficiently involved in applying or implementing the Thai customs and tax laws."<sup>79</sup>

60. In *Thailand – Cigarettes (Philippines)*, the Panel examined a claim regarding determination of certain internal taxes on the basis of a guarantee value, instead of a declared transaction value, and regarding lack of an automatic refund mechanism for excess taxes paid. The Panel determined that this claim was improperly brought under Article X:3(a) as it concerned substantive issues to be dealt with under other WTO provisions.<sup>80</sup>

61. The Panel in *US – COOL* found that, despite the absence of any specific instance of application, the context in which the letter at issue was issued by Secretary Vilsack to industry in general showed a sufficient basis for the letter to constitute an act of administering the COOL measure. In the course of its analysis, the Panel stated:

"The term 'administer' in Article X:3(a) refers to 'putting into practical effect or applying' a legal instrument of the kind described in Article X:1. We also recall the panel's observation in *Argentina – Hides and Leather* regarding the proper scope of Article X:3(a) that the relevant question is 'whether the substance of such a measure is administrative in nature or, instead, involves substantive issues more properly dealt with under other provisions of the GATT 1994'. "<sup>81</sup>

62. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel found a violation of Article X:3(a) because of the uncertainty caused by the delay in the implementation of a certification scheme that provided the only exception to the requirements that the challenged technical regulation entailed:

"On that basis, the Panel concludes that by (i) introducing a low ILUC-risk certification requirement (i.e. the criteria and procedure) together with the high ILUC-risk cap and phase out as of mid-2019, which was to be transposed by all EU member States by mid-2021 at the latest, and (ii) only publishing the promised detailed Rules for operationalizing such a requirement in mid-2022 such that it is impossible to use due to uncertainty attaching to its criteria and process, there is a violation of Article X:3(a)."<sup>82</sup>

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<sup>78</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.873-7.874.

<sup>79</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.886.

<sup>80</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.982-7.988.

<sup>81</sup> Panel Reports, *US – COOL*, para. 7.821.

<sup>82</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.1062.

### 1.5.1.2 "in a uniform, impartial and reasonable manner"

#### 1.5.1.2.1 General

63. In *US – Stainless Steel (Korea)*, the Panel rejected Korea's claim that the United States violated Article X:3(a) by departing from its own established policy with respect to the determination of the prices of local sales to be compared to allegedly dumped exports. The Panel held that Article X:3(a) was not "intended to function as a mechanism to test the consistency of a Member's particular decisions or rulings with the Member's own domestic law and practice":

"[W]e have grave doubts as to whether Article X:3(a) can or should be used in the manner advocated by Korea. As the United States correctly points out, the WTO dispute settlement system 'serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements'. It was not in our view intended to function as a mechanism to test the consistency of a Member's particular decisions or rulings with the Member's own domestic law and practice; that is a function reserved for each Member's domestic judicial system,<sup>83</sup> and a function WTO panels would be particularly ill-suited to perform. An incautious adoption of the approach advocated by Korea could however effectively convert every claim that an action is inconsistent with domestic law or practice into a claim under the *WTO Agreement*.

In any event, we do not consider that the DOC in this investigation committed the 'unprecedented departure' from 'established policy' alleged by Korea such that its behaviour was either non-uniform or unreasonable. In our view, the requirement of uniform administration of laws and regulations must be understood to mean uniformity of treatment in respect of persons similarly situated; it cannot be understood to require identical results where relevant facts differ. Nor do we consider that the requirement of reasonable administration of laws and regulations is violated merely because, in the administration of those laws and regulations, different conclusions were reached based upon differences in the relevant facts."<sup>84</sup>

64. In *Argentina – Hides and Leather*, the Panel explained the nature of the obligation under Article X:3(a) by distinguishing between transparency between WTO Members and transparency with respect to individual traders:

"In applying these tests, it is important to recall that we are not to duplicate the substantive rules of the GATT 1994. Thus, for example, the test generally will not be whether there has been discriminatory treatment in favour of exports to one Member relative to another. Indeed, the focus is on the treatment accorded by government authorities to the traders in question."<sup>85</sup>

65. In *US – Hot-Rolled Steel*, the Panel held that violations of Article X:3(a) require a significant impact on the Member's overall administration of its law:

"While it is not inconceivable that a Member's actions in a single instance might be evidence of lack of uniform, impartial, and reasonable administration of its laws, regulations, decisions and rulings, we consider that the actions in question would have to have a significant impact on the overall administration of the law, and not simply on the outcome in the single case in question. Moreover, we consider it unlikely that such a conclusion could be reached where actions in the single case in question were, themselves, consistent with more specific obligations under other WTO Agreements."<sup>86</sup>

66. In *US – Corrosion-Resistant Steel Sunset Review* Japan argued that the application of the US laws and regulations with regard to the sunset reviews was unreasonable and partial, and hence

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<sup>83</sup> (footnote original) It is for this reason that both Article X:3(b) of *GATT 1994* and Article 13 of the *AD Agreement* require Members to maintain appropriate judicial, arbitral or administrative tribunals or procedures.

<sup>84</sup> Panel Report, *US – Stainless Steel*, paras. 6.50-6.51.

<sup>85</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.76.

<sup>86</sup> Panel Report, *US – Hot-Rolled Steel*, para. 7.268.

inconsistent with Article X:3(a), because the US authorities demanded less information from United States domestic producers than from foreign exporters. The Panel recalled WTO case law that matters relating to the substantive nature of laws and regulations go beyond the scope of Article X:3(a):

"Japan further argues that the fact that not as much information is requested from domestic producers renders the administration of US law partial.

The nature and quantity of the information that will be in the possession of foreign exporters and producers will necessarily differ from the information possessed by the domestic industry, and this information will be used for different purposes by the investigating authority. This is because generally, in investigations (and reviews), foreign exporters will be the main source of information regarding the dumping, or likelihood of continuation or recurrence of dumping, component of the determination that must be made, while domestic producers will possess more information relevant to the injury component of the determination that must be made. Consequently, we find that this aspect of Japan's claim also falls outside the scope of Article X:3(a)."<sup>87</sup>

#### **1.5.1.2.2 "uniform"**

67. The Appellate Body in *EC – Selected Customs Matters* found that Article X:3(a) of the GATT 1994 does not require uniformity of administrative processes:

"In its broadest sense, an administrative process may be understood as a series of steps, actions, or events that are taken or occur in relation to the making of an administrative decision. Given this broad definition of administrative process, it appears to us that Article X:3(a) of the GATT 1994 does not contemplate uniformity of administrative processes. In other words, non-uniformity or differences in administrative processes do not, by themselves, constitute a violation of Article X:3(a). This Article contains an obligation to administer in a uniform manner legal instruments of the kind described in Article X:1—laws, regulations, judicial decisions, and administrative rulings of general application pertaining to the subject matters set out in that provision. We agree with the Panel that the term 'administer' in Article X:3(a) refers to putting into practical effect, or applying, a legal instrument of the kind described in Article X:1. Thus, under Article X:3(a), it is the application of a legal instrument of the kind described in Article X:1 that is required to be uniform, but not the processes leading to administrative decisions, or the tools that might be used in the exercise of administration."<sup>88</sup>

68. In *China – Raw Materials*, the Panel found that a system under which export quotas were allocated according to "operation capacity" by 32 local departments in charge of foreign trade, which were not provided with any guidelines or standards (so that each would have to interpret the operation capacity criterion as it sees fit) constituted non-uniform administration inconsistent with Article X:3(a). The Panel stated: "there is a very real risk that in the absence of any definition or standardization of an understanding of what 'operation capacity' means that similar exporters in terms of size, experience, and other factors may be treated differently depending on which of 32 dispersed local office deals with their application. Under such circumstances it could well be assumed that one exporter could well find its application rejected while another exporter of equal description would succeed."<sup>89</sup> The Panel concluded:

"[T]he lack of any definition, guidelines or standards in how the 32 Local Departments in charge of Foreign Trade should apply the potentially critical operation capacity criterion constitutes relevant evidence in establishing non-uniform administration of the operation capacity criterion. Moreover, the Panel is persuaded that the lack of any definition, guidelines or standards pose a very real risk that this criterion will be administered differently depending on which Local Department handles the quota application.

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<sup>87</sup> Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 7.305-7.306.

<sup>88</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 224.

<sup>89</sup> Panel Report, *China – Raw Materials*, para. 7.743.

Consequently, the Panel concludes that the lack of any definition, guidelines or standards in how the operation capacity criterion should be applied poses a very real risk to the interests of relevant parties such that this necessarily leads to non-uniform administration inconsistently with Article X:3(a) of the GATT 1994."<sup>90</sup>

69. In *US – COOL*, the Panel considered the meaning of the term "uniform" in the context of Article X:3(a):

"The term 'uniform' is defined as 'of one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times'. We find guidance for the meaning of 'uniform' under Article X:3(a) in the findings by panels in previous disputes. For instance, the panel in *Argentina – Hides and Leather* stated that 'uniform administration' requires that Members ensure that their laws are applied consistently and predictably. Additionally, in *US – Stainless Steel*, the panel noted that, 'the requirement of uniform administration of laws and regulations must be understood to mean uniformity of treatment in respect of persons similarly situated'. Based on the dictionary meaning and guidance provided by previous panels, we will assess whether Mexico has established that the concerned shifts in the guidance provided by USDA constitute a non-uniform administration of the COOL measure."<sup>91</sup>

#### 1.5.1.2.3 "impartial"

70. In *Argentina – Hides and Leather*, the Panel examined an Argentine measure authorizing representatives of the domestic leather industry to be present when hides are checked before exportation, and found that it violated Article X:3:

"Much as we are concerned in general about the presence of private parties with conflicting commercial interests in the Customs process, in our view the requirement of impartial administration in this dispute is not a matter of mere presence of representatives [of the downstream consuming industry] in such processes. It all depends on what that person is permitted to do. In our view, the answer to this question is related directly to the question of access to information as part of the product classification process as discussed in the previous Section. Our concern here is focussed on the need for safeguards to prevent the inappropriate flow of one private person's confidential information to another as a result of the administration of the Customs laws, in this case the implementing Resolution 2235.

Whenever a party with a contrary commercial interest, but no relevant legal interest, is allowed to participate in an export transaction such as this, there is an inherent danger that the Customs laws, regulations and rules will be applied in a partial manner so as to permit persons with adverse commercial interests to obtain confidential information to which they have no right.

While this situation could be remedied by adequate safeguards, we do not consider that such safeguards presently are in place. Therefore, Resolution 2235 cannot be considered an impartial administration of the Customs laws, regulations and rules described in Article X:1 and, thus, is inconsistent with Article X:3(a) of the GATT 1994."<sup>92</sup>

71. In *Thailand – Cigarettes (Philippines)*, the Panel examined a claim that the dual appointment of Thai government officials to posts in the management of the Thai Tobacco Monopoly (TTM) constituted partial administration of laws and regulations. The Panel found that based on the evidence, dual appointment constitutes an administrative process leading to administration of Thai customs and fiscal laws and regulations.<sup>93</sup> The Panel found that the Philippines had not proved that the features relating to the appointment of certain government officials as TTM directors necessarily led to a lack of impartial administration of the Thai customs and fiscal rules:

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<sup>90</sup> Panel Report, *China – Raw Materials*, paras. 7.751-7.752.

<sup>91</sup> Panel Reports, *US – COOL*, para. 7.876.

<sup>92</sup> Panel Report, *Argentina – Hides and Leather*, paras. 11.99-11.101.

<sup>93</sup> See paragraph 58 above.



"[W]e are mindful of the seriousness of the allegation concerning a sovereign government's administration of its laws and regulations. We recognize that there may be situations where a government's measure or act is so egregiously flawed that the unfairness inherent in such a measure or act may be sufficient to demonstrate an impartial administration without the need to illustrate it with a concrete example(s) of decisions resulted from the concerned administration. However, under the circumstances of this dispute, we do not find that the appointment of government officials as TTM directors, considered in the light of the implemented safeguards present, amounted to such a situation.

At the same time, however, we wish to emphasize that the principle of transparency and procedural fairness that permeates the obligations under Article X:3(a) and consequently the trading system in general must be respected by the Members with utmost effort. ... In the light of the unusual factual circumstances in Thailand that certain government officials in charge of customs and tax determinations also serve on the board of directors for TTM, the only domestic competitor against imported cigarettes, it would be only prudent for Thailand to ensure that the administration of its customs and fiscal laws is carried out in a transparent and impartial manner."<sup>94</sup>

72. In *China – Raw Materials*, the Panel, considering the measure described in paragraph 68 above, was not convinced that the lack of definition of any guidelines or standards for administration would necessarily lead to partial administration inconsistent with Article X:3(a).<sup>95</sup> The Panel in *China – Raw Materials* also examined a claim that the involvement of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (CCCME) in administering the export quotas on various raw materials created an inherent conflict of interest because an exporter must share sensitive business information with an entity that represents its competitors and potential customers. The Panel opined that "[t]he mere sharing of confidential information will not necessarily result in partial administration. This would be the case only if those persons who receive the confidential commercial information are able to use it in a manner that is contrary to the interests of those providing the information".<sup>96</sup> Because the Panel concluded that members of the CCCME Secretariat did not participate in deciding which applicant exporters were awarded a part of the export quota, the Panel concluded that it did not need to consider whether the members of the CCCME Secretariat are persons with adverse commercial interests, or whether adequate safeguards are in place to prevent the inappropriate flow of confidential information.<sup>97</sup>

#### **1.5.1.2.4 "reasonable"**

73. In *Argentina – Hides and Leather*, the Panel also ruled that the measure described in paragraph 70 above was not "reasonable":

"[A] process aimed at assuring the proper classification of products, but which inherently contains the possibility of revealing confidential business information, is an unreasonable manner of administering the laws, regulations and rules identified in Article X:1 and therefore is inconsistent with Article X:3(a)."<sup>98</sup>

74. The Panel in *Dominican Republic – Import and Sale of Cigarettes* found that the Dominican Republic had administered its Selective Consumption Tax in an unreasonable manner inconsistent with Article X:3(a), because the tax authorities disregarded the actual price of domestic cigarettes when determining the tax base for imports, in a manner not supported by the domestic rules in force at the time:

"[T]he obligation under Article X:3(a) of the GATT is that Members administer the provisions covered by that Article in a uniform manner, in an impartial manner, and in a reasonable manner. These are not cumulative requirements. A Member may thus act in a breach of its obligations under Article X:3(a) of the GATT, if it administers the provisions in an unreasonable manner, even if there is no evidence that that Member

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<sup>94</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.909-7.910.

<sup>95</sup> Panel Report, *China – Raw Materials*, paras. 7.753-7.755.

<sup>96</sup> Panel Report, *China – Raw Materials*, para. 7.783.

<sup>97</sup> Panel Report, *China – Raw Materials*, para. 7.785.

<sup>98</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.94.



has also administered the provisions in a non-uniform manner or in a partialized manner.

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By its own admission, it is clear that the Dominican Republic did not clearly support its determination of the tax base for the application of the Selective Consumption Tax on imported cigarettes on any one of the three methodologies contained in the legislation in force at the time. Furthermore, the Dominican Republic authorities disregarded the actual retail selling price of cigarettes to determine the 'nearest similar product on the domestic market'. The Dominican Republic has argued that the decision to disregard the retail selling price was taken based on the value declared at customs by the importer. In its own words, '[t]he authorities of the Dominican Republic relied on several factors, including the declared customs value of the imported cigarettes, whenever there was evidence that the pricing policies of the importer alone could not be relied on to determine the nearest similar product in the domestic market'. However, there is no evidence that the decision was based on any particular provision of the Dominican Republic law in force at the time. Indeed, the Dominican Republic legislation does not appear to grant discretion to the authorities to deviate from the methods described, nor does it grant discretion to disregard retail selling prices and to favour customs-declared values. There is furthermore no evidence that the Dominican Republic authorities notified the importers about the alleged discrepancy between the customs value and the selling price information, nor about the motivation for its decision to disregard retail selling prices.

The Panel thus finds that the manner in which the Dominican Republic administered the provisions governing the Selective Consumption Tax, in particular with respect to the determination of the tax base for the application of the tax on cigarettes, and the use in this regard of the 'nearest similar product on the domestic market', was unreasonable. The fact that the Dominican Republic authorities did not support its decisions regarding the determination of the tax base for imported cigarettes by resorting to the rules in force at the time and that they decided to disregard retail selling prices of imported cigarettes, is not 'in accordance with reason', 'having sound judgement', 'sensible', 'within the limits of reason', nor 'articulate'.<sup>99</sup>

75. In *Thailand – Cigarettes (Philippines)*, the Panel, in a finding not reviewed by the Appellate Body, examined a claim of unreasonable administration and found that the Philippines had not established that the features of Thailand's granting selected customs and tax officials with a dual function as TTM directors necessarily lead to an unreasonable administration of the Thai customs and tax laws and regulations within the meaning of Article X:3(a). In this context, the Panel first noted Thailand's explanations regarding the rationale behind this policy:

"[G]ranting dual function officials the power to make customs and fiscal decisions concerning cigarettes, both imported and domestic, as well as access to confidential information on imported cigarettes would appear to constitute an act of *inappropriate* and/or *not* sensible administration unless there is a particular rationale that can explain the concerned act.

Thailand nonetheless points out that granting dual positions to selected government officials promotes legitimate administrative objectives: (i) they 'have expertise relevant to the management of a state-owned enterprise' importing tobacco and collecting the related taxes; (ii) they can 'play a role in ensuring that *TTM itself* complies efficiently' with the Thai legislation; and (iii) they are making sure that TTM's activities are consistent with Thai public health policy (TTM Board includes an individual of the Ministry of Health)."<sup>100</sup>

76. The Panel in *Thailand – Cigarettes (Philippines)* found no inconsistency with WTO rules in Thailand's policy even if there could be other means to achieve the same result:

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<sup>99</sup> Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.383 and 7.387-7.388. See also Panel Report, *EU – Energy Package*, paras. 7.241, 7.860-7.861.

<sup>100</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.922-7.923.

"A sovereign state has the discretion and authority to structure its government and manage and administer its own laws and regulations as it deems fit. ... [W]e are not in a position to second guess the specific needs of the Thai government in assigning selected customs and tax officials with a dual role as a director of a state enterprise, TTM. We therefore recognize that the Thai government officials serving as DG Excise, DG Revenue, DG Commerce may indeed be well equipped to apply their expertise in laws and regulations relating to customs and internal taxes to the management of TTM.

The Philippines argues that, even though those objectives were legitimate, other avenues were available to reach identical results. We agree[.] However, as noted above, it is our view that Thailand, as a sovereign state, may administer its laws and regulations in the way it considers most appropriate in the particular circumstances in which it is situated. It should be noted though, that a WTO Member's discretion to administer its own laws, must be exercised in a manner consistent with its obligations under the WTO Agreement. Our task is, therefore, not to find the best administrative means to achieve a Member's goal."<sup>101</sup>

77. In *Thailand – Cigarettes (Philippines)*, the Panel also examined a claim that delays in Customs appeals of customs valuation determinations resulted in unreasonable administration of the Thai customs laws under Article X:3(a). The Panel observed that "[a]lthough we do not consider that the obligation for a WTO Member to administer its laws and regulations in a reasonable manner under Article X:3(a) sets a specific time limit for administrative review processes, such as the BoA review in this dispute, a review process taking over 7 years, particularly compared to the average time taken for other similar claims (i.e. 2.5 years), would appear to be, at least in the abstract sense, rather unusual."<sup>102</sup> The Panel found as follows:

"The overall length of the administrative process, combined with less-than-prompt actions (for example requesting information from [the importer]) taken by the BoA, also tends to show prejudice caused to other Member governments and traders under Article X:3(a). The overall delays shown throughout the course of the review process therefore are 'not appropriate or proportionate' considered against the nature of the circumstances concerned. We therefore find that the concerned delays in the BoA review process resulted in the administration of the Thai customs law in an *unreasonable* manner and are in violation of Article X:3(a) of the GATT 1994."<sup>103</sup>

78. In finding that Thailand administered the provisions of its Revenue Code in contravention of the reasonableness requirement of Article X:3(a), the Panel in *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines*) stated:

"We further observe that Thailand, in its response, has not addressed the timing element highlighted in the question from the Panel, i.e. that the importer is required to submit the data on the average actual market price on the date of notification. We fail to see how the requirement to notify the average actual market price prevailing on the same day that the notification is due helps to address the objective that the notification requirement seeks to achieve according to Thailand, i.e. ensuring there is no unilateral determination of the tax base by a taxpayer. As we have found above, importers do not and are not in a position to know the average actual market price on the date of notification. Thus, if anything, the notification requirement forces the taxpayer to arbitrarily determine the value to be notified, which, in our view, undermines the alleged objective of avoiding unilateral tax base determination. We can therefore identify no rational connection between the objectives pursued by the VAT notification requirement and the difficulties imposed on the importers in attempting to comply with it."<sup>104</sup>

79. In *China – Raw Materials*, examining the measure described at paragraph 68 above, the Panel found that "there is a very real risk that in the absence of any definition or standardization of

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<sup>101</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.924-7.925.

<sup>102</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.954.

<sup>103</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.969.

<sup>104</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines*), para. 7.943.

an understanding of what 'operation capacity' means that similar exporters in terms of size, experience, and other factors may be treated differently depending on which of 32 dispersed local office deals with their application. Under such circumstances it could well be assumed that one exporter could well find its application rejected while another exporter of equal description would succeed."<sup>105</sup> The Panel then went on and stated:

"[T]he lack of any definition, guidelines or standards in how the 32 Local Departments in charge of Foreign Trade should apply the potentially critical operation capacity criterion constitutes relevant evidence in establishing unreasonable administration of the operation capacity criterion. Moreover, the Panel is persuaded that the lack of any definition, guidelines or standards pose a very real risk that this criterion will be administered differently depending on which Local Department handles the quota application.

Consequently, the Panel concludes that the lack of any definition, guidelines or standards to guide how the operation capacity criterion should be applied poses a very real risk to the interests of relevant parties such that this necessarily leads to unreasonable administration inconsistently with Article X:3(a) of the GATT 1994."<sup>106</sup>

80. In *China – Raw Materials*, the Panel also considered and rejected a claim that the involvement of the CCCMC<sup>107</sup> in export quota administration would necessarily lead to unreasonable administration in violation of Article X:3(a). The Panel found that the documents required to be submitted to the CCCMC were relevant to the CCCMC's task of evaluating eligibility of quota applicants, and that the claimants had not "demonstrated that the features leading to the involvement of the CCCMC in export quota administration post a very real risk to the interests of relevant parties such that this necessarily results in unreasonable administration of the export quotas inconsistently with Article X:3(a)."<sup>108</sup>

81. In *US – COOL*, the Panel considered the meaning of the term "reasonable" in the context of Article X:3(a):

"The term 'reasonable' is defined as 'in accordance with reason', 'not irrational or absurd', 'proportionate', 'sensible', and 'within the limits of reason, not greatly less or more than might be thought likely or appropriate'. We assess the parties' claims of not reasonable administration in light of these definitions.

In our view, whether an act of administration can be considered reasonable within the meaning of Article X:3(a) entails a consideration of factual circumstances specific to each case. This is confirmed by previous disputes where the requirement of reasonable administration was understood as requiring the examination of the features of the administrative act at issue in the light of its objective, cause or the rationale behind it."<sup>109</sup>

82. The Panel in *US – COOL* concluded that the Vilsack letter did not administer the COOL measure in a "reasonable" manner:

"Although, in general, a WTO Member has the discretion to administer its laws and regulations in the manner it deems fit, it equally has the responsibility to respect 'certain minimum standards for transparency and procedural fairness' as regards its actions. As the Appellate Body observed, Article X:3(a) of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations.

This responsibility, in our view, applies to all types of actions falling within the broad scope of the term 'administer' under Article X:3(a). We consider that the Vilsack letter did not meet these minimum standards of procedural fairness in relation to the

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<sup>105</sup> Panel Report, *China – Raw Materials*, para. 7.743.

<sup>106</sup> Panel Report, *China – Raw Materials*, paras. 7.745-7.746.

<sup>107</sup> See paragraph 72 above.

<sup>108</sup> Panel Report, *China – Raw Materials*, paras. 7.794-7.796.

<sup>109</sup> Panel Reports, *US – COOL*, paras. 7.850-7.851.

implementation of the 2009 Final Rule by both allowing the 2009 Final Rule (AMS) to enter into force and, at the same time, suggesting industry compliance with stricter labelling requirements than those contained in the 2009 Final Rule (AMS).

Based on the manner in which the Secretary of Agriculture addressed the decision to implement the 2009 Final Rule (AMS), taken together with the circumstances under which the letter was issued, we consider that the Vilsack letter was not 'appropriate', and thus does not meet the requirement of reasonable administration of the COOL measure within the meaning of Article X:3(a)."<sup>110</sup>

## **1.5.2 Article X:3(b)**

### **1.5.2.1 "prompt review and correction"**

83. The panel in *EC – Selected Customs Matters* stated:

"[A] due process theme underlies Article X of the GATT 1994. In the Panel's view, this theme suggests that an aim of the review provided for under Article X:3(b) of the GATT 1994 is to ensure that a trader who has been *adversely affected* by a decision of an administrative agency has the ability to have that *adverse* decision reviewed."<sup>111</sup>

84. The Panel in *Thailand – Cigarettes (Philippines)* examined a claim of violation of Article X:3(b) related to the delays referred to in paragraph 77 above. In a finding upheld by the Appellate Body, the Panel determined:

"[T]he excessive delays that have been caused in the ... appeals before the BoA (the prerequisite step necessary to even reach the Thai Tax Court) are so significant in terms of their duration and frequency that these specific instances can be considered as an indication of the capacity for delays in the system. Therefore, we conclude that Thailand failed to maintain an independent tribunal for the prompt review of customs value determinations inconsistently with Article X:3(b)."<sup>112</sup>

85. The Appellate Body in *Thailand – Cigarettes (Philippines)* opined that promptness within the meaning of Article X:3(b) should be measured on a case by case basis:

"[T]he due process objective reflected in Article X:3 of the GATT 1994 suggests that 'prompt review and correction' is to be understood as review and correction of administrative action that is performed in a quick and effective manner and without delay. What is quick or performed without delay depends on the context and particular circumstances, including the nature of the specific type of action to be reviewed and corrected. Whether a system does or does not ensure prompt review thus cannot be determined in the abstract. We therefore agree with the Panel that the nature of the specific administrative action at issue informs the meaning of the word 'prompt' in the particular circumstances of a Member's domestic system.

... The reference to 'correction' indicates that Article X:3(b) requires more than mere declaratory action or *ex post* review of whether administrative action conforms to domestic law or not. Compliance with the obligation to maintain tribunals or procedures for the 'correction' of administrative action relating to customs matters requires that Members ensure that their system of review provides for the relevant administrative action to be set right."<sup>113</sup>

86. The Appellate Body in *Thailand – Cigarettes (Philippines)* noted that Article X:3(b) is flexible with regard to the type of review mechanisms that can be used by Members:

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<sup>110</sup> Panel Reports, *US – COOL*, paras. 7.861-7.863.

<sup>111</sup> Panel Report, *EC – Selected Customs Matters*, para. 7.536.

<sup>112</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.1015.

<sup>113</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 203-204.

"Finally, we note that Article X:3(b) does not prescribe one particular type of review or correction of administrative action relating to customs matters. Instead it refers to 'judicial, arbitral or administrative tribunals or procedures'. This suggests that there are a variety of ways in which a Member may comply with the obligation of maintaining tribunals or procedures for prompt review and correction of administrative action relating to customs matters, provided that, *inter alia*, such tribunals and procedures are independent of the agencies entrusted with administrative enforcement as required by the second sentence of Article X:3(b)."<sup>114</sup>

87. The Panel in *Thailand – Cigarettes (Philippines)* also found that Thailand acted inconsistently with Article X:3(b) by failing to maintain or institute independent review tribunals or process for the prompt review of decisions on guarantees required to be posted by importers to secure the payment of import duties; appeal was only available after issuance of notice of final assessment. Moreover, there was no timetable for issuance of such notices. Upholding the Panel decision, the Appellate Body observed that "the review system maintained by Thailand imposes delays that are essentially coextensive with the lifetime of a guarantee's security function"<sup>115</sup> and found as follows:

"[T]he character of a guarantee is relevant in determining what can be regarded as 'prompt' with respect to the review of guarantee decisions. As set out above, a 'guarantee' is defined as '[s]omething given or existing as security, such as to fulfill a future engagement or a condition subsequent'. This definition clarifies a key element of a guarantee, namely, its relation to a future event. A guarantee is tied to, but distinct from, the fulfilment of an engagement or condition in the future. Accordingly, a guarantee is effective as a security from the time it is given up to the time when the engagement or condition is fulfilled. Once the future condition is fulfilled, the guarantee no longer serves as a security.

We also recall our above consideration that the due process objective reflected in Article X:3 of the GATT 1994 suggests that 'prompt review and correction' is to be understood as review and correction of administrative action that is performed in a quick and effective manner and without delay. It follows that the mechanism for the review of administrative action relating to customs matters must permit review to be timely and effective. In the particular circumstances of a guarantee, which is effective as a security from the time it is given until the time when the engagement or condition is fulfilled, we consider that, for a review to be considered timely and effective, it must at least be possible to challenge the guarantee during the time it serves as a security. This is so because it is during the period of time that a guarantee is required that importers are most affected by the guarantee decision."<sup>116</sup>

#### **1.5.2.2 "administrative action relating to customs matters"**

88. In *Thailand – Cigarettes (Philippines)*, the Panel examined a claim under Article X:3(b) regarding the alleged absence of a right to appeal against the amount of a guarantee for payment of customs duties. In a finding upheld by the Appellate Body, the Panel suggested that "'administrative action relating to customs matters' in Article X:3(b) of the GATT 1994 includes a wide range of acts applying legal instruments having a rational relationship with customs matters, which clearly includes *valuation* of goods being imported"<sup>117</sup> and that "the term 'administrative action relating to customs matters' in Article X:3(b) is not necessarily limited to *final* administrative determinations where the so-called intermediary actions taken prior to final determinations result in an immediate adverse effect on traders."<sup>118</sup> The Panel and the

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<sup>114</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 205.

<sup>115</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 221.

<sup>116</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 219-220.

<sup>117</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.1029; Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 202.

<sup>118</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.1035.

Appellate Body concluded that the imposition of a guarantee is an "administrative action relating to customs matters" within the meaning of Article X:3(b).<sup>119</sup>

89. In *US – Countervailing and Anti-Dumping Measures (China)*, the parties agreed that the phrase "administrative action relating to customs matters" includes administrative action relating to countervailing and anti-dumping duty proceedings. In this regard, the parties were of the view that the obligations in Article X:3(b), Article 23 of the SCM Agreement, and Article 13 of the Anti-Dumping Agreement are cumulative in nature (the latter provisions contain judicial review obligations regarding countervailing duty and anti-dumping duty determinations). The Panel stated:

"We see no reason to disagree with the parties' understanding of the phrase 'administrative action relating to customs matters'. The dictionary definition of the word 'customs' is 'such duty levied by a government on imports', which suggests that the term 'customs' is broad enough to include countervailing duties. As previously noted, the term 'countervailing duty' is defined in Article VI:3 of the GATT 1994, and footnote 36 to Article 10 of the SCM Agreement, as 'a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise'. In addition, we note that in *Thailand – Cigarettes (Philippines)*, the Appellate Body considered the meaning of 'administrative action relating to customs matters'. The Appellate Body stated that 'the obligation contained in Article X:3(b) is not limited to particular types of customs-related 'administrative action'', and agreed with the panel that the phrase 'administrative action relating to customs matters' encompasses 'a wide range of acts applying legal instruments that have a rational relationship with customs matters'.<sup>120</sup> Furthermore, as the obligations in Article 23 of the SCM Agreement and Article 13 of the Anti-Dumping Agreement only came into existence in 1995, interpreting the phrase 'administrative action relating to customs matters' in Article X:3(b) so as to exclude countervailing duty and anti-dumping duty determinations would have meant that, prior to 1995, there was no obligation to provide for the prompt review and correction of such measures."<sup>121</sup>

#### **1.5.2.3 "Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement"**

90. The Panel in *EC – Selected Customs Matters* noted that "in some WTO Members, administrative action relating to customs matters may be reviewed by the same administrative authority that originally took the action. ... Such review would not qualify under Article X:3(b) of the GATT 1994 because, in such case, the reviewing body is not independent of the administrative authority whose decision is the subject of review."<sup>122</sup> It defined "independent" in the context of Article X:3(b) as "free of control or influence from the administrative agencies whose decisions are the subject of review, [so as to act] with freedom in institutional and practical terms from interference by the agencies whose decisions are being reviewed".<sup>123</sup>

91. The Appellate Body in *EC – Selected Customs Matters* found that Article X:3(b) does not require that first instance review decisions must govern the practice of all the agencies entrusted with administrative enforcement throughout the territory of a particular WTO Member:

"[W]e are of the view that Article X:3(b) of the GATT 1994 requires a WTO Member to establish and maintain independent mechanisms for prompt review and correction of administrative action in the area of customs administration. However, neither text nor context nor the object and purpose of this Article require that the decisions emanating

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<sup>119</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.1053; Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 216.

<sup>120</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 197 and 202.

<sup>121</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.261.

<sup>122</sup> Panel Report, *EC – Selected Customs Matters*, footnote 894.

<sup>123</sup> Panel Report, *EC – Selected Customs Matters*, para. 7.520.

from such first instance review must govern the practice of *all* agencies entrusted with administrative enforcement *throughout the territory* of a particular WTO Member."<sup>124</sup>

92. In *Thailand – Cigarettes (Philippines)*, the Panel found:

"Members may have a system under which an initial appeal of an administrative action must be made to an authority within the agency entrusted with enforcement prior to an independent body. We do not therefore consider that the existence of interposing steps prior to an independent review in itself is a systemic flaw that prevents Thailand from maintaining procedures for the prompt review of administrative actions under Article X:3(b)."<sup>125</sup>

#### **1.5.2.4 "their decisions shall be implemented by, and shall govern the practice of, such agencies"**

93. In *US – Countervailing and Anti-Dumping Measures (China)*, the Panel rejected China's claim that the measure at issue violated Article X:3(b) of the GATT.<sup>126</sup> At issue was PL 112-99, as US law enacted on 13 March 2012 that expressly provided for the applicability of US countervailing duty (CVD) law to imports from non-market economy (NME) countries in all US CVD investigations initiated on or after 20 November 2006. The United States had been applying US CVD law to imports from China since 2006. In 2012, a US court decided that US CVD law was not applicable to imports from China and other countries that the United States treated as NMEs under its trade remedy laws. PL 112-99 was enacted before that court decision became final. The Panel found that the United States had not acted inconsistently with Article X:3(b), on the grounds that the obligation that administrative agencies implement and be governed by decisions of the tribunals maintained to review their administrative action relating to customs matters does not prohibit a Member from taking legislative action in the nature of PL 112-99.

### **1.6 Relationship with other GATT provisions**

#### **1.6.1 General**

94. In *EC – Bananas III*, the Appellate Body explained the relationship between Article X and other GATT provisions. See the excerpt referenced in paragraph 50 above. This finding of the Appellate Body was also cited by the Panel in *Argentina – Hides and Leather*.<sup>127</sup>

#### **1.6.2 Article I**

95. In *Indonesia – Autos*, the Panel examined whether a series of measures taken by Indonesia to develop its domestic automobile industry was inconsistent with Article X as well as Articles I and III. After having found that the Indonesian National Car Programme violated "the provisions of Article I and/or Article III of GATT", the Panel did not consider it necessary to examine Japan's claims under Article X of GATT.<sup>128</sup>

96. In *Argentina – Hides and Leather*, the Panel addressed the concept of "uniformity" with respect to Article X:3(a), stating that this provision goes beyond Article I to require "uniform administration of Customs laws and procedures between individual shippers and even with respect to the same person at different times and different places":

"The term 'uniform' appears in the GATT 1994 only with respect to administration of Customs laws. ...

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<sup>124</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 303.

<sup>125</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.1014.

<sup>126</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 7.242-7.297.

<sup>127</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.60.

<sup>128</sup> Panel Report, *Indonesia – Autos*, para. 14.152.



It is obvious from these uses of the terms that it is meant that Customs laws should not vary, that 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. Uniform administration requires that Members ensure that their laws are applied consistently and predictably and is not limited, for instance, to ensuring equal treatment with respect to WTO Members. That would be a substantive violation properly addressed under Article I. This is a requirement of uniform administration of Customs laws and procedures between individual shippers and even with respect to the same person at different times and different places.

We are of the view that this provision should not be read as a broad anti-discrimination provision. We do not think this provision should be interpreted to require all products be treated identically. That would be reading far too much into this paragraph which focuses on the day to day application of Customs laws, rules and regulations. There are many variations in products which might require differential treatment and we do not think this provision should be read as a general invitation for a panel to make such distinctions."<sup>129</sup>

### 1.6.3 Article III

97. In *Indonesia – Autos*, the Panel discussed the relationship between Articles III and X. See the excerpt referenced in paragraph 95 above.

## 1.7 Relationship with other WTO Agreements

### 1.7.1 Licensing Agreement

98. In *EC – Bananas III*, the Appellate Body reviewed the Panel's finding that the EC import licensing system on imports of bananas was in violation of Article X as well as Article 1.3 of the Licensing Agreement. The Appellate Body stated that "the provisions of Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* have identical coverage":

"Article X:3(a) of the GATT 1994 applies to all 'laws, regulations, decisions and rulings of the kind described in paragraph 1' of Article X, which includes those, *inter alia*, 'pertaining to ... requirements, restrictions or prohibitions on imports ...'. The EC import licensing procedures are clearly regulations pertaining to requirements on imports and, therefore, are within the scope of Article X:3(a) of the GATT 1994. As we have concluded, the *Licensing Agreement* also applies to the EC import licensing procedures. We agree, therefore, ... that *both* the *Licensing Agreement* and the relevant provisions of the GATT 1994, in particular, Article X:3(a), apply to the EC import licensing procedures. In comparing the language of Article 1.3 of the *Licensing Agreement* and of Article X:3(a) of the GATT 1994, we note that there are distinctions between these two articles. The former provides that 'the rules for import licensing procedures shall be neutral in application and administered in a fair and equitable manner'. The latter provides that each Member shall 'administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions or rulings of the kind described in paragraph 1 of [Article X]'.

We attach no significance to the difference in the phrases 'neutral in application and administered in a fair and equitable manner' in Article 1.3 of the *Licensing Agreement* and 'administer in a uniform, impartial and reasonable manner' in Article X:3(a) of the GATT 1994. In our view, the two phrases are, for all practical purposes, interchangeable. We agree, therefore, ... that the provisions of Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* have identical coverage.

Although Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import

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<sup>129</sup> Panel Report, *Argentina – Hides and Leather*, paras. 11.81 and 11.83-11.84.



licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the GATT 1994."<sup>130</sup>

### **1.7.2 Customs Valuation Agreement**

99. In *Thailand – Cigarettes (Philippines)*, the Panel found that "'administrative action relating to customs matters' in Article X:3(b) of the GATT 1994 includes a wide range of acts applying legal instruments having a rational relationship with customs matters, which clearly includes *valuation* of goods being imported".<sup>131</sup> See paragraph 88 above.

### **1.7.3 Anti-Dumping Agreement and SCM Agreement**

100. In *US – Countervailing and Anti-Dumping Measures (China)*, the Panel found that the phrase "administrative action relating to customs matters" includes administrative action relating to countervailing and anti-dumping duty proceedings. See paragraph 89 above.

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<sup>130</sup> Appellate Body Report, *EC – Bananas III*, paras. 203-204.

<sup>131</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.1029; Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 202.