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THE U.S.-EC DISPUTE OVER CUSTOM MATTERS: TRADE FACILITATION, CUSTOMS UNIONS, AND THE MEANING OF WTO OBLIGATIONS

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"[W]e make no finding either on many other issues that may arise under Article XXIV. The resolution of those other issues must await another day." WTO Appellate Body Report on European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R, para. 65 (April 7, 2004).

I. INTRODUCTION

In 1996 and 2001, World Trade Organization (WTO) Members affirmed a commitment to actively address the issues surrounding trade facilitation in the sphere of customs procedures and enforcement of Members' municipal customs laws.[1] In March of 2005, the WTO authorized constitution of a panel to resolve a dispute alleging the European Community's (EC) constituent states disparately enforce the EC's Uniform Customs Code.[2] The United States claims its exporters, particularly small and medium companies, are unable to resort to a central European customs administration to remediate inconsistent application of the Uniform Customs Code.[3]

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1. *See generally* World Trade Organization, Doha Ministerial Declaration of 14 Nov. 2001, WT/MIN(01)/DEC/1, ¶ 27 (Nov. 20, 2001); WTO Singapore Ministerial Declaration of 18 Dec. 1996, WT/MIN(96)/DEC, ¶¶ 20-23 (Dec. 18, 1996).

2. WTO Secretariat, *Note on Constitution of the Panel Established at Request of the United States, European Communities—Selected Customs Matters*, WT/DS315/9 (May 30, 2005).

3. Request for Establishment of a Panel by the United States, *European Communities—Selected Customs Matters*, WT/DS315/8 (Jan. 14, 2005) [hereinafter Panel Establishment Request].

The dispute not only brings the necessity for a uniform WTO agreement on trade facilitation to the fore, but also emphasizes the apparent inconsistency between the General Agreement on Tariffs and Trade (GATT) Article X's mandate for WTO Members to uniformly, impartially, and reasonably administer municipal customs laws and Article XXIV's allowance of individual members of a customs union to substantially apply common commercial regulations and laws in relation to non-members of the customs union.[4]

This Article, divided into five parts, analyzes the U.S.-EC dispute, the relationship between GATT Articles X and XXIV, and discusses the role of trade facilitation in providing a sustainable solution to the issues raised in the dispute. Part II presents the background of the dispute. Part III describes the allegations raised under Article X:3(a) and (b) in the American request for constitution of a WTO panel in light of EC Community law, as well as addresses the relationship between Article X and Article XXIV. Part IV considers measures necessary to promote trade facilitation, and asserts the essentiality of formal bilateral cooperation between the United States and EC in respect to customs matters. Part V recounts the solutions proposed by this work, namely an agreement between WTO Members on the understanding of the relationship between the obligations of Article X and Article XXIV and the conclusion of a bilateral treaty between the United States and EC concerning harmonization of customs procedures and classification.

II. DESCRIPTION OF THE DISPUTE

On September 21, 2004 the United States requested consultations to address "the non-uniform administration by the European Communities of laws, regulations, judicial decisions and administrative rulings . . . pertaining to the classification and valuation of products for customs purposes and to requirements, restrictions or prohibitions on imports."[5] The United States asserted the EC failed to establish

4. General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 188, 194 [hereinafter GATT 1947], *amended by* Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 155 [hereinafter Agreement Establishing WTO] and General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, 1867 U.N.T.S. 187 (1994) [hereinafter GATT 1994].

5. Request for Consultations by the United States, *European Communities—Selected Customs Matters*, WT/DS315/1, G/L/694, 1 (Sept. 27, 2004) [hereinafter *European Communities—Selected Customs Matters*]; WTO Dispute Settlement Proceeding Regarding European Communities—Selected Customs Matters, 69 Fed. Reg. 6450-60451 (Oct. 8, 2004); *see* WTO Agreement, *Understanding on Rules and Procedures Governing the Settlement of Disputes*,

administrative and judicial fora to address inconsistent application of the EC's common external tariff scheme and trade regulations related to customs matters.[6] Citing the EC regulations and the EC Uniform Customs Code, the United States asserted the discretion permitted national customs authorities to administer these EC laws resulted in disparate application of supposedly uniform EC laws.[7] The United States asserted the EC Uniform Customs Code provided for Member States to establish an appeal process to review customs determinations, and that such a law permitted widely varying procedures for appeal of a custom authority's decision in different Member States.[8] Further, appellate review at the community level occurred only after exhaustion of a Member State's internal legal system's remedies, causing substantial delay in resolving incorrect classification decisions.[9]

Additionally, the United States asserted that community delegation to national customs authorities for implementation of the EC common external tariff resulted in varying procedures for entry of goods, valuation, tariff classification, assessment of penalties, "different certificate of origin requirements, different criteria among Member States for the physical inspection of goods, different licensing requirements for importation of food products, and different procedures for processing express delivery shipments."[10] The United States claimed the practical delegation of community authority resulted in conduct that violated the EC's WTO obligations articulated in Article X:3(a) and (b), which are:

> 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

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33 I.L.M. 1226, art. 4 [hereinafter DSU]; *see also* Rossella Brevetti & Joe Kirwin, *Customs: U.S. Files WTO Complaint Against Inconsistent EU Customs Administration*, 21 INT'L TRADE REP. (BNA) 1548 (Sept. 23, 2004).

6. *European Communities—Selected Customs Matters*, *supra* note 5, at 3.

7. *Id.* at 2.

8. *Id.*

9. *Id.* (review by a Community organ of a classification decision usually follows years after initial challenge of the decision).

10. *Id.*

> 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.[11]

In requesting consultations, the United States sought a prompt resolution to its complaints from the EC.[12] Further, the United States hoped to assist small and medium sized businesses, which "often lack the resources to work their way through Member State and EU bureaucracies in order to reconcile inconsistencies in classification or valuation in different States."[13] By invocation of the Doha Declaration's goal of enhancing trade facilitation, the United States viewed its request as furthering the Declaration's aims.[14] Finally, the United States sought a systematic solution to the disparate administration of EC customs laws and lack of prompt judicial or administrative review at the community level.[15]

Australia, Japan, Brazil, Argentina, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and India requested to join the consultations.[16] Each asserted it conducted a substantial amount of export

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11. GATT 1947, *supra* note 4, art. X:3(a). The United States also alleges a violation of Article X:1. This aspect of the U.S. WTO action is not addressed in the present work due to a desire to focus the discussion as articulated in the Introduction. Article X:1 requires the publication of all laws, regulations, administrative decisions, and judicial rulings relating to "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 therefore [sic], or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use." GATT 1947, *supra* note 4, art. X:1. The Article applies the publication requirement to treaties regarding trade policy entered into by a Member. *See id.*

12. Press Release, Office of U.S. Trade Representative, *US Files WTO Case Against EU Over European Customs System* (Sept. 21, 2004), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2004/September/US_Files_WTO_Case_Against_EU_Over_European_Customs_System.html (last visited June 20, 2005).

13. *Id. See also* U.S. Trade Representative, Small Business Trade Policy Agenda, Opening the Global Marketplace for Small Business (addressing goal of reduction of tariffs and combating inconsistent administration of customs regulations by foreign governments), *available at* http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2004/asset_upload_file578_6758.pdf (last visited June 20, 2005).

14. Press Release, *supra* note 12.

15. *Id.*

16. *See* Request to Join Consultations, *European Communities—Selected Customs Matters*, WT/DS315/2 (Oct. 8, 2004); Request to Join Consultations, *European Communities—Selected*

trade to the EC justifying its admission to the consultations.[17] Yet, the EC denied these nations admission.[18]

The U.S. Trade Representative announced three distinct reasons for initiating consultations with the EC.[19] The first reason stressed the recent expansion of the EC from fifteen Member States to twenty-five.[20] Thus, the problem of lack of uniform administration of EC customs law increased with the additional members joining the EC in May of 2004.[21] The Representative believed addressing the issue early on in the enlargement process would help to ensure continued export levels from the United States to the EC, which were $155.2 billion in 2003.[22]

The second reason for instituting the consultations focused on advancing the Doha Agenda's mandate to achieve greater trade facilitation or reduction of administrative burdens on importers.[23] As the third reason, the Representative asserted the ineffectiveness of combating the EC's lack of uniform administration on an individual basis through negotiations with the EC Trade Commissioner, and the failure of the EC to systematically allocate resources to resolve the issues raised by the Americans.[24]

The EC responded to the American request to establish a panel by noting that the United States had failed to raise its concerns in more appropriate bilateral or multilateral venues.[25] Further, the EC asserted that during consultations the United States failed to evidence a "single example of real and practical problems for U.S. operators resulting from the application of EC customs measures."[26] In response to the allegation that

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Customs Matters, WT/DS315/3 (Oct. 8, 2004); Request to Join Consultations, *European Communities—Selected Customs Matters*, WT/DS315/4 (Oct. 11, 2004); Request to Join Consultations, *European Communities—Selected Customs Matters*, WT/DS315/5 (Oct. 11, 2004); Request to Join Consultations, *European Communities—Selected Customs Matters*, WT/DS315/6 (Oct. 12, 2004); *Request to Join Consultants, European Communities—Selected Customs Matters* WT/DS315/7 (Oct. 12, 2004).

17. *See supra* note 16.

18. Gary G. Yerkey, *Customs: U.S. Asks to Set Up Panel to Rule in Dispute With EU Over Customs Procedures*, 22 INT'L TRADE REP. (BNA) 78 (Jan. 20, 2005) (quoting U.S. Trade Representative as indicating that consultations confirmed concerns, and European Commission's spokeswoman describing U.S. complaint as without a legal basis).

19. Press Release, *supra* note 12.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. Press Release, *supra* note 12.

25. Dispute Settlement Body, *Minutes*, WT/DSB/M/182, ¶ 31 (Feb. 17, 2005).

26. *Id.* (citing only three submissions received by the U.S. Trade Representative in response to Federal Register Notice).

the EC violated Article X:3(a) and (b), the EC asserted the American argument that the EC needed to create a central customs administration, as well as centralized judicial and administrative tribunals on the community level to replace national procedures, amounted to a challenge, far outside the scope of WTO review, of the EC's internal distribution of competencies by domestic legislation.[27] The EC contended its Member States presently enforced a harmonized regulatory regime across the Community under the supervision of the European Commission and European Court of Justice.[28]

Predictably, consultations did not remedy the situation, and the United States requested the establishment of a panel to adjudicate the suspected violations of WTO law by the EC.[29] The Dispute Settlement Body initially rejected the American request in February 2005.[30] Pursuant to Article 6.1 of the Dispute Settlement Understanding (DSU), the Dispute Settlement Body may, with the consensus of the Members, deny a request to establish a panel.[31] The second American request met with success in March 2005 with the establishment of a panel by the Dispute Settlement Body.[32]

In the request to establish a panel, the United States asserted two breaches of WTO law by the EC.[33] The first echoed the request for consultations in stating the EC failed to administer its customs classification and valuation, as well as its requirements, restrictions, and prohibitions on imports in an impartial, reasonable, and uniform manner, in violation of Article X:3(a).[34] Secondly, the failure of the EC to maintain or institute judicial, arbitral, or administrative tribunals with

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27. *Id.*

28. *Id.*

29. Panel Establishment Request, *supra* note 3, at 1-2; WTO Dispute Settlement Proceeding Regarding European Communities—Selected Customs Matters, 70 Fed. Reg. 18448-18449 (Apr. 11, 2005).

30. Dispute Settlement Body, *supra* note 25, ¶ 32; Daniel Pruzin, *Customs: EU Blocks WTO Panel on U.S. Complaint that EU Customs Practices Lack Uniformity*, 22 INT'L TRADE REP. (BNA) 142 (Jan. 27, 2005).

31. DSU, *supra* note 5, art. 6.1.

32. Dispute Settlement Body, *supra* note 25, ¶ 30 (Mar. 21, 2005); *WTO Secretariat (Note on Constitution of the Panel Established at the Request of the United States), European Communities—Selected Customs Matters*, WT/DS315/9, ¶ 1 (May 30, 2005) (establishing panel and electing members); Daniel Pruzin, *Customs: WTO Established Dispute Panel to Rule on Customs Practices by European Union*, 22 INT'L TRADE REP. (BNA) 469 (Mar. 24, 2005).

33. Panel Establishment Request, *supra* note 3, at 1; *cf. supra* note 11 (indicating United States also claimed breach of Art. X:1, which is not discussed in this Article).

34. Panel Establishment Request, *supra* note 3, at 1.

accompanying procedures to promptly address customs matters at the community level constituted a violation of Article X:3(b).[35]

The United States placed particular emphasis on its first claim of violation of Article X:3(a). Arguing the separate EC Member States' custom authorities administered the Customs Code and its accompanying regulations in "numerous different forms," the United States delineated certain areas most illustrative of the lack of uniform, impartial, and unreasonable administration of EC customs regulations.[36] There areas were:

> classification and valuation of goods; procedures for the classification and valuation of goods, including the provision of binding classification and valuation information to importers; procedures for the entry and release of goods, including different certificate of origin requirements, different criteria among member States for the physical inspection of goods, different licensing requirements for importation of food products, and different procedures for processing express delivery shipments; procedures for auditing entry statements after goods are released into the stream of commerce in the European Communities; penalties and procedures regarding the imposition of penalties for violation of customs rules; and record-keeping requirements.[37]

Further evidence of the lack of uniformity in customs matters concerned the municipal laws, regulations, manuals, and administrative practices of the nations comprising the EC.[38]

Elaborating on its second claim, the United States declared that the lack of efficient appellate review within the EC Member States resulted in no effective community-wide review, which failed to meet the requirements of Article X:3(b).[39] The failure to establish procedures for appeals of national customs authorities' decisions to EC tribunals, as required by the Customs Code, further evidenced the EC's failure to meet its Article X:3(b) obligations.[40]

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35. *Id.* at 2.
36. *Id.*
37. *Id.*
38. *Id.*
39. Panel Establishment Request, *supra* note 3.
40. *Id.* (citing Articles 243 through 246 of the Customs Code of the European Union). Article 245 provides for implementation of appellate procedures by the Member States, while Article 243 dictates appeal shall be in the first instance to the customs authority of the Member States and then to an independent body within the Member States. *See* Council Regulation (EEC) 2913/92,

In response to the American claims, the EC reiterated its previous arguments affirming EC measures were WTO compliant.[41] Additionally, the EC noted the United States failed to engage in any meaningful discussions addressing the American concerns over the EC customs administration.[42] The EC asserted the request for a panel concerned "questions regarding the distribution of competences in the administration of customs rules within the internal legal order of a WTO Member which had gone well beyond what was required by the WTO rules."[43] Despite the EC's belief that the American request failed to allege any factual or legal basis for its claims, the EC acquiesced to the American request to establish a panel.[44]

III. VIOLATIONS OF ARTICLE X:3(A) AND (B)?

An opportunity exists, within the context of the U.S. complaint against the EC, to clarify GATT/WTO law regarding the extent to which a customs union need apply its common external tariff scheme in a uniform, impartial, and reasonable manner pursuant to Article X. Determination of whether the EC's administration of its customs laws violates Article X begins with the general principles defining the scope of a Member's obligations under the Article's provisions. Analysis of past WTO disputes where similar conduct constituted a breach of Article X illustrates how the current panel may resolve the present dispute. If EC customs practices violate WTO law, then remedy under the WTO system must also be considered. In particular, should the EC fail in its obligations under Article X:3(b), the question arises whether a remedy pursuant to WTO dispute settlement procedures empowers a panel or the Appellate Body to recommend, and the Dispute Settlement Body to require, alteration of national judicial systems to effectuate compliance with WTO law. A final consideration, related to remedy, is whether Article XXIV provides a defense or exception to Article X's requirements thereby insulating the EC from violation of its WTO obligations.

Establishing the Community Customs Code, 1992 O.J. (L 302) 1 (last altered by Commission Regulation (EC) 60/2004, Laying down transitional measures in the sugar sector by reason of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, and Slovakia, 2004 O.J. (L 009) 8). On evidence of this claim, see TIMOTHY LYONS, EC CUSTOMS LAW 452-53 (2001) (describing United Kingdom's different system for appeal).

41. Dispute Settlement Body, *supra* note 25, ¶ 29 (Mar. 21, 2005).

42. *Id.*

43. *Id.*

44. *Id.*

A. *Article X:3(a)*

1. General Principles

In the context of disputes alleging a violation of Article X, certain general rules of interpretation are applied.[45] The first general interpretative principle is a Member may challenge only the administration, not the substance, of another Member's laws, regulations, decisions, and rulings under Article X:3(a).[46] Thus, the central requirement under Article X is that a Member administer its laws uniformly, reasonably, and impartially with respect to other Members.[47] Such a requirement exists to promote predictability for private importers to assess the level of tariff applicable to a particular good and identify the compulsory procedures required for entry of merchandise into a nation's customs territory.[48]

Impartial administration has been interpreted as the absence of an unfair advantage to a party subject to the challenged laws.[49] Reasonableness is defined through consideration of the actual administration of the law, "in accordance with reason, not irrational or absurd, proportionate, having sound judgment, sensible, not asking for too much, within the limits of reason, not greatly less or more than might be thought likely or appropriate, articulate."[50] Uniform administration has been defined as "uniformity of treatment in respect of persons similarly situated; it cannot be understood to require identical results where relevant facts differ."[51] Uniformity requires that "customs laws should not vary,

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45. *See* DSU, *supra* note 5, art. 16.1.

46. Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, ¶ 200 (Sept. 9, 1997) [hereinafter Report on EC].

47. GATT 1947, *supra* note 4, art. X:3(a). The terms uniform, impartial, and reasonable are interpreted according to their ordinary meanings pursuant to Article 3.2 of the DSU. *See* Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, ¶ 114 (Oct. 12, 1998) [hereinafter *Appellate Body Shrimp Report*].

48. *Appellate Body Shrimp Report*, *supra* note 47.

49. Panel Report, *Argentina—Measures Affecting The Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, ¶ 11.100 (Dec. 19, 2000) [hereinafter Panel Report, *Argentina*].

50. Panel Report, *Dominican Republic Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, ¶ 7.388 (Nov. 26, 2004) [hereinafter Panel Report, *Dominican Republic*], *ruling not challenged* in Appellate Body Report, *Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, ¶ 56 (Apr. 25, 2005).

51. Panel Report, *United States—Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, ¶ 6.51 (Dec. 22, 2000) [hereinafter Panel Report, *U.S.—Anti-Dumping*] (same reasoning applied to determining reasonableness of administration).

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."[52] Therefore, "[u]niform 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."[53]

Members may challenge another Member's administration of its trade regulations under three separate and distinct theories: that the administration of the law is impartial; unreasonable; or lacking uniform application.[54] Thus, "a [M]ember may . . . 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 . . . [the] Member has also administered the provisions in a non-uniform manner or in a partialized manner."[55] Therefore, a Member fulfills its WTO obligations if the challenged measure is administered in a reasonable, impartial, and uniform manner.[56]

Members prove violations of Article X:3(a) through evidence illustrating the "real effect that a measure might have on traders operating in the commercial world."[57] A violation of Article X:3(a) occurs only if the measure at issue effects a "significant impact on the overall administration of that Member's law and not simply on the outcome of the single case in question."[58]

Review of a challenged provision for consistency with a Member's domestic law is not appropriate under the DSU.[59] Only after consideration of WTO agreements specifically relating to the dispute at hand should a Member resort to Article X:3(a).[60]

While WTO law excludes review of substantive provisions of a Member's trade regulations, determination of whether a challenged measure is administrative or substantive occurs within dispute settlement

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52. Panel Report, *Argentina*, *supra* note 49, ¶ 11.83.

53. *Id.* Yet, the Article does not require "all products be treated identically." *Id.* ¶ 11.84.

54. *See* Panel Report, *Dominican Republic*, *supra* note 50, ¶ 7.383.

55. *Id.* ¶ 7.383.

56. *See* Panel Report, *Argentina*, *supra* note 49, ¶ 11.86.

57. *Id.* ¶ 11.70.

58. Panel Report, *United States—Sunset Review of Anti-Dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, ¶ 7.310 (Aug. 14, 2003) [hereinafter *Sunset Review of Anti-Dumping*] (citing Panel Report, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, ¶ 7.268 (Feb. 28, 2001) [hereinafter Panel Report, *Japan Anti-Dumping Measures*]).

59. *Id.* ¶ 7.267; Panel Report, *U.S.—Anti-Dumping*, *supra* note 51, ¶ 6.50 n.64.

60. Report on EC, *supra* note 46, ¶ 204.

proceedings by examination of whether the measure is obligative or right-creating ("a substantive measure") or merely directs the manner of applying an obligative measure ("an administrative measure").[61] Thus, an administrative measure sets "forth means for the application and enforcement of substantive customs rules."[62] In other words, an administrative measure "merely provides for a certain manner of applying [the relevant] substantive rules" and "require[s] the administering authority to administer those laws and implementing regulations in [a] . . . particular way."[63]

Inability to review the challenged measure under Article X:3(a) because it is substantive does not preclude challenge of the same measure under other covered WTO agreements.[64] An example of this principle occurred in a WTO panel action involving the United States. Japan challenged the substantive provisions of an American statute and regulation governing self-initiation of anti-dumping reviews under the WTO Anti-Dumping Agreement and Article X:3(a).[65] The panel upheld the challenge under the Anti-Dumping Agreement, while denying the reviewability of the same statute and regulation under Article X:3(a).[66] Hence, the Anti-Dumping Agreement permitted substantive challenge of the measure, which was precluded under Article X:3(a).

A Member may only challenge another Member's "laws, regulations, judicial decisions and administrative rulings of general application" under Article X:3(a).[67] Such "laws, regulations, decisions and rulings" are those solely defined and enumerated in Article X:1.[68] Should the challenged measure fail to meet the definition under Article X:1, then the alleged violation may not be considered for consistency under Article X:3(a).[69]

Also precluded from challenge under the Article X:3(a) are specific actions taken by a Member because such specific measures affecting

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61. Panel Report, *Argentina*, *supra* note 49, ¶¶ 11.70, 11.72.

62. Panel Report, *United States-Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234R, ¶¶ 7.140, 7.144 (Sept. 16, 2002).

63. *Id.* ¶ 7.144 (quoting Panel Report, *Argentina*, *supra* note 49, ¶ 11.72).

64. *Sunset Review of Anti-Dumping*, *supra* note 58, ¶ 7.289; Report on EC, *supra* note 46, ¶ 200.

65. *Sunset Review of Anti-Dumping*, *supra* note 58, ¶¶ 2.2, 3.1.

66. *Id.* ¶ 7.293.

67. Panel Report, *European Communities—Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/R, ¶¶ 269-270 (Mar. 13, 1998) [hereinafter Panel Report, *European Communities on Poultry*].

68. Panel Report, *Dominican Republic*, *supra* note 50, ¶ 7.375.

69. *Id.* ¶ 7.375 (noting order of analysis and asserting measure must first be within Art. X:1 to then determine measure's consistency with Art. X:3(a)).

particular transactions fail to meet the general application test.[70] Specific actions are defined as certain demarcated incidences involving application, to identified goods, of a measure determinative of a particular tariff or tariff related measure.[71] Therefore, licenses 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."[72] Although, specific instances are admissible evidence to show a violation of the Article.[73]

There also exists a good faith obligation to fulfill the obligations articulated in Article X.[74] This obligation of good faith has yet to give rise to the direct applicability in DSU matters of various additional customary international legal principles, despite strong arguments insisting upon incorporation of these principles.[75] Should these additional customary principles be inducted into DSU proceedings, a broader interpretation of the Article would result, implicating greater duties for Members.

2. EC Customs Laws

Although, a WTO panel will not assess the substantive provisions of EC customs legislation, a general discussion of the relevant portions of the current EC customs regime provides an appropriate context to discuss whether its administration violates WTO law.[76] Management of customs

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70. Appellate Body Report, *European Communities—Measures Affecting the Importation of Certain Poultry Products*, WTDS69/AB/R, ¶ 114 (July 13, 1998); Appellate Body Report, *United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R, at 21 (Feb. 25, 1997).

71. Appellate Body Report, *European Communities on Poultry*, *supra* note 70, ¶¶ 113-14 (Appellate Body ruling Members need not specify "in advance the precise treatment to be accorded to each individual shipment").

72. *Id.* ¶ 113 (Appellate Body agreeing with and quoting Panel's Report ¶ 269).

73. Panel Report, *Japan Anti-Dumping Measures*, *supra* note 58, ¶ 7.268.

74. Panel Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, ¶ 7.1986 n.4715 (July 11, 2003); U.N. Convention on the Law of Treaties, May 23, 1969, arts. 26, 31(1), 1155 U.N.T.S. 331 (*entered into force* Jan. 27, 1980) [hereinafter Vienna Convention].

75. *See generally* JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (2003); John O. McGinnis, *The Appropriate Heirarchy of Global Multilateralism and Customary International: The Example of the WTO*, 44 VA. J. INT'L L. 229, 261-69 (2003); Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535 (2001).

76. *See* Panel Report, *Argentina*, *supra* note 49, ¶ 11.61. The Panel asserted "it is incumbent upon us to ensure that in our analysis we focus on the administration of the Customs laws." *Id.* For a historical account of EC customs law, see LYONS, *supra* note 40, at 1-193; DOMINIK LASOK, THE TRADE AND CUSTOMS LAW OF THE EUROPEAN UNION 26-37, 363-400 (3d ed. 1998); BEN J.M.

issues at the Community level occurs through cooperation between the Competitiveness (Internal Market, Industry, and Research) component of the European Council, the Committee on Internal Market and Consumer Protection of the European Parliament, and the European Commission's Taxation and Customs Union Directorate-General.[77] These bodies create and execute a general customs strategy which prioritizes the operational implementation of EC law, increased competitiveness of the EC in international trade, and effective utilization of technology in the collection of customs duties.[78]

The basis of customs law in the EC is the Uniform Customs Code of the European Union.[79] The Code provides a uniform set of general rules to be implemented by national customs authorities to harmonize the application of duties and procedures for processing imports into the EC.[80] The Code compliments the Treaty establishing the European Community Articles 23 to 27 and title X, which mandates implementation of a

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TERRA, COMMUNITY CUSTOMS LAW, A GUIDE TO THE CUSTOMS RULES ON TRADE BETWEEN THE (ENLARGED) EU AND THIRD COUNTRIES 3-37 (1995) (addressing each aspect of the Code); Izzet M. Sinan, *European Community Customs Duties: A Significant Consideration for U.S. Companies*, 18 WM. MITCHELL L. REV. 401 (1992); PATRICK L. KELLY & IVO ONKELIN, EEC CUSTOMS LAW (1986) (containing community legislation, judicial decisions, and forms in use at the time).

77. *See* TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Dec. 24, 2002, O.J. (C325) 33, 90-91 (2002) (art. 33); EC Directorate General for Taxation and the Customs Union, Mission Statement (2006), *available at* http://ec.europa.eu/taxation_customs/resources/documents/common/about/welcome/mission_statement_en.pdf (last visited June 8, 2006); European Parliament, Committee Responsibilities (2005), *available at* http://www.europarl.europa.eu/activities/export/committees/presenation_do?committee=12412languageEN (last visited June 8, 2006); European Council, Press Release 13839/ (02 Presse 344) 5-6 (Nov. 14, 2002).

78. *See* European Commission, *The Communication Concerning a Strategy for the Customs Union*, 14-16 EUR. PARL. DOC. (COM 51) 2001, *available at* http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2001/com2001_0051en01.pdf (last visited June 22, 2005); Council Resolution (EC) 171/01, Strategy for the Customs Union, 2001 O.J. (C 171) 1 (affirming customs strategy). Customs duties are taxes collected and levied by customs authorities. *See* Council Regulation (EEC) 2913/92, Establishing the Community Customs Code, Articles 4(10), 20(3)(c-g), 1992 O.J. (L 302) 1 (last amended by the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, 2003 O.J. (L 2360) 33) [hereinafter Code].

79. *See id.* arts. 243, 245; Commission Regulation (EEC) 2454/93, laying down provisions for the implementation of Council Regulation (EEC) 2913/92 establishing the Community Customs Code, 1993 O.J. (L 253) 1 (last amended by Council Regulation (EC) No. 837/2005 of May 23, 2005 amending Commission Regulation (EEC) No. 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code 2004 O.J. (L 139) 1-2) [hereinafter Implementing Regulation].

80. *See* Code, *supra* note 78, arts. 1, 2(1), 4(10), 20.

common external tariff scheme applicable to all third country imports by the Member States, as well as requires cooperation between national customs authorities in relation to customs matters.[81] Although the Code is the central component of EC customs regulation, other laws affect EC customs procedures across all Member States.[82] National customs authorities apply the Code and Community legislation to "collect duties which have to be passed on to the EC as the Community's own resources (subject to a deduction of 10% to defray administrative expenses)."[83]

The common external tariff "applies to all products imported into the Community from outside the EC, thus erecting a single tariff wall which no individual state is free to breach."[84] Although not included in the Code, the common external tariff is incorporated by reference in Article 20(1) of the Code, which mandates the exclusive application of the integrated tariff of the EC to ensure all imports subject to a duty are collected uniformly.[85]

The common external tariff is synonymous with the integrated EC tariff, commonly know by the acronym TARIC.[86] The TARIC is comprised of the tariff classification system embodied in the International Convention on the Harmonized Commodity Description and Coding System (Harmonized System) and the Common Customs Tariff.[87] The Harmonized System

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81. *See generally* European Commission, The Customs Policy of the European Union (1999), *available at* http://europa.eu.int/comm/publications/booklets/move/19/txt_en.htm (last visited June 22, 2005).

82. On major customs laws surveyed, see generally STEFANO INAMA & EDWIN VERMULST, CUSTOMS AND TRADE LAWS OF THE EUROPEAN COMMUNITY 136-92 (1999); *see also* Directory of Community Legislation 02, *available at* http://europa.eu.int/eur-lex/lex/en/repert/index_02. htm (last visited June 22, 2005) (containing all legislation in effect currently relating to customs in the EC).

83. K.P.E. LASOK & D. LASOK, LAW AND INSTITUTIONS OF THE EUROPEAN UNION 434 (7th ed. 2001). EC Member States may not enact separate legislation governing classification of goods for tariff purposes. *Id.* at 435 (citing HZA Bremen-Feihafen v. Waren-Import Gesellschaft Krohn & Co., 1970 E.C.R. 451, at 463; Deutsche Bakels GmbH v. Oberfinazdirektion Müchen, 1970 E.C.R. 1001; Gijs van de Kolk v. Inspector der Invoerrechten, 1990 E.C.R. I-265).

84. JOSEPHINE STEINER & LORNA WOODS, TEXTBOOK ON EC LAW 139 (7th ed. 2000).

85. MICHAEL LUX, GUIDE TO COMMUNITY CUSTOMS LEGISLATION 76 (2002).

86. TARIC stands for "Tarif intégré des Communautés européennes." *Id.* at 77. *See* TOM WALSH, THE CUSTOMS CODE OF THE EUROPEAN UNION WITH IMPLEMENTING REGULATION AND ANNEXES 47 (Damian McCarthy ed., 2000).

87. International Convention on the Harmonized Commodity Description and Coding System, June 14, 1983, 1035 U.N.T.S. 3. (*entered into force* Jan. 1, 1988). *See* Council Regulation (EEC) 2658/87, Tariff and Statistical Nomenclature and Common Customs Tariff, 1987 O.J. (L 256) 1 (last amended by Council Regulation (EC) 493/2005, Amending Annex I to Regulation (EEC) 2658/87, Tariff and Statistical Nomenclature and Common Customs Tariff, 2005 O.J. (L 082) 1); LYONS, *supra* note 40, at 111.

> is a multipurpose international product nomenclature developed by the World Customs Organization (WCO). It comprises about 5,000 commodity groups, each identified by a 6-digit code, arranged in a legal and logical structure and is supported by well-defined rules to achieve uniform classification. The system is used by more than 190 countries and economies as a basis for their customs tariffs and for the collection of international trade statistics.[88]

A technical committee of the WCO, the Harmonized System Committee, manages the Harmonized System nomenclature (description of goods under headings and subheadings) and provides appropriate amendments to the classification of goods under particular sections of the System.[89] Additionally, the Committee issues opinions regarding classification of specific goods, as well as modifies the explanatory notes (or interpretive guidance utilized in classifying a good) under each heading.[90] The Committee is supported by the Scientific Sub-Committee and the Harmonized System Review Committee in ensuring that classification descriptions are technically current and in accord with trading practices.[91] The method of classification is governed by the General Rules of Interpretation, which provide a delineated method to determine the proper tariff classification of a good.[92] The Harmonized System provides the basis for the EC integrated tariff, and is enacted into Community law.[93]

The Common Customs Tariff (CCT) provides the rate of duty in all instances save imposition of a flat-rate charge or application of duty relief.[94] The CCT is defined in Article 20(3) of the Customs Code, and consists of seven distinct elements. These are: 1. the Combined Nomenclature (CN); 2. other applicable nomenclature; 3. rates normally levied on CN goods under the Common Agricultural Policy or other

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88. Panel Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/R, ¶ 2.9 (May 30, 2005) [hereinafter Panel Report, *EC-Frozen Chicken*]. *See generally* FRANCIS SNYDER, INTERNATIONAL TRADE AND CUSTOMS LAW OF THE EUROPEAN UNION 6-10 (1998).

89. Classification of goods or tariff classification "governs the application of customs duties and also the application of other trade-related measures including quantative restrictions, anti-dumping duties, preferential tariff rates, export refunds and suspension of customs duties." SNYDER, *supra* note 88, at 6.

90. *Id.*

91. *See id.* n.5.

92. *See* Integrated Tariff of the European Communities, 2003 O.J. (C 103) 1, 10-11 (rules 1-6 are the WCO general rules for the interpretation of the Harmonized System).

93. 1987 O.J. (L 198) 3.

94. LUX, *supra* note 85, at 108 (citing Code, *supra* note 78, art. 20(1), (4)).

specific regulation governing the processing of agricultural goods; 4. preferential tariff provisions between the EC and third countries; 5. preferential tariff measures based solely on EC regulations; 6. "autonomous suspensive measures providing for a reduction in, or relief from, import duties;" and 7. any other tariff measures provided for in EC law.[95] The CN is a list of descriptive product classifications consisting of "four columns showing the CN code numbers, the description of goods and two rates of duties."[96] The two rates of duty reflect autonomous duties, "which are the original CCT rates[,] and 'conventional' duties" that apply to WTO Members as well as other states granted Most Favored Nation status by the EC.[97]

Therefore, the TARIC

> comprises: (a) the HS nomenclature; (b) EC subdivisions to that nomenclature, referred to as "CN subheadings"; and (c) preliminary provisions, additional section or chapter notes and footnotes relating to CN subheadings. Therefore, each subheading in the CN has an eight-digit code number with the first six digits representing the corresponding digits in the HS and the last two digits identifying CN subheadings. Additionally, a ninth digit is reserved for the use of national statistical subdivisions and a tenth and eleventh digit for an EC integrated tariff[.] . . . The CN consists of 21 sections, covering 99 chapters. The CN is contained in Annex I of EEC Regulation No. 2658/87.[98]

Every good entering the customs territory of the EC, as defined in Article 3 of the Customs Code, must be classified under the TARIC.[99] Classification occurs through physical examination of a good and its constituent elements to determine that good's placement under a heading and subheading to assess the corresponding rate of duty set down in the TARIC.[100] It is the responsibility of the importer to properly classify the merchandise entering the customs territory of the EC; such classification

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95. LYONS, *supra* note 40, at 112-13.

96. LASOK & LASOK, *supra* note 83, at 434.

97. *Id.*

98. Panel Report, *EC-Frozen Chicken*, *supra* note 88, ¶ 2.5. *See also* WALSH, *supra* note 86, at 47.

99. *See* Code, *supra* note 78, art. 20(6). *See generally* LYONS, *supra* note 40, at 111-57 (discussing operation of the tariff system); WALSH, *supra* note 86, at 51-80 (describing classification system and relevant legal authorities). There are limited exceptions for dual-use items, endangered species, dangerous chemicals, and waste. *See* LUX, *supra* note 85, at 79.

100. *See* Code, *supra* note 78, art. 20(6); *see generally* LUX, *supra* note 85, at 78-108.

is subject to review by national customs authorities at the point of entry of the goods.[101] Classification of the goods under a heading and subheading determines the amount of duty owed at the point of entry.[102] National customs authorities are charged with the uniform application of the TARIC.[103]

Article 12 of the Customs Code provides for the issuance of Binding Tariff Information (BTI) on tariff classification of goods, which is an opinion by the national customs authorities on the proper TARIC classification of a particular good.[104] These BTIs are binding on all Member States as to the TARIC classification of the good, and the importer may request BTIs by writing to a Member State or States' national customs authorities.[105] The BTI is binding for a period of six years, unless a Community Regulation is adopted announcing: a contradictory legal basis from that of the BTI; the interpretation of the BTI is no longer valid because of a change in the governing nomenclature; or the holder of the BTI is notified of withdrawal, amendment, or revocation of the BTI.[106] Copies of all BTIs issued or revoked by national customs authorities must be transmitted to the European Commission by electronic means.[107]

Unfortunately, separate Member State customs authorities have issued contradictory classifications for the same goods.[108] However, the

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101. WALSH, *supra* note 86, at 52. Howe & Bainbridge BV v. Oberfinanzdirektion Frankfurt am Main, 1982 E.C.R. 3257. The Court of Justice holds "it is for the Member States to designate the authorities and the persons called upon to undertake the tariff classification of products and to determine the training of such persons in order to enable them to perform their task properly." *Id.*

102. Code, *supra* note 78, art. 20(2), (6).

103. WALSH, *supra* note 86, at 51-52. Sociaal Fonds voor de Diamantarbeiders v. NV Indiamex et Association de fait De Belder, 1973 E.C.R. 1609. The Court of Justice rules "Member States may not, subsequent to the establishment of the common customs tariff, introduce, in a unilateral manner, new charges on goods imported directly from third countries or raise the level of those in existence at that time." Id.

104. Code, *supra* note 78, art. 12(2). *See also id.* art. 11(1) (any person may request information from customs authorities on legislation). *Cf. id.* arts. 8, 9 (relating to national customs authorities' decisions issuance and withdrawal).

105. *Id.* art. 12(1); Implementing Regulation, *supra* note 79, art. 6(1), 11. The importer may supply models for examination and testing. *See generally* WALSH, *supra* note 86, at 40-42.

106. Code, *supra* note 78, art. 12(4),(5). *See* Wesergold GmbH & Co. KG v. Oberfinanzdirektion Munchen, 1991 E.C.R. I-1895.

107. Implementing Regulation, *supra* note 79, arts. 8(1), 13.

108. *See, e.g.*, Commission Decision (EC) 97/2003, Validity of Certain Binding Tariff Information (BTI) issued by the Federal Republic of Germany, 2003 O.J. (L 36) 40 (redressing German customs authority's divergent BTIs on classification from EC regulation); RALPH H. FOLSOM & MICHAEL P. CLOES, EUROPEAN UNION BUSINESS LAW A GUIDE TO LAW AND PRACTICE HANDBOOK 272 (1995) (noting Member State BTIs fail to disregard traditional national views); *see*

Implementing Regulation lays out a procedure for remedying inconsistencies in BTIs.[109] The Commission, upon the discovery of different BTIs relating to the same goods producing inconsistent TARIC classification, shall adopt a measure to effect uniform tariff classification.[110]

Entry of goods into any EC Member State must be accompanied by the Single Administrative Document for the purpose of making a formal customs declaration to the Member State's customs authority to access the appropriate duty.[111] The utilization of electronic measures for importers to make declarations is under review by the EC.[112] The Commission introduced a revised, modernized customs code to harmonize the use of information technology in customs matters between the Member States, and the Council recently enacted the Commission's recommendations.[113] The new system for computerized declarations will take effect on July 1, 2006, but permits exceptions for Member States not possessing the necessary computer technology for a transition period.[114]

The Customs Code establishes a Customs Code Committee for the purpose of answering questions raised by its chairman or any Member of

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also U.S. Trade Representative, 2005 Trade Policy Agenda and 2004 Annual Report of the President of the United States on the Trade Agreements Program 175-76 (2005) (noting discrepancy in classifications), *available at* http://www.ustr.gov/Document_Library/Reports_Publications/2005/2005_Trade_Policy_Agenda/Section_Index.html(last visited June 22, 2005); Decision No. 253/2003/EC of the European Parliament and of the Council, Adopting an Action Programme for Customs in the Community (Customs 2007), 2003 O.J. (L 36) 1 (authorizing pragmatic reform for new EC Member States through adoption of Commission recommendation appearing at 2002 O.J. (C 126 E) 268); Decision No. 210/97/EC of the European Parliament and of the Council, Adopting an Action Programme for Customs in the Community (Customs 2000), 1997 O.J. (L 33) 24, *amended by* Decision 105/2000/EC, 2000 O.J. (L 13) 1 (discussing similar issues in context of previous program).

109. Implementing Regulation, *supra* note 79, art. 9.

110. *Id.*

111. *Id.* arts. 205, 222 (defining paper and electronic processing of formal declarations).

112. *See* European Commission, Communication on a Simple and Paperless Environment for Customs and Trade and on the Role of Customs in the Integrated Management of External Borders Proposal for a Regulation of the European Parliament and of the Council Amending Council Regulation (EEC) 2913/92, Establishing the Community Customs Code, COM (2003) 452 final (July 24, 2003); Council Resolution, Creating a Simple and Paperless Environment for Customs and Trade, 2003 O.J. (C 305) 1, *adopted* July 24, 2003 by the Council, 2004 O.J. (C 96) 10.

113. Council Regulation (EC) 837/2005, *amending* Commission Regulation (EEC) 2454/93, laying down provisions for the implementation of Council Regulation (EEC) 2913/92, Establishing the Community Customs Code, 2005 O.J. (L 139) 1.

114. *See id.*

the EC on the subject of Community customs legislation.[115] The Committee takes responsibility for maintenance of the CN and recommends classification regulations to harmonize tariff classifications across the EC.[116] The Committee is comprised of representatives of all Member States and is led by a chairman empowered to raise questions on Community customs legislation for the Committee's consideration and resolution.[117]

The Commission, under the Customs 2007 program, takes a leading role in the promulgation of new legislation and initiatives to reform customs administration throughout the EC and harmonize Member States' administration of community customs legislation through computerization.[118] The Custom 2007 program follows previous agendas in retaining a Customs Policy Committee to discuss broad ranging issues affecting customs administration.[119] The purpose of the Committee is to make recommendations to the Commission for necessary changes in the administration of Community customs legislation throughout the EC, as well as manage the Customs 2007 program initiatives.[120]

The EC, as a member of the WTO, is bound by a number of international conventions that establish general standards applicable to the municipal administration of customs matters to ensure a degree of uniformity in the realm of international trade.[121] Expanding the scope of traditional GATT obligations, WTO agreements extended Member-

115. Code, *supra* note 78, arts. 247(1), 248(1) (examining Combined Nomenclature, TARIC nomenclature, and any other nomenclature based on the Combined Nomenclature).

116. *See, e.g.*, Hewlett Packard BV v. Directeur général des douanes et droits indirects, 2001 E.C.R. I-03981, ¶ 18 (describing Customs Committee as serving articulated function and detailing process of BTI challenge from national authorities to European Court of Justice).

117. Code, *supra* note 78, art. 247(1).

118. *See supra* note 112.

119. *See Report from the Commission to the European Parliament and the Council on the Implementation of the Customs 2002 Programme*, EUR. PARL. DOC. (COM 672) 2003, at 10, 12 (reciting goal of expanded use of technology and asserting electronic TARIC greatest source for unifying Member State customs administration of EC law); *see also* Decision 253/2003/EC of the European Parliament and of the Council, Adopting an Action Programme for Customs in the Community (Customs 2007), 2003 O.J. (L 36) 1 (authorizing pragmatic reform for new EC Member States through adoption of Commission recommendation appearing at 2002 O.J. (C 126 E) 268); Decision 210/97/EC of the European Parliament and of the Council, Adopting an Action Programme for Customs in the Community (Customs 2000), 1997 O.J. (L 33) 24, *amended* by Decision 105/2000/EC (Customs 2002), 2000 O.J. (L 13) 1 (discussing similar issues in context of previous program).

120. *See supra* note 119.

121. *See generally* Kevin C. Kennedy, *The GATT-WTO System at Fifty*, 16 WIS. INT'L L.J. 421 (1998) (discussing history of GATT and WTO innovations).

nations' obligations over certain aspects of customs administration.[122] These agreements, concluded at the Uruguay Round, include the Agreements on Technical Barriers to Trade, Preshipment Inspection, Import Licensing, Anti-Dumping, Sanitary and Phytosanitary Measures, Trade-Related Investment Measures, and Subsidies and Countervailing Measures.[123] The WCO administers the WTO Agreement on Customs Valuation and Rules of Origin, and therefore works closely with the WTO in the areas of customs administration.[124]

3. Discussion of Relevant WTO Disputes

Having presented a broad overview of EC customs law, analysis of previous WTO decisions follows. These decisions reflect possible interpretations panels or the WTO Appellate Body may adopt in formulating a remedy to a situation similar to the present dispute. With a proper context of the substance of EC customs legislation, its application as alleged in the present dispute may be shown to be inconsistent with Article X:3(a) through WTO decisions.

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122. *Cf.* Case 1/94, Competence of the Community to Conclude International Agreements Concerning Services and the Protection of International Property, 1994 E.C.R. I-5267 (concluding the Community did not have competence to conclude WTO agreements on trade in services and intellectual property); *see generally* Nanette Neuwahl, *The WTO Opinion and Implied External Powers of the Community—A Hidden Agenda?*, *in* THE GENERAL LAW OF E.C. EXTERNAL RELATIONS 139-51 (Alan Dashwood & Christophe Hillion eds., 2000).

123. Agreement on Technical Barriers to Trade, Apr. 15, 1994, 33 I.L.M. 117 (1994); Agreement on Preshipment Inspections, Apr. 15, 1994, *available at* http://www.wto.org/english/docs_e/legal_e/21-psi.pdf (last visited June 23, 2005); Agreement on Import Licensing Procedures, Apr. 15, 1994, *available at* http://www.wto.org/english/docs_e/legal_e/23-lic.pdf (last visited June 23, 2005); Agreement on the Implementation of Article VI, Apr. 15, 1994, Anti-Dumping Agreement, *available at* http://www.wto.org/english/docs_e/legal_e/19-adp.pdf)(last visited June 23, 2005); Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, 1867 U.N.T.S. 493 (1994); Agreement on Trade-Related Investment Measures, Apr. 15, 1994, 1868 U.N.T.S. 186 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/18-trims.pdf (last visited June 23, 2005); Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, 1867 U.N.T.S. 14 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/24-scm.pdf (last visited June 23, 2005).

124. *See* Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, 33 I.L.M. 168, 171 (1994). Customs valuation relates to the method of calculating the value of goods entered into a country's customs territory for the purpose of levying the appropriate rate of duty. *Id.* art. 1. The chief method of determining the value of goods entering a territory is transaction value or "the price actually paid or payable for the goods when sold for export to the country of importation." *Id. See* Agreement on Rules of Origin, Apr. 15, 1994, 33 I.L.M. 209 (1994). Rules of origin are "laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods," as well as apply preferential tariff duty rates. *Id.* art. 1.

a. *Honduras v. Dominican Republic*

Honduras challenged the Dominican Republic's rules and administrative practices governing the imposition of a tax upon cigarettes.[125] Three separate laws requiring three separate standards governed the manner in which the Dominican customs authority assessed the appropriate tax upon imported cigarettes.[126] The three separate standards obligated Dominican customs officials to apply three unique formulas, each resulting in a different amount of tax assessed upon imported cigarettes depending upon which formula the customs authority employed.[127] Despite the laws, evidence before the panel proved that the customs authority administered a fourth, extra-legal methodology, to determine the appropriate tax in practice.[128] Although the Dominican Republic had replaced the three separate laws and fourth extra-legal methodology at the time of the panel report, the panel decided that use of the fourth extra-legal methodology, at the time the dispute arose, to determine the appropriate tax base for imported cigarettes with no notice to importers of this practice was an unreasonable administration of the law, which violated Article X:3(a).[129]

The result of the dispute emphasizes the requirement of uniformity in the application of a WTO Member's trade regulations, as well as the necessity for harmonization of internal municipal law to ensure notification of the regulations to importers by consistent operation of the laws.[130] In addition, the dispute expounds a general rule requiring that a WTO Member not enforce separate and distinct laws or regimes, which lead to contradictory results in tariff classification.[131] The panel announced another wide-ranging tenet of WTO law: that application of extra-legal measures to determine tariff classification is a violation of Article X:3(a).[132]

Applying the above standards to the U.S.-EC dispute, the EC as a whole legislates a uniform customs tariff classification scheme, the

125. Panel Report, *Dominican Republic*, *supra* note 50, ¶¶ 1.3, 2.5.

126. *Id.* ¶ 7.380.

127. *Id.*

128. *Id.* ¶ 7.387.

129. *Id.* ¶¶ 7.388, 7.390, 7.392.

130. Panel Report, *Dominican Republic*, *supra* note 50, ¶¶ 7.390-7.393 (noting adoption of single tax code provision repealing previous laws and instituting single tax).

131. *Id.*

132. *Id.*

TARIC.[133] The national customs authorities administer the TARIC in different ways leading to contradictory tariff classifications.[134] These classifications amount to an extra-legal determination of the appropriate tariff classification. Consistent operation of the TARIC should provide uniform tariff classification throughout the EC. The EC presents one legal regime to importers, but additional legal rules exist, unbeknownst to the importer, by which national customs authorities classify goods outside of governing Community law.[135] Therefore, national customs authorities operate separate classification regimes applying multiple standards to disparately classify the same goods under the TARIC. The actions of national customs authorities constitute an unreasonable administration of the EC customs regime because the customs authorities operate extra-legal tariff classification regulations, which cause classification of the same goods under different TARIC rates of duty. Furthermore, such an administration of the EC customs laws by national customs authorities is unreasonable because the various national authorities apply different rates of duties dependant upon which national customs authority initially classifies the goods.[136]

For similar reasons, tariff classification of the same goods between different EC Member States illustrates partiality.[137] Importers entering their goods in one Member State receive a classification at a lower rate of duty, while other importers entering the same goods in another Member State incur a greater rate of duty.[138] Both Member States should apply the same rate of duty under the same classification for the same goods. Assurance of the similarly of classification between Member States ensures importers receive impartial treatment under the EC customs regime.

b. *EC Bananas III*

Another relevant dispute arose as to "whether the requirements of uniformity, impartiality and reasonableness set out in Article X:3(a)

133. *See supra* notes 86, 87, 93.

134. *See supra* note 108.

135. *See supra* note 108.

136. *See supra* note 108.

137. Although, a Head of Division in the European Commission argues, in relation to providing uniform tariff classifications, "[g]iven the large variety of goods traded worldwide and the overlapping principles of the tariff nomenclature, different classification results cannot be excluded even if the utmost attention is paid in the classification process." LUX, *supra* note 85, at 103.

138. *See supra* note 108 (collecting sources noting phenomenon).

preclude[d] the imposition of different import licensing systems on like products imported from different Members."[139] The EC operated two separate import regimes: "one preferential regime for traditional ACP bananas and one *erga omnes* regime for all other imported bananas."[140] Application of the separate schemes involved distinct licensure requirements depending upon the origin of the bananas for the purpose of ensuring bananas from ACP nations were more competitive in the EC market with the assistance of the import licensing scheme and combined tariff preferences.[141] The licensing scheme imposed a greater burden on third party banana importers to provide large amounts of information to obtain the license, while permitting traditional ACP bananas licensure based on substantially less submitted data.[142]

A 1968 note by the GATT Director-General, interpreted Article X:3(a)'s requirement of uniform, impartial, and reasonable administration of customs laws to prohibit a contracting party from implementing different regulations and procedures.[143] The note asserted GATT obligations "would not permit, in the treatment accorded to imported goods, discrimination based on country of origin, nor would they permit the application of one set of regulations and procedures with respect to some contracting parties and a different set with respect to the others."[144] The WTO Appellate Body confirmed that the note was never adopted by the GATT contracting parties.[145] As a result, the Appellate Body "found that the panel erred in finding that Article X:3(a) of the GATT 1994 precludes the imposition of one system of import licensing procedures on a product originating in certain Members and a different system on the same product originating in other Members."[146] Therefore, WTO Members may apply different import licensing requirements depending upon the country in which a product originates in accord with Article X:3(a).

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139. Report on EC, *supra* note 46, ¶ 199.

140. *Id.* ¶ 23. ACP "refers to African, Caribbean and Pacific States which are parties to the Fourth ACP-EC Convention of Lomé (Lomé Convention), signed in Lomé, 15 December 1989, as revised by the Agreement signed in Mauritius, 4 November 1995." *Id.* n.2.

141. *Id.* ¶ 29.

142. Panel Report, *European Communities—Regime for Importation, Sale and Distribution of Bananas*, WT/DS27/R/GTM,WT/DS27/R/HND, ¶ 7.211 (May 22, 1997) [hereinafter Panel Report, *EC—Bananas*].

143. GATT Director-General, *Agreement on Implementation of Article VI*, Nov. 29, 1968, L/3149; *see* GENERAL AGREEMENT ON TARIFFS AND TRADE, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 274 (6th ed. 1994).

144. Panel Report, *EC—Bananas*, *supra* note 142, ¶ 7.209.

145. Report on EC, *supra* note 46, ¶ 200.

146. *Id.* ¶ 201.

The dispute illustrates that WTO Members possess flexibility in the practical application of customs laws, upon the express provision that different licensing schemes are identified and accessible to a third country's traders. The EC may employ different licensing schemes on specific products originating in specific countries, but may not *ad hoc* permit Member States to enforce different licensing schemes individually.[147] It is consistent with Article X:3(a) for an importer's merchandise to receive different treatment dependent upon its point of entry into the EC under a licensing scheme previously notified to the importer.[148] Under the licensing regulations analyzed in the dispute, individual national customs authorities did not practically employ different import licensing requirements; rather, the licensing measures applied across the EC and were uniformly enforced by the national customs authorities.[149]

The U.S.-EC dispute is distinguishable from the WTO's previous allowance of separate licensing schemes by the EC. The distinction occurs because the separate licensing regimes in EC Bananas III, described above, were imposed uniformly by the EC national customs authorities pursuant to Community law (i.e., the national authorities did not impose separate alternate national import licensing requirements). In the present dispute, the EC operates a uniform classification system at the Community level, while on the national level, Member States classify the same goods differently, yielding disparate rates of duty. This system lacks uniform application of the Community legislation at the national level, and is not similar to the WTO-compliant import licensing regime described in EC Bananas III. The system presently the subject of dispute between the United States and the EC violates Article X:3(a) because it lacks uniform administration.

B. *Article X:3(b)*

A WTO Member must guarantee judicial or administrative procedures exist to ensure prompt review of administrative decisions relating to customs matters within the Member's territory.[150] These tribunals or procedures must exist independent of the customs agency responsible for enforcement of their decisions.[151] Decisions by independent procedure or tribunal govern the customs authority's administration of the law, unless

147. *See* Report on EC, *supra* note 46.
148. *Id.*
149. *Id.*
150. *See* GATT 1947, *supra* note 4, art. X:3(b).
151. *Id.*

a Member's municipal laws permit appeal of such decisions to another body.[152] Should a Member permit an additional appeal under domestic law, the customs authority must be authorized to challenge the subsequent appellate decision "in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts."[153]

1. General Principles

Detailed discussion of Article X:3(b) in either WTO or GATT disputes has not occurred. Of the disputes mentioning the section, a general rule requiring "Members to maintain appropriate judicial, arbitral or administrative tribunals or procedures" to address customs matters is articulated.[154] The general rule exists to "provide for domestic review procedures relating to customs matters to which normally only private traders, not Members would have access."[155] A Member must, under Article X, ensure "rigorous compliance with the fundamental requirements of due process . . . in the application and administration of a measure[,] which purports to be an exception to the treaty obligations . . . ," and guarantee due process is observed by measures executing ordinary WTO obligations.[156] Additionally, Article X "establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations . . . ."[157]

2. EC Customs Law

Any ruling by a Member States' customs authorities may be challenged by an importer.[158] The importer, following applicable national laws, protests the customs decision to the customs authority itself.[159] Practically, an importer "directly and individually concerned by a decision of the customs authorities on the application of the customs legislation" lodges an appeal before the national customs authority, "unless national law determines that the person concerned may appeal directly to the judicial

152. *Id.*

153. *Id.*

154. Panel Report, *U.S.—Anti-Dumping*, *supra* note 51, n.64.

155. Panel Report, *Argentina*, *supra* note 49, ¶ 11.68. *See* GATT 1994, *supra* note 4.

156. *Appellate Body Shrimp Report*, *supra* note 47, ¶ 182.

157. *Id.* ¶ 183.

158. Code, *supra* note 78, art. 243(1) (right of appeal exercised in Member State where decision taken or applied for).

159. *Id.* art. 243(2)(a).

authority."[160] To protest the customs authority failing to provide the remedy desired by the importer, an appeal may be lodged pursuant to national laws in an independent, usually judicial, tribunal.[161] Appellate procedures are set out in the separate Member States' laws, and there is no mandate that these procedures be uniform throughout the EC.[162] There are requirements that national procedures not "be framed in such a way as to render virtually impossible or very difficult the exercise of the rights conferred by EC law," and that Community law "be treated [no] less favourably than comparable national claims."[163] The European Court of Justice succinctly held that Member States of the EC must "designate the courts having jurisdiction and . . . determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from direct effect of Community law."[164] Additionally, the Court of Justice articulated EC treaty instruments permit

> appropriate measures to remedy differences between provisions laid down by law, regulation or administrative action in Member States if they are likely to distort or harm the functioning of the common market . . . [, but in] the absence of such harmonization[,] the right conferred by Community law must be exercised before the national courts in accordance with the conditions laid down by national rules.[165]

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160. LUX, *supra* note 85, at 62-63 (citing Kofisa Italia Srl. Minestero delle Finaze, 2001 E.C.R. I-207).

161. Code, *supra* note 78, art. 243(2)(b)(tribunal may be judicial or equivalent specialized body established under Member States laws). *See also id.* art. 244 (lodging of appeal does not suspend decision, but mandatory suspension upon customs authorities belief decision contrary to EC customs legislation).

162. *Id.* art. 245. *See* SIONAIDH DOUGLAS-SCOTT, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 312 (Pearson Education 2002) (asserting community relegates enforcement to national Member States without procedural mandates to guide implementation).

163. DOUGLAS-SCOTT, *supra* note 162, at 313; *see generally* KOEN LENAERTS & DIRK ARTS, PROCEDURAL LAW OF THE EUROPEAN UNION (Robert Bray ed., 1999).

164. LENAERTS & ARTS, *supra* note 163, at 57 n.2, 59 nn.9-10 (quoting Case 33/76, Rewe v. Landwirtschaftskammer Saarland, 1976 E.C.R. 1989; Case 811/79, Case 826/79, Amministrazione delle Stato v. Ariete, 1980 E.C.R. 2545, 2554-55; Amministrazione delle Finanze dello Stato v. MIRECO, 1980 E.C.R. 2559, 2574-75); *see* Francis G. Jacobs, *Enforcing Community Rights and Obligations in National Courts: Striking the Balance, in* REMEDIES FOR BREACH OF EC LAW, 25, 28-32 (Julian Lonbay & Andrea Biondi eds., 1997) (describing procedural and judicial procedures required by EC law); Grainne De Burca, *National Procedural Rules and Remedies: Changing Approach of the Court of Justice, in* REMEDIES FOR BREACH OF EC LAW *supra*, at 37-46 (discussing tension between EC mandates and national procedures).

165. LENAERTS & ARTS, *supra* note 163, at 57 n.2, 59 nn.9-10 (quoting *Rewe*, 1976 E.C.R. 1989; Case 45/76, Comet v. Produktschap voor Siergewassen, 1976 E.C.R. 2043, 2053).

The European Court of Justice, in an unreported decision, addressed whether an individual importer may directly appeal a decision of a national customs authority to a judicial tribunal.[166] Specifically, the Court evaluated whether "the appeal referred to in Article 243(2) of Regulation (EEC) No. 2913/92 [may] be brought directly before the judicial authority without the matter having first been referred to the customs authorities."[167] The Court asserted the text of Article 243(2) did not necessitate appeal to the customs authority followed by subsequent appeal to a judicial tribunal.[168]

Further, the Court noted the legislative history of the Article indicated a rejection of initial proposals requiring detailed appellate procedures, which "expressly provided that in principle an appeal to the judicial authorities was to be subject to a prior appeal to the customs authorities."[169] Thus, an importer could, in compliance with Community law, lodge an appeal of a customs decision directly with a judicial body under a national procedure.[170] Yet, Community law does not permit an importer to bypass provisions of national law requiring first appeal to the customs authority in favor of lodging a judicial appeal.[171] Thus, national law determines whether an importer may appeal a customs decision directly to a judicial tribunal or to a customs authority in the first instance.[172]

The Court also referred to the opinion issued by the Economic and Social Committee on the establishment of the Community Customs Code.[173] The opinion asserted

> What makes harmonization [sic] of rights of appeal special however is not only the differences between national procedures, which are in some cases considerable, but also the fact that they often apply

166. Case 1/99, Kofisa Italia Srl v. Ministero delle Finanze, ¶ 15 (Unreported, Jan. 11, 2001), *available at* http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit& alldocs=alldocs& docj=docj&docop=docop& docor=docor&docjo=docjo&numaff=&datefs=&datefe=&nomusuel=& domaine=&mots=Kofisa+Italia+Srl+Ministero+delle+Finanze+&resmax=100 (last visited July 12, 2005) [hereinafter Case 1/99, *Kofisa Italia Srl*]. *See also* Case Comment, Court Rules on Appeals Procedures vol. 70, 7 (2001).

167. Case 1/99, *Kofisa Italia Srl, supra* note 166, ¶ 17.

168. *Id.* ¶ 36.

169. *Id.* ¶ 40.

170. *Id.* ¶ 39.

171. *Id.* ¶ 42.

172. Case 1/99, *Kofisa Italia Srl, supra* note 166, ¶ 17.

173. *Id.* ¶ 41; Opinion on the proposal for a Council Regulation (EEC) Establishing a Community Customs Code and the Proposal for a Council Resolution (EEC) determining cases and the special conditions under which the temporary importation arrangements may be used with total relief from import duties, 1991 O.J. (C 60) 5 [hereinafter Opinion on EEC].

> uniformly to the whole field of national administrative and tax law so that the harmonization [sic] of rights of appeal for the purposes of customs law only will fragment hitherto uniform national appeals procedures.[174]

Additionally, the opinion affirmed the validity of national regulation of appellate rights relating to customs matters.[175] The danger, according to the Committee, was in fragmenting uniform national appellate procedures, while harmonizing all national law through Community legislation establishing uniform rules applicable to all customs litigation within the Community.[176]

In sum, national procedural law determines the method of appeal. Community law establishes basic norms for appellate procedure, but the Member States are free to construct the exact method of appeal binding upon the importer. Yet, the Court did not address whether an importer has a right to appeal a decision of a national customs authority directly to a Community body. The right appears implicit because the importer may request a preliminary ruling from the European Court of Justice on a customs matter.[177] Additionally, an importer may appeal to the Court of First Instance when: the Commission requests a Member State alter a BTI issued to a specific importer; upon an error by the customs authority in levying the appropriate duty on particular merchandise; special circumstances requiring the repayment or remission of customs duties; or repayment of duties levied in an anti-dumping or countervailing duties action where discovery that the "margin of dumping or subsidies is lower than the duty actually paid."[178]

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174. *Id.* ¶ 41. *See* Opinion on EEC, *supra* note 173, at 11 (explicating appellate procedures were not previously harmonized as most other areas embodied in the Customs Code).

175. *Id.*

176. *Id.* at 6.

177. LUX, *supra* note 85, at 63 (right to request preliminary ruling in Article 234 of the EC Treaty). *Cf.* Ilona Cheyne, *International Instruments as a Source of Community Law*, *in* THE GENERAL LAW OF E.C. EXTERNAL RELATIONS 254-75 (Alan Dashwood & Christophe Hillion eds., 2000).

178. LUX, *supra* note 85, at 63-64. The European Court of Justice consists of two independent courts: The Court of First Instance and the Court of Justice. *See* KOEN LENAERTS & PIET VAN NUFFEL, CONSTITUTIONAL LAW OF THE EUROPEAN UNION, 442, 448-50 (Robert Bray ed., 2d ed. 2005) (addressing the jurisdiction of the Court of First Instance and the treaty provisions describing its role); NEVILLE MARCH HUNNINGS, THE EUROPEAN COURTS 184-229 (1996); *see generally* RENAUD DEHOUSSE, THE EUROPEAN COURT OF JUSTICE (2000). An importer may not challenge a regulation itself, unless the regulation grants the importer the right of challenge or "where the person is in a specific situation that differs from that of his competitors." LUX, *supra* note 85, at 64 (citing Extramet v. Council, 1991 E.C.R. I-2501 and Al Jubail Fertilizer v. Council, 1991 E.C.R.

3. Violation of EC Customs Code as a Basis for WTO Violation?

The United States alleges EC Member States violate WTO law by failing to enact domestic appellate remedies as mandated by the Customs Code 243.[179] Additionally, the United States asserts the EC violates Article X:3(b) because no effective community-wide appellate mechanism exists to timely address importers disputes with national customs authorities.[180] These claims raise three distinct issues. The first, whether violation of the EC Community law amounts to a violation of WTO obligations. The second, what is the status of the EC and its Member States within the WTO treaty regime, particularly whether the United States may directly challenge EC Member States separately from the EC. The third, whether the WTO may mandate the EC's alteration of community-wide judicial proceedings, as well as repeal of EC Member States' appellate procedures currently in force to conform these systems to WTO standards.

Examination of whether violation of Community law constitutes a violation of WTO obligations requires exposition of the status of Community law. One scholar succinctly stated Community law "is equivalent to a domestic legal system in that it operates with its own laws and procedures separate from international law, notwithstanding the fact that its legal actors include sovereign states."[181] The Court of Justice, in adjudicating an importer's challenge to a tariff classification by an EC Member State, asserted that Community law "constitutes a new legal order of international law for the benefit of which states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals."[182] Community law arises "from the Treaties [establishing the Community] as obligations in public international law," and is therefore *sui generis*.[183] The EC "created its own legal system [in contrast to ordinary international treaties] which . . . became an integral part of the legal systems of the

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I-3187 as examples of both situations).

179. Lux, *supra* note 85, at 63-64.

180. Panel Establishment Request, *supra* note 3, at 2.

181. Ilona Cheyne, *International Instruments as a Source of Community Law*, *in* THE GENERAL LAW OF E.C. EXTERNAL RELATIONS, *supra* note 122, at 254-75, 254 n.1 (citing Van Gend en Loos, 1963 C.M.L.R. 82).

182. Preliminary Ruling at the Request of the Tariff Administration, Case 26/62 Van Gend en Loos v. Netherlands Inland Revenue Admin., 1963 C.M.L.R. 82, 85.

183. Hazel Fox et al., *The Reception of European Community Law into Domestic Law*, *in* THE INTEGRATION OF INTERNATIONAL AND EUROPEAN COMMUNITY LAW INTO NATIONAL LEGAL ORDER A STUDY OF THE PRACTICE IN EUROPE 27-38 (Pierre Michel Eisemann ed., 1996).

Member states" assuring the supremacy of Community law to national legislation.[184]

Whether WTO obligations have been incorporated into Community law, thereby making WTO law directly applicable, is subject to debate.[185] Nonetheless, the requirements of Article 243 of the Customs Code and Article X:3(b) are coextensive, as both cover similar, if not the exact same obligations.[186] Article X:3(b) requires WTO Members to "maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose . . . of the prompt review and correction of administrative action relating to customs matters," while Article 243 requires EC Member States to provide procedures for "appeal against . . . decisions taken of the customs authorities . . . initially, . . . before the customs authorities . . . [and] subsequently, before an independent body, which may be a judicial authority or an equivalent specialized body."[187] Therefore, violation of the Customs Code should constitute a violation of WTO obligations by the Member States, if they are subject to WTO obligations, because the provisions are coextensive.[188] Further, if EC Member States are signatories to the WTO treaty, then they are obligated to comply with the requirement of Article X:3(b) stated above, which is the same obligation levied upon EC Member States by Community law.[189]

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184. *Id.* at 28 (quoting Costa v. Enel, 1964 E.C.R 585). Whether community law that conflicts with national constitutional provisions prevails has not been addressed. *Id.* at 33.

185. *See* Armin von Bogdandy, *Legal Equality, Legal Certainty, & Subsidiarity in Transnational Economic Law, in* EUROPEAN INTEGRATION AND INTERNATIONAL COORDINATION STUDIES IN TRANSNATIONAL ECONOMIC LAW IN HONOR OF CLAUS-DIETER EHLERMANN 13-37, 27-28 n.70 (Armin Von Bogdany et al. eds., 2002) (noting debate and sources as well as asserting direct applicability of WTO law pressures national regulatory schemes to harmonize); Steve Peers, *Fundamental Right or Political Whim? WTO Law and the European Court of Justice, in* THE EU AND THE WTO LEGAL AND CONSTITUTIONAL ISSUES 111-30 (Grainne DeBurca & Joanne Scott eds., 2001) (summarizing Court of Justice jurisprudence on direct applicability and collecting sources referencing debate); Ilona Cheyne, *Haegeman, Demirel, and Their Progency, in* THE GENERAL LAW OF E.C. EXTERNAL RELATIONS, *supra* note 122, at 20-41, 39-41 (asserting GATT 1947 provisions were directly applicable to Member States through community law as indicated by various European Court of Justice decisions).

186. Note that the text of Article X:3(b) of GATT 1947 was unchanged by the WTO Agreement. GATT 1947, *supra* note 4, art. X:3(b). Therefore, under previous community law, Article X:3(b) was directly applicable to Member States. *See id.*

187. *Id.*; Code, *supra* note 78, art. 243.

188. *See generally* PIERRE DIDIER, WTO TRADE INSTRUMENTS IN EU LAW (1999) (illustrating EC adopted WTO Anti-Dumping Agreement into Community law through Regulation (EC) 3283/94, 1994 O.J. (L 349) 1 and Regulation (EC) 384/96, 1996 (L 56) 1).

189. Violation of Community law that is not coextensive with WTO obligations is not a violation of WTO obligations. GATT 1947, *supra* note 4, art. X:3(b).

Assessment of whether Member States are full signatories to the WTO convention, as well as the international legal personality of the EC, resolves the second issue. Exact definition of the EC as an international legal entity receives varying interpretations.[190] Scholars define the EC as a "new . . . political and legal association . . . [founded] under supranationality . . . [meaning] that there are powers or competences vested in the institutions which have both 'supremacy' vis-à-vis the Member states and 'direct effect' vis-à-vis the citizens of the Member states."[191] Therefore, the EC is a "supranational legal system[,] . . . an *ex novo* creation . . . [with] its own system of legal concepts . . . , which is, to a great extent, different from that employed at the national level."[192]

Both the EC and each of its constituent Member States are signatories to the WTO Agreement.[193] WTO jurisprudence illustrates that a WTO Member may allege WTO violations against individual EC constituent states.[194] Because both the EC and its Member States are signatories to the WTO conventions each maintain separate and distinct international obligations under WTO treaties.[195] Breach of these obligations is a violation of international law.[196] Enforcement through general public

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190. *See infra* notes 191 & 192.

191. Inger-Johanne Sand, *Understanding the EU/EEA as Systems of Functionality Different Processes: Economic, Political, Legal, Administrative and Cultural, in* EUROPE'S OTHER: EUROPEAN LAW BETWEEN MODERNITY AND POSTMODERNITY, 93-109 (Peter Fitzpatrick & James Henry Bergeron eds., 1998).

192. MARIA LUISA FERNADEZ ESTEBAN, THE RULE OF LAW IN THE EUROPEAN CONSTITUTION xiii (1999) (statement cited is of Professor Luis Maria Diez-Picazo in the Preface).

193. *See* WTO Member web page for EC, http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm (last visited July 17,2005).

194. Appellate Body Report, *European Communities-Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, ¶. 1 n.2 (June 5, 1998).

195. *See* Vienna Convention, *supra* note 74, art. 26. "*Pacta sunt servanda.* Every treaty in force is binding upon the parties to it and must be performed by them in good faith." *See id* (the principle also known by the Latin phrase *rebus sic stantibus*).

196. The Permanent Court of International Justice held "that it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation." Chorzow Factory (Merits) Case, P.C.I.J. (ser. A.) No. 17, at 29 (1928). The concept of breach of the law of nations or *ius gentium* and its remedy derives from Roman law. JOHN WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 18 (1894). A "state is responsible for any failure on the part of its organs to carry out international obligations . . . ." TIM HILLER, SOURCEBOOK ON PUBLIC INTERNATIONAL LAW 90 (1998) (quoting Draft Code of General Principles of Law that formed basis of International Court of Justice's constitutive statute Article 38(1)(c)); *see generally* WILHELM G. GREWE, THE EPOCHS OF INTERNATIONAL LAW (Michael Byers trans., 2000); AMOS S. HERSHEY, THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW (1918); C.H. STOCKTON, A MANUAL OF INTERNATIONAL LAW FOR THE USE OF NAVAL OFFICERS 16-18 (1911); HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW (1846); *see also* JOHN H. JACKSON, THE WORLD TRADING SYSTEM LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 107-37 (2d

international law of a breach of an actor's international obligations is limited.[197] Nevertheless, to affirmatively resolve the second issue raised above, both the EC and its Member States are separately subject to WTO obligations and dispute settlement procedures.

Turning to the final issue of whether the WTO may require alteration of a violating Member's judicial system, at least one eminent scholar argued that breaches of WTO obligations fall within the scope of remedy proscribed in DSU Article 19 for a panel to require a Member to bring a violating measure into conformity according to a binding recommendation.[198] The scope of a binding recommendation is uncertain, but previous WTO decisions recognize the specific steps a Member must initially take to implement a recommendation remain within the sole discretion of the Member found to violate its WTO obligations.[199]

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ed. 2002) (discussing and defining effective international rulemaking and implementation procedures, as well as future mechanisms for rule implementation in WTO).

197. *See* Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 EUR. J. INT'L L. 763-813, 766-74 (2000) (discussing customary international law remedies as cessation of international law violation and a form of reparation to parties injured by the violation limited to compensation, guarantees of non-repetition of the violating act, or *restitutio in integrum*); *see generally* JOHN COLLIER & VAUGHAN LOWE, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW INSTITUTIONS AND PROCEDURES (1999); REMEDIES IN INTERNATIONAL LAW: THE INSTITUTIONAL DILEMMA (Malcolm D. Evans ed., 1998).

198. *See* Robert Hudec, *Broadening the Scope of Remedies in WTO Dispute Settlement, in* IMPROVING WTO DISPUTE SETTLEMENT PROCEDURES: ISSUES AND LESSONS FROM THE PRACTICE OF OTHER INTERNATIONAL COURTS AND TRIBUNALS 369-400 (Friedl Weiss ed., 2000) (approving approach outlined above as articulated in Panel Report, *Guatemala-Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/R (June 19, 1998), *reversed on appeal by*, WT/DS60/AB/R (Nov. 2, 1998)). Article 19 of the DSU provides:

> 1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.
> 2. In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements. (footnotes excluded).

199. *See* Authorities collected in WTO Appellate Body Repertory of Reports and Awards 1995-2004, Arbitration Awards Under Article 21.39(c) of the DSU, *available at* http://www.wto.org/english/tratop_e/dispu_e/repertory_e/arb1_e.htm#ARB.1.1 (last visited July 17, 2005) (illustrating Member's discretion in implementing recommendations). *See also* WTO Appellate Body Repertory of Reports and Awards 1995-2004, Review of Implementation of DSB Rulings, R.4.1-4.3.6 (2005), *available at* http://www.wto.org/english/tratop_e/dispu_e/repertory_e/r4_e.htm (last visited July 17, 2005).

Although a panel may recommend repeal of a violating measure and suggest approaches for a Member to alleviate the violation, the panel may not pronounce a binding remedy that requires a definite method for a Member to cure a nonconforming measure.[200] Yet, if the violating Member's chosen steps fail to achieve a legally valid solution, then the complaining Member may resort to DSU Article 21.5 to compel a valid remedy.[201] Whether, under DSU 21.5, the WTO may require a Member to alter its judicial system is resolved by reference to a well-known dispute concerning the Indian system of patent registration.[202]

The dispute between the United States and India concerned the lack of protection afforded to "pharmaceutical and agricultural chemical products under Article 27 of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement), or of a means for the filing of patent applications . . . and of legal authority for the granting of exclusive marketing rights for such products."[203] The panel found India violated the TRIPS Agreement and recommended India bring its domestic regime into

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200. *See* Panel Report, *United States—Continued Dumping and Offset Act of 2000*, WT/DS217/14,WT/ DS234/22, ARB-2003-1/16, ¶ 52 (June 13, 2003) (Arbitrator asserting recommendation by Panel to repeal legislation not binding on United States).

201. On the authority of the WTO Dispute Settlement System, see generally William J. Davey, *Has the WTO Dispute Settlement System Exceeded Its Authority? A Consideration of Deference Shown by the System to Member Government Decisions and Its Use of Issue Avoidance Techniques*, 4 J. INT'L ECON. L. 79-110 (2001). Article 21.5 of the DSU reads:

> Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.

202. A number of scholars address the scope of remedies available under the WTO Agreement and propose use of alternate remedies. *See* Steve Charnovitz, *Rethinking Trade Sanctions*, 95 AM. J. INT'L L. 792-832 (2001) (suggesting use of DSU authorized non-tariff sanctions and implementation of new effective compliance mechanism); Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 EUR. J. INT'L L. 763, 763-813, 800-09 (2000) (discussing WTO enforcement remedies as compensation and countermeasures); Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules—Toward a More Collective Approach*, 94 AM. J. INT'L L. 335, 335-47 (2000). *See also* Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 333-77 (1999).

203. Appellate Body Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, ¶ 1 (Dec. 17, 1997) [hereinafter Appellate Body Report, *India*].

compliance with WTO obligations.[204] In finding a violation of WTO obligations, the panel, in essence, asserted India's domestic patent legislation and administrative organization failed.[205]

Interestingly, the EC, a third party participant in the appeal, asserted India failed to implement measures required by TRIPS.[206] The Appellate Body noted the TRIPS Agreement's text permitted Members the freedom to implement the appropriate method pursuant to domestic law to comply with TRIPS obligations.[207] Nonetheless, the Body examined India's domestic law and found India's method of implementing TRIPS failed to effectuate India's obligations under the Agreement.[208]

Additionally, the Body found India needed to implement an effective mechanism to protect exclusive marketing rights.[209] The Body recommended that India bring its "legal regime for patent protection of pharmaceutical and agricultural chemical products into conformity with India's obligations . . . [under] the *TRIPS Agreement*."[210] The Dispute Settlement Body accepted the Appellate Body's report, and India passed legislation altering its domestic legal regime relating to patent protection to conform with its WTO obligations.[211]

In light of the foregoing case, adoption by the WTO Dispute Settlement Body of panel or Appellate Body recommendations that a Member bring its regime into compliance with WTO obligations appears to have the effect of requiring a Member to substantially alter its domestic legal regime. In the context of the present dispute, if the EC were found to violate Article X:3(a), then a panel could recommend the EC bring its measure into conformity.[212] The means of conformance would be left to the EC. Yet, the only compliant method would be implementation of a direct Community-wide review system, as well as enactment by EC Member States of adequate appellate review mechanisms.[213] Thus, the effect of a panel conformity recommendation, in the present dispute, is to *de facto* require a Member to modify its domestic legal structures.[214]

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204. *Id.* ¶ 2.

205. *See id.* ¶ 15 (United States asserted Panel found the Indian system a failure).

206. *Id.* ¶ 23.

207. *Id.* ¶ 59.

208. Appellate Body Report, *India*, *supra* note 203, ¶¶ 61-71.

209. *Id.* ¶ 84.

210. *Id.* ¶ 98.

211. *See* Status Report by India, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/10/Add.4, WT/DS79/6 (Apr. 16, 1999).

212. *See* Appellate Body Report, India, *supra* note 203, ¶¶ 83, 98.

213. *See id.*; GATT 1947, *supra* note 4, art. X:3(b) (read in conjunction with art. X:3(a) WTO law requires a uniform procedure throughout the community).

214. *See* WTO Secretariat, *Clarification and Improvement of GATT Articles V, VIII and X*

C. *The Applicability of Article XXIV:8(ii)*

As a former Judge of the Appellate Body noted, an "important task for Members of the WTO is to ensure that WTO disciplines are effectively applied to prevent... [customs unions and regional free trade agreements] from being too exclusive and discriminatory in relation to outside parties."[215] Article XXIV:8(ii) pronounces a substantive obligation upon WTO Members who are part of a customs union to maintain a uniform customs tariff regime applicable to third party countries importing into the customs union.[216] This substantive obligation resides within the general exception Article XXIV grants to customs unions to Article I's obligations.[217] The scope of such an exception has seldom been subject to explication through GATT/WTO dispute settlement decisions.[218] Only one WTO dispute extensively dealt with the provisions of Article XXIV, while

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Proposals made by WTO Members, TN/TF/W/43, at 21 (June 3, 2005) [hereinafter Clarification of GATT] (citing communication indicating measures needed to ensure uniform administration of trade measures with introduction of central department within Member governments to interpret "trade regulations such as those relating to customs classification or customs valuation, etc."); *see* WTO Secretariat, *Communication by Japan, Mongolia, Chinese Taipei, Pakistan and Peru*, TN/TF/W/8 (Jan. 28, 2005). Additionally, the EC has proposed that "procedures for appeal [adopted by members] should be easily accessible . . . , and costs should be reasonable and commensurate with costs in providing for appeals." Clarification of GATT, *supra*, at 20 (June 3, 2005). The EC asserts all Members should, "for imports, exports and goods in transit,... be...[obliged]...to provide a non discriminatory, legal right of appeal against customs and other agency rulings and decisions, initially within the same agency or other body, and subsequently to a separate judicial or administrative body." Communication by the European Communities, TN/TF/W/6, ¶ 7 (Jan. 28, 2005) (a large part of the Communication addresses Article X).

215. *See* Mitsuo Matsushita, *Legal Aspects of Free Trade Agreements: In the Context of Article XXIV of the GATT 1994, in* WTO AND EAST ASIA NEW PERSPECTIVES 497-514 (Mitsuo Matsushita & Dukgeun Ann eds., 2004).

216. *See* GATT, ANALYTICAL INDEX: GUIDE TO LAW AND PRACTICE 769 (6th ed. 1994) (quoting Sept. 1978 notification by EEC regarding use of European Accounting Unit L/4709, Oct. 4, 1978, 2, ¶ 4). *Cf.* JAMES H. MATHIS, REGIONAL TRADE AGREEMENTS IN THE GATT/WTO ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT (2002) (discussing additional Article XXIV internal requirements to maintain a customs union).

217. Appellate Body Report, *European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, ¶ 81 (Apr. 7, 2004) [hereinafter *Appellate Body Report, Tariff Preferences*]. *See* Arim von Bogdany and Tiltman Makatsch, *Collision, Co-Existance or Co-Operation? Prospects for the Relationship Between WTO Law and European Union Law, in* THE EU AND THE WTO LEGAL AND CONSTITUTIONAL ISSUES 138-41 (Grainne DeBurca & Joanne Scott eds., 2001).

218. "The meaning of Article XXIV is by no means clear and amenable to different interpretations." Matsushita, *Legal Aspects of Free Trade Agreements: In the Context of Article XXIV of the GATT 1994, in* WTO AND EAST ASIA NEW PERSPECTIVES, *supra* note 215, at 499.

three unadopted GATT panel decisions discussed the Article at length.[219] Allowance of a customs union within the general WTO scheme of obligations occurs as a result of the belief such associations encourage and promote international trade.[220]

1. General Principles

Originally, Article XXIV provided an exception to Article I's Most Favored Nation obligation, but the WTO Appellate Body recently provided a broader reading of Article XXIV as an exception to WTO obligations—as well as both a general and specific defense against alleged violations.[221] The scope of the two defenses are vague, but one may adduce that the defenses operate in the context of the Appellate Body's belief that custom unions effectuate trade and are therefore good for the international trading system.

The definition of a customs union was of central importance to the Appellate Body in a recent decision.[222] As a result, Article XXIV:8(ii) received substantial explanation.[223] The Appellate Body explained that Article XXIV:8(ii) "establishes the standard for the trade of constituent members *with third countries* in order to satisfy the definition of a 'customs union.'"[224] The Article requires a common external tariff scheme, but permits constituent members of customs unions flexibility in implementing that scheme.[225] Members need not apply "*the same* duties and other regulations of commerce as other constituent members with respect to trade with third countries."[226] Members of a customs union need only apply "substantially the same" duties and commerce regulations to countries outside the customs union.[227] The meaning of substantially the same invokes both qualitative and quantitative considerations, and

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219. *See* Appellate Body Report, *Tariff Preferences*, *supra* note 217; *see infra* notes 244, 258, 277.

220. Bogdany & Makatsch, *Collision, Co-Existance or Co-Operation? Prospects for the Relationship between WTO Law and European Union Law*, *in* THE EU AND THE WTO LEGAL AND CONSTITUTIONAL ISSUES, *supra* note 217, at 139; *Accord* John H. Jackson, *Foreword, Perspectives on Regionalism in Trade Relations*, 27 LAW & POL'Y INT'L BUS. 873 (1996).

221. Appellate Body Report, *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (Oct. 22, 1999), ¶¶ 45 n.13, 52 [hereinafter Appellate Body Report, *Restrictions on Imports*].

222. *Id.* ¶¶ 43, 47-49.

223. *Id.* ¶¶ 49-50.

224. *Id.* ¶ 49.

225. *Id.*

226. Appellate Body Report, *Restrictions on Imports*, *supra* note 221, ¶ 49.

227. *Id.*

approximates sameness in application of a common tariff to a greater degree than "comparable trade regulations having similar effects."[228] Additionally, execution of this common tariff scheme must not raise barriers to trade with countries outside of the customs union.[229]

A WTO Member may, if two conditions are satisfied, raise Article XXIV as a specific defense to breach of a Member's WTO obligations on grounds that compliance with such obligations prohibits the formation of a customs union.[230] A Member must show by competent evidence that the measure challenged is compatible with paragraphs 5(a) and 8(a) of Article XXIV as the first condition for raising the defense.[231] Second, the Member must prove formation of a customs union would be prevented without introduction of the measure.[232]

The Appellate Body, possibly retreating from its earlier position that Article XXIV provides both a general defense and a specific defense, held in a subsequent case that the defense of Article XXIV may justify a measure inconsistent with other GATT obligations only when the Member asserting the defense proves the measure satisfies the above-referenced two conditions: proving the challenged measure complies with paragraphs 5(a) and 8(a) of Article XXIV; and establishing a formation of a customs union is prevented without the challenged measure.[233] Additionally, the defense must be raised by the Member against whom a violation is alleged; therefore, a panel may not *sua sponte* discuss the applicability of the defense in a given dispute.[234]

Discussion of Article XXIV as an exception to WTO obligations occurred in the context of an alleged violation of the Agreement on Safeguards by the United States.[235] Refusing to address the relationship between the Agreement and Article XXIV, the Appellate Body asserted Article XXIV provided an exception to obligations of the Agreement on Safeguards in only two factual situations:

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228. *Id.* ¶ 50.

229. *Id.* ¶ 57 ("purpose set forth in paragraph 4 informs the other relevant paragraphs of Article XXIV").

230. *Id.* ¶¶ 58-61 (describing in detail two conditions necessary for defense).

231. Appellate Body Report, *Restrictions on Imports*, *supra* note 221, ¶ 58.

232. *Id.*

233. Appellate Body Report, *Argentina—Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, ¶ 109 (Dec. 14, 1999).

234. *Id.* at ¶¶ 109-110.

235. Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, ¶¶ 198-199 (Feb. 15, 2002).

> One is when, in the investigation by the competent authorities of a WTO Member, the imports that are exempted from the safeguard measure *are not considered* in the determination of serious injury. The other is when, in such an investigation, the imports that are exempted from the safeguard measure *are considered* in the determination of serious injury, *and* the competent authorities have *also* established explicitly, through a reasoned and adequate explanation, that imports from sources outside the free-trade area, alone, satisfied the conditions for the application of a safeguard measure. . . .[236]

This conclusion read in conjunction with the Appellate Body's redefinition of the feasibility of the general defense discussed above, evidences the Body's retreat from its initial holding that Article XXIV enunciated both a broad general and a specific defense.[237] To the extent panels will accord with the Body in the limitation of the general defense is uncertain, but the present dispute could clarify the Body's position—if the defense is raised and the panel decision is appealed.

In any case, the alleged violation must be shown by the complaining Member in order for a panel to evaluate the applicability of the Article XXIV defense claimed by the alleged violator.[238] Therefore, the burden of proof remains upon the complaining Member to prove an initial violation of WTO obligations.[239]

2. Unadopted GATT Panel Jurisprudence

The Appellate Body, in rendering its decision on the Article XXIV defense, referred to unadopted GATT panel decisions addressing the scope

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236. *Id.* ¶ 198.

237. *See generally* Joel P. Trachtman, *Toward Open Recognition Standardization and Regional Integration Under Article XXIV of GATT*, 6 J. INT'L ECON. L. 459 (2003) (discussing WTO consistency of various trade agreements under Safeguards).

238. Panel Report, *Canada—Certain Measures Affecting the Automotive Industry*, WT/DS139/R,WT/DS142/R, ¶ 10.51 (Feb. 11, 2000) [hereinafter Panel Report, *Canada—Automotive Industry*].

239. On the burden of proof, see generally Panel Report, *United States—Anti-Dumping Measures on Oil Country Tublar Goods (OTCG) from Mexico*, WT/DS282/R, ¶ 7.8 (June 20, 2005); Appellate Body Report, *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, at 12-17 (Apr. 25, 1997); Panel Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, ¶¶ 9.57-9.58 n.286 (May 31, 1999); Panel Report, *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, ¶¶ 6.34-6.40 (Mar. 27, 1998).

of Article XXIV.[240] Generally, WTO jurisprudence asserts that

> adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.[241]

Moreover, the Appellate Body held

> *unadopted* panel reports "have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or WTO Members." Likewise, we agree "a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant."[242]

Thus, future reference to the GATT panel decisions referred to in the Appellate Body's Article XXIV decision may continue to inform WTO law.[243] Analysis of these panel decisions follows.

a. EC-Citrus Products

The first dispute to address the scope of Article XXIV occurred in 1985.[244] The United States complained that tariff preferences granted by

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240. Appellate Body Report, *Tariff Preferences*, *supra* note 217, n.13. *See also* WTO Appellate Body Repertory of Reports and Awards 1995-2004, *Status of Panel and Appellate Body Reports*, S.8.1-2 (2005) (collecting authorities discussing applicability of previous GATT precedent), *available at* http://www.wto.org/english/tratop_e/dispu_e/repertory_e/s8_e.htm#S.8.1 (last visited July 17, 2005).

241. Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 14-15 (Oct. 4, 1996).

242. *Id.* at 97.

243. *See Appellate Body Shrimp Report*, *supra* note 47, ¶¶ 108–109; Agreement Establishing WTO, *supra* note 4, art. 16(1):

> Except as otherwise provided for under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES of the GATT 1947 and the bodies established in the framework of the GATT 1947.

244. Panel Report, *European Community-Tariff Treatment on Imports on Citrus Products from*

the EC to a number of Mediterranean countries for importation of citrus fruits negatively impacted American exports of similar citrus fruit to the EC.[245] The EC had established agreements with a number of these Mediterranean countries, and submitted the agreements to the GATT for approval as interim agreements leading to the formation of a customs union.[246] The panel found that Part IV and Article XXIV "constituted distinct sets of rights and obligations and that measures taken under one could not be covered by the other."[247] The adherence to the "precise criteria" of Article XXIV was required.[248] Yet, the panel asserted that it lacked jurisdiction to pass upon whether the EC agreements complied with Article XXIV's provisions because no decision by the GATT Council occurred approving the agreements.[249] Had the GATT Council approved these agreements as consistent with Article XXIV, then a contracting party could not challenge the agreements as nullifying or impairing benefits accruing under the GATT.[250] The challenged agreements were not so approved, and therefore the panel found the preferential tariff scheme adversely affected American exporters of citrus fruit by upsetting the balance of rights and obligations under Articles I and XXIV.[251] This upsetting of rights and obligations disadvantaged the United States as a non-member of the EC agreements, and therefore "entitled [the United States] to offsetting or compensatory adjustment to the extent that the grant of the preferences had caused substantial adverse effects to its actual trade or its trade opportunities."[252]

Further, the panel addressed the relationship between Article XXIV and Article XXIII.[253] Article XXIII provided for remedy of a nullification or impairment by one Contracting Party of another Contracting Party's GATT rights, and set out special procedures for the Contracting Parties to utilize in assessing a measure's conformity with GATT obligations.[254] The

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Certain Countries in the Mediterranean Region, L/5776 (Feb. 7, 1985) [hereinafter Panel Report, *Citrus Products*].

245. *Id.* ¶ 3.1.

246. *Id.* ¶¶. 2.9, 2.10, 3.2 (some agreements submitted as free trade areas).

247. *Id.* ¶ 4.11 (Part IV refers to nonreciprocal treatment in trade negations between developed and developing nations); *see generally* WTO SECRETARIAT, REGIONALISM AND THE WORLD TRADING SYSTEM 15-16 (1995).

248. *Id.*

249. Panel Report, *Citrus Products*, *supra* note 244, ¶¶ 4.14, 4.15 (Panel found terms of reference excluded analysis of EC agreements consistency with provisions of Article XXIV).

250. *Id.* ¶ 4.19.

251. *Id.* ¶ 4.37.

252. *Id.*

253. *Id.* ¶ 4.16.

254. *See* GATT 1947, *supra* note 4, art. XXIII.

panel refrained, without a special mandate, from analyzing agreements challenged for conformity with GATT obligations—particularly if such agreements satisfied the requirements of Article XXIV.[255]

The dispute illustrates the ability of the panel process to address regional agreements lacking approval by the GATT Council for compliance with GATT obligations. This principle may be relevant to the present dispute, since the agreement enlarging the EC customs union has yet to be approved by the WTO. Further, the panel decision highlights the distinctiveness of obligations within GATT Articles, and may set down a general principle that a violator of GATT obligations can not solely assert compliance with alternative Articles as providing a general exception to GATT obligations.[256] Finally, the decision infers deference to specific procedures applicable to a dispute over general GATT provisions.[257]

b. *EC-Bananas I*

In another dispute, the EC argued Article XXIV, in connection with Part IV, permitted a portion of EC Member States to apply a preferential tariff scheme.[258] The EC's theory declared Article XXIV:8 only obligated Members to remove restrictive internal importation regulations relating solely to developed Members thereby permitting such restrictions relating to developing countries.[259] The panel concluded Article XXIV applied only in situations in which a challenged measure fell within the rubric of a customs union or free trade area.[260] Reasoning invocation of Article XXIV for any agreement would deprive other contracting parties the right to investigate the matter pursuant to Article XXIII, the panel held Article XXIV trumped Article XXIII only in a situation where the agreement challenged was *prima facie* covered by Article XXIV.[261] Finding the agreement currently under challenge covered by Article XXIV, the panel nonetheless found Article XXIV, coupled with Part IV, did not permit EC Member States to retain restrictive regulations or fail to liberalize trade

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255. *Id.*

256. *Cf.* discussion of Article XXIV as a general exception in section C, subsection 1 of the text.

257. Panel Report, *Citrus Products*, *supra* note 244, ¶¶ 3.27, 4.16.

258. Panel Report, *EEC-Member States' Import Regimes for Bananas*, ¶ 364, DS/32/R (June 3, 1993) [hereinafter Panel Report for Bananas].

259. *Id.*

260. *Id.* ¶ 367.

261. *Id.* In the Panel's words: "only in those cases in which the agreement for which Article XXIV was invoked was prima facie the type of agreement covered by this provision, i.e., on the face of it capable of justification under it." *Id.*

with developing countries along the same tariff preferential scheme as applied to developed countries.[262]

Therefore, the panel opined, Part IV does not modify contracting parties' obligations pursuant to Article XXIV.[263] Neither does Part IV create an additional exception to Article I's Most Favored Nation principle.[264] The addition of Part IV to the GATT did not reflect a subtraction of contracting parties obligations under already established GATT obligations.[265] The panel found the preferential tariff scheme applied in a portion of the EC Member States was not justified under Article XXIV.[266]

Additionally, the panel reasoned that Article XXIV:5-8 provided an exception to GATT obligations solely for the purpose of forming or entering into an interim agreement to form a customs union or free trade area.[267] The Article did not provide a general exception to GATT obligations, nor permit a universal justification for restrictive import measures.[268] Thus, the EC's Member States provision for such restrictive import measures violated Article I and could not be justified by Article XXIV.[269] Yet, the measure might be justified if ratified by the contracting parties pursuant to Article XXV.[270] Article XXV:5 provided a mechanism for contracting parties, by two-thirds vote of the parties, to permit a waiver of GATT obligations in an exceptional circumstance.[271]

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262. *Id.* ¶ 372.

263. Panel Report for Bananas, *supra* note 258, ¶ 371.

264. *Id.*

265. *Id.* Part IV places additional obligations on developed contracting parties.

266. *Id.* ¶ 374 (scheme violated Article XI:2(c)(i)).

267. *Id.* ¶ 358.

268. Panel Report for Bananas, *supra* note 258, ¶ 358.

269. *Id.* ¶ 375.

270. *Id.*

271. Such a waiver was obtained by the EC regarding its banana importation scheme. *See* Ministerial Decision, *European Communities—Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas*, WT/MIN(01)/16 (Nov. 14, 2001). The text of Article XXV:5 reads:

> In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement; Provided that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. The CONTRACTING PARTIES may also by such a vote
>
> (i) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and

The panel decision recognizes the tension between Article XXIV and Article XXIII. This panel rejected the notion that Article XXIV's specific procedures for reviewing a customs union's compatibility with GATT obligations prohibited a contracting party, not party to the customs union, from adjudicating a claim for violation under the Article XXIII panel process.[272] The decision lays down the general principle that an alleged violation is justiciable by a panel consistent with Article XXIII.[273] Additionally, the panel's reasoning asserts Article XXIV does not act as an exclusionary clause insulating measures adopted by a customs union in contravention of GATT obligations from panel review.[274] Finally, the panel reminds the disputants of the procedural ability of contracting parties to obtain consent from two-thirds of the contracting parties to maintain GATT inconsistent measures.[275] Such consent excludes the measure from challenge under Article XXIII.[276]

c. *EC-Bananas II*

Another dispute discussing the EC's importation of bananas, focused on the new Community-wide tariff scheme effective in 1993, which abolished "the 20 per cent *ad valorem* bound tariff rate, applied in all EEC member states except Germany[,] quantitative restrictions on imports imposed by several member states of the EEC, and preferential tariffs accorded to African, Caribbean and Pacific (ACP) countries."[277] The new uniform tariff scheme provided specific duties for the importation of bananas from non-EC Member States and non-ACP free trade area countries, as well as quotas and an import licensing requirement.[278] The EC argued that a panel established pursuant to Article XXIII to investigate whether a nullification or impairment of GATT rights could not assess a free trade agreement's conformity with GATT provisions because Article XXIV:7 mandated special procedures available solely to the contracting

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(ii) prescribe such criteria as may be necessary for the application of this paragraph.

GATT 1947, *supra* note 4, art. XXV:5.

272. Panel Report for Bananas, *supra* note 258, ¶¶ 365-367.

273. *See id.* ¶ 367.

274. *Id.*

275. *Id.* ¶¶ 372, 375.

276. *Id.*

277. Panel Report, *EEC-Import Regime for Bananas*, ¶ 128, DS/38/R, (Feb. 11, 1994) [hereinafter Panel Report on *EEC—Bananas*].

278. *Id.* ¶¶ 128, 129.

parties to decide a free trade agreement's conformity with GATT obligations.[279]

The panel first considered whether the EC's free trade agreement with the ACP countries was a type of agreement covered under Article XXIV.[280] The panel undertook this investigation because if the EC were allowed to simply raise Article XXIV as a shield to "deprive all other contracting parties of their procedural rights under Article XXIII:2, and therefore also of the effective protection of their substantive rights, in particular those under Article I:1," then no contracting party could challenge the provisions of a free trade agreement.[281]

The panel's examination of the provisions of the EC-ACP free trade agreement concluded that the agreement, by its own terms, was not of a type covered under Article XXIV.[282] The agreement failed the definition of Article XXIV:8(b) because the "obligation to liberalize the trade in products originating in all of the constituent territories" within the meaning of the Article was not satisfied.[283] Therefore, the agreement was not a free trade agreement as recognized under GATT.[284] As a result, Article XXIV did not provide a justification to the EC's violation of its Article I obligations.[285]

The panel decision follows the reasoning set out in EC-Bananas I.[286] Article XXIV does not exclude review of a customs union's compliance with GATT obligations simply because the Article provides specific review procedures.[287] Article XXIII mandates a method for contracting parties to challenge another party's GATT inconsistent measures.[288] Also, the decision indicates that Article XXIV, if complied with, justifies measures otherwise inconsistent with GATT obligations.[289]

3. WTO Responses to Issues Raised in Unadopted GATT Panel Reports

The Appellate Body, referring to EC-Citrus Products and EC-Bananas I, addressed whether the specific review mechanism of Article XXIV

279. *Id.* ¶ 156.

280. *Id.* ¶¶ 157, 158 (Panel noted examination by working parties of EC-ACP agreements did not reference Article XXIV).

281. *Id.* ¶ 158.

282. Panel Report on *EEC—Bananas*, *supra* note 277, ¶ 159.

283. *Id.*

284. *Id.* ¶ 164.

285. *Id.*

286. *Id.* ¶¶ 156-158.

287. Panel Report on *EEC—Bananas*, *supra* note 277, ¶ 158.

288. *Id.*

289. *Id.* ¶¶ 162, 164, 170.

precluded panel review in an Article XXIII proceeding of a measure alleged to be inconsistent with WTO obligations.[290] One of the disputants, India, espoused a theory, echoing the EC's contention in EC-Bananas I and II, that a panel could not substantively review a free trade area, customs union, or interim agreement leading to the formation of either because that right of review rested solely through the specific review procedures of Article XXIV:7.[291] India asserted a balance must exist between the political and judicial bodies of the WTO in order for the competences of such bodies to remain respectfully distinct from each other.[292] Therefore, India argued, "there is a principle of institutional balance which requires panels, in determining the scope of their competence, to take into account the competence conferred upon other organs of the WTO."[293] The Appellate Body concluded no principle of institutional balance exists under or within WTO law.[294]

In rejecting the existence of a principle of institutional balance, the Appellate Body affirmed prior GATT jurisprudence articulated in the unadopted panel decisions discussed above.[295] The Body affirmed the ability of a panel, pursuant to Article XXIII, to adjudicate an Article XXIV measure's compliance with WTO obligations.[296] The Body's decision implicitly rejected the EC's contention, articulated in EC-Bananas I and II, that a panel lacked authority to review a measure's conformity with GATT/WTO obligations because a specific review mechanism existed.[297]

The ability of a panel to review a customs union's compliance with Article XXIV in order to receive its benefits was confirmed in a WTO panel decision.[298] Like the panel in EC-Bananas II, this WTO panel

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290. Appellate Body Report, *India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, ¶¶ 11, 12, 53, WT/DS90/AB/R,(Aug. 23, 1999) [hereinafter Appellate Body Report, *India—Quantitative Restrictions*].

291. *Id.* (India propounded argument in context of balance-of-payments dispute asserting Article XXVIII:12 and the Balance of Payments Agreement conferred power of review upon bodies other than panels disallowing panel review of alleged violation pursuant to Article XXVIII:B).

292. *See id.*

293. *Id.* ¶ 98.

294. *Id.* ¶ 100.

295. *See* Panel Report for Bananas, *supra* note 258, ¶¶ 365-367; Panel Report on *EEC—Bananas*, *supra* note 277, ¶¶ 156-158.

296. Appellate Body Report, *India—Quantitative Restrictions*, *supra* note 290, ¶ 100.

297. *See* Luzius Wasescha, *Article Part IV: Grouping on WTO DSU Reform: Proposal Relating to First-Level Permanent Panel Comment on a WTO Permanent Panel Body*, 6 J. INT'L ECON. L. 224, 226 (2003) (arguing professional panel would reach same conclusion as Appellate Body that DSU grants authority to Panel to review consistency of regional trade agreements for compliance with WTO obligations).

298. Panel Report, *Canada—Automotive Industry*, *supra* note 238, ¶¶ 10.53-10.57.

substantively reviewed the challenged measure to determine if it met the definition of Article XXIV:8, as a free trade area.[299] The challenged practice involved an import exemption for automobiles entering Canada from the United States and Mexico.[300] The EC argued that a free trade area did not exist between Canada and Mexico despite the NAFTA agreement.[301] The panel found the import exemption provided duty-free treatment to both members of the alleged free trade area, as well as to non-members of the alleged free trade area.[302] Additionally, the import exemption did not provide "for duty-free treatment of imports of products of parties to a free-trade area" because application of the measure failed uniformly to exempt automobiles originating in the United States and Mexico in certain instances.[303] The panel ruled the measure did not satisfy the conditions of Article XXIV:8 for a valid free trade area, and therefore found Article XXIV inapplicable as a justification of a violation of other WTO obligations.[304]

Review of WTO jurisprudence confirms WTO dispute resolution bodies have adopted a number of the principles expressed in the three previous unadopted GATT panel decisions.[305] Continued reference to the general precepts announced in the GATT panel decisions in WTO dispute resolution bodies will further define the scope of Article XXIV and its place within the dispute settlement process. The next section addresses another GATT panel decision, which may assist WTO panels or the Appellate Body in the resolution of disputes similar to the current dispute between the United States and the EC.

D. *A Similarly Situated Case and Possible Solution to the Conundrum:* Chile v. EC

Another GATT panel decision directly addressed the clash between Article X:3(a) and Article XXIV. The panel report, adopted by the GATT Council, did not render a direct opinion on how the two Articles related to one another, but offered a possible solution.[306] The dispute pitted Chile

299. *Id.* ¶¶ 10.55-10.57.

300. *Id.* ¶¶ 10.55-10.56.

301. *Id.* ¶ 10.53.

302. *Id.* ¶ 10.55.

303. Panel Report, *Canada—Automotive Industry*, *supra* note 238, ¶ 10.56.

304. *Id.* ¶¶ 10.57, 11.1

305. *See* Appellate Body Report, *India—Quantitative Restrictions*, *supra* note 290, ¶ 100; Panel Report, *Canada—Automotive Industry*, *supra* note 238, ¶¶ 10.51-10.57.

306. Panel Report, *European Economic Community—Restrictions on Imports of Dessert Apples—Complaint by Chile*, ¶ 6.3, L/6491 (Apr. 18, 1989) GATT B.I.S.D. (36th Supp.), at 93

against the EC over, *inter alia*, disparate import licensing requirements across the ten Member States of the EC for importation of dessert apples.[307]

Chile alleged the separate and distinct requirements to obtain an import license in each of the EC Member States violated Article X:3(a)'s obligation to uniformly administer a Member's customs laws.[308] Specifically, Chile argued "the problem was not whether the licenses were administered in an identical manner in all member states, but that in some of them the licenses were restrictive and non-automatic in character," as well as lacking reciprocity between Member States.[309] Chile also alleged the EC's licensing scheme was unreasonable because licenses lasted only one month and asserted the entire licensing scheme favored certain national importers while disadvantaging others, thereby causing the system to be partially administered.[310]

The panel found the EC licensing scheme applied to all EC Member States and was administered in a "substantially uniform manner."[311] The "minor administrative variations" regarding the application and securing of an import license did not constitute a breach of Article X:3(a).[312] Thus, the panel opined there was no need to consider whether "the requirement of 'uniform' administration of trade regulations was applicable to the Community as a whole or to each of its Member states individually."[313] The panel did not discuss arguments alleging the licensing scheme was unreasonable and partial.[314]

The panel failed to address a crucial question of whether Article X:3(a) required either uniform administration of an EC Council Regulation by its Member States, or the Member States to administer internal law uniformly, or both. Notwithstanding that failure, the panel decision utilized the key phrase, "substantially uniform" to describe how the EC administered its licensing scheme.[315] Use of this phrase suggests the panel interpreted Article XXIV:8(ii) as permitting members of a customs union

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[hereinafter Panel Report, *Dessert Apples*].

307. *Id.*
308. *Id.* ¶ 6.4.
309. *Id.* ¶ 6.3.
310. *Id.* ¶ 6.4.
311. Panel Report, *Dessert Apples*, *supra* note 306, ¶ 12.30.
312. *Id.*
313. *Id.*
314. *See id.* (no mention of these arguments in Panel's findings).
315. *Id.* ¶ 12.30.

to employ substantially similar customs duties and commercial regulations.[316]

The panel then took Article XXIV:8(ii)'s allowance of substantially similar regulations within a customs union and amalgamated Article X:3(a)'s requirement of uniform administration to produce the phrase "substantially uniform."[317] This substantially uniform standard would harmonize the language of Article X:3(a) and XXIV:8(ii) by creating a separate method of evaluation for conformity with WTO obligations for a measure implemented in a customs union.

Under the substantially uniform formulation, Article XXIV:8(ii) would not serve as a defense permitting a WTO inconsistent measure. Rather, substantially similar would serve to modify Article X:3(a) obligations for customs unions. The modified Article X:3(a) obligation of a customs union to apply its commercial and customs regulations in a substantially uniform manner in regards to third countries would alter WTO obligations for a customs union, but would preserve the internal consistency of the WTO Articles. Yet, such a formulation varies from the GATT panel in EC-Citrus Product's assertion of the distinctness of WTO obligations.[318] However, the substantially uniform standard effectuates the plain meaning of the Article's text in permitting a customs union to implement and administer substantially similar trade regulations throughout the union.[319]

With the adoption of the DSU and its procedural mandates, as well as prior decisions of the Appellate Body,

> only WTO Members have the authority to amend the covered agreements or to adopt . . . interpretations [d]etermining what the rights and obligations under the covered agreements ought to be [, and therefore it] is not the responsibility of panels and the Appellate Body; it is clearly the responsibility solely of the Members of the WTO.[320]

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316. *Id.*

317. *Cf.* GATT 1947, *supra* note 4, art. X:3(a), *with id.* art. XXIV:8(ii) (language in both articles conjoined results in phrase substantially uniform).

318. *See* Panel Report, *Citrus Products*, *supra* note 244, ¶ 4.11.

319. *Cf.* DSU, *supra* note 5, arts. 3.2, 19.2 (providing Panel recommendations may not diminish or add to obligations under the agreements covered by the DSU). *See also Contribution of the United States*, TN/DS/W/74, at 2-3 (Mar. 15, 2005) (querying whether panels have the ability to fill gaps if the treaty is silent).

320. Appellate Body Report, *United States-Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, ¶ 92 (Dec. 11, 2000).

As discussed above, unadopted GATT panel reports may guide a WTO panel's reasoning and a WTO panel may adopt the reasoning expressed in the unadopted GATT panel report. The substantially uniform formulation, presented by the GATT EC-Citrus panel might provide guidance to the present panel or the Appellate Body in addressing the allegations presented by the United States. The Appellate Body previously held, "we have difficulty in envisaging circumstances in which a panel could add to the rights and obligations of a Member of the WTO if its conclusions reflected a correct interpretation and application of provisions of the covered agreements."[321] Should the present panel adopt the reasoning of the prior GATT panel, it may be providing an appropriate interpretation of Article X, the covered agreement. Yet, given the prohibition on panels or the Appellate Body altering the scope of Member's obligations, the need for an agreement by the WTO Members on the interpretation of Article X and Article XXIV may be necessary to adopt the substantially uniform standard.[322] Thus, the Members could adopt the substantially uniform standard and reconcile the obligations of these two Articles by ratification of an Understanding on the Application of Article X's obligations to members of Article XXIV customs or trade unions.

E. *Brief Discussion of Article XXIV:12*

The applicability of paragraph 12 of Article XXIV to the present dispute requires exploration. The text of Article XXIV:12 reads: "Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories." The relation of this paragraph to Article XXIV:8(ii) and Article X:3(a) in the context of a customs union is unclear. Reference to two GATT panel decisions provides useful guidance in determining the relation.

In the Chile-EC dispute, Chile alleged the EC violated Article XXIV:12 by non-uniform administration of the import licensing scheme through its Member States.[323] Chile argued the EC's responsibility for trade policy, coupled with implementation of the import licensing regulations, required the EC to "be held responsible for seeing that member states administered this system in accordance with Article X."[324]

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321. Appellate Body Report, *Chile—Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, ¶ 79 (Dec. 13, 1999).

322. GATT 1947 *supra* note 4, art. XXIV:12.

323. Panel Report, *Dessert Apples*, *supra* note 307, ¶ 7.1.

324. *Id.*

The EC argued Article XXIV:12 was an exception to GATT obligations.[325] The panel did not address either arguments.[326]

Another dispute involved a challenge to the Canadian legal scheme, which regulated importation of alcoholic beverages from foreign countries.[327] Under Canadian law, importation of foreign alcoholic beverages fell under federal law, but the federal parliament had enacted legislation delegating to provincial authorities the right to regulate importation of such beverages into their territories—provided importation fell under an exception to the general federal restriction on foreign importation of alcoholic beverages.[328] Additionally foreign liquor producers could not import unless compliance with provincial law was achieved.[329] Each province enacted differing requirements for importation of liquor into their separate territories.[330]

Parties to the dispute agreed that the provincial authorities responsible for regulating foreign liquor were regional authorities under Article XXIV:12.[331] The panel ruled that Article XXIV was not an exception to GATT obligations, but "merely qualified the obligation to implement the provisions of the General Agreement in relation to measures taken by regional and local governments and authorities."[332] Therefore, GATT obligations were directly applicable to the regional authorities because the text of Article XXIV provided that GATT obligations are observed by the regional and local governments and such observation may only take place if the obligations are directly applicable.[333]

The panel found the different practices violated Canadian's GATT obligations and analyzed whether all reasonable measures were undertaken by the federal government to ensure provincial compliance with GATT.[334] The panel asserted "Canada would have to show that it had made a serious, persistent and convincing effort to secure compliance by the provincial liquor boards with the provisions of the General Agreement" in order to

325. *Id.* ¶ 7.2.

326. *See id.* ¶¶ 12.1, 13.1 (panel did not reference or address article XXIV:12 argument).

327. Panel Report, *Canada—Import, Distribution and Sale of Certain Alcoholic Drinks By Provincial Marketing Agencies*, Oct. 16, 1991, GATT B.I.S.D. (39th Supp.), at 27, ¶ 2.1 (1991) [hereinafter Panel Report, *Alcoholic Drinks*].

328. *Id.*

329. *Id.* ¶ 2.2.

330. *Id.*

331. *Id.* ¶ 5.35.

332. Panel Report, *Alcoholic Drinks*, *supra* note 327, ¶ 5.36.

333. *Id.*

334. *Id.* ¶ 5.37.

justify its breach of GATT.[335] After surveying the various procedures employed by the separate provinces, the panel found Canada had violated Article XXIV:12 by failing to evidence a serious, persistent, and convincing effort to secure compliance with GATT provisions.[336]

Article XXIV:12 is not an exception to GATT obligations, but rather a modification, as indicated by prior GATT practice.[337] The requirement of a customs union to ensure compliance by its constituent local governments with WTO obligations follows from the placement of paragraph 12 within the Article expressly enumerating the obligations of custom unions.[338] Paragraph 1 of Article XXIV declares "each such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party . . . ."[339] The obligation to evidence a serious, persistent, and convincing effort to secure compliance with GATT provisions by the EC of its Member States' governments with the application of its common tariff and commercial regulations follows.[340]

Chile's argument that Article X applies to Article XXIV:12 remains unresolved.[341] If Article X:3(a)'s obligation for uniform administration applies, then a customs union would need to ensure uniform administration by its members of the common tariff and commercial regulations (i.e., to uniformly administer import regulations). Again, a harmonization of the two Articles occurs if Article X:3(a) modifies Article XXIV:12 to require a customs union to administer import regulations in a substantially uniform manner. Thus, the EC would need to ensure reasonable measures directed Member States to administer the common import regulations in a substantially uniform manner.

F. *A Final Consideration*

GATT/WTO dispute resolution decisions have referenced the disparate treatment resulting from differing application of administrative customs regulations by several Member States.[342] Two recent panel decisions addressing Article II violations necessitate consideration because of the

335. *Id.*
336. *Id.* ¶¶ 5.37-5.40.
337. GATT 1947, *supra* note 4, art. XXIV:1.
338. Panel Report, *Alcoholic Drinks*, *supra* note 327, ¶ 5.36.
339. GATT 1947, *supra* note 4, art. XXIV:1.
340. *See* Panel Report, *Alcoholic Drinks*, *supra* note 327, ¶¶ 5.37-5.40.
341. Appellate Body Report, *Restrictions on Imports*, *supra* note 221, ¶ 49.
342. *See infra* notes 343, 349.

reasoning articulated in the decisions as well as each panel's description of EC custom practices.

1. *Brazil v. EC*

The dispute alleged a violation of Article II for lack of uniformity in the EC in tariff classification of certain computer equipment and application of the EC's tariff concession schedule.[343] Important for the present dispute is the fact the Appellate Body noted evidence before the panel illustrated that "during the Uruguay Round tariff negotiations, the practice regarding the classification of LAN equipment by customs authorities throughout the European Communities was *not* consistent."[344] The Appellate Body further asserted that the EC is a customs union, and the panel erred in assessing Member States classification of LAN equipment rather than the practice of the EC as a whole.[345] The panel needed to analyze the export market, which was the EC and not the individual Member States.[346]

Again, this dispute did not allege violation of Article XXIV, but it evidenced that the Appellate Body has noted inconsistent administration of the common external tariff scheme by EC Member States.[347] It is unclear whether Article XXIV's acceptance of substantially similar application of a custom union's common external tariff underlies the Appellate Body's statement. Nonetheless, under the above-articulated jurisprudence of Article XXIV, substantially similar is defined as reaching a degree of sameness.[348] Application of completely different tariff classifications to the same product by different Member States must evidence a lack of substantially similar administration of a common external tariff scheme.

2. *Brazil & Thailand v. EC*

Notwithstanding the discussion above, a recent WTO panel report found EC customs classification practices "consistent" in regards to Brazil and Thailand's challenge of EC tariff classification of "frozen, boneless cuts of poultry impregnated with salt in all parts, with a salt content by

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343. Appellate Body Report, *European Communities—Customs Classification of Certain Computer Equipment* WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, ¶¶ 1, 57, 92 (June 5, 1998).

344. *Id.* ¶ 95.

345. *Id.* ¶ 96.

346. *Id.*

347. *Id.* ¶ 95.

348. *See supra* note 228.

weight of 1.2%" pursuant to TARIC.[349] The dispute focused on whether the EC violated Article II by issuing a regulation altering the TARIC classification of frozen cuts of poultry, resulting in "treatment for certain products that is less favourable than that provided for" in the EC's tariff schedule.[350] In the context of resolving the dispute, the EC acknowledged that certain customs offices issued BTIs for the same goods under different tariff chapter classifications, such that a "substantial [amount of] trade entered the European Communities under this incorrect interpretation."[351]

The EC contended these BTIs were not followed by other EC Member customs authorities.[352] Thailand noted the EC's obligation under Article X:3(a) to uniformly administer its customs laws.[353] Additionally, Thailand noted the EC's internal law obligating the Commission to harmonize customs law in the EC.[354] Thailand asserted the EC, with knowledge of the divergent BTIs, failed to harmonize classification throughout the Community.[355] The EC responded that approximately 30,000 BTIs are issued each year, and that "there were substantial problems communicating BTIs as a result of a lack of interoperability of computer systems and that the EC Commission only had one official and two administrative assistants monitoring all issues with respect to the first 40 chapters of the CN during the period prior to 2001."[356] Hence, over a period from 1996 to 2002 the EC acknowledged Member States classified frozen poultry under an "incorrect" TARIC sub-chapter heading, which arose through issuance of BTIs by separate EC Member States unbeknownst to the EC until 2001.[357]

The panel asserted, "BTIs may be useful to provide an *indication* of how products with a particular set of characteristics are being classified by the importing Member."[358] The EC acknowledged divergent classification and failed to submit statistical information regarding classification during

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349. Panel Report, *EC—Frozen Chicken*, *supra* note 88, ¶¶ 1.1, 7.265.

350. *Id.* ¶ 7.1; *see also id.* ¶¶ 1.3, 2.1.

351. *Id.* ¶ 7.260.

352. *Id.* (recall that under the Customs Code other national customs authorities must recognize BTIs issued by other Member States).

353. *Id.* ¶ 7.263.

354. Panel Report, *EC-Frozen Chicken*, *supra* note 88, ¶ 7.263 (reminding EC that Commission possesses authority to intervene once varying national BTIs are discovered pursuant to community law).

355. *Id.* (again recall Community legislation provides a specific remedy for the situation described).

356. *Id.* ¶ 7.264.

357. *Id.* ¶¶ 7.264, 7.269.

358. *Id.* ¶ 7.271.

the 1996 to 2002 timeframe as required by the panel.[359] Nonetheless, on the basis of BTIs submitted by the EC, all of which classified the merchandise under the same subheading, the panel ruled EC classification consistent during 1996-2002.[360] The panel did find a violation of Article II on the basis of the lack of direction to the customs authorities in determining the proper classification of the merchandise under the appropriate sub-chapter heading.[361]

These two disputes evidence a recognition that the EC falls short of its articulated uniformity in internal legislation. The Brazil and Thailand dispute recognizes that EC customs practices are inconsistent and illustrates an uneasiness of how to address the situation.[362] Both disputes deal with the notion of inconsistent practice peripherally, but reveal an uneasiness to tackle the apparent issue that such practice is in and of itself a violation of WTO obligations.[363]

IV. TOWARDS GREATER TRADE FACILITATION

Both the present dispute and the past disputes analyzed above occur against the backdrop of the larger global project called trade facilitation. The notion of trade facilitation grows out of the desire for private industry to import and export goods globally with the assistance of technology and minimal administrative burdens.[364] Addressing trade facilitation's impact

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359. Panel Report, *EC-Frozen Chicken*, *supra* note 88, ¶ 7.269.

360. *Id.* ¶¶ 7.270, 7.275.

361. *Id.* ¶ 7.328. The Panel held

> the lack of certainty associated with the application of the criterion of long-term preservation with respect to the concession contained in heading 02.10 of the EC Schedule runs counter to one of the objects and purposes of the WTO Agreement and the GATT 1994, namely that the security and predictability of the reciprocal and mutually advantageous arrangements must be preserved.

Id.

362. *See* Panel Report, *EC—Frozen Chicken*, *supra* note 88, ¶¶ 7.260, 7.264, 7.269, 7.270, 7.275.

363. In regards to the appropriateness of a Panel deciding a classification dispute, rather than referring the matter to the WCO, the Panel asserted, "We understand that, once seized of a matter, Article 11 prevents a panel from abdicating its responsibility to the DSB. In other words, in the context of the present case, we lack the authority to refer the dispute before us to the WCO or to any other body." *Id.* ¶ 7.56.

364. *See* Doha Ministerial Declaration, *supra* note 1, ¶ 27; PETER GALLAGHER, THE FIRST TEN YEARS OF THE WTO 1995-2005, at 39 (2005); United Nations Economic Commission for Europe, Trade Facilitation: An Introduction to the Basic Concepts and Benefits, ECE/TRADE/289 (2002),

upon the present dispute suggests a broader remedy incorporating the goals of facilitation and the need for greater transatlantic harmonization of customs procedures to ensure disputes, such as the current one, are avoided in the future. To describe the broader remedy, a discussion of the content of trade facilitation and its role in transatlantic business transactions follows.[365]

Facilitation of the trade in goods transpires under the auspices of national customs administrations and international organizations.[366] Among the international organizations specializing in trade facilitation are the World Bank and the U.N. Centre for Trade Facilitation and Electronic Business.[367] The World Bank initiates customs modernization programs in a number of countries to foster development of customs administrations capable of instituting WTO compliant procedures through technology to assist in the importation of goods.[368] The U.N. Centre for Trade Facilitation and Electronic Business is responsible for the Single Administrative Document utilized by the EC.[369] Both of these organizations are component parts of the Global Facilitation Partnership for Transportation and Trade.[370] The Global Partnership incorporates numerous organizations in a venture to provide modernization programs to a variety of nations, as well as provoke discourse on policy mechanisms necessary to implement a global system of trade under modern procedures and technology.[371]

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available at http://www.unece.org/trade/forums/forum02/docs/02tfbroch.pdf (last visited June 9, 2006).

365. On barriers to transatlantic partnerships between the United States and EC, see GREGORY C. SHAFFER, DEFENDING INTERESTS PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION 126-39 (2003).

366. *See supra* note 364; *see also* Gerard McLinden, *Trade Facilitation: Progress and Prospects for Doha Negotiations*, *in* Trade, Doha, and Development A Window into the Issues, 75-85, 176-82 (Richard New Farmer ed., 2006).

367. *See* McLinden, *supra* note 366, at 180.

368. *See generally* CUSTOMS MODERNIZATION HANDBOOK (Luc De Wulf & José B. Sokol eds., 2005); Trade Facilitation in the World Bank, *available at* http://siteresources.worldbank.org/INTRANETTRADE/Resources/Topics/TF_Brochure_feb05.pdf (last visited June 25, 2005).

369. *See* Mandate, Terms of Reference and Procedures for UN/CEFACT, TRADE/R.650/Rev.3 (Aug. 18, 2004), *available at* http://www.unece.org/cefact/r650rev3.pdf (last visited June 25, 2005).

370. *See generally* Global Facilitation Partnership for Transportation and Trade Web Site, http://www.gfptt.org/ (last visited June 25, 2005).

371. On the breadth of measures currently underway by members of the Global Partnership, see WTO Secretariat, *Note on Technical Assistance and Capacity Building on Trade Facilitation*, TN/TF/W/54 (July 21, 2005).

Among the chief proponents of facilitation is the WCO.[372] One of the influential initiatives of the WCO is the International Convention on the Simplification and Harmonization of Customs Procedures, or Revised Kyoto Convention.[373] The Convention is a comprehensive set of obligatory standards for members to apply in all aspects of customs administration.[374] The Convention contains twenty Articles describing the scope and administrative functions of the Convention.[375] These Articles are followed by a General Annex consisting of ten chapters dealing exclusively with definitions, standards, and recommended practices to be embodied in national customs laws and their administration.[376] The Convention concludes with nine Specific Annexes, which address certain defined areas of customs administration in greater detail.[377] These Specific Annexes also contain definitions, standards, and recommended practices.[378] Although the treaty is not presently in force, its principles guide the modern administration of customs procedures.[379]

The WCO also recently promulgated a series of fundamental principles governing trade facilitation. The Framework of Standards to Secure and Facilitate Global Trade addresses a number of developments to modernize national customs administrations with an inclusive view toward administrative assistance to developing countries.[380] The 166 Members of

372. *See* WCO, *Compendium of WCO Capacity Building Tools*, G/C/W/445 (Dec. 12, 2002); WCO, *Trade Facilitation Issues in the Doha Ministerial Declaration Review of GATT Articles*, G/C/W/392, ¶¶ 2-7 (July 11, 2002) [hereinafter *Trade Facilitation Issues*].

373. *See Trade Facilitation Issues*, *supra* note 372, ¶¶ 11-25, Annex I-II (July 11, 2002). This convention amends the currently in force International Convention on the Simplification and Harmonization of Customs Procedures, May 18, 1973, 950 U.N.T.S. 270. *See also* Sean Murphy, *Amendment of the Treaty on the Simplification and Harmonization of Customs Procedures*, 98 AM. J. INT'L L. 843 (2004) (discussing protocol amending treaty whose text is found at Protocol of Amendment to International Convention on Simplification and Harmonization of Customs Procedures, June 26, 1999, S. TREATY DOC. 108-6, at 9 (2003) and indicating the President of the United States condones the Protocol's adoption).

374. *See* LYONS, *supra* note 40, at 7-11 (describing components of Revised Kyoto Convention and previously enforced Kyoto Convention).

375. Convention text, *available at* http://www.wcoomd.org/ie/En/Topics_Issues/FacilitationCustomsProcedures/Kyoto_New/Content/content.html (last visited June 23, 2005).

376. *See id.*

377. *See id.*

378. *See id.*

379. *See* WCO General Secretariat, *Position Ratifications and Accessions*, Aug. 13, 2004, PG0087E1 (2004) (prior Kyoto Convention remains presently in force), *available at* http://www.wcoomd.org/ie/En/Conventions/PG0087E1.pdf (last visited June 21, 2005).

380. WCO, *Framework of Standards To Secure and Facilitate Global Trade* (2005) [hereinafter WCO Framework], *available at* www.customs.treas.gov/linkhandler/cgov/import/communications_to_industry/wco_framework.ctt/wco_framework.pdf (last visited July 22, 2005).

the WTO "adopted" the Framework on June 24, 2005, which rests upon two "pillars" of "Customs-to-Customs network arraignments and Customs-to-Business partnerships."[381] Particularly, the Framework confirms the need to ease transit of legitimate trade by removal of technical, procedural, and technological barriers.[382] Accomplishment of global trade facilitation occurs through "integrated supply chain management" or use of electronic documentation to prescreen imports to alleviate the necessity to physically inspect every shipment entering national territories.[383] The Framework represents a large step forward in concretely promoting trade facilitation, but falls short of a comprehensive treaty encompassing global harmonization of customs procedures.[384]

The above measures compliment the WTO's Doha Agenda, which mandates discussion of trade facilitation.[385] The WTO recognizes the importance of reducing unnecessary burdens upon importers to ease transport of goods into a Member's territory and ultimately to the consumer.[386] Illustrative of the significance of trade facilitation, WTO Members, in the "July Decision," agreed to table discussion of such essential topics as trade and investment, trade in competition policy, and transparency in government procurement in favor of a singular dialogue on trade facilitation.[387] Members have submitted numerous suggestions on necessary measures to realize the global goal of universal facilitation in trade mechanisms.[388] Proposals for a WTO Agreement on Trade Facilitation have been received, but a lack of consensus on the integral

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381. *Id.* ¶ 1.4; Message from the Commissioner of Customs and Border Patrol, Historic Adoption of the Framework of Standards to Secure and Facilitate Global Trade, June, 24, 2005, *available at* http://www.customs.gov/xp/cgov/newsroom/commissioner/messages/historic_adoption.xml (last visited July 23, 2005) (announcing adoption of Framework and praising standards). The International Chamber of Commerce Customs Guidelines, *available at* http://www.iccwbo.org/home/statements_rules/statements/2003/customs_guidelines.asp (last visited July 27, 2005).

382. *See supra* note 381.

383. WCO Framework, *supra* note 380, Annex 1.

384. The WCO Framework adopts a gradual approach to overall facilitation, and is not a treaty itself. *Id.*

385. Trade facilitation is one of the "Singapore Issues," adopted by WTO Members. *See* Draft Ministerial Text, Second Revision, JOB(03)/150/Rev.2 (Sept. 13, 2003).

386. *See* McLinden, *supra* note 366, at 176, 179-80.

387. WTO Council Decision of Aug. 1, 2004, WT/L/579, ¶ 1 (d), (g) (Aug. 2, 2004). The Decision asserts, except for trade facilitation, "no work towards negotiations on any of these [Singapore] issues will take place within the WTO during the Doha Round." *Id. See generally* WTO SECRETARIAT, 2005 ANNUAL REPORT 3 (2005).

388. *See* WTO Secretariat, *Negotiating Group on Trade Facilitation—Clarification and Improvement of GATT Articles V, VIII and X—Compilation of Proposals Made by WTO Members*, TN/TF/W/43/Rev.1 (July 20, 2005).

measures darkens the prospects for such an Agreement's institution in the near future.[389]

The United States and India submitted a far-reaching proposal calling for the establishment of a "multilateral mechanism for the exchange and handling of information between Members."[390] The proposal focuses on implementation of "a mechanism that is practical and effective, involving a commitment pertaining to (1) a defined universe of information, (2) a practical basis for exchange that is efficient and not burdensome, and (3) a structure for information exchange that is forward-looking. . . ."[391] The Communication articulates adherence to the WCO's Framework discussed above, particularly adoption of the electronic prescreening model to transmit "information consisting of the 'documentation' or data elements that relate to the movement of goods across a border" to the national customs authority responsible for approving the importer's entry of the goods.[392] Finally, proposal of the mechanism seeks to underpin current bilateral instruments.[393]

Given the breadth of organizations addressing the subject of trade facilitation, the two leading trade blocs (the United States and the EC) have an opportunity to lead by example. Indeed, the United States and EC's New Transatlantic Agenda confirms the two bear "a special responsibility to lead multilateral efforts towards a more open world system of trade and investment."[394] Noting the United States and India proposal for a trade mechanism that underpins existing bilateral treaty regimes, the United States and EC could provide a bilateral model of a trade facilitative convention.[395]

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389. *See* Peter Sutherland, *The Doha Development Agenda: Political Challenges to the World Trading System—A Cosmopolitan Perspective*, 8 J. INT'L ECON. L. 363, 367, 375 (2005) (noting immense challenge facing negotiators in the revised Doha Agenda and cost assessment necessary to achieve facilitation).

390. *See* Communication from India and the United States, *Proposal on the Establishment of a Multilateral Mechanism for the Exchange of Information Between Members*, TN/TF/W/57 (July 22, 2005).

391. *Id.* ¶ 6.

392. *Id.* ¶ 5 (documentation consists of "name of importing or exporting party, origin of goods, description of goods, HS classification, declared value, shipper").

393. *Id.* ¶ 2.

394. The New Transatlantic Agenda, *available at* http://europa.eu.int/cgi-bin/etal.pl (last visited July 23, 2005) (Agenda contains a "Joint EU/U.S. Action Plan" containing specific reference to leading the WTO in opening markets to trade and investment).

395. *Accord* Organization for Economic Cooperation and Development, Economics Department, The Benefits of Liberalizing Product Markets and Reducing Barriers to International Trade and Investment: The Case of the United States and the European Union, ECO/WKP(2005)19 (May 26, 2005), *available at* http://www.olis.oecd.org/olis/2005doc.nsf/linkto/ECO-WKP(2005)19 (last visited July 23, 2005) (arguing reduced tariff, competition, and foreign direct investment

Given the rise of bilateral free trade agreements, the United States and the EC have an opportunity to execute a bilateral treaty on customs procedures and enforcement with provision for uniform classification decisions and mechanisms for enforcement.[396] There exists a need for convergence rather than estrangement between the United States and the EC.[397] A bilateral treaty amalgamates American and European interests in trade facilitation and provides a framework to resolve technical disputes quickly without the need to expand *de facto* WTO enforcement mechanisms to include alteration of Member's judicial structures. Cooperation between the world's greatest trading blocs ensures joint prosperity. Further, harmonization of procedures for the importation of goods permits close cooperation between customs authorities, which is vital not only to facilitate trade in goods, but to carry out the police functions of customs authorities. Additionally, the agreement would serve as a basis for a larger multilateral instrument, as envisaged by the WTO Members.[398]

The basis for a bilateral convention between the United States and EC exists under the auspices of the Transatlantic Economic Partnership and Transatlantic Business Dialog.[399] In 1996, the United States and EC executed an agreement on mutual assistance and cooperation in customs matters.[400] That agreement affirmed a "commitment to the facilitation of the legitimate movement of goods and . . . exchange [of] information . . . and expertise on measures to improve customs . . . procedures . . . and

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barriers would benefit both the United States and the EC). *Cf.* ADAM S. POSEN, FLEETING EQUALITY: THE RELATIVE SIZE OF THE U.S. AND EU ECONOMIES TO 2020 (Brooking Institute Sept. 2004) (arguing U.S. economy will be nearly 20% bigger than the enlarged European economy in 2020), *available at* www.brookings.edu/fp/cuse/analysis/posen20040901.htm (last visited July 23, 2005).

396. *See generally* Jo-Ann Crawford & Roberto V. Fiorentino, *The Changing Landscape of Regional Trade Agreements*, WTO Discussion Paper No. 8, at 1-4, 8-15 (2005) (describing extensive coverage of diverse areas under trade agreements and EC's predominance in trade agreements currently in-force).

397. The United States and EC recognized the need to "strengthen the multilateral trading system and take concrete, practical steps to promote closer economic relations between us." The New Transatlantic Agenda, *available at* http://europa.eu.int/cgi-bin/etal.pl (last visited July 23, 2005).

398. *Accord* Crawford & Fiorentino, *supra* note 396 (advocating trade agreements if their provisions can be incorporated into the multilateral trading system).

399. *See* Transatlantic Economic Partnership: Action Plan of Nov. 9, 1998, *available at* http://europa.eu.int/comm/trade/issues/bilateral/countries/usa/index_en.htm (last visited July 22, 2005) (agreement between the United States and the EC to strengthen their economic relationships).

400. Agreement Between the European Communities and the United States of America on Customs Cooperation and Mutual Assistance in Customs Matters, Nov. 7, 1996, *available at* http://www.useu.be/DOCS/custag1196.html (last visited July 23, 2005).

computerized systems . . ."[401] Further, the agreement enshrined a commitment for both parties' customs authorities to ensure mutual compliance with customs laws and procedures.[402]

On the basis of the agreement, a new bilateral convention covering both exchange of information and enforcement of customs laws and harmonization of tariff classification of goods may result. In exploiting mutual assistance between the American and EC customs authorities, a uniform system of classification may occur under the auspices of harmonizing the tariff schedules of these two trading blocs. Because the United States and the EC share use of the Harmonized System, each need only coordinate its explanatory notes and subheadings to produce a uniform tariff classification schedule.

To accomplish total uniformity in goods classification, a tiered approach permits incremental phasing out of the separate tariff schedules.[403] If the bilateral convention operates on a ten year schedule for total integration, then benchmarks of three year periods of review and adjustment allows the customs authorities to set substantive milestones in amalgamating their distinctive schedules. Any such instrument must incorporate a single electronic customs declaration admissible throughout the United States and the EC.

Coupled with the single electronic declaration, a centralized classification body must oversee implementation of the uniform tariff schedule. This centralized body should consist of a professional staff supported by an administration versed in the technical aspects of customs classification. In a sense, the centralized body would be a permanent panel of experts with authority to issue final goods classifications binding upon both the United States and all EC Member States customs authorities.

Disputes, if any, should be decided by the centralized panel of experts in order to ensure practical uniform enforcement of one classification for particular goods. Nonetheless, to ensure independent review, a solitary appeal to either the Court of International Trade for American importers or the European Court of Justice for European importers should lie. A notification system should notice judicial bodies of appeals in each chamber to ensure duplicity of efforts is avoided.

Decision on appeal occurs under appellate rules contained in the bilateral convention. A jurisprudence based upon the same convention

401. *Id.* art. 7.

402. *Id.* art. 11.

403. The tiered approach to tariff elimination occurs in the North American Free Trade Agreement's Article 302 and Annex 302.2. North American Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 (entered into force, Jan. 1, 1994).

should avoid disparate rulings from these two judicial bodies. The bilateral convention, or more properly a transatlantic customs code, provides a viable solution to the current dispute and serves the interests of facilitating trade, while ensuring trade in goods between the United States and the EC transpires under a harmonious classification regime and enforcement mechanism.

V. CONCLUSIONS

This work suggests two concurrent solutions to disputes similar to the present dispute between the United States and the EC. First, a disparity in the text of Article X:3(a) and Article XXVI:8(a)(ii) may be resolved through a separate Agreement between WTO Members on the meaning of the two provisions in relation to each other. Such an Agreement should adopt the phraseology of prior GATT panel decisions announcing a standard of substantially uniform administration of a Member's trade regulations. Second, in the interests of trade facilitation, the United States and the EC should execute and adopt a bilateral treaty encompassing a transatlantic customs code harmonizing customs classification procedures, tariff schedules, and enforcement mechanisms.

These two proposed solutions, within the modern landscape of international trade, can be accomplished. In an environment charged with a desire to achieve global facilitation in trade, these solutions harness the capabilities of the main trading blocs and recognize the strength of the United States and EC to proactively lead the project of global integration of trade. Through partnership, private enterprise in both territories thrives. Projecting a well-defined bilateral organization onto the multilateral trading system will encourage corporate confidence and increase access to the global market by a greater number of enterprises.