DEUTSCHES FORSCHUNGSINSTITUT FÜR ÖFFENTLICHE VERWALTUNG SPEYER
GERMAN RESEARCH INSTITUTE FOR PUBLIC ADMINISTRATION SPEYER

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FÖV 58
Discussion Papers

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Deutsches Forschungsinstitut für öffentliche Verwaltung Speyer

2010

Gefördert durch die Bundesrepublik Deutschland

Nicht im Buchhandel erhältlich
Schutzgebühr: € 5,-
Bezug: Deutsches Forschungsinstitut
für öffentliche Verwaltung Speyer
Postfach 14 09
67324 Speyer
http://www.foev-speyer.de

ISSN 1868-971X (Print)
ISSN 1868-9728 (Internet)

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Content

In the present time of growing globalisation the European customs administration system can not be seen isolated from worldwide harmonisation processes. Therefore, the regulatory autonomy of customs administration in the European Union (EU) is also determined by outside influences, especially by the World Trade Organisation (WTO), which has become an intense and far-reaching legal system. EU customs law is centrally constituted on EU level, but implemented by national customs authorities of the EU Member States. For this system of indirect or decentralised administration, the legal system of the WTO prescribes in Article X:3 (a) GATT 1994 the requirements for uniformity in the administration of customs law in the EU. Thus, coherence and uniformity of customs administration in the EU is not only demanded by the interest in coherent administration of EU law, but comes under pressure also from exigencies stemming from the WTO.

I. Exigencies of uniformity in Article X:3 (a) GATT 1994

The essence of Article X GATT 1994 is transparency as an important principle of the WTO and an essential requirement to the idea of open markets contributing to legal certainty and predictability of legal decisions which is underlying all WTO law.[1] The due process theme underlying Article X GATT 1994 helps "to ensure that traders are treated fairly and consistently when seeking to import from or export to a particular WTO member."[2] The provision is also a great example for the far-reaching impact WTO law as international law has on the domestic regulation of WTO members.[3]

Paragraphs 1 and 2 of Article X GATT 1994 regulate the immediate publication of all domestic regulations of general application regarding international trade, so that governance and traders can take notice of them before their application in particular cases.[4] Apart from

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1 *Dierksmeier*, pp. 26 et seq.

2 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.108; uphold by the Appellate Body, see Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, paras. 193, 220.

3 *Dierksmeier*, p.27.

4 *Dierksmeier*, p. 26.

creating transparency, especially Article X:3 (a) GATT 1994 also prevents from indirect reintroduction of trade barriers through factually discriminating trade regulations by helping to discipline the application of domestic trade regulations.[5] At the same time, the paragraph has to perform a balancing act between its aim to create uniformity for traders in shape of equal treatment of goods on the one hand and its quest to preserve the autonomy of WTO members in establishing and implementing their trade regulations compliant with the WTO on the other hand.[6] Article X:3 (a) GATT 1994 says: "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."

1. Term "administration"

The term "to administer (...) laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article" defines the scope of Article X:3(a) GATT 1994. Article 31 (1) of the Vienna Convention, to which Article 3.2 DSU refers, indicates that a treaty provision has to be interpreted on the one hand in accordance with its ordinary meaning and on the other hand in its particular context and besides the context, also object and purpose have to be considered. In doing so there is also the jurisprudence of the Dispute Settlement Body of the WTO that has to be considered.

a) Ordinary meaning

The ordinary meaning of the term "administration" is defined as "the process or activity of running a business, organization etc."[7] The verb "administer" therefore means to "manage and be responsible for the running of (a business, organization, etc.) [or to] be responsible for the implementation or use of (law or resources)."[8] The administration of trade regulations in the context of Article X:3 (a) GATT 1994 is there-

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5 *Niestedt/Stein*, 2006 AW-Prax 12, pp.516 et seq. (517).

6 *Niestedt/Stein*, 2006 AW-Prax 12, pp.516 et seq. (517).

7 Oxford Dictionary of English, 2005, p. 21.

8 Oxford Dictionary of English, 2005, p. 21.

fore related to the application of those regulations which, pursuant to paragraph 1 of Article X GATT 1994, are rules of general application and do not contain specific transactions.[9] The term also relates to the administrative process included in the application of a law for it represents "(...) the series of steps, actions or events that are taken or occur in pursuance of what is required by the law in question." [10] Furthermore, it relates to the results of administrative processes as final manifestation of the application of a legal instrument in a particular case. [11]

However, differing from the ordinary meaning of Article X:3 (a) GATT 1994, the term can also contain the laws and regulations themselves as the measure in question. Basically Article X:3 (a) GATT 1994 provides no substantial requirements to laws and regulations but dictates the manner of their application as the text clearly indicates that the requirements of uniformity, impartiality and reasonableness apply to the administration of those laws.[12] The Panel in *US – Corrosion-Resistant Steel Sunset Review* affirmed this opinion deciding that the content of laws and regulations could be challenged under relevant provisions of the covered agreements.[13] Also, the Panel in *EC-Selected Customs Matters* suggested that the term "administer" refers to any action that puts into practical effect the relevant laws and regulations but not the laws and regulations themselves, because they merely exist without effect until they are actually applied in practice.[14] On the contrary, in *Argentina – Bovine Hides* the Panel came to the conclusion that the substance of a measure can be challenged under Article X GATT 1994 as long as the substance of the measure is administrative in nature and has not been dealt with more properly

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9 Appellate Body Report, *EC – Poultry*, WT/DS69/AB/R, para. 111.

10 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, paras. 7.105, 7.119; uphold by the Appellate Body, see Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 227.

11 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, paras. 7.105, 7.119; uphold by the Appellate Body, see Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 227.

12 Appellate Body Report, *EC – Bananas*, WT/DS27/AB/R, para. 201.

13 Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, WT/DS244/R, para. 7.289.

14 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, paras. 7.104, 7.106.

under other provisions of the GATT 1994.[15] The different interpretation of the term by the Panel and the Appellate Body rests to some extent in the wording of the GATT 1994, because the English version is not the only official language of the text. The French and Spanish versions are also authoritative. However, the English term "to administer" is much wider than the French term "appliquer" or the Spanish term "aplicar", which corresponds more to "to apply",[16] defined as to "bring or put into operation or use."[17]

b) Context

The term should also be interpreted in the context of the provision. The examination of the substantial content of laws and regulations can not be deduced from the context of Article X:3 (a) GATT 1994.[18] The Panel in *EC-Selected Customs Matters* suggested that the underlying theme of Article X GATT 1994 of the due process objective again relates to the application of laws and regulations, whereas a relation to laws and regulations as such was considered to stay unclear.[19] Following rather the more restrictive opinion in *EC – Bananas III*[20] than the wider approach in *Argentina – Bovine Hides*,[21] it considered the text of Article X:3 (a) GATT to require a distinction between the instruments being administered and the acts of administration and sug-

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15 Panel Report, *Argentina – Bovine Hides*, WT/DS155/R, para. 11.70.

16 Dictionnaire Francais-Anglais and Spanish-English Dictionary at www.worldreference.com (http://www.wordreference.com/fren/appliquer and http://www.wordreference.com/es/en/translation.asp?spen=aplicar), last visit 11.01.2010; see also Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.109.

17 Oxford Dictionary of English, 2005, p. 75; see also Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.109.

18 Panel Report, EC – Selected Customs Matters, WT/DS315/R, para. 7.108; Appellate Body Report, *EC – Bananas*, WT/DS27/AB/R, para. 200.

19 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.108.

20 Appellate Body Report, *EC – Bananas*, WT/DS27/AB/R, para. 200; see also Panel Report, *EC – Selected Customs Matters*, WT/DS315/R para. 7.113 footnote 255.

21 Panel Report, *Argentina – Bovine Hides*, WT/DS155/R, paras. 11.69-11.72; see also Panel Report, *EC – Selected Customs Matters*, WT/DS315/R para. 7.114 footnote 256.

gested not to contemplate "(…) the possibility that laws and regulations can simultaneously qualify as laws (…) of the kind described in Article X:1 GATT 1994 and as acts of administration within the meaning of Article X:3 (a) GATT 1994."[22] The Panel also discussed the interpretation that the substantive content of laws and regulations may be considered to be subject to the obligation of uniform administration under Article X:3 (a) GATT 1994, in case these laws and regulations are administrative in nature or tools of administration,[23] which would render redundant either the term "administer" or the reference to paragraph 1 and therefore would be precluded by the principle of effective treaty interpretation which requires to give effect to all terms of a provision.[24] Finally, the Panel saw no textual support in Article X:3 (a) GATT 1994 for a difference between laws and regulations examined to be administered in a uniform fashion and laws und regulations qualified as administrative in nature and therefore examined for their substantive content.[25] If one follows this restrictive opinion, the solution of the interpretation problem lies in the relation between Article X:3 (a) GATT 1994 and its reference to paragraph 1 and is therefore limited to the application of laws and regulations, whereas the substantial GATT conformity of those laws and regulations has to be examined under other GATT provisions.[26] At the same time, the practical relevance of these distinction is partially considered to be marginal as laws "administrative in nature" are expected to be regularly applied and this application can then be examined under Article

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22 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.115; reversed by the Appellate Body, see Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para.217.

23 A view relying upon comments made by the Panel in *Argentina – Bovine Hides*, paras. 11.69-11.72 and put forward by the United States in this dispute.

24 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.117; reversed by the Appellate Body, see Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 217.

25 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.118; reversed by the Appellate Body, see Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 217.

26 *Niestedt/Stein*, 2006 AW-Prax 12, pp. 516 et seq. (517).

X:3 (a) GATT 1994,[27] so that finally it is always the concrete application which is relevant.[28]

The wider opinion also considers the relation between paragraph 1 and paragraph 3 in Article X GATT 1994, but leads to an extension of the scope of Article X:3 (a) GATT 1994 so that the substantive content of laws and regulations can be examined if they are administrative in nature. The Panel in *Argentina – Bovine Hides* argued that the provision's own linking to paragraph 1 would be contrary to a requirement that Article X:3 (a) GATT 1994 shall apply only to unwritten rules of administration and "(…) would almost certainly require a review of a specific instance of abuse rather than the general rule applicable."[29]

A similar approach was taken by the Appellate Body in *EC-Selected Customs Matters*. According to the Body's opinion, the distinction between laws and regulations of general application set out in Article X:1 GATT 1994 and the administration of those legal instruments does not exclude "(…) the possibility of challenging under Article X:3 (a) the substantive content of a legal instrument that regulates the administration of a legal instrument of the kind described in Article X:1."[30] Only claims concerning the substantive content of legal instruments of the kind described in Article X:1 GATT 1994 fall outside the scope of Article X:3 (a) GATT 1994, but this should be no reason to not examine legal instruments that regulate the application or implementation of those paragraph 1 legal instruments under Article X:3 (a) GATT 1994. [31] Simultaneously, the Appellate Body narrowed the scope of Article X:3 (a) GATT 1994 through additional requirements regarding the type of evidence for claims concerning the substantive content of legal instruments regulating the administration of a legal instrument of the kind described in Article X:1 GATT 1994. According to this, the complainant has to prove that the challenged legal instru-

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27 *Niestedt/Stein*, 2006 AW-Prax 12, pp. 516 et seq. (517).

28 *Dierksmeier*, p.54.

29 Panel Report, *Argentina – Bovine Hides*, WT/DS155/R, para. 11.71.

30 Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, paras. 199, 200.

31 Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, paras. 199, 200.

ment necessarily leads to impermissible administration of the legal instrument of the kind described in Article X:1 GATT 1994.[32]

c) Conclusion

The ordinary meaning of the term "administer" and its context in Article X:3 (a) GATT 1994 make clear that the administration of laws and regulations themselves is relevant and always requires reference to the application of a particular provision. This administration also encompasses the administrative process and its result, as well as laws and regulations regulating the administration of legal instruments of the kind described in Article X:1 GATT 1994. However, the violation of Article X:3 (a) GATT 1994 lies in impermissible administration as a lack of uniformity, impartiality or reasonableness and not in the use of different administration tools. Even different administration tools can be executed in such a manner that in practice their application still leads to uniform, impartial and reasonable results.[33] Thus, the examination of the substantive content of laws and regulations regulating the administration of other legal instruments is limited to contents which necessarily lead to non-uniform, partial or unreasonable administration.

In short, an infringement of Article X:3 (a) GATT 1994 occurs either in case that the administrative authorities actually apply legal instruments of the kind described in Article X:1 GATT in a non-uniform, partial or unreasonable manner or in case that differences in administrative processes used by the administrative authorities necessarily lead to non-uniform, partial or unreasonable results.

2. Term "uniformity"

The term "in a uniform, impartial and reasonable manner" dictates the qualities administration must meet in order to be in compliance with Article X:3 (a) GATT 1994. For the purpose of this paper, which is concerned with the degree of uniformity in the European customs ad-

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32 Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 201.

33 See also *Dierksmeier*, p. 52.

ministration, only the term "uniform" is of relevance, whereas the terms "impartial" and "reasonable" can be neglected. Again, Articles 31 to 33 of the Vienna Convention have to be consulted for the purpose of interpretation. Therefore, the term "uniform" has to bee seen in the light of its ordinary meaning as well as in its context. Additionally, the jurisprudence of the Dispute Settlement Body of the WTO has to be considered.

a) Ordinary meaning

The term "uniform" is defined as "remaining the same in all cases and at all times; unchanging in form or character"[34], the noun "uniformity" therefore simply means "the quality or state of being uniform."[35]

The Panel in *Argentina – Bovine Hides* noted that the term appears in the GATT 1994 only with respect to administration of customs laws[36] and thus considered it obvious not to be a requirement for ensuring equal treatment with respect to WTO members, but between individual shippers and even with respect to the same person at different times and places.[37] At the same time Article X:3 (a) GATT 1994 should not be read as a broad anti-discrimination provision to ensure all products be treated equally, for it would not be an appropriate role for a Panel to judge the many variations in products that might require differential treatment.[38] Article X:3 (a) GATT 1994 "(...) focuses on the day to day application of Customs laws, rules and regulations."[39] Therefore, the Panel interpreted the term in the way that customs laws should not vary, so that every trader would be able to expect the same treatment both over time and in different places and with respect to other persons.[40] Summing up, the term "uniform"

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34 Oxford Dictionary of English, 2005, p. 1925.

35 Oxford Dictionary of English, 2005, p. 1925.

36 Panel Report, *Argentina – Bovine Hides*, WT/DS155/R, para. 11.81; this Panel Report was not appealed at the Appellate Body.

37 Panel Report, *Argentina – Bovine Hides*, WT/DS155/R, para. 11.83.

38 Panel Report, *Argentina – Bovine Hides*, WT/DS155/R, para. 11.84.

39 Panel Report, *Argentina – Bovine Hides*, WT/DS155/R, para. 11.84.

40 Panel Report, *Argentina – Bovine Hides*, WT/DS155/R, para. 11.83.

interpreted by the Panel in *Argentina – Bovine Hides* means that the laws have to be applied consistently and predictably.[41]

For the Panel in *EC – Selected Customs Matters*, the definition of the term "uniform" requires geographic uniformity, as administration should be uniform in the whole territory of a WTO member.[42] Regarding the standard of uniformity the Panel identified two possible interpretations: On the one hand, it could require absolute and instantaneous identity in administration concerning the same facts or, on the other hand, it could mean that simply the same rules should be applied but have not necessarily to lead to identical results of administration.[43]

b) Context

Although it is suggested by the first interpretation of the ordinary meaning, there is no requirement for absolute uniformity in each and every case based on identical facts, because this would be an utopian demand in the factual context of the provision.[44] In the reality of most systems of administrations, which involve millions of acts of administrations and many administrations officials every year, it is not practically viable to achieve such absolute identity.[45] Article X:3 (a) GATT 1994 embodies an ideal and therefore the language of this provision cannot be interpreted literally, but ought to be read as embodying an ideal type, because administration officials as human beings administer laws and thus are not able to apply each law in each country at any time in an entirely uniform manner.[46] Therefore the real question

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41 Panel Report, *Argentina – Bovine Hides*, WT/DS155/R, para. 11.83.

42 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.123. Findings of the Panel regarding the interpretation of the term "uniform" have not been changed by the Appellate Body, see Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 212, footnote 475.

43 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.124.

44 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.131.

45 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.131.

46 *Bhala*, Chapter 16 Section III, 16-014, p. 461.

is suggested to be "(…) the permissible degree of variance among WTO Members from what is considered ideal."[47]

For the same reasons it seems counterproductive to impose an obligation of instantaneous uniformity in interpreting the provision. Although non-uniformity cannot persist for indefinite periods of time,[48] in following the principle of effective treaty interpretation, uniformity must be attained within a reasonable period of time, depending upon the specific administration at issue as well as the factual and legal complexity of a particular case.[49] Simultaneously, the measure at issue must have significant impact on the overall administration of the law and affect administrative decisions on a regular basis, not simply on the outcome of a single case,[50] because individual cases of non-uniform administration can be reconciled later within reasonable time.[51]

Looking at the immediate context of the term "uniform" in Article X:3 (a) GATT 1994, it becomes clear that this obligation is intrinsically tied to both terms "administer" and "laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article."[52] Therefore, the Panel in *EC-Selected Customs Matters* considered it necessary "(…) to first clarify the administration that is being challenged in a particular case"[53] for the specific form, nature and scale of administration can vary from case to case and can concern a specific administrative process as well as the administration of an entire system. As a result, the term "uniform" has to be interpreted in a flexible manner, considering the circumstances in a particular case, but in all cases also must meet certain minimum standards of due process, such as notice, transparency, fairness and equity.[54] The nar-

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47 *Bhala*, Chapter 16 Section III, 16-014, p. 461.

48 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.133.

49 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.132.

50 Panel Report, *US – Hot-Rolled Steel*, WT/DS184/R, para. 7.268; affirming reference to this ruling was also made in Panel Report, *US –Corrosion-Resistant Steel Sunset Review*, WT/DS244/R, para. 7.310.

51 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.132.

52 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.125.

53 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.126.

54 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.134.

rower the challenge in a particular case is with respect to the specific form of administration and the specific legal instruments alleged to be administered in a non-uniform manner, the more ambitious the requirement of uniformity will be, whilst a less exacting standard of uniformity will be demanded the more broad and wide-ranging the challenge in a particular case is.[55] Thus, the criterion for uniformity is not so strict in general, but becomes more critical in case of concrete claims.

Finally Article X:3 (a) GATT 1994 entails no obligation on how to achieve uniform administration. This issue lies rather in the sovereignty of the WTO members, to whom the provision vests discretion to determine both the nature and level of administrative authorities and the administrative tools for implementing the legal instruments of the kind described in Article X:1 GATT 1994.[56] Therefore, the provision does not require uniformity towards administrative processes and such differences by themselves do not constitute a violation of Article X:3 (a) GATT 1994.[57] Neither the processes leading to administrative decisions nor the tools that might be used in administration must be uniform, but the application of a legal instrument of the kind described in Article X:1 GATT 1994.[58] Furthermore, whether a WTO member has acted consistently with its own domestic legislation is not a Panel's task to consider, because this function is reserved for each member's domestic judicial system.[59] Neither does an alleged departure from established policy constitute a violation of Article X:3 (a) GATT 1994.[60]

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55 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.129.

56 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.141.

57 Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 224.

58 Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 224.

59 Panel Report, *US – Hot-Rolled Steel*, WT/DS184/R, para. 7.267.

60 Panel Report, *US – Sheet/Plate from Korea*, WT/DS179/R, para. 6.50.

c) Conclusion

The key feature of the term “uniform” is its flexibility. Article X:3 (a) GATT 1994 provides no obligation of absolute uniformity, although this interpretation is one possibility referring to the ordinary meaning of the term “uniform”. Considering the context of the provision, namely the day to day administration of trade regulations, such a demand would be utopian and therefore unreasonable. Uniformity in this context cannot be interpreted separately, but has to be considered in relation with the other terms of Article X:3 (a) GATT 1994, “administer” and “laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article”. Therefore, the criterion of uniformity depends to some extent on the circumstances of a particular case, with consideration of the specific form of both, the challenged administration and the legal instruments of the kind described in Article X:1 GATT 1994. Article X:3 (a) GATT 1994 establishes certain minimum standards for transparency and procedural fairness that administration of trade regulations must not fall below, and although the criterion for uniformity is not so strict in general, it becomes more critical in case of concrete claims. Finally, one has to keep in mind that the provision does not prescribe how the WTO members have to achieve uniform administration. Simultaneously the measure at issue is inoffensive for the purpose of Article X:3 (a) GATT if it is simply the outcome in an individual case with no impact on the administration of the law overall and therefore thus not affect administrative decisions on a regular basis.

II. Relevance for the application of European customs law

1. Uniform administration as own obligation of the EU in the area of customs administration

The EU[61] is full signatory to the WTO Agreement pursuant to Article XI WTO Agreement and therefore is obliged under Article XVI:4 WTO Agreement to "(...) ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." Although each member state of the EU is as well a signatory of this Agreement and can get addressed by WTO jurisprudence because of alleged violation of WTO law,[62] the EU maintains distinct and separate international obligations under WTO treaties.[63] For this reason, the obligation entailed in Article X:3 (a) GATT 1994 to administrate the legal instruments of the kind described in Article X:1 GATT 1994 in a uniform manner is an own obligation of the EU as signatory to the WTO Agreement and due to the fact that in creating the EU customs law, the EU has realised a competence for which WTO law prescribes particular requirements.

The obligation to uniform administration refers to legal instruments in Article X:1 GATT 1994 and therefore effects the execution of EU customs law, because this paragraph encompasses all laws and regulations of general application "(...) pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefore, or affect-

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61 After the Treaty of Lisbon has come into force on 1st December 2009, the European Union (EU) is now legal successor of the European Communities (EC) pursuant to Article 1 III Treaty on the European Union (hereinafter EU Treaty), has its own legal personality pursuant to Article 47 EU Treaty and can sign international agreements pursuant to Article 216 I Treaty on the functions of the European Union (hereinafter FEU Treaty). Therefore, the EU legally succeeded the EC as member of the WTO. Under public international law, it is more important that no WTO member contradicted to the EU being the successor of the EC.

62 Appellate Body Report, *EC – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 1 footnote 2.

63 *Erskine*, (18) 2006 Florida Journal of International Law (2), pp. 423 et seq. (454).

ing their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use (...)." The laws and regulations of general application described in Article X:1 GATT 1994 which Article X:3 (a) GATT 1994 refers to are not limited in their scope of application, but apply to a range of situations or cases.[64] The large enumeration in Article X:1 GATT 1994 makes clear that it covers not only the criteria of the bases of taxation for cross-boarder traded products, but also encompasses the numerous forms of prohibitions and restrictions and all other trade regulations and decisions of general application.[65] In summary, beyond the literal customs law it affects every regulation and decision of relevance for cross-border traded goods,[66] which are understood as the legal framework of the whole supply chain to which the customs law is part.

2. Single contents of the obligation to uniform administration with regard to the EU system of customs administration

The obligation to uniform administration pursuant to Article X:3 (a) GATT 1994 does not demand uniformity in legislation, but in application of laws, and although it allows a content-related examination in case of using legal instruments for administration regulating purposes, such administrative tools only constitute a violation of Article X:3 (a) GATT 1994 when necessarily leading to a lack of uniformity.[67]

A violation of Article X:3 (a) GATT occurs when EU customs law as legal instrument of the kind described in Article X:1 GATT 1994 is actually applied in a non-uniform manner by the customs authorities in the EU. Likewise, an infringement of the WTO obligation to uniform administration in WTO Member States occurs when differences in the administrative process respectively in the substantive content of legal instruments regulating the administration of rules and regulations of

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64 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.116.

65 *Puth*, in: Hilf/Oeter (eds.), 2005 § 10 para. 35; *Rogmann*, in: Kluth/Müller/Peilert (eds.), 2008, pp. 797 et seq. (803); the same, 2008 ZfZ 3, pp. 57 et seq. (59).

66 *Rogmann*, in: Kluth/Müller/Peilert (eds.), 2008, pp. 797 et seq. (803); the same, 2008 ZfZ 3, pp. 57 et seq. (59).

67 Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, paras. 201, 226.

the kind described in Article X:1 GATT 1994 necessarily lead to non uniform administration of the latter. Additionally, such measures of customs authorities in the EU must affect the overall administration of EU customs law and not only be an exclusive result in an individual case[68] that can be reconciled later within reasonable time.[69] In contrast, with respect to non-uniform administration within the meaning of Article X:3 (a) GATT 1994 it is sufficient that EU customs law is applied differently in respect of only two EU Member States on a regular basis.[70] It is the absence of procedures, mechanisms and institutions ensuring against divergences in customs administrations and removing them as a matter of right when occurring that would constitute a structural shortcoming of the EU system of customs administration in violation of Article X:3 (a) GATT 1994.[71] On the other hand, because the provision does not prescribe how to achieve uniform administration,[72] there is no obligation for the EU to build a centralized system of customs administration at the EU level. Therefore, the administration of EU customs law by 27 national customs authorities does not in itself constitute a breach of Article X:3 (a) GATT.[73]

There are findings in the WTO jurisprudence which may be generalized and which provide more information about the obligation to uniform administration in Article X:3 (a) GATT 1994.

a) Provisions of discretionary nature

EU customs law contains many provisions that provide customs authorities with flexibility in the application to some extent. However, the existence and exercise of such discretion does not by itself create

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68 Panel Report, *US – Hot-Rolled Steel*, WT/DS184/R, para. 7.268; affirming reference to this ruling was also made in Panel Report, *US –Corrosion-Resistant Steel Sunset Review*, WT/DS244/R, para. 7.310.

69 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.132.

70 *Dierksmeier*, 2008 AW-Prax 5, pp. 200 et seq. (201).

71 *Rogmann*, 2008 ZfZ 3, pp. 57 et seq. (p. 64); *Rovetta/Lux*, (2) 2007 GTCJ (5), pp. 195 et seq. (207).

72 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.141; Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 224.

73 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.141.

a violation of Article X:3 (a) GATT 1994, as long as it neither has improper effect on the provisions underlying due process objective nor leads to insecurity and unpredictability in the trading environment without justifiable reason.[74] The substantive content of such provisions regulating the administration of legal instruments of the kind described in Article X:1 GATT 1994 can be examined under Article X:3 (a) GATT 1994,[75] but the ordinary meaning of the term "uniform administration" does not indicate that Article X:3 (a) GATT 1994 dictates that a provision that regulates a particular matter of customs administration has to be drafted in prescriptive rather than discretionary terms.[76] Discretionary provisions by definition may be applied in different ways and may lead to different results, but at the same time reflect a policy decision of legislation to provide administration with a certain degree of freedom in the application.[77] In many cases, there is a plausible reason for the existence of discretion, making it seem unlikely that it was the intention of the drafters of Article X:3 (a) GATT 1994 to interpret such differences as an instance of non-uniform administration.[78] On the other hand, there are certain limits to the types of provisions drafted in discretionary terms and to the way discretion is exercised in a particular case, namely the underlying due process objective of Article X:3 (a) GATT 1994 as well as the security and predictability of the trading environment, which must not be endangered without justifiable reason.[79] In summary one can say that the exercise of discretion may or may not constitutes a violation of Article X:3 (a) GATT 1994 and therefore has to be assessed for its result,[80]

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74 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.434; uphold by the Appellate Body, see Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 217.

75 Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, paras. 200, 210.

76 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.430.

77 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.429.

78 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.431.

79 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.431.

80 *Hoekmann/Mavroidis*, (8) 2009 World Trade Review (1), pp. 31 et seq., (37).

which only constitutes an infringement when it necessarily leads to non-uniform administration.[81]

aa) Penalty provisions and customs offences

Concretely, the Panel as well as the Appellate Body in *EC – Selected Customs Matters* examined the existing differences in penalty provisions among the EU Member States in order to find out whether they constitute a violation of Article X:3 (a) GATT 1994. Because of the absence of EU competence there are no penalty provisions on the EU level and the legislators of the EU Member States are empowered to set such provisions. In this absence of harmonisation of the Union legislation that also includes customs offences, the national legislators are free to choose the appropriate penalties,[82] bound by common principles to provide penalties to be effective, proportionate and dissuasive,[83] because otherwise the EU Member States would fail to fulfil their obligations under the EU Treaty, in particular Article 4 (3) sub paragraph 2 EU Treaty.[84] However, the different national penalty provisions in the EU system of customs administration do not constitute an infringement of Article X:3 (a) GATT 1994, for they do not necessarily lead to non-uniform administration.[85] Rather, different results may occur because of the exercise of discretion in the application of the penalty provisions in question and specific circumstances of a

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81 Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 201, 226.

82 ECJ, C-213/99, *Andrade*, [2000] ECR I-11083, para. 20.

83 ECJ, Case C-68/88, *Commission/Greece*, [1989] ECR 2965, paras. 23-25; similarly, Case C-326/88, *Hansen*, [1990] ECR I-2911, para. 17, Case C-36/94, *Siesse*, [1995] ECR I-3573, para. 20, Case C-213/99, *Andrade*, [2000] ECR I-11083, para. 19; see also Council Resolution of 29th June 1995 on the effective and uniform application of Community law and on the penalties applicable for breaches of Community law in the internal market, OJ C 188, 22nd of July 1995, p. 1 et seq.

84 ECJ, Case C-68/88, *Commission/Greece*, [1989] ECR 2965, paras.23-25; the finding relates to Article 10 EC Treaty, which is succeeded by Article 4 (3) sub paragraph 2 EU Treaty in principle.

85 Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 211.

case.[86] Therefore, a violation of Article X:3 (a) GATT 1994 depends, on the one hand, on the degree of uniformity that is required, which in turn depends on the nature of the penalty provisions as well as the nature of the customs law that shall be enforced, and, on the other hand, on the impact of differences between the penalty provisions in the enforcement of customs law.[87] This affirms that flexibility is the key feature of uniformity under Article X:3 (a) GATT 1994 and that the requirements for uniform administration become not that strict until concrete claims are raised.

bb) Audit procedures

A similar conclusion was made by both Panel and Appellate Body in *EC – Selected Customs Matters*, with respect to differences in audit procedures among the EU Member States.[88] Post clearance audit is used to control economic operators through examination of their audits, accounts, systems and records. In this area common EU law applicable throughout the EU does exist and is legally binding in the EU Member States, but also leaves some discretion to their national customs authorities. Additionally, the EC submitted in the dispute a non-binding guidance on EU level, the Community Customs Audit Guide, issued by the EU Commission to assist the customs authorities of the EU Member States in implementing audit procedures and to provide a practical basis for a common approach, setting out a framework for post clearance and audit based controls. As has already been shown above, the mere existence of discretion is no violation of uniform administration under Article X:3 (a) GATT 1994. Rather, the result of exercise of discretion must necessarily lead to non-uniform administration in a particular case.[89] The concrete EU provision in question, namely Article 78 II CC, is drafted in discretionary terms,

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86 Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 213.

87 Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, paras. 211, 212.

88 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.434; uphold by the Appellate Body, see Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 217.

89 Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, paras. 201, 226.

but not without justifiable reason, because "(...) a certain degree of uncertainty as to when and under what conditions an audit will be carried out is in the interest of sound customs administration and must be accepted by traders as part of a normal customs regime."[90] Additionally, the Community Customs Audit Guide helps to ensure that traders are treated fairly and consistently.[91] As the existence and exercise of discretion in this provision does neither unduly compromise the underlying due process objective of Article X:3 (a) GATT 1994 nor create insecurity and unpredictability of the trading environment without just cause, an infringement would require that the differences in audit procedures necessarily lead to non-uniform administration, and do not stem from the exercise of discretion and special circumstances of a concrete case.[92] Again, this reaffirms the flexible feature of uniformity under Article X:3 (a) GATT 1994.

b) Indefinite terms in EU customs law

The legal norms in EU customs law entail many indefinite terms which need to be interpreted as necessary part of application of these provisions in customs administration. Assuming that every term in a legal norm is automatically a legal term, the character of such a term is indefinite if its application is not possible by way of using a legally binding text, for example a legal definition, and therefore has to be interpreted under ordinary meaning and systematic, historical and teleological context.[93] The application of a single provision is a form of administration because such action puts legal norms into practical effect[94] and such a concrete act of administration is narrow in nature and therefore a high degree of uniformity is required for the purpose of

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90 Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 215.

91 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.432.

92 Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 216.

93 *Blechschmidt*, 2006 BDZ-Fachteil 12, F-89 (F-90).

94 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.104; uphold by the Appellate Body, see Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 224.

Article X:3 (a) GATT 1994.[95] An infringement of Article X:3 (a) GATT 1994 in such a case occurs if different customs authorities of the EU Member States interpret such indefinite terms in legal norms of EU customs law differently and therefore apply them differently on the same set of facts.[96] Also, divergences in the substantive content of legal instruments which regulate the application of legal instruments of the kind described in Article X:1 GATT 1994 by interpreting indefinite terms in EU customs law and which are only applicable in single EU Member States can constitute a violation of Article X:3 (a) GATT 1994 when those differences necessarily lead to non-uniform administration of a concrete legal norm in EU customs law.[97]

aa) Tariff classification

In the customs area of tariff classification many legal norms take the form of positions in the headings and subheadings of the Combined Nomenclature as part of the Common Customs Tariff of the EU. To determine the proper tariff classification of a product, abstract terms in form of the terminology of the goods must be interpreted and subsumed under those headings, subheadings and positions. The features of the goods prescribed therein are effectively the matter of facts of these legal norms and the classification under a single position is a simple subsumption with the tariff rate as legal consequence.[98] One can distinguish between collective terms, encompassing a multiplicity of goods, and single terms, only regarding a separate product. The interpretation of the goods terminology can be very difficult and challenging because the terminology comes to a big part from technical

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95 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.153, see also paras. 7.199, 7.214, 7.223, 7.247, 7.293, 7.361, 7.378, 7.392, 7.411, 7.458, 7.475; findings of the Panel regarding the interpretation of the term "uniform" have not been changed by the Appellate Body, see Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 212, footnote 475.

96 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, paras. 7.293, 7.304, 7.305; uphold by the Appellate Body, see Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 260.

97 Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, paras. 239, 240, 241.

98 *Blechschmidt*, 2006 BDZ-Fachteil 12, F-89 (F-90).

languages of a large variety, like the chemical or technological industry, and is not always used in its original specialised sense.[99] Furthermore, there a 23 different official languages in the EU, whereas the Combined Nomenclature of the EU is based on the Harmonized Commodity Description and Coding System of Tariff Nomenclature (hereinafter HS),[100] an internationally standardised system of names and numbers for classifying traded products that has been developed and is being maintained by the World Customs Organization (WCO) and is only authoritative in English or French pursuant to Article 20 III HS. Therefore, some of the difficulties with the interpretation in the area of tariff classification stem from mistranslation or at least translation difficulties.[101] Additionally, the EU Member States have different cultural and traditional backgrounds that can affect the interpretation of indefinite terms. Different traditions regarding public holidays, for example, can include the use of single articles in a way that is unknown in other EU Member States but has to be considered in classification.[102]

In the meaning of Article X:3 (a) GATT 1994 the tariff classification of a single product by national customs authorities of the EU Member States constitutes an act of administration, because such action puts into practical effect respectively applies a legal instrument of the kind described in Article X:1 GATT 1994, namely the EU rules in the area of tariff classification like the Common Customs Tariff of the EU. [103] Simultaneously, such an application of a few tariff headings in the Common Customs Tariff is narrow in nature and thus requires a high degree of uniformity.[104] Therefore, a violation of Article X:3 (a)

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99 *Blechschmidt*, 2006 BDZ-Fachteil 12, F-89 (F-90).

100 OJ L 198, 20th of July 1987, p. 3 et seq.

101 *Blechschmidt*, 2007 BDZ-Fachteil 1-2, F-3 (F-5).

102 *Blechschmidt*, 2007 BDZ-Fachteil 1-2, F-3 (F-5).

103 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.104, see also paras. 7.198, 7.213, 7.222, 7.246, 7.292; uphold by the Appellate Body, see Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 224.

104 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, paras. 7.199, 7.214, 7.223, 7.247, 7.293; findings of the Panel regarding the interpretation of the term "uniform" have not been changed by the Appellate Body, see Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 212, footnote 475.

GATT 1994 occurs if different customs authorities apply the headings and subheadings of the Common Customs Tariff differently because of divergences in the interpretation of goods terminology and therefore classify the same products under different positions of the Common Customs Tariff.

To prove such an infringement it is not sufficient to rely on a different tariff classification of a single product in the past. Rather, it has to be shown that such an instance of non-uniform administration currently exists.[105] In this context efforts to reconcile those instances of non-uniform administration must be taken into consideration in order to determine whether a past violation still persists and continues to have effect. [106] The precise manner in which divergences in tariff classification should be resolved is not dictated by Article X:3 (a) GATT 1994 because the provision does not prescribe how to achieve uniform administration, but nevertheless the measures should be effective.[107]

Because of these requirements the Panel in *EC – Selected Customs Matters* concluded in one case regarding the tariff classification of network cards for personal computers that a non-uniform administration, which had occurred more than ten years ago, did not substantiate a current violation of Article X:3 (a) GATT 1994 without evidence to indicate that the differences in tariff classification of this certain product continued to have effect at the time of establishment of the Panel.[108] Furthermore, the Panel took the view that those differences in the past had been resolved after they had been brought to the attention of the EU institutions in the way of preliminary ruling of the ECJ in two cases in which the court clarified the correct classification of network cards for personal computers, [109] because there was no evidence for persisting divergence in tariff classification of such products afterwards.[110]

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105 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, paras. 7.206, 7.217.

106 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, paras. 7.202, 7.206.

107 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.304.

108 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.206.

109 ECJ, Case C-339/98, *Peacock*, [2000] ECR I-08947 and ECJ, Case C-463/98, *Cabletron*, [2001] ECR I-3495.

110 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.205.

Similarly it found that regarding the tariff classification of drip irrigate products, there was no evidence for non-uniform administration in tariff classification to persist at the time of establishment of the Panel, but in fact had occurred during a relatively short period of time in the past, because on the contrary those differences had been resolved by a certain measure of the EC, [111] namely the adoption of Commission Regulation (EC) No. 763/2002 of 3 March 2002.[112]

However, in a third case, the Panel in *EC – Selected Customs Matters* adjudged the EC for non-uniform tariff classification of LCD flat monitors with a digital video interface (hereinafter LCD).[113] The Panel found that in 2004 and 2005 divergent tariff classification of such products did exist because of different interpretation of goods terminology regarding LCD, which was not disputed by the EC.[114] Although action had been taken by the EC to resolve those divergences since 2004 – *inter alia* Council Regulation (EC) No. 493/2005 of 16 March 2005,[115] which provides the concerned importers with certainty about tariff treatment,[116] and Commission Regulation (EC) No. 634/2005 of 26 April 2005,[117] which regulates the classification of a particular type of LCD monitors[118] – the Panel considered those measures to not have been effective,[119] because some confusion among the national customs authorities of EU Member States on the tariff classification of such products apparently continued to exist.[120] Thus, it concluded that this confusion might have caused different tariff classification in the present and ongoing adverse impact on the trading environment. [121] Therefore, the Panel found a violation

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111 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.217.

112 OJ L 117, 4th of May 2002, p. 3 et seq.

113 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.305.

114 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.294.

115 OJ L 82, 31st of March 2005, p. 1 et seq.

116 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.279.

117 OJ L 106, 27th of April 2005, p. 7 et seq.

118 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.281.

119 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.295.

120 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.300.

121 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.304.

of Article X:3 (a) GATT 1994,[122] although the EC had *inter alia* issued Commission Regulation (EC) No. 2171/2005 of 23 December 2005[123] in the meantime, which in fact reconciled the divergences, but was not accepted as evidence by the Panel for being submitted belatedly after the interim review stage of the dispute settlement.[124]

Uphold by the Appellate Body,[125] the findings regarding the tariff classification of LCD of both, the Panel and the Appellate Body, have been criticised for some reasons.

One point of criticism was that the Panel failed to take into account some of the evidences submitted by the EC, in particular Commission Regulation (EC) No. 2171/2005. The Appellate Body argued that the Panel did take the new EC regulation into account, but without accrediting it with the weight the EC might had wished for, which was within its discretion.[126] This has been criticised as "(…) a weak argument for rejecting the appeal" because none of the features of the new submitted regulation had been discussed by the Panel, which rather has been accused to have made an unsubstantiated assertion that the Appellate Body considered to be sufficient.[127]

Indeed it is unintelligible on which point the Panel shall have made an objective assessment of the facts with respect to Regulation (EC) No. 2171/2005, because it only mentioned its existence in a footnote. It seems doubtful that this approach should meet the requirement of making an objective assessment of the facts within the meaning of Article 11 DSU.

Furthermore, the Panel relied on evidence that post-dated its establishment, which the Appellate Body decided not to be an overstepping of its terms of reference, arguing that a Panel could do so to

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122 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.305.

123 OJ L 346, 29th of December 2005, p. 7 et seq.

124 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.305, footnote 580.

125 Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 260.

126 Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 258.

127 *Hoekmann/Mavroidis*, (8) 2009 World Trade Review (1), pp. 31 et seq., (41).

the extent that such pre-dating or post-dating evidence is relevant for the assessment of whether or not a violation of Article X:3 (a) GATT 1994 existed at the time the Panel was established.[128] Therefore both the Panel and the Appellate Body considered it to be sufficient for the finding of an infringement of Article X:3 (a) GATT 1994 that non-uniform administration with regard to tariff classification of LCD had existed in the past – which was not disputed by the EC – without proof on sides of the EC that this violation had been reconciled. This finding has been criticised to be "(…) quite unintelligible, since the Appellate Body imposes a remarkable shift in the allocation of burden of proof: it is not for the EC to show that it is a good citizen; it is for the US to show that the EC is bad citizen."[129]

The Panel had indeed already decided before that it must be proven that violations in the past continue to have effect to be an appropriate evidence for the existence of an alleged non-uniform administration at the time of the establishment of the Panel.[130] It seems quite a different approach for the Panel, as well as for the Appellate Body in this case, to demand that the burden of proof has shifted to the EC, which had to submit counter-evidence in such way that measures to resolve non-uniform administrations had been effectively undertaken. However, there are indeed differences in this case. The non-disputed divergence in tariff classification of LCD did not date back for a long time, in fact two years instead of ten as it was the case with regard to the tariff classification of network cards for computers. Furthermore, there had been some evidence to indicate that the measures undertaken by the EC did not solve the problem, contrary to the cases of tariff classification of both network cards for computers and drip irrigation products. Therefore, the Panel and the Appellate Body seem to be of the view that non-uniform administration in the past can be a *prima facie* evidence for a current violation of Article X:3 (a) GATT 1994, [131] if it does not date back too long a time, for example a whole

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128 Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 254.

129 *Hoekmann/Mavroidis*, (8) 2009 World Trade Review (1), pp. 31 et seq., (41).

130 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, paras. 7.206, 7.217.

131 Similar: *Hoekmann/Mavroidis*, (8) 2009 World Trade Review (1), pp. 31 et seq., (41).

decade, and if no measures have been undertaken to resolve the infringement, or if they have not been effective.[132]

Finally, it has been criticised that the Panel did not explain what facts in the case of tariff classification of LCD necessarily lead to non-uniform application.[133]

However, in this regard one has to differentiate between the application of legal instruments of the kind described in Article X:1 GATT 1994, which has to be uniform, and the administrative process respectively the substantive content of legal instruments regulating the administration of those legal instruments of the kind described in Article X:1 GATT 1994, which do not have to be uniform by themselves, but must not necessarily lead to non-uniformity in the application of legal instruments of the kind described in Article X:1 GATT 1994. In the case of LCD, the application of legal instruments of the kind described in Article X:1 GATT 1994, namely the EU rules in the area of tariff classification like the Common Customs Tariff, had been challenged and therefore it is sufficient that this application is non-uniform to constitute a violation of Article X:3 (a) GATT 1994, whereas the additional condition of "necessarily leading" is not required.

Indeed, the Appellate Body has reserved findings of a Panel regarding the administration of EU customs law in the area of tariff classification because it failed to explain how divergences in the substantive content of legal instruments in form of interpretative aids that are applicable only nationally regarding indefinite terms in EU customs law necessarily lead to non-uniform administration of particular legal norms of EU customs law.

In the case of tariff classification of blackout drapery lining (hereinafter BDL) the Panel in *EC – Selected Customs Matters* had come to a contradictory result: On the one hand, it concluded that the divergent classification decisions of customs authorities in different EU Member States relied upon objectively justifiable reason because it considered the products that had been subject of classification not to be identical, and therefore saw no non-uniform administration in vio-

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132 Similar: *Hoekmann/Mavroidis*, (8) 2009 World Trade Review (1), pp. 31 et seq., (41).

133 *Hoekmann/Mavroidis*, (8) 2009 World Trade Review (1), pp. 31 et seq., (40).

lation of Article X:3 (a) GATT 1994.[134] On the other hand, it considered the administrative process leading to the tariff classification decision of BDL both to constitute an act of administration within the meaning of Article X:3 (a) GATT 1994[135] and this act to be non-uniform,[136] arguing that the customs authorities in one EU member state relied upon an interpretative aid that is applicable only nationally for the purpose of classifying BDL and additionally did not take into account the classification decisions of customs authorities in other EU Member States.[137] The Panel stated that "(...) a system of customs administration which allows or at least does not prevent customs authorities from unilaterally relying upon interpretative aids in carrying out their functions, which are not provided for in the binding rules applicable to all customs authorities, such as in the European Communities, could lead to non-uniform administration in violation of Article X:3 (a) GATT 1994 in certain circumstances"[138] and that "(...) a customs administration system which does not *require* reference by customs authorities to decisions taken by other customs authorities operating within the same system and/or cooperation between customs authorities before customs decisions are taken, such as in the European Communities, could lead to non-uniform administration in violation of Article X:3 (a) GATT 1994 in certain circumstances."[139] However, this was not the outcome in this specific case, because the outcome itself, the tariff classification of BDL, had not been considered to be objectionable by the Panel, and thus it censured only the potential for a violation of Article X:3 (a) GATT 1994, the administrative process that could lead to GATT-inconsistence outcomes.

As has already been mentioned before, the administrative process can be encompassed by the term "administer" itself. However, it neither constitutes an act of administration within the meaning of Article X:3

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134 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, paras. 7.264, 7.265.

135 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.266.

136 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.276.

137 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, paras. 7.267, 7.271, 7.272, 7.275.

138 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.267.

139 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.272; emphasis in the original.

(a) GATT 1994, nor does it require uniformity; it is rather the application of legal instruments of the kind described in Article X:1 GATT 1994 that must be uniform.[140] Divergences in the substantive content of legal instruments which are not of the kind described in Article X:1 GATT 1994 but regulate their application are inoffensive as long as they do not necessarily lead to different results of tariff classification on the same set of facts. Consequently, the findings of the Panel regarding the tariff classification of BDL had been reversed by the Appellate Body for the Panel failed to analyse whether the features of the administrative process in tariff classification of BDL, namely the use of a national interpretative aid in only a single EU member state, necessarily lead to non uniform administration of a legal instrument of the kind described in Article X:1 GATT 1994.[141] One has to agree with the Appellate Body's view that in a case such as the tariff classification of BDL it seems impossible to come to such a conclusion, given the Panel's earlier finding that the result of the administrative process in this case was actually correct.[142]

bb) Customs valuation

In the area of customs valuation in EU customs law many indefinite terms in legal norms exist, too, which are interpreted and applied by customs authorities of the EU Member States, which constitutes acts of administration within the meaning of Article X:3 (a) GATT 1994, because such action puts into practical effect legal instruments of the kind described in Article X:1 GATT 1994, [143] namely Chapter 3 of Title II of the Community Customs Code (Articles 28-36) and its Implementing Regulation (Title V, Articles 141-181a) as the basic provisions on customs valuation. The administration of EU rules in the area of customs valuation is primarily the responsibility of the national customs authorities of the EU Member States, but there are a number

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140 Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 224 and again with regard to BDL para. 239.

141 Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, paras. 240, 242.

142 Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 241.

143 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, paras. 7.360, 7.377, 7.391, 7.410.

of tools to ensure uniform administration, including amendments to EU rules regarding customs valuation, opinions of the Customs Code Committee and the Compendium of Customs Valuation texts. Concerning the point of interpretation of indefinite terms in the area of customs valuation, it is interesting to the possibility of the EU Commission to amend the valuation rules contained in the Implementing Rule in accordance with the procedure of Article 247 CC if there is a need for more detailed rules on valuation, whereas the opinions of the Customs Code Committee and the Compendium of Customs Valuation texts are not legally binding. Furthermore, there are informal bilateral contacts among national customs authorities of the EU Member States regarding the exchange of customs valuation information, but the current system is not a formalised one.[144] Finally, Annex 23 of the Implementing Regulation contains interpretative notes on customs valuation which the national customs authorities shall comply with when applying the provisions of the Community Customs Code (CC) and its Implementing Regulation (CCIR) regarding customs valuation pursuant to Article 141 I CCIR. Nevertheless, there remain plenty of indefinite terms in the EU rules on customs valuation that have to be interpreted and applied in the day-to-day work of the national customs authorities of the EU Member States.

For the purpose of Article X:3(a) GATT 1994 such an application of a few provisions of EU customs law is narrow in nature and thus requires a high degree of uniformity.[145]

A violation of Article X:3 (a) GATT 1994 occurs if different customs authorities apply single provisions of the Common Customs Code and its Implementing Rule regarding customs valuation differently because of divergences in the interpretation of indefinite terms in cases with the same set of facts. Additionally, it is not permissible under Article X:3 (a) GATT 1994 that the administrative process respectively the substantive content of legal instruments regulating the administration

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144 Final Report, Customs 2002 Project Group, 11th November 2003,COM (2003) 672 final, p. 25; similar Final Report, Customs 2007 Project Group, 7th October 2008, COM (2008) 612 final, p.5.

145 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, paras. 7.361, 7.378, 7.392, 7.411; findings of the Panel regarding the interpretation of the term "uniform" have not been changed by the Appellate Body, see Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 212, footnote 475.

of those legal instruments of the kind described in Article X:1 GATT 1994 necessarily lead to non-uniformity in the application of legal instruments of the kind described in Article X:1 GATT 1994 as regular result in particular cases.

Regarding the interpretation of indefinite terms in EU customs law, the Panel in *EC-Selected Customs Matters* has been very strict in its demand for substantial evidence for proving the administration of the national customs authorities to affect the same set of facts. In one case regarding the treatment of royalty payments as part of the customs value under Article 32 I c) CC, the Panel came to the conclusion that the term "royalties" in the context of forming part of the customs value was actually applied differently for the purpose of customs valuation by different customs authorities.[146] However, because of the lack of detailed information about the transaction in question, there had been no sufficient evidence that those divergences affected the same set of facts, and therefore the Panel found no violation of Article X:3 (a) GATT 1994.[147]

In the case of the deduction of vehicle repair costs covered by a seller's warranty from customs value pursuant to Article 29 III a) CC, the Panel concluded that there had been non-uniform administration regarding the treatment of such costs as part of the customs value in the past, but found no evidence for such a violation of Article X:3 (a) GATT 1994 in the present, considering an amendment of Article 145 CCIR[148] which had removed this infringement in 2002.[149] This conclusion is in compliance with the Panels findings in the area of tariff classification that it is not sufficient to rely on a different interpretation of a single provision in the past. Rather, it has to be shown that such an instance of non-uniform administration currently exists, and that in this context efforts to reconcile those instances of non-uniform admini-

146 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para.7.369.

147 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, paras.7.370, 7.371; not appealed on the Appellate Body.

148 Commission Regulation (EC) No. 444/2002 of 11 March 2002, OJ L 68, 12th of March 2002, p. 11 et seq.

149 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, paras. 7.401, 7.402, 7.403.

stration must be taken into consideration to determine if a past violation still persists and continues to have effect.[150]

cc) Customs procedures

The same requirements as in the area of tariff classification and customs valuation are effective in the area of customs procedures, which is also one of the core areas in EU customs law. Customs procedures are regulated in the Common Customs Code and its Implementing Regulation, but some provisions refer to domestic law of the EU Member States or have gaps that have to be closed by domestic law.[151] Simultaneously, the implementing of customs procedures is the responsibility of the EU Member States authorities. Although Article 250 CC provides that the decisions, measures and documents issued by one customs authority shall have the same legal effects in other EU Member States when the customs procedure is used in several EU Member States, there is no consulting obligation under EU law when there occurs disagreement among the national customs authorities regarding customs procedures in a particular situation, but exchange of information is practised among the customs authorities.[152] Such differences among customs authorities regarding customs procedures occur, *inter alia*, because in the area of customs procedures, too, the basic provisions in Title IV Chapter 2 of the Community Customs Code and in its Implementing Regulation entail plenty of indefinite terms which have to be interpreted by national customs authorities of the EU Member States. If there is no legally binding text on the EU level, the national customs authorities often apply national guidances as interpretative and implementing aid in administrating those provisions in EU customs law.

In *EC-Selected Customs Matters*, the Panel examined in the area of customs procedures *inter alia* the application of such different national guidances for processing under customs control by different national customs authorities, but found neither substantive divergences

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150 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, paras.7.202, 7.206.

151 *Wolffgang*, in: Witte/Wolffgang (eds.), 2009, B.II, p. 22.

152 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, European Communities' reply to Panel question No. 149, Annex B, pp. B-37, B-38.

in those legal instruments nor a non-uniform practice within the meaning of Article X:3 (a) GATT 1994 in applying such guidances.[153] Although this case was not subject of the appeal at the Appellate Body, considering its general findings[154] one can say that neither divergences in the administrative process nor in national legal instruments regulating this process and the application of EU customs law alone are a violation of Article X:3 (a) GATT 1994 as long as they do not necessarily lead to non-uniform administration of concrete provisions of legal norms in EU customs law as legal instruments of the kind described in Article X:1 GATT 1994.[155] This is only the case if the indefinite terms in particular provisions are interpreted and applied differently on the same set of facts as a regular result of an administrative process respectively of the application of national guidances. However, one has to keep in mind that such national guidances are issued by customs authorities themselves, regulate customs matters of importance in the day-to-day administration of EU customs law and therefore are often codified customs practice.[156] Thus, substantive divergences in national guidances can indicate that concrete provisions in EU customs law are administered in a non-uniform manner, considering that the application of a single provision is an act of administration which is narrow in nature und requires a high degree of uniformity under Article X:3 (a) GATT 1994.[157]

dd) Summary

Eventually, there are no differences between the different customs areas in EU customs law, namely tariff classification, customs valuation and customs procedure, regarding the requirements of uniform administration under Article X:3 (a) GATT 1994 towards the interpretation

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153 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.464.

154 Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, paras. 239, 240, 241.

155 *Dierksmeier*, p. 70.

156 *Dierksmeier*, p. 70.

157 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.458; findings of the Panel regarding the interpretation of the term “uniform” have not been changed by the Appellate Body, see Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 212, footnote 475.

and application of indefinite terms in legal norms of EU customs law by national customs authorities of the EU Member States. This means that indefinite terms must not be interpreted differently on the same set of facts. It also means that the use of legal instruments which are regulating the administration of EU customs law and are only applicable nationally must not necessarily lead to a different application of concrete legal norms in EU customs law as a regular result. The same holds true for differences in the substantive content of such national legal instruments interpreting those indefinite terms in EU customs law.

c) Administrative process and administration structure and design

As the Appellate Body in *EC-Selected Customs Matters* stated, the administrative process can be encompassed by the term "administer" but does not itself constitute an act of administration within the meaning of Article X:3 (a) GATT 1994, and therefore requires no uniformity. Rather, it is the application of legal instruments of the kind described in Article X:1 GATT 1994 that must be uniform.[158] Although the customs procedures are regulated in the Common Customs Code and its Implementing Regulation, the general procedural law is regulated only in individual areas and gaps have to be closed by using domestic law of the EU Member States.[159] Therefore, in the EU system of customs administration, the implementation of EU customs law, understood as the administrative process, is the responsibility of the EU Member States authorities and thus is often moulded by national administrative traditions.[160] These circumstances have provoked critics to articulate the allegation that the EU customs union is merely a customs laws union, but neither a process union nor an administration union.[161] Indeed, the administrative sovereignty remains with the EU Member States, and EU law in general does not encompass parameters for distribution of competence or authority. Therefore, the particular organisation of customs authorities is regulated by the particular do-

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158 Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 224.

159 *Kunas*, in: Bongartz (ed.), 2000, pp. 1 et seq. (7).

160 *Kunas*, in: Bongartz (ed.), 2000, pp. 1 et seq. (21).

161 See for example *Weerth*, 2008 ZfZ 7, pp. 178 et seq. (181).

mestic law of the EU member state.[162] The EU Commission has no authority to issue commands towards the national customs authorities of the EU Member States.[163] However, as already mentioned before, the administration of EU customs law by 27 different national customs authorities does not in itself constitute a breach of Article X:3 (a) GATT, for WTO law does not prescribe how to achieve uniform administration[164] and therefore does not articulate an obligation for the EU to build a centralized system of customs administration at the European Union level.[165]

Nevertheless, the circumstances of administrative processes in the EU customs law system hold to some extent the risk of leading to non-uniformity within the meaning of Article X:3 (a) GATT 1994. The Panel in *EC-Selected Customs Matters* refused to review the structural aspects of the EU system of customs administration as it considered this to be a matter outside its terms of reference,[166] and therefore it only made statements regarding specific cases. However, in those single cases the Panel in *EC-Selected Customs Matters* criticised the EU system of customs administration.

One case was the treatment of amendments to explanatory notes by customs authorities in the area of tariff classification, in which it was stated: "In the Panels view, in the context of the EC system of customs administration, the absence of an obligation imposed upon the Member States to treat the explanatory note in the same way, could amount to an instance of non-uniform administration in violation of Article X:3 (a) GATT 1994."[167] The EU had been criticised on the point that in the context of an amendment to an explanatory note for tariff classification of camcorders in some EU Member States the explanatory note was treated as equivalent to a regulation and given prospective effect only, whereas in other EU Member States the ex-

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162 *Rogmann*, 2008 ZfZ 3, pp. 57 et seq. (58).

163 *Rogmann*, 2008 ZfZ 3, pp. 57 et seq. (67).

164 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.141; Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 224.

165 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.141.

166 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.63.

167 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.350; not appealed at the Appellate Body.

planatory note was treated as a mere clarification of the law and thus given retrospective effect.

In another case, the Panel in *EC-Selected Customs Matters* examined the administrative process regarding the revocations of binding tariff information (hereinafter BTI) under Article 12 CC by customs authorities of EU Member States. A BTI informs about the correct tariff classification of an individual product in the view of the customs authority that issues the BTI, is only binding for the holder and no other person and has to be accepted by every customs authority throughout the EU pursuant to Article 12 II CC. Every BTI issued by a national customs authority is introduced into the European Binding Tariff Information database (EBTI) that has been developed and is being maintained by the European Commission. The Panel criticised that the EU system of customs administration "(…) does not provide for uniform withdrawal of revocations of BTI. Nor does the system impose an obligation on member State customs authorities to consult with and/or notify other customs authorities of decisions to withdraw revocations of BTI", an issue that could result in non-uniform administration of the Common Customs Tariff in violation of Article X:3 (a) GATT 1994.[168] Furthermore, it noted the lack of a provision in EU customs law which prescribes that the withdrawal of revocation of BTI is immediately binding on all the national customs authorities of EU Member States, as well as the lack of a specific EU customs law provision requiring the transmission of the withdrawal of revocation of BTI by national customs authorities of EU Member States to the European Commission.[169]

Although the Panel in *EC-Selected Customs Matters* took the view that it was outside its terms of reference to make any findings in relation to the design and structure of the EU system of customs administration, it discussed some institutional mechanisms as an important context for the examination of particular instances of alleged violations of Article X:3 (a) GATT 1994.[170] Therefore it noted that the customs authorities of the EU Member States are not obliged to con-

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168 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.340.

169 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.340, footnote 624.

170 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, paras. 7.155, 7.490.

sult with one another before making customs decisions or to consult the EBTI database when classifying a good.[171] In general, the Panel found the EU system of customs administration "(…) complicated and, at times, opaque and confusing."[172] The Appellate Body reversed the Panel's findings that the examination of the EU system of customs administration as a whole or overall and its design and structure was outside the Panels terms of reference,[173] but found itself unable to complete the analysis due to the lack of sufficient foundation of factual findings upon which it could rely.[174] Nevertheless, the Appellate Body emphasised: "Certainly, the Panel raised doubts about the effectiveness of these institutions and mechanisms in bringing about uniformity of administration of European Communities customs laws. However, the Panel did not find that these institutions and mechanisms are structurally flawed in such a way that the European Communities' system of customs administration would necessarily lead to non-uniform administration, in violation of Article X:3 (a) of the GATT 1994."[175]

d) Violation of EU customs law

Implementing EU customs law by national customs authorities of the EU Member States is a case of indirect enforcement of EU law by EU Member States. Therefore, the national customs officials have to base their customs decisions directly upon EU customs law.[176] If national customs officials interpret indefinite and abstract terms in legal norms of EU customs law in a manner that has no basis in EU law and perform a practice that is not followed by other national customs authorities of EU Member States, this can be a violation of Article X:3 (a)

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171 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, paras. 7.177, 7.180, 7.181, 7.187, 7.190.

172 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.191.

173 Appellate Body, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 176.

174 Appellate Body, *EC – Selected Customs Matters*, WT/DS315/AB/R, paras. 286, 287.

175 Appellate Body, *EC – Selected Customs Matters*, WT/DS315/AB/R, para. 285.

176 *Rogmann*, 2008 ZfZ 3, pp. 57 et seq. (58).

GATT 1994. It is not the task of a Panel to determine the consistency or otherwise of EU acts with EU customs law[177] and therefore the infringement of EU customs law alone is no lack of uniformity within the meaning of Article X:3 (a) GATT 1994. Rather, such behaviour has to lead to divergences in the customs administration between different national customs authorities. If such an infringement only occurs in a single case that can be revealed afterwards there is also no violation of the WTO law, because Article X:3 (a) GATT 1994 does not impose instantaneous uniformity, but uniformity must be attained within a reasonable period of time.[178] However, it becomes a problem if the infringement is part of the usual customs administration practice without effective measures to end such behaviour by national customs authorities and therefore has significant impact on the overall administration of the law and not simply on the outcome of the individual case.[179]

In *EC – Selected Customs Matters*, the Panel examined single cases of allegedly non-uniform administration in which the EC stated that the challenged administration did not have a legal basis in EU customs law. One case was the valuation of a good for customs purposes based on a basis other than the transaction of the last sale (hereinafter "successive sale") in which the administration of Article 147 I CCIR of some customs authorities was criticised for imposing a form of prior approval[180] that, according to the EC, had no legal basis in EU customs law.[181] The Panel found a violation of Article X:3 (a) GATT 1994 because "(...) the imposition of a requirement by member States, whether in practice and/or as a matter of law, that is

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177 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.320.

178 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, paras. 7.132, 7.133.

179 Panel Report, *US – Hot-Rolled Steel*, WT/DS184/R, para. 7.268; affirming reference to this ruling was also made in Panel Report, *US –Corrosion-Resistant Steel Sunset Review*, WT/DS244/R, para. 7.310.

180 US first written submission, *EC – Selected Customs Matters*, WT/DS315/R para. 87; see also Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, paras 4.19, 7.372.

181 EC first written submission, *EC – Selected Customs Matters*, WT/DS315/R, para. 395; see also Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.373 and Court of Auditors Special Report No. 23/2000, OJ C 84, p. 1 et seq. (pp. 16, 17).

not justified by the terms of EC law and which is not being applied in other member States (…) necessarily falls foul of the obligation of uniform administration (…)".[182] This, however, was reversed by the Appellate Body because of lack of evidence for actual non-uniform administration.[183]

In another case the Panel in *EC – Selected Customs Matters* examined the attitude of customs authorities of EU Member States towards binding tariff information (BTI) under Article 12 CC. BTI shall be legally binding on the competent authorities of all EU Member States under the same conditions pursuant to Article 11 CCIR. The Panel stated that if an EU customs authority fails to acknowledge and treat as binding a BTI issued by another customs authority of a different EU member state for an identical product when this BTI is invoked by the holder and classifies the product differently, this will necessarily lead to non-uniform administration of the Common Customs Tariff in violation of Article X:3 (a) GATT 1994.[184]

In conclusion, taking into account the general findings of the Appellate Body regarding the uniform administration obligation, one can say that the crucial issue is not so much the inconsistence with EU law, but rather the differences in the application of EU customs law as a consequence of such an infringement of an individual EU customs provision by some, but not all, national customs authorities of the EU Member States. In this case, such behaviour necessarily leads to different customs decisions as a regular result and not only in an individual case.

III. Conclusion

The relevance of Article X:3 (a) GATT 1994 for the application of European customs law is not to be underestimated. The degree of regulation in domestic law today is much higher as was the case when the GATT was first created in 1947, because the implement-

182 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.382.

183 Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, paras. 269, 270.

184 Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, para. 7.320; not appealed on the Appellate Body.

tation of laws and regulations is now codified to a great extent in other legal instruments and therefore regulation has grown tremendously.[185] Avoiding a point of view that is too formalistic, the Appellate Body in *EC – Selected Customs Matters* took a more sensitive approach to this issue than former WTO jurisprudence, considering the present reality in law and administration, and explicitly involved such legal instruments which regulate the application of laws and regulations of the kind described in Article X:1 GATT 1994 in the examination under Article X:3 (a) GATT 1994.[186] Therefore, its findings have important implications for the scope of this provision and its impact on European customs administration.

To some extent, the EU system of customs administration holds the risk of leading to non-uniformity within the meaning of Article X:3 (a) GATT 1994. This is due to its decentralised character regarding the implementation of EU customs law. However, neither provisions of discretionary nature nor indefinite terms in EU customs law constitute a lack of uniformity by themselves, but only when necessarily leading to non-uniformity on a regular basis in concrete cases. Likewise, the infringement of EU customs law alone is no violation of Article X:3 (a) GATT 1994, but has to lead to divergent customs administration between different national customs authorities.

Flexibility as the key feature of uniformity within the meaning of Article X:3 (a) GATT 1994 seems to be the appropriate interpretation of this term in the light of the administrative reality of today and also given the general character of the provision. Whilst the possibility of flexible application provides Article X:3 (a) GATT 1994 with practical relevance for European customs administration, it also leads to less predictability. This is because the emphasis on the flexible character of the provision creates the demand for its application to always adjust itself to the individual case.[187] However, those difficulties are a challenge not only for the EU, but are common to all systems of customs administration worldwide.

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185 Dispute Settlement Commentary (DSC), Appellate Body Report, *EC – Selected Customs Matters*, (WT/DS315/AB/R) / DSR 2006:IX, 3791, p. 16.

186 Similar: Dispute Settlement Commentary (DSC), Appellate Body Report, *EC – Selected Customs Matters*, (WT/DS315/AB/R) / DSR 2006:IX, 3791, p. 16.

187 *Dierksmeier*, p. 62.

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Citation: Dispute Settlement Commentary (DSC), Appellate Body Report, *EC – Selected Customs Matters*, (WT/DS315/AB/R) / DSR 2006:IX, 3791, p. (...).

ISSN 1868-971X (Print)
ISSN 1868-9728 (Internet)