

COMMUNICATION BY THE UNITED STATES

The following communication, dated 4 February 2010, is circulated at the request of the Delegation of the United States.

DRAFT TEXT ON PENALTY DISCIPLINES

I. INTRODUCTION

1. Importers, exporters and other participants in the international supply chain are expected to adhere to laws and regulations governing international trade. Customs imposes penalties on those who do not comply with the rules for import, export and transit.
2. Customs enforcement of import, export and transit laws and traders' compliance with the laws is fundamental to the efficient operation of the global trading system. The need for guidance in the area of customs offenses and customs response to the offenses is recognized in the International Convention on Simplification and Harmonization of Customs Procedures (the Revised Kyoto Convention). Specifically, Annex H contains extensive standards on the procedures for assessing and settling penalties for customs offenses.
3. Recently, traders have expressed concern about the transparency, predictability and impartiality of some customs penalty regimes. Concerns have ranged from excessive penalties for minor clerical mistakes, to serious allegations of customs officials personally profiting by the amount collected through the assessment of penalties.
4. Article VIII:3 sets out fundamental disciplines relating to the imposition of penalties:

No contracting party shall impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning.
5. Earlier papers in the NGTF touched on the topic of penalties, particularly in the context of publication (TN/TF/W/17 and TN/TF/W/114). However, the draft consolidated text includes no provisions clarifying and improving penalty disciplines, which directly affect the goal of facilitating trade.

6. Penalty regimes must be objective, transparent, and provide for penalties that are appropriate to the offense. Further, it is to the benefit of customs authorities to encourage traders who discover that they have made an error or mistake to come forward and disclose that error to customs. Excessive and non-transparent penalties can discourage such disclosure and inhibit trade. The proposed text clarifies and improves Article VIII:3 through provisions which bolster the integrity of penalty regimes by addressing the proper treatment of penalties for minor errors, permitting traders to disclose errors and receive reduced penalties, and ensuring that customs officers do not personally profit from the imposition and collection of additional duties and penalties.

7. The United States submits the following textual proposal, for Members' consideration and inclusion in the draft consolidated negotiating text, TN/TF/W/165. It could be inserted as part of Article 5, among proposals grouped with the issue when it was included in the Compilation of Members' Textual Proposals (*see, e.g.*, TN/TF/W/43/Rev.12); or in Article 6, where other proposals related to Article VIII are covered; or it could become a separate article.

II. TEXTUAL PROPOSAL

1. Each Member shall ensure that penalties for breaches of customs laws, regulations, and procedural requirements are based on the culpability of the legally responsible party for compliance with the relevant law, regulation, or procedural requirement.

2. Each Member shall provide that any penalty for minor breaches, other than clerical errors, of customs laws and regulations shall be no greater than necessary to serve merely as a warning to avoid future breaches.

3. Each Member shall provide that a clerical error in completing paper or electronic customs documents shall not be subject to penalties, unless the error is part of a consistent pattern of such errors over a significant period of time. A Member may require correction of the clerical error prior to payment of the duties, fees, and taxes.

4. Each Member shall ensure that it maintains procedures to avoid conflicts of interest, including ensuring that government officials do not personally benefit or receive a portion of any penalties or duties assessed or collected.

5. Each Member shall ensure that when a penalty is assessed for a breach of customs laws, regulations, or procedural requirements, an explanation in writing is provided to the legally responsible party upon whom the penalty is assessed specifying the nature of the breach, the products and/or means of transport involved, and how the penalty amount was determined.

6. Each Member shall provide for the reduction of civil or administrative penalties which would have otherwise been imposed on a legally responsible party, when that party voluntarily discloses the circumstances of a breach of customs laws, regulations, or procedural requirements prior to the discovery by the customs administration of the breach. Where the disclosing party can correct the breach, a Member may require that the party correct it within a reasonable period of time, including paying any duties, taxes, and fees owed.

7. Each Member shall establish or maintain judicial, arbitral, or administrative tribunals and procedures for prompt review and, where warranted, correction of final administrative actions regarding matters covered by this Article. Such tribunals shall be impartial and independent of the

office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.¹

8. Each Member shall specify a fixed, finite period within which it may initiate penalty proceedings in connection with a breach of a customs law, regulation, and procedural requirement.

9. "Legally responsible party" is the person(s) that has the obligation to comply with a customs law, regulation or procedure.

10. "Clerical error" shall mean a mistake made in copying, inputting or transmitting information.

11. "Minor breaches" shall mean inadvertent omissions or mistakes, including mistakes in interpretation of a customs law, regulation or procedural requirement, made without fraudulent intent or gross negligence.

¹ This language may be dropped from the proposal should it be adequately addressed in the context of the Article X proposals on appeal procedures.