ANNEX A

RESPONSES TO QUESTIONS POSED BY THE PANEL AND OTHER PARTIES AFTER THE FIRST SUBSTANTIVE MEETING OF THE PANEL

ANNEX A-1

RESPONSES OF THE UNITED STATES TO QUESTIONS POSED BY THE PANEL AFTER THE FIRST SUBSTANTIVE MEETING

(23 September 2005)

QUESTIONS FOR THE UNITED STATES:

1. Please respond to the assertion by the European Communities in paragraph 14 of its First Written Submission that the measure at issue in this dispute is "the manner in which the EC administers" customs laws.

In this dispute, the United States is challenging the manner in which EC customs law is administered (as well as the absence of EC tribunals or procedures for the prompt review and correction of customs administrative decisions, as required by Article X:3(b) of the GATT 1994). In particular, we are challenging the absence of uniformity in the administration of EC customs law. The manner in which the EC administers its customs law – that is, the lack of uniformity in such administration – may not itself be a "measure." The "specific measures at issue" for purposes of Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") are the laws, regulations, decisions and rulings that make up EC customs law, though in some cases these are being administered through laws and regulations which are themselves measures. These measures are identified in the first paragraph of the US request for the establishment of a panel (and are set out again in Question No. 3 of the Panel's consolidated questions). The United States does not challenge the substance of these measures but, rather, the lack of uniformity in their administration.

Lack of uniformity in administration of the measures at issue manifests itself in a number of different ways. One way in which it manifests itself is through the existence of different instruments in different member States to enforce EC customs law. For example, to the extent that different EC member States have available and apply different penalties to enforce EC customs law, this is evidence of a lack of uniformity in the administration of EC customs law. Similarly, to the extent that different EC member States have available and apply different audit procedures to ensure compliance with EC customs law, this too is evidence of lack of uniformity in the administration of EC customs law.

Penalties and audit procedures – as well as other means of administration – may themselves take the form of measures. The measures that are the means of administration cause and provide evidence of the lack of uniformity of administration of the customs laws at issue. We will elaborate on this point in our responses to Question Nos. 29, 32, and 90, *infra*.

2. In paragraph 20 of its First Written Submission, the United States submits that a Member does not administer its law in a uniform manner within the meaning of Article X:3(a) of the GATT 1994 if identical products or identical transactions receive different treatment in different geographical regions and the Member provides no mechanism for the systematic reconciliation of such differences. Similarly, in paragraph 119 of its First Written Submission, the United States submits that, as concerns the administration of EC law with respect to classification and valuation and to the application of certain customs procedures, there is an absence of uniformity and an absence of legal mechanisms to achieve uniformity. Please clarify whether the United States is arguing that: (a) different treatment in different geographical regions for identical products or identical transactions would be in violation of Article X:3(a) of the GATT 1994; or (b) different treatment in different geographical regions for identical products or identical transactions would be in violation of Article X:3(a) of the GATT 1994 only

if there is no mechanism or no effective mechanism for the systematic reconciliation of such differences.

The United States recognizes that in the course of administration of customs laws, inconsistencies may occur from time to time between authorities in different regions within a WTO Member's territory. The United States does not argue that the emergence of an inconsistency automatically and necessarily evidences a breach of GATT Article X:3(a). The administration of customs laws entails more than the first-instance decisions made at individual ports. Where an inconsistency is systematically and promptly reconciled, the fact that for a brief period there was an inconsistency in administration does not mean that the Member has breached Article X:3(a). What is critical is the existence of a mechanism – such as a central authority – to cure such inconsistencies**.**

The fact that there may be sporadic instances in which inconsistencies emerge and are cured does not satisfy the Article X:3(a) obligation of "uniform" administration. This is evident, for example, from the fact that the obligation of uniform administration applies to "all" of a Member's laws, regulations, decisions and rulings of the kind described in paragraph 1 of Article X.

The argument of the United States is that the EC does not have any mechanism to cure the inconsistencies that exist in member State administration of customs law and render these non-uniform results uniform. It is the absence of a central customs authority or any other mechanism to achieve uniform administration that leads to the conclusion that the EC fails to meet its obligation under Article X:3(a).

3. Please identify what the United States is challenging under Article X:3(a) of the GATT 1994 regarding:

(a) Council Regulation (EEC) No. 2913/92 of 12 October 1992; Commission Regulation (EEC) No. 2454/93 of 2 July 1993; and the Integrated Tariff of the European Communities established by Council Regulation (EEC) No. 2658/87 of 23 July 1987;

(b) the "related measures" referred to in paragraph 3 of the United States' First Written Submission; and

(c) EC rules on customs classification, customs valuation and customs procedures.

The United States is challenging the administration of the listed measures. By referring in its request for establishment of a panel to each of the measures referred to in the Panel's question, the United States captured the universe of measures that constitute EC customs law. The principal such measures are those referred to in subparagraph (a) of the Panel's question. However, those are not the only such measures. As the EC itself has noted,[1] these measures are supplemented by miscellaneous Commission regulations and other measures pertaining to customs classification and valuation and customs procedures.

With regard to each of the listed measures, the measure is administered by 25 separate member State customs authorities, and the instruments the EC holds out as reconciling the divergences that occur among those separate authorities do not do so, so as to achieve the uniform administration that GATT Article X:3(a) requires. While the substance of the various measures differs – measures concerning classification are different from measures concerning valuation, for example – the problem of non-uniform administration is the same. Accordingly, in our First Written Submission, we described the problem of non-uniform administration in systemic terms and then

[1]*See, e.g.*, EC First Written Submission, paras. 92-96.

described how that problem manifests itself in the three areas of classification, valuation, and customs procedures.

4. If the United States is challenging the alleged absence of uniformity overall with respect to the administration of the EC customs system, please explain why and how the various specific instances of alleged non-uniform administration pointed to by the United States to illustrate its claim of non-uniform administration underline and fully support the essence of the United States' claim.

The United States is, indeed, challenging the absence of uniformity overall with respect to the administration of the EC customs system. In our First Written Submission and at the first Panel meeting, we supported this challenge by providing evidence of how the system of customs law administration operates. In particular, we demonstrated that EC customs law is administered by 25 separate member State customs authorities, and that the instruments the EC holds out as reconciling the divergences that occur among those separate authorities do not do so, so as to achieve the uniform administration that GATT Article X:3(a) requires. In response, the EC described various principles of EC law, as well as instruments and institutions that, in its view, reconcile divergences and bring about uniformity of administration. However, as the United States showed, none of these principles, instruments, and institutions reconciles the divergences in member State administration. They amount to a loose network of non-binding guidance to member State authorities, general duties of cooperation, and discretion for Commission and member State officials to refer matters to the Customs Code Committee. The only aspect of this network that may be brought to bear systematically is the opportunity for a trader to appeal action by a particular member State customs authority through the courts of that member State. However, for reasons we discussed in our opening statement at the first Panel meeting, the availability of that opportunity does not discharge the EC's obligation under Article X:3(a).

To illustrate the absence of uniformity overall with respect to the administration of the EC customs system, we brought to the Panel's attention a number of illustrative cases. The main purpose of these illustrations was to demonstrate that the EC's breach of Article X:3(a) is not simply an abstract or technical problem. It is a problem with real-world implications for actual traders. What is essential is not the number of illustrations or the particular details of each illustration. Rather, what the illustrations show is that the systemic problem identified by the United States in demonstrating how customs administration in the EC operates affects three key areas of customs administration – classification, valuation, and customs procedures.

Blackout Drapery Lining: The blackout drapery lining case is a glaring example of non-uniform administration of the Common Customs Tariff in which no EC institution stepped in to cure the non-uniformity. There, the customs authority in one member State – Germany – applied the Common Customs Tariff in a manner that plainly diverged from its application by other member State authorities. Its application of the Common Customs Tariff caused it to classify the good at issue under subheading 3921, whereas other member State authorities had consistently classified blackout drapery lining under subheading 5907.

The German authority made no attempt to reconcile its classification decision with the classification decisions reflected in binding tariff information ("BTI") issued by other member States' customs authorities that were brought to its attention. Moreover, the German authority relied on a rationale that plainly is not compelled by the Common Customs Tariff and that the Commission nevertheless declined to identify as a non-uniformity. In particular, the German authority found that the presence of plastic coating made the blackout drapery lining ineligible for classification under Tariff subheading 5907 (contrary to the Harmonized System explanatory note on subheading 5907[2]), and the German authority relied on an interpretive aid specific to Germany – concerning the fineness

[2]Harmonized System Explanatory Note, Subheading 59.07 (Exhibit US-48).

of the lining's web – which the EC claims was developed by analogy to a Commission regulation pertaining to the classification of ski trousers.[3]

In brief, the blackout drapery lining case is a case in which one member State's customs authority declined to take account of other member States' BTI, ignored an applicable Harmonized System explanatory note, and ultimately relied for its classification on a country-specific interpretive aid based on an analogy to a good classifiable under a completely different chapter of the Common Customs Tariff. This situation did not prompt any action by an EC institution to reconcile a non-uniformity of administration, illustrating the US claim. Indeed, the very fact that when confronted with this situation the EC denies that a non-uniformity even exists[4] underscores the problem.

LCD Monitors: The LCD monitors case is another example of non-uniform administration of the Common Customs Tariff by different member States, with the EC failing to step in to reconcile the non-uniformity. Confronted with divergent classifications for LCD monitors with digital video interface, the Customs Code Committee was unable to reach a decision on how to reconcile the divergences. Accordingly, the Council of the European Union adopted a stop-gap measure – a regulation temporarily suspending duties on a subset of the product at issue based on size. Products above the size threshold defined in the Council regulation remain subject to duties depending on the classification assigned in different member States.

The EC states that the adoption of the Council regulation concerning a subset of LCD monitors reflects a deliberate choice based on the "specific circumstances of the case."[5] It argues that it took a qualified majority to adopt the Council duty suspension regulation, just as it would have taken a qualified majority in the Customs Code Committee to actually approve a classification regulation. The difference, however, is that a duty suspension regulation is far different from a classification regulation. One is a temporary policy solution, while the other is a definitive determination of a technical issue. The ability of the Council to adopt a duty suspension regulation does not demonstrate the system's ability to achieve uniformity when it comes to the administration of classification rules. Indeed, the very fact that the question of classification remains unresolved shows an inability of the system to achieve uniformity in this area.

That the LCD monitors case is an apt illustration of the problem identified by the United States is further underscored by the EC's own explanation of the action that the Customs Code Committee did take with respect to this good. At paragraph 353 of its First Written Submission, the EC states that the Committee concluded that "unless an importer can demonstrate that a monitor is only to be used with an ADP machine (heading 8471) or to be used as an indicator panel (heading 8531), it has to be classified under heading 8528." As we pointed out in our opening statement, the requirement of a showing that a monitor is "*only* to be used with an ADP machine" is contrary to the applicable Tariff Chapter note, which makes reference to sole or principal use.[6] Thus, far from illuminating the matter, the guidance given by the Committee in this case appears to foster rather than resolve inconsistent administration of classification rules.

Court of Auditors Valuation Report: The Court of Auditors valuation report (Exhibit US-14) discusses a number of divergences in member State administration of EC customs valuation rules. The First Written Submission of the United States drew attention to highlights from this report. Like the classification examples, the cases referred to here all exhibit inconsistencies in member State administration, coupled with failure by EC institutions to systematically cure the inconsistencies. The one example of inconsistent administration of valuation rules where the EC states that it took action in

[3]EC First Written Submission, para. 343; Exhibit EC-78, p. 14.
[4]EC First Written Submission, para. 346.
[5]EC First Written Submission, para. 360.
[6]US Opening Statement, First Panel Meeting, para. 28.

response to the Court of Auditors report concerns vehicle repair costs covered by a seller under warranty.[7] Yet, as the report explains at paragraph 73, the Commission was first made aware of inconsistent member State practice in this area in a 1990 report. The fact that an instance of non-uniform administration first called to the Commission's attention in 1990 was resolved by a regulation adopted in 2002 hardly demonstrates that the system works in a manner consistent with the obligation of uniform administration set forth in GATT Article X:3(a).

With respect to the other examples of non-uniform administration referred to in the Court of Auditors report, the EC does not deny the divergences. Instead, it dismisses them as differences based on factual issues[8], minor variations[9], or matters not part of customs procedures.[10] These simply constitute the EC's characterizations. The fact remains that the Court of Auditors report carefully identifies particular inconsistencies in administration of customs valuation rules that the EC failed to reconcile. In this respect, the illustrations in the report further support the US challenge based on an absence of overall uniformity in the EC customs administration system.

Reebok: The Reebok case is a specific example of divergent administration of customs valuation rules, with the EC failing to reconcile the divergence. As described in the First Written Submission of the United States, the case entails one member State's authority treating an importer as related to its non-EC sellers for valuation purposes. Other member State authorities did not find the importer to be related to its non-EC sellers.

The Reebok case supports the US claim by showing a particular manifestation of non-uniform administration in the valuation area. Tellingly, while the EC characterizes the case as "relatively complex,"[11] it does not contradict the essential facts as described in the US First Written Submission.

Processing Under Customs Control: The United States referred to processing under customs control as an illustration of member States diverging in the administration of EC law when it comes to customs procedures. In particular, different member States apply different economic tests to decide whether to permit processing under customs control. By way of example, we showed that the United Kingdom customs authority requires an applicant to show both the creation of maintenance of processing activities in the EC and an absence of harm to essential interests of Community producers of similar goods. In contrast, we showed that the French authority requires the former showing but not the latter.

The EC responds that all member States apply both tests and refers to a mention of absence of harm to competitors in the French customs bulletin in Exhibit US-35.[12] However, that mention (in paragraph 78 of the bulletin) is simply an introductory paraphrase of certain provisions from the Community Customs Code. After the introduction, the bulletin specifies that the economic conditions test will be carried out according to the modalities set forth thereafter ("il s'effectue selon les modalités définies ci-après"). As explained in the US First Written Submission, the relevant modality (in paragraph 83) makes no reference to harm to Community producers.

Local clearance procedures: The United States referred to local clearance procedures as a second illustration of member States diverging in the administration of EC law with respect to customs procedures. In particular, we showed that different member States impose different requirements for carrying out local clearance procedures. The EC counters that the US description

[7]EC First Written Submission, paras. 397-98.
[8]EC First Written Submission, para. 393.
[9]EC First Written Submission, para. 396.
[10]EC First Written Submission, para. 400.
[11]EC First Written Submission, para. 407.
[12]EC First Written Submission, para. 415.

blends certain discrete procedural steps and mistakes certain details with respect to particular member States. However, the EC does not dispute the existence of divergences in the administration of local clearance procedures.

Penalties: Penalties represent a third aspect of customs procedures in which member States diverge. The EC does not even contest the existence of divergences in this area. Rather, it contends that penalties are not covered by Article X:3(a). It argues variously that the subject matter of measures described in Article X:1 does not include penalties and that, in any event, differences in penalties among member States are differences in substantive law rather than differences in the administration of EC customs law. As we explained in our opening statement[13] and additionally in response to Question Nos. 29 and 32, *infra*, the EC misunderstands the US argument with respect to penalties.

Measures setting forth penalties are tools for administering other laws – in this case, customs laws. Thus, the availability of a penalty for violation of a customs law is intended to induce compliance with that law. Article X:1 describes the laws that are to be administered uniformly under Article X:3(a), as opposed to the tools for their uniform administration, such as penalties. Therefore, even if the EC were correct that Article X:1 does not cover penalty laws, its argument would be irrelevant.

Moreover, the EC's argument that differences in penalty laws are differences of substance rather than differences of administration mistakenly assumes that a law (or other measure) cannot be administrative in nature. Plainly, penalty laws are administrative in nature, inasmuch as they presume the existence of other laws and prescribe consequences for the violation of those laws.

In short, the penalties illustration underlines and fully supports the essence of the US claim by pointing to yet another divergence in the administration of EC customs law. The EC does not dispute that this divergence exists. Instead, it characterizes the divergence as outside the scope of Article X. However, for the reasons just explained (and explained in greater detail in response to Question Nos. 29 and 32), the EC's argument on this point is incorrect.

Audit Procedures: The United States referred to differences in audit procedures – i.e. procedures for verifying importers' statements with respect to classification, valuation, and origin of goods – as a further example of non-uniformity in the area of customs procedures. Like penalties, the EC concedes the existence of differences among member States in this area. Its only argument as to why such differences are not inconsistent with Article X:3(a) is that they are differences of substance rather than differences of administration. But, as with penalties, this argument ignores that certain measures are administrative in nature and, in effect, defines away an undeniable non-uniformity by labeling it a non-uniformity pertaining to "substance".

Collectively, the various instances of non-uniform administration that we have summarized in response to this question underline that the systemic problem at the heart of the present dispute manifests itself in three principal areas of customs administration. Precisely because the problem is systemic, it is not confined to classification, valuation, or procedures. Non-uniformity of administration is an essential feature of all three areas. The chief evidence of non-uniform administration is the demonstration that the instruments the EC holds out as reconciling the divergences that occur among the 25 different member State customs authorities do not do so, so as to achieve the uniform administration that GATT Article X:3(a) requires. The illustrations show how the EC's administration of its customs laws allows non-uniform administration to persist in three discrete areas.

[13]US Opening Statement, First Panel Meeting, paras. 46-52.

5. With respect to the United States' claims regarding the European Communities' administration of rules on customs valuation, is the United States only challenging the administration of EC rules regarding: (a) related parties; (b) royalty payments; (c) valuation on a basis other than the transaction of last sale; and (d) vehicle repair costs covered under warranty. If the United States is challenging other aspects of EC rules on customs valuation under Article X:3(a) of the GATT 1994, please clearly and specifically identify those rules.

The United States claim concerns the system for customs law administration in the EC. That system – in which EC customs law is administered by 25 separate member State authorities and the EC fails to have in place a central agency or other mechanism to reconcile divergences among the different authorities – fails to achieve the uniform administration required by GATT Article X:3(a). The United States is challenging the EC's failure to have in place a system that achieves the uniform administration required by that provision. This aspect of customs law administration in the EC affects the administration of all of the rules that make up EC customs law. The EC's failure to achieve uniform administration manifests itself in a variety of areas, including those alluded to in this question.

6. In paragraph 26 of the United States' First Written Submission, the United States notes that it does "not purport to catalogue every aspect of customs procedures in which member State practices diverge. Rather, we focus on a few key areas as a way to illustrate the more general point." The United States specifically refers to EC customs rules regarding: (a) audit following release for free circulation; (b) penalties for infringements of EC customs laws; (c) processing under customs control; and (d) local clearance procedures. Please provide an exhaustive list of all EC customs procedures challenged under Article X:3(a) of the GATT 1994.

The United States refers to its response to Question No. 5. As indicated in the response to that question, what the United States is challenging is the EC's failure to provide the uniform administration required by GATT Article X:3(a). That failure is not confined to any particular customs rule or group of rules. It is an overarching feature of customs law administration in the EC. It is an essential aspect of the administration of all EC customs laws. The EC customs rules alluded to in this question are illustrations of areas in which the lack of uniform administration manifests itself.

7. Please clarify what is meant by "treatment" in respect of each of the following references:

(a) In paragraph 20 of its First Written Submission, the United States submits that "a Member does not administer its law in a uniform manner if identical products or identical transactions receive different treatment in different geographical regions and the Member provides no mechanism for the systematic reconciliation of such differences."

(b) In paragraph 84 of its First Written Submission, the United States submits that "as detailed as the Code and the Implementing Regulation are, they do not ensure uniform administration in the sense that similar transactions will be treated similarly throughout the territory of the EC".

As used in the two quoted statements, the term "treatment" means the application to a particular good or a particular transaction of laws, regulations, decisions and rulings of the kind described in paragraph 1 of GATT Article X. For example, when a customs authority applies a measure of general application – e.g., a classification rule of interpretation – to a particular good and thereby determines the good's classification and the corresponding duty owed it accords treatment to that good in the sense intended in paragraphs 20 and 84 of the First Written Submission of the United States. Where customs authorities in different regions apply measures of general application differently to materially identical goods or transactions, this amounts to a failure to administer the

measures of general application in a uniform manner.

The blackout drapery lining case is a good case in point. There, the measure of general application was the Common Customs Tariff. The question for customs authorities in different member States was how to apply the Common Customs Tariff to blackout drapery lining in order to determine its classification. In its application of the Tariff, the German customs authority decided to rely on an interpretive aid (derived from an EC regulation pertaining to certain apparel products) that directed it to focus on the density of the product. That decision led it to classify the blackout drapery lining under heading 3921. That was the treatment the German authority accorded the product. Other member State authorities did not rely on the interpretive aid used by the German authority and, consequently, classified the product differently, under heading 5907. In short, different member State authorities applied the Common Customs Tariff differently, resulting in different classifications and different duty liabilities.

8. Please comment on the European Communities' interpretation of the "minimum standards" it alleges are demanded by the uniformity obligation in Article X:3(a) of the GATT 1994.

The difficulty in responding to this question is that the EC has not actually identified what it means by "minimum standards". It has characterized Article X:3(a) as "a minimum standards provision", but has not elaborated on what that means.[14] It has offered no basis for identifying what the minimum is. Nor has it explained how its characterization of Article X:3(a) flows from the ordinary meaning of its terms, in their context, and in light of the object and purpose of the GATT 1994.

The EC's characterization of Article X:3(a) as a minimum standards provision is based entirely on a passing reference in the Appellate Body report in *US – Shrimp*.[15] Article X:3(a) was not directly at issue in that dispute. At issue was whether a measure that the United States claimed to constitute a general exception subject to Article XX of the GATT 1994 was consistent with the requirements set forth in the chapeau of that article – in particular, the requirement that a measure not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail. In deciding that question, the Appellate Body looked to Article X:3 as an analogous "due process" provision. It stated that Article X:3 "establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations. . . ."[16] However, the Appellate Body did not elaborate on what it meant by "minimum standards." Indeed, it went on to find that whatever those standards are, the measure at issue in the *US – Shrimp* dispute did not meet them. In short, the passing use of the phrase "minimum standards" in the Appellate Body report in *US – Shrimp* is of no help in illuminating the question of how the obligation of uniform administration in Article X:3(a) should be interpreted.

9. In paragraph 19 of its Oral Statement at the first substantive meeting, the United States submits that WTO jurisprudence suggesting that a pattern of non-uniformity is needed to prove a violation under Article X:3(a) of the GATT 1994 is inapplicable to cases in which geographical non-uniformity is being alleged. If that is the case, please clearly explain what would be needed to prove a violation under Article X:3(a) in cases in which geographical non-uniformity is being alleged.

The EC's assertion that a pattern of non-uniformity is needed to prove a violation under

[14]EC Oral Statement, First Panel Meeting, para. 24.

[15]*See* EC Oral Statement, First Panel Meeting, para. 24; EC First Written Submission, para. 231.

[16]Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, para. 183 (adopted 6 November 1998) ("*US – Shrimp*").

GATT Article X:3(a) comes from an isolated statement in the Panel report in *US – Hot-Rolled Steel*.[17] There, Japan alleged that the application of US anti-dumping law in a particular investigation violated the obligation of uniform, impartial and reasonable administration. The Panel found that Japan had not even alleged (let alone established) "a pattern of decision-making" that would support its claim.[18]

In that context – where the claim was that the application of a particular law in a particular case violated the obligations of Article X:3(a) – it made sense to insist on a pattern. It would be difficult, if not impossible, to determine whether the actions of the investigating authorities in that case were uniform, impartial and reasonable without knowing what they had done in other, similar cases. Assessing the presence or absence of uniformity, in particular, called for comparisons between the case at hand and other similar cases.

Where, as in the present dispute, the issue is geographical non-uniformity, the context is much different from the context in *US – Hot-Rolled Steel*. The question is not whether a particular administrative authority is applying a particular law in a uniform manner – a determination that can be made only by looking at multiple instances of that authority's application of the law. The question is whether different authorities across the territory of a WTO Member (in this case, 25 different authorities) are applying various laws uniformly.

How non-uniformity of administration can be shown where the nature of the non-uniformity being alleged is geographical non-uniformity will depend on the circumstances of the allegation. In the present dispute, the allegation is that the EC does not reconcile divergences among the member State authorities when they occur and that the EC, therefore, fails to uniformly administer its customs law as Article X:3(a) requires. To prove this allegation, what is needed is to provide evidence of the mechanisms that the EC does have in place and to demonstrate how these fail to perform the role of reconciling inconsistencies of administration among 25 different member State agencies. The United States submits that this is what it has done in its First Written Submission and that, for the reasons discussed in its opening statement and interventions at the first Panel meeting, the EC has failed to rebut that evidence.

Moreover, requiring evidence of a pattern of non-uniformity in the present dispute would lead to a perverse result. It would make it impossible to challenge an overall absence of uniformity and instead force a complaining Member to focus one by one on individual instances of non-uniform administration. Thus, even if the EC did not have in place the various mechanisms that it claims (incorrectly) bring about uniformity of administration of customs law, another WTO Member still would be precluded from making a systemic claim. Instead, it would have to resort to challenging particular cases of non-uniform administration.

It is illogical for the EC to suggest that where non-uniform administration evidences itself in neat patterns – presumably, consistent differences between member States that go unreconciled – the particular non-uniformities may be challenged under Article X:3(a), but where the system as a whole fails to achieve uniform administration, there is no basis for challenge. To put it another way, by the EC's reasoning, for non-uniform administration to be susceptible to challenge under Article X:3(a) there must be a uniformity – i.e. a pattern – to the non-uniform administration. But, by this same reasoning, where non-uniform administration manifests itself in various and unpredictable ways in diverse areas of customs law, due to the overall way in which the system operates, such non-uniform administration is not susceptible to challenge. This result is inconsistent with Article X's focus on fairness to traders[19] and should be rejected.

---

[17]EC First Written Submission, para. 240.

[18]Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS/184/R, para. 7.268 (adopted 23 August 2001).

[19]*See* Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, paras. 11.76 to 11.77 (adopted 16 February 2001).

10. In paragraph 9 of its Oral Statement at the first substantive meeting, the United States submits that "our complaint is that because the retaining of competence over customs administration in the hands of member State authorities is not coupled with the systematic reconciling of divergences among member State authorities, it is inconsistent with the obligation of uniform administration under Article X:3(a)". Further, in paragraph 12 of its Oral Statement at the first substantive meeting, the United States submits that the "system" for administering customs law in the European Communities does not ensure the uniformity that Article X:3(a) requires. In light of the constitutional structure and institutional set-up in the European Communities for the administration of customs matters, please specifically identify aspects/elements/measures/mechanisms the United States would expect the European Communities to take to achieve the "systematic reconciliation of divergences among member State authorities" to ensure uniform administration of its customs laws within the meaning of Article X:3(a) of the GATT 1994.

Preliminarily, the United States notes that prescribing the method for the EC to come into compliance with its obligation under GATT Article X:3(a) is not necessary to resolve this dispute. What is at issue is whether the EC is in compliance with its obligation, not what it must do to come into compliance.

Having said that, in answering this question it is useful to consider different approaches to customs administration along a spectrum. At one end of the spectrum is the status quo, which fails to achieve the uniformity of administration required by GATT Article X:3(a). At the other end of the spectrum is an approach to customs administration that relies on a single EC customs agency authorized to ensure uniformity of administration across the territory of the EC. Creation of such an agency appears to the United States to be an obvious option for achieving the systematic reconciliation of divergences among member State authorities to ensure uniform administration of the EC's customs laws within the meaning of Article X:3(a). We understand this to be the principal means of achieving uniform administration of customs law in the territory of virtually every other WTO Member, and we are aware of no constitutional impediment to the EC's taking the same approach. At the same time, we do not rule out the possibility that somewhere along the spectrum between the status quo and the establishment of a single EC customs agency other options exist that would enable the EC to satisfy its obligation of uniform administration under Article X:3(a).

11. Within the context of the present EC system of customs administration consisting of, *inter alia*, the Customs Code Committee and the EBTI system, what value would be added through the establishment of a single, centralized EC authority proposed by the United States in the document entitled "Elements of Potential EC Customs Reform" dated 22 December 2004?

First, it should be noted that the centralized EC authority proposed in the 22 December 2004 document (included herewith as Exhibit US-49) was one element of a multi-part package that the United States proposed to the EC in the interest of reaching a mutually agreeable solution to the present dispute. With that objective in view, the United States did not insist on the most obvious and comprehensive approach to addressing lack of uniform administration of customs law in the EC which, as discussed in response to Question No. 10, would have entailed the establishment of a centralized authority for all aspects of the administration of customs law.

The United States focused on a centralized authority for the issuance of binding advance rulings (with respect to classification, valuation, and origin) because having in place an effective system of binding advance rulings would represent substantial progress toward achieving uniform administration more generally. Having a single, centralized entity issue advance rulings would eliminate the risk of divergent administration that exists when 25 different authorities perform that function and no central authority routinely detects and steps in to cure inconsistencies.

With respect to valuation, the entity proposed would establish on an EC-wide basis a form of binding guidance that does not exist today. As noted in our First Written Submission, only some member States currently issue what amounts to binding valuation guidance (a divergence of administration with respect to EC valuation rules).[20] Indeed, the concept of establishing EC-wide binding valuation guidance was one of the improvements that the Court of Auditors recommended in its report on the administration of valuation rules in the EC.[21]

With respect to classification, neither the Customs Code Committee nor the EBTI database brings uniformity of administration to the BTI system. As discussed in the First Written Submission of the United States, institutional impediments, including the fact that matters get referred to the Committee only at the discretion of Commission or member State representatives, make the Committee an ineffective arrangement for systematically achieving uniformity in the BTI system. The EBTI database also is not an effective tool for achieving that objective. Unless a good is described in exactly the same way to the authority consulting the database as it had been described to the authorities that previously issued BTI that may be relevant, a search of the database will be of limited value. Even where descriptions are the same or similar, the database does not reveal in any detail the rationale applied by different authorities in classifying a particular good in a particular way. It may indicate a citation to the general interpretive rule that the authorities relied on, but provides no narrative explanation for the classification. Thus, an authority trying to decide how to classify a good pursuant to an application for BTI would gain little insight into the rationale of other member State authorities simply by consulting the EBTI database.[22]

In sum, the value added by establishing a centralized authority as described in the 22 December 2004 document is to eliminate non-uniform administration to a large degree by providing definitive, binding, EC-wide rulings on matters of valuation, classification, and origin.

12. The United States refers to divergent decisions taken by member State authorities throughout its First Written Submission. For example, the United States refers to divergence in classification decisions: generally (paragraph 21); with respect to network cards for personal computers (footnote 33); with respect to drip irrigation products (footnote 33); and with respect to unisex articles or shirts (paragraph 76). Further, the United States refers to divergence in customs valuation decisions (paragraphs 25 and 93). In light of these references, does the United States consider that Article X:3(a) of the GATT 1994 requires substantive decisions to be uniform? If so, does the United States consider that substantive decisions regarding customs matters could amount to "administration" within the meaning of Article X:3(a)? If so, please specify which type(s) of decisions.

Article X:3(a) requires administration of measures of the kind referred to in Article X:1 to be uniform. The tools of administration can take a variety of forms. "Decisions" are tools of

[20]US First Written Submission, paras. 98-99.

[21]Court of Auditors, Special Report No 23/2000 concerning valuation of imported goods for customs purposes (customs valuation), together with the Commission's replies, reprinted in *Official Journal of the European Communities* C84, para. 52 (14 March 2001) ("Court of Auditors Valuation Report") (Exhibit US-14) ("The lack of Community-wide binding valuation decisions is one of the problems arising where a customs union does not have a single customs administration."); *id.*, para. 86 (recommending legislative action to allow establishment of Community-wide valuation decisions).

[22]The EC suggests that the EBTI database is more accessible than the United States claims, in light of the number of consultations of the database and the fact that the United States was able to find BTI concerning blackout drapery lining. *See* EC First Written Submission, paras. 319 & 323. But, the number of consultations of the database reveals very little. It may indicate anything from academic curiosity to collection of statistical information. The fact that the United States was able to identify BTI concerning blackout drapery lining is due to the fact that the exporter at issue had actual knowledge of the fact that particular member State authorities had issued BTI for the product at issue at particular times. In other words, this BTI was not obtained by the sort of random search that a trader or authority ordinarily would perform.

administration. Accordingly, when an EC member State customs authority decides to classify a good in a particular way it is administering the Common Customs Tariff. When a member State customs authority decides that the buyer and seller of goods are related parties it is administering the CCC rules on valuation. Any decision by a member State customs authority that applies a measure of general application to a particular good or transaction may amount to "administration" within the meaning of Article X:3(a). Where substantive decisions differ from one member State to another, this is evidence of lack of uniform administration of the laws at issue in the decisions.

13. Please provide evidence of specific examples to prove the assertion made in paragraph 47 of the United States' First Written Submission that, in reality, member States do not always treat binding tariff information issued by other member States as binding.

We refer the Panel to Exhibit US-30, which is a March 2005 questionnaire on the topic of "trade facilitation" prepared by a group based in the EC known as the Foreign Trade Association ("FTA"). As stated in the introduction, the questionnaire was sent to 70 of FTA's member companies, and 20 responses were received, representing experience in five different member States. In response to question 1.4, concerning classification, a company reported that "[b]inding tariff information from Germany is still not accepted by other EU countries, especially Greece and Portugal."[23]

We also refer the Panel to the report of the Panel in the dispute *European Communities – Customs Classification of Frozen Boneless Chicken Cuts (Complaints by Brazil and Thailand)*. At issue there was whether a certain product should be classified under Tariff heading 0210 or 0207. The complaining parties relied on issuance of BTI by several EC member States consistently classifying the product under heading 0210. In response, the EC asserted that "this interpretation was not followed in other EC customs offices."[24]

Finally, we refer the Panel to Exhibit US-23, which is the decision of the Main Customs Office in Bremen, Germany in the blackout drapery lining case. At page 4 of that decision, the German customs authority acknowledges that "[n]umerous binding customs tariff decisions have been handed down regarding comparable goods." Without any explanation, however, the German authority declined to follow those decisions and did not distinguish the product at hand from the products at issue in those other decisions.

14. In paragraph 16 of its First Written Submission, the United States submits that "[t]here is no customs authority to speak of. Nor is there an EC institution to systematically reconcile divergences that may arise among member States in the administration of EC customs legislation."[1] Is the United States suggesting that Article X:3(a) of the GATT 1994 requires WTO Members to establish a central customs authority to reconcile divergences that may arise among customs authorities throughout that Member? If so, please justify making reference to the specific terms and meaning of the relevant terms in Article X:3(a).

[1] *See also United States' First Written Submission, para. 19 where the United States submits that "the EC's customs laws are administered by 25 different authorities, among which divergences inevitably occur, and the EC does not provide for the systematic reconciliation of such divergences".*

The United States does not suggest that Article X:3(a) of the GATT 1994 requires WTO Members to establish a central customs authority to reconcile divergences that may arise among

[23]Foreign Trade Association, Questionnaire on the topic "Trade Facilitation": Facilitation of Trade in WTO States, response to question 1.4 (March 2005) ("FTA Questionnaire") (Exhibit US-30).

[24]Panel Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts* (Complaint by Brazil), WT/DS269/R, WT/DS286/R, para. 7.260 (circulated 30 May 2005) ("*EC – Chicken Cuts*").

customs authorities throughout that Member. As discussed in response to Question No. 10, *supra*, establishment of such an authority appears to be an obvious way for a WTO Member to comply with its obligation of uniform administration under Article X:3(a). We are not aware of any WTO Member other than the EC that does not have such an authority. At the same time, we do not rule out the possibility that there may be other ways to achieve uniform administration.

15. In paragraph 76 of its First Written Submission, the United States submits that the examples of blackout drapery lining and liquid crystal display flat monitors with digital video interface are not isolated and that, rather, traders of other products have also encountered practical difficulties resulting from the systemic problem of non-uniform administration of customs classification law in the European Communities. Please identify the other products referred to in this statement and provide evidence of non-uniform administration for each of them.

We refer the Panel to Exhibit US-30, the March 2005 Foreign Trade Association questionnaire on trade facilitation. There, a respondent company noted that "[u]nisex-articles or shorts have different classifications in Italy and Spain to those in Germany. These articles have to be imported via Germany which causes additional costs."[25]

We also refer to the Panel to Exhibit US-17, which is the opinion of the Advocate-General in the ECJ case of *Peacock AG* v. *Hauptzollamt Paderborn*. In paragraphs 7-8 of that opinion, the Advocate-General describes the facts of the case, which included issuance of BTI for network cards by customs authorities in Denmark, the Netherlands, and the United Kingdom, which were not followed by customs authorities in Germany.

We also refer the Panel (as in our response to Question No. 13, *supra*), to the EC's admission in the context of the *EC – Chicken* dispute. There, the EC asserted that customs authorities in certain member States classified the product at issue differently from customs authorities in other member States, despite BTI issued by the latter.

Finally, we refer the Panel to footnote 33 of the First Written Submission of the United States. There, we refer to a case in which customs authorities in France and Spain differed over whether a drip irrigation product should be classified as an irrigation system or a pipe. In fact, France had issued BTI for this product in 1999, classifying it as an irrigation system under Tariff heading 8424 (which carried an *ad valorem* duty rate of 1.7%). In December 2000, when an importer of this same product attempted to enter the product through Spain, the Spanish customs authorities disregarded the French BTI and classified the product as pipe, under Tariff heading 3717 (which carried an *ad valorem* duty rate of 6.4%). The EC states that this matter ultimately was resolved through the Commission's adoption of a classification regulation.[26] But, this does not change the fact that for a year-and-a-half, when a trader should have been able to rely throughout the territory of the EC on BTI issued by a given member State's customs authority, it was not able to do so.

16. With respect to tariff classification, the United States refers to non-uniform administration with respect to blackout drapery lining, liquid crystal display flat monitors with digital video interface, network cards for personal computers, drip irrigation products and unisex articles or shorts, which examples it says are illustrative of non-uniform administration of EC customs rules.

(a) Please provide all relevant statistical evidence and/or other information to show the incidence of non-uniform administration in the context of the overall administration of the EC customs regime with respect to tariff classification.

[25]FTA Questionnaire, p. 4 (Exhibit US-30).
[26]EC First Written Submission, para. 364 n.177.

(b) To what degree are the tariff classification cases involving blackout drapery lining, liquid crystal display flat monitors with digital video interface, network cards for personal computers, drip irrigation products and unisex articles or shorts: (i) representative of; (ii) significant for; and (iii) have an impact on the administration of the EC rules on tariff classification as a whole?

The US claim does not turn on the statistical frequency of non-uniform administration with respect to tariff classification. We have referred to particular instances of non-uniform administration with respect to tariff classification strictly by way of illustration, to demonstrate to the Panel the real-world impact of what might otherwise seem to be an abstract and technical problem.

For purposes of the US claim, what is relevant is *the fact* that divergences occur and are not reconciled, *not the frequency* of particular types of divergences. The EC itself acknowledges that divergences occur[27] but argues that there are mechanisms in place to systematically reconcile such divergences. The United States disagrees. The EC system of customs law administration consists of 25 independent member State customs authorities with no central, EC authority or other, similar mechanism overseeing their operation and reconciling divergent administration. Instead, there is a loose web of principles, instruments, and institutions, including non-binding guidance, plus general obligations of cooperation between member States, plus discretionary referrals of matters to the Customs Code Committee. That loose web of principles, instruments, and institutions does not provide the uniform administration of EC customs law required by Article X:3(a).

In any event, it is the EC, rather than the United States, that is likely to have the information sought in this question. While the United States does not believe that the information at issue is necessary for the Panel to find that the EC is not in compliance with its obligation of uniform administration, the United States requests that the Panel exercise its authority under Article 13 of the DSU to seek relevant information from the EC. For example, the Panel might seek from the EC a statistically significant sample of BTI and other classification decisions from various member States (including explanations of the bases for those decisions) in order to determine the frequency of divergent administration. Additionally, the United States calls to the Panel's attention Exhibit US-33, which is the EC's draft Modernized Customs Code. At page 4 of that document, the EC states, by way of introduction, that "[a]n external study in 2003 has allowed the Commission to gain a clearer understanding of the current situation in the member States and of the potential cost and benefits."[28] The United States requested a copy of this study during consultations, but the EC declined to provide it. The United States also suggests that the Panel request a copy of this study or draw an inference from the EC's refusal to provide it.

The United States recalls that in evaluating the incidence of non-uniform administration with respect to valuation rules, the EC's Court of Auditors had access to "documents handled in the Customs Valuation Committee, customs authority valuation audit files, written valuation rulings, decisions of appeal tribunals and the actual customs declarations" for more than 200 companies and groups of companies.[29] The United States has not had the benefit of such access with respect to any of the matters at issue in this dispute. Therefore, it is difficult to respond directly to the Panel's question. If the Panel were to exercise its authority under Article 13 of the DSU, it might seek information of the type that was made available to the Court of Auditors in preparing its report on valuation. However, for the reasons discussed above, the Panel should not need the information sought by this question in order to conclude that the EC fails to comply with its obligation of uniform administration of customs laws.

---

[27]*See, e.g.*, EC First Written Submission, paras. 144, 238, 396, 401, 426.

[28]European Commission, Directorate-General for Taxation and Customs Union, TAXUD/458/2004 – Rev 4, *Draft Modernized Customs Code*, p. 4 (11 November 2004) (Exhibit US-33).

[29]Court of Auditors Valuation Report, para. 10 (Exhibit US-14).

17. Please comment on the following arguments made by the European Communities:

(a) In paragraph 331 et seq of its First Written Submission, the European Communities argues that the case of blackout drapery lining does not reveal any lack of uniformity in the European Communities' classification practice.

(b) In paragraphs 347 et seq of its First Written Submission, the European Communities argues that measures have been taken by the European Communities to ensure uniform classification practice in respect of liquid crystal display flat monitors with digital video interface.

The EC's assertion that the blackout drapery lining case does not reveal a lack of uniformity in EC classification practice is incorrect for several reasons. First, the EC misstates the facts of the case when it asserts that the product before the German authorities was not flocked and, therefore, was distinguishable from the product at issue in the various BTI contained in Exhibit US-22. In fact, the determination of the Hamburg customs office on which the Bremen customs office relied found the product to contain "flocking with individual fibers."[30] For classification purposes, the relative density of the flocking was not a material distinction between the product before the German authorities and the product before other member State authorities. In fact, other member State authorities have classified blackout drapery lining under heading 5907 where the flocking on the products surface was found to be "sparsely applied."[31]

Second, the EC simply ignores the statement by the German customs authority that "[a]ssignment of the goods to class 5907 could only be considered if, in accordance with the label of that class: 'other webs,' the goods were not plastic-coated as per class 3921."[32] That statement was plainly erroneous, as is evident from the Harmonized System explanatory note that accompanies subheading 5907. According to that note, "The fabrics covered [under subheading 5907] include . . . [f]abric, the surface of which is coated with glue (rubber glue or other), *plastics*, rubber or other materials and sprinkled with a fine layer of other material such as . . . textile flock or dust to produce imitation suedes. . . ."[33]

Third, the EC asserts that the German customs authorities were justified in relying for their classification decision on an interpretive aid that was particular to Germany and not uniformly used by member State customs authorities in applying the Common Customs Tariff to coated textile fabrics, such as blackout drapery lining. That interpretive aid directed the customs authority to look to the density of the product's fiber.[34] The EC states that "the text in question [i.e. referred to only by the Hamburg Customs Office, not by the Main Customs Office of Bremen which decided the appeal."[35] However, the Bremen Office plainly relied on the findings of the Hamburg Office and, moreover, expressly referred to the fact that "[t]he web is not fine," an apparent allusion to the finding of the Hamburg Office based on the interpretive aid.[36]

More fundamentally, the EC states that "the criterion that the web is not fine was developed in analogy to another EC classification regulation and is a relevant factor to determine whether the

[30]Letter from Main Customs Office Hamburg-Waltershof to ORNATA GmbH, 29 July 1998 (original and English translation), p. 1 (Exhibit US-50).

[31]BTI UK103424227 (Exhibit US-51).

[32]Hauptzollamt Bremen, Letter Decision to Bautex-Stoffe GmbH, 22 September 2004 (original and English translation) ("Bautex-Stoffe Decision"), p. 4 (Exhibit US-23).

[33]Harmonized System Explanatory Note, Subheading 59.07 (Exhibit US-48).

[34]*See generally* US First Written Submission, para. 72.

[35]EC First Written Submission, para. 342.

[36]Bautex-Stoffe Decision, p. 4 (Exhibit US-23).

textile fabric is present merely for reinforcing purposes."[37] The classification regulation to which the EC refers (Exhibit EC-78) is a regulation pertaining to the classification of ski trousers, which are classifiable under Chapter 62 of the Tariff. The interpretive rules referred to in that regulation are relevant to classification of an apparel item, but make no sense when applied for a product such as blackout drapery lining. For example, the rules take account of whether the fabric forms the inside or outside of the product, a criterion that is relevant to apparel but not to a product, such as lining, that has no inside or outside.

The particular aspect of the ski trousers rule on which the German authority relied in this case was the tightness of the weave of the fabric. However, Note 2(a) to Chapter 59 of the Common Customs Tariff expressly makes that criterion irrelevant to the classification of coated fabrics. Thus, it states that heading 5903 applies to "textile fabrics, impregnated, coated, covered or laminated with plastics, *whatever the weight per square meter* and whatever the nature of the plastic material. . . ."

In sum, contrary to the EC's assertion, the blackout drapery lining case illustrates a lack of uniformity in classification practice within the EC inasmuch as (1) other member State authorities have classified the product at issue under heading 5907, even where flocking is sparse; (2) the decision to exclude the product from heading 5907 due to the existence of a plastic coating was directly contrary to the applicable Harmonized System explanatory note; and (3) the German customs authority ultimately relied on an interpretive aid that no other member State authority uses for classifying the product at issue, and the EC contends that such reliance on a member State-specific interpretive aid based on analogy to rules pertaining to a completely different product is justifiable under EC law, even when the terms of the interpretive aid as applied are in direct contradiction to the applicable Tariff chapter notes.

With respect to liquid crystal display ("LCD") monitors with digital video interface ("DVI"), it is important to note that the EC does not claim that it ensures "uniform *classification* practice." It states that it has taken measures to "ensure a uniform practice."[38] The difference is important and highlights the fact that the EC has not reconciled non-uniformity in member State application of the Common Customs Tariff to LCD monitors with DVI.

What the EC did was adopt a regulation that temporarily suspends duties on certain LCD monitors with DVI regardless of their classification. The temporary duty suspension applies only to monitors below a specified size threshold. Monitors above that threshold continue to be subject to divergent classification from member State to member State, a fact that the EC does not contest.

The EC makes reference to a separate regulation (set out in Exhibit EC-85) classifying monitors of a particular type under heading 8528.[39] However, the monitors at issue there are below the size threshold specified in the duty suspension regulation. In other words, the separate classification regulation does nothing to reconcile non-uniform classification of monitors above the size threshold specified in the duty suspension regulation.

Curiously the regulation in Exhibit EC-85 states that "[c]lassification under subheading 8471 60 is excluded, as the monitor is not of a kind solely or principally used in an automated data processing system. . . ." Thus, the Commission in this case applied the sole or principal use test, as indicated in Note 5 to Chapter 84 of the Common Customs Tariff. By contrast, the conclusion of the Customs Code Committee to which the EC refers in paragraph 353 of its First Written Submission requires that an importer demonstrate that "a monitor is *only* to be used with an ADP machine" in order to have it classified under heading 8471.

[37]EC First Written Submission, para. 343.
[38]EC First Written Submission, para. 356.
[39]EC First Written Submission, para. 361.

As we discussed in our Oral Statement at the first Panel meeting, the conclusion of the Customs Code Committee, which abandons the sole or principal use test set out in the Common Customs Tariff in favor of a sole use test, actually detracts from rather than promotes uniformity.[40] member State authorities now are confronted with two conflicting tests for classifying LCD monitors with DVI for ADP machines – the sole or principal use test in the Tariff chapter notes or the sole use test in the Customs Code Committee's conclusion. Indeed, in stating that the Netherlands classification of the goods at issue as video monitors is "in line with the CN, as confirmed by the Customs Code Committee," the EC implies that more than one classification of the same goods may be in line with the CN.

For the foregoing reasons, the measures the EC has taken do not provide uniform classification practice, as non-uniform criteria are employed in respect of LCD monitors with DVI for ADP machines.

18. Please respond to the submission made by the European Communities in paragraph 345 of its First Written Submission that "the United States has had its own difficulties in classifying [blackout drapery lining]. In fact, the New York customs office first classified [blackout drapery lining] products under HTSA heading 5903.90.25.00. This ruling was initially confirmed by the Headquarters of US Customs. In 2004, these rulings were revoked by Customs Headquarters, which decided that the classification had been erroneous, and classified the merchandise under heading HTSA 5907.00.6000".

The United States notes, first, that actions of US administrative agencies are not at issue in the present dispute. Nevertheless, in the interest of illuminating the issues that are in dispute, the United States answers as follows.

Pursuant to Customs Regulations (19 CFR 177.1), a ruling was requested regarding the classification of blackout drapery lining (BDL). New York Ruling Letter (NY) H81427, dated August 15, 2001, was issued in response to the request. In NY H81427, the BDL was classified in heading 5903 of the Harmonized Tariff Schedule (HTS). In NY H81427, the BDL was excluded from classification in heading 5907, HTS, because the layer of flock was considered not visible to the naked eye, following laboratory analysis. Chapter Note 5(a) to Chapter 59 excludes coated fabrics from classification in heading 5907, HTS, if the coating cannot be seen with the naked eye.

A request for reconsideration of NY H81427 was made pursuant to Customs Regulations (19 CFR 177.12). In Headquarters Ruling Letter (HQ) 965343, dated July 30, 2002, the initial ruling was affirmed. The ruling noted that according to the laboratory analysis the textile flocking was not visible to the naked eye and determined that the BDL was classifiable in 5903, HTS.

A subsequent request was made to reconsider HQ 965343. Thereafter, an additional laboratory analysis was performed. This decision was based on a second lab report that identified the presence of flock visible to the naked eye. It also demonstrated that the textile fabric had been coated with a layer of plastics upon which a layer of textile flock had been applied.

In light of this new information, a notice proposing to revoke the previous ruling was issued pursuant to US statute (19 USC 1625(c)) in the *Customs Bulletin*, Vol. 38, Number 6, on February 4, 2004. Interested parties were given 30 days to comment on the proposed revocation and/or identify an affected ruling that was not identified in the notice. No comments were received in response to the notice.

In HQ 966508, dated March 17, 2004, HQ 965343 and NY H81427 were revoked pursuant to

[40]US Oral Statement, First Panel Meeting, para. 28.

Customs Regulations (19 CFR 177.12). Sixty calendar days after the final notice was issued, the revocations became effective. The BDL was reclassified in heading 5907, HTS.

At no point during the foregoing process did the United States ever have in force conflicting rulings on the BDL. US Customs pursued a transparent process, including a public notice, which fully explained the proposed change and offered the public an opportunity to provide comments on its proposal.

19. Please respond to the submission made by the European Communities in paragraph 362 of its First Written Submission that "the US customs authorities have also found it difficult to properly classify LCD monitors. For instance, in a ruling of June 3, 2003, US Customs found that it was not possible to determine the principal function of a particular type of LCD monitor, and therefore decided to classify it under heading 8528 in application of General Interpretative note 3(c), which foresees classification under the heading which occurs last in numerical order".

The United States notes, first, that actions of US administrative agencies are not at issue in the present dispute. Nevertheless, in the interest of illuminating the issues that are in dispute, the United States answers as follows.

In examining the classification of LCD monitors, US Customs applies the requirements of classification as an automatic data processing (ADP) unit within the meaning of Note 5(B) to Chapter 84 of the Harmonized System. Multimedia monitors meet the criteria of Note 5(B)(b) and 5(B)(c). In reaching its classification decisions, US Customs has focused on whether the monitor meets the criterion of Note 5(B)(a) as to whether or not it is of a kind solely or principally used with an ADP system and whether the monitor is also *prima facie* classified under another heading (e.g., heading 8528, as a video monitor). In all of its administrative rulings dealing with this question, US Customs applies judicial precedent in determining "principal use."

The ruling referred to in paragraph 362 of the EC's First Written Submission was submitted for consideration in accordance with US Customs Regulations (*see* 19 CFR Part 177). Customs found that the monitor in question was a composite machine as defined by Note 3 to Section XVI of the Harmonized System, because it has the functions of both an ADP monitor and a video monitor. After examining all of the evidence provided, Customs found that a principal function of the monitor in question could not be established. Therefore, Customs followed the guidance of the General Explanatory Notes to Section XVI which states in pertinent part: "Where it is not possible to determine the principal function, and where, as provided in Note 3 to the Section, the context does not otherwise require, it is necessary to apply General Interpretative Rule 3(c)."

Monitors have technical specifications that drive their use. "Sole or principal use" is the standard that the text of the Harmonized System specifies for classification of these machines. In this instance, the trader was unable to demonstrate principal use as an ADP monitor. Accordingly, based on the HS, the proper result is to apply GRI 3(c).

20. With respect to the United States' reference in footnote 33 of its First Written Submission to examples of allegedly divergent classification decisions among member States concerning network cards for personal computers and drip irrigation products, please respond to comments made by the European Communities in footnote 177 of its First Written Submission with respect to these two products.

With respect to both the network cards example and the drip irrigation products example, the EC's comment is that the matter was resolved. In the first case, it was resolved through litigation that ultimately led to an ECJ decision, and in the second case it was resolved through the adoption of a Commission regulation. However, these observations obscure the fact that in both cases a key element in the network of tools of uniform administration of classification rules as portrayed by the

EC – the requirement that member States honor BTI issued by other member States – did not operate in the manner the EC claims it should. Although BTI issued by one member State is supposed to be binding on all member States, both the network cards example and the drip irrigation products example represent cases in which one or more member States did not treat as binding BTI issued by other member States. This is so regardless of the fact that the matters may ultimately have been resolved.

21. In paragraphs 51 and 52 of its First Written Submission, the United States submits that the structure of the binding tariff information system under EC law allows applicants to "pick and choose" among member States, relying only on binding tariff information that is favourable. Please provide evidence to prove that this "picking" and "choosing" occurs in practice.

The EC itself acknowledges that picking and choosing occurs in practice. For example, in the Panel report in *EC – Chicken Cuts*, in summarizing the EC's argument, the Panel stated, "The European Communities adds that it is possible under EC law to withdraw an application for a BTI where the outcome is considered unfavourable by the importer."[41] Further, in its explanatory memorandum accompanying the draft Modernized Customs Code the EC states, "[I]t is proposed to extend the binding effect of the decision [i.e. BTI] also to the holder(s) of the decision in order to avoid the system only being used where the applicant is satisfied with the result."[42]

A simple search of the EBTI database also strongly suggests the occurrence of picking and choosing. It shows that the issuance of BTI is heavily skewed in favor of certain member States. The database allows a searcher to identify how many BTI each member State issued with a start date during a specified period. Thus, if one queries how many BTI Germany issued with a start date between January 1 and December 31, 2004, the search result indicates 12,731 BTI issued. The numbers go down dramatically from there. Italy issued 232; Greece issued 1; Belgium issued 451.[43] This skewing suggests strategic selection of the member States in which importers apply for BTI.

Finally, that picking and choosing occurs in practice is confirmed by the fact that importers regularly approach commercial officers at US embassies in EC member States to inquire as to the optimal authorities from which to apply for BTI.

22. In paragraph 131 of its First Written Submission, the United States submits that the problem of reaching a decision in the context of the Customs Code Committee is magnified by the recent expansion of the European Communities to 25 member States. Does the United States have any concrete evidence indicating that decision-making has become more difficult since expansion? If so, please provide the Panel with all relevant evidence.

Given the decision-making process of the Committee as described in paragraphs 121 through 132 of the First Written Submission of the United States, it is evident on its face that decision-making has become more difficult. In addition, we refer the Panel to paragraph 131 of our First Written Submission, in which we cite a senior EC official who stated that "organising a majority decision will be more difficult, since one will have to negotiate with 25 – instead of 15 – member States." This senior official is close to the decision-making process and certainly in a position to apprehend the difficulties that would be encountered by enlargement.

---

[41]Panel Report, *EC – Chicken Cuts*, para. 7.261 (citing EC's Second Written Submission, para. 51; EC's Reply to Panel Question No. 117).

[42]European Commission, Directorate-General for Taxation and Customs Union, TAXUD/447/2004 Rev 2, *An Explanatory Introduction to the modernized Customs Code*, p. 12 (Feb. 24, 2005) (Exhibit US-32).

[43]*See* http://europa.eu.int/comm/taxation_customs/dds/cgi-bin/ebtiquer?Lang=EN (last consulted on 23 September 2005).

23. Please clearly explain whether and, if so, how the following statements demonstrate a violation of Article X:3(a) of the GATT 1994, making reference to the specific terms and meaning of the relevant terms in Article X:3(a):

(a) In paragraph 86 of its First Written Submission, with respect to the treatment of royalty payments, the United States submits that the EC Court of Auditors "found that in a number of cases, different member States apportioned royalties differently to the customs value of identical goods imported by the same company".

(b) In paragraph 87 of its First Written Submission, with respect to valuation on a basis other than the transaction of the last sale, the United States submits that the EC Court of Auditors "found that authorities in some member States required importers to obtain prior approval for valuation on a basis other than the transaction value of the last sale, whereas authorities in other States imposed no such requirement".

(c) In paragraph 88 of its First Written Submission, with respect to vehicle repair costs covered under warranty, the United States notes that "[i]n at least one member State – Germany – the Court found that customs authorities reduced the customs value of imported vehicles by the value of repairs undertaken in the territory of the EC and reimbursed by the foreign seller. Other member States – in particular, Italy, the Netherlands, and the United Kingdom – declined requests for similar customs value reductions".

(d) In paragraphs 96 and 97 of its First Written Submission, the United States submits that the EC Court of Auditors "found that different member State authorities take different approaches to [valuation audits performed after goods have been released for free circulation] ... In the case of at least one member State, the Court found that the customs authorities lack the right to perform post-importation audits at all, except in cases of fraud. Even among the States in which authorities are permitted to perform post-importation audits, the Court found differences among working practices".

Each of these statements describes an instance of inconsistent administration of EC customs law concerning valuation. In each case, the inconsistency was material, affecting importers' ultimate liability for customs duties. These instances of inconsistency, plus others to which the United States has referred, illustrate the EC's failure to uniformly administer EC customs law.

The specific terms of Article X:3(a) at issue are "administer" and "uniform." We discuss the meaning of these terms at paragraphs 32 to 38 of our First Written Submission. In particular, the ordinary meaning of "administer" is "carry on or execute (an office, affairs, etc.)," and the ordinary meaning of the term "uniform" is "of one unchanging form, character, or kind; that stays the same in different places or circumstances, or at different times." In each of the foregoing cases, EC law on valuation was "executed" – in the sense that measures of general application were applied to particular persons – in a manner that did not "stay[] the same in different places." Rather, it varied by member State.

24. With respect to the four aspects of the EC customs regime on valuation that the United States alleges are illustrative of the fact that EC customs rules are not administered uniformly in the European Communities (namely, related parties; royalty payments; valuation on a basis other than the transaction of last sale; and vehicle repair costs covered under warranty):

(a) Please provide all relevant statistical evidence and/or other information to show the incidence of non-uniform administration in the context of the overall administration of the EC customs regime with respect to customs valuation.

(b) To what degree are the examples specifically referred to by the United States in its First Written Submission (concerning related parties; royalty payments; valuation on a basis other than the transaction of last sale; and vehicle repair costs covered under warranty): (i) representative of; (ii) significant for; and (iii) have an impact on the administration of the EC rules on customs valuation as a whole?

The US claim does not turn on the statistical frequency of non-uniform administration with respect to customs valuation. We have referred to particular instances of non-uniform administration with respect to customs valuation strictly by way of illustration, to demonstrate to the Panel the real-world impact of what might otherwise seem to be an abstract and technical problem.

For purposes of the US claim, what is relevant is *the fact* that divergences occur and are not reconciled, *not the frequency* of particular types of divergences. The EC itself acknowledges that divergences occur[44] but argues that there are mechanisms in place to systematically reconcile such divergences. The United States disagrees. The EC system of customs law administration consists of 25 independent member State customs authorities with no central, EC authority or other, similar mechanism overseeing their operation and reconciling divergent administration. Instead, there is a loose web of principles, instruments, and institutions, including non-binding guidance, plus general obligations of cooperation between member States, plus discretionary referrals of matters to the Customs Code Committee. That loose web of principles, instruments, and institutions does not provide the uniform administration of EC customs law required by Article X:3(a).

In any event, it is the EC, rather than the United States, that is likely to have the information sought in this question. While the United States does not believe that the information at issue is necessary for the Panel to find that the EC is not in compliance with its obligation of uniform administration, the United States requests that the Panel exercise its authority under Article 13 of the DSU to seek relevant information from the EC. For example, the Panel might seek from the EC information of the type that enabled the EC's Court of Auditors to make the findings contained in its report on customs valuation (Exhibit US-14).

The United States recalls that in evaluating the incidence of non-uniform administration with respect to valuation rules, the Court of Auditors had access to "documents handled in the Customs Valuation Committee, customs authority valuation audit files, written valuation rulings, decisions of appeal tribunals and the actual customs declarations" for more than 200 companies and groups of companies.[45] The United States has not had the benefit of such access with respect to any of the matters at issue in this dispute. Therefore, it is difficult to respond directly to the Panel's question. If the Panel were to exercise its authority under Article 13 of the DSU, it might seek information of the type that was made available to the Court of Auditors in preparing its report on valuation.

Additionally, the United States calls to the Panel's attention Exhibit US-33, which is the EC's draft Modernized Customs Code. At page 4 of that document, the EC states, by way of introduction, that "[a]n external study in 2003 has allowed the Commission to gain a clearer understanding of the current situation in the member States and of the potential cost and benefits."[46] The United States requested a copy of this study during consultations, but the EC declined to provide it. The United States also suggests that the Panel request a copy of this study or draw an inference from the EC's

[44]*See, e.g.*, EC First Written Submission, paras. 144, 238, 396, 401, 426.
[45]Court of Auditors Valuation Report, para. 10 (Exhibit US-14).
[46]*Draft Modernized Customs Code*, p. 4 (Exhibit US-33).

refusal to provide it. However, for the reasons discussed above, the Panel should not need the information sought by this question in order to conclude that the EC fails to comply with its obligation of uniform administration of customs laws.

25. Please respond to the submission made by the European Communities in paragraph 397 of its First Written Submission that differences that existed between member States in the treatment of repair costs covered by a warranty have been resolved by Commission Regulation (EC) No 444/2002 of 11 March 2002 (Exhibit EC-89).

While the regulation cited by the EC does appear to address the issue of treatment of repair costs covered by warranty, what is remarkable is that it took the EC 12 years to resolve this matter. The Court of Auditors report notes that the inconsistency at issue was first brought to the Commission's attention in 1990.[47] A system that leads to resolution of non-uniformity of administration 12 years after it is brought to the attention of the relevant authority hardly satisfies the requirement of Article X:3(a). We also note that this is the only inconsistency identified in the Court of Auditors report that the EC claims to have resolved. The EC attempts, unsuccessfully, to explain away four other material areas of non-uniformity of administration identified by the Court of Auditors (treatment of royalty payments; conditions under which a sale other than the last sale which led to introduction of goods into the EC may be used as basis for customs valuation; valuation audits; and provision of binding valuation guidance), but does not deny the existence of non-uniformity of administration in these areas.

26. Please provide concrete evidence to support the submission in paragraphs 25 and 90 – 92 of the United States' First Written Submission that different member States have taken different positions on whether an importer is related to non-EC companies that manufacture its products for the purposes of customs valuation.

The description at paragraphs 25 and 90-92 of the First Written Submission of the United States is based on a narrative account by the importer at issue. Due to concerns relating to the pendency of litigation over the matter at issue and the commercial sensitivity of the information that supporting documentation would contain, the importer declined to provide documentation at this time.

However, a Decision of the European Ombudsman (Exhibit US-52) confirms the description of the non-uniform administration of EC laws on valuation as set forth in the referenced paragraphs of the First Written Submission of the United States. The importer at issue confirms that it is the company described in that Decision. The importer's complaint concerning lack of uniform administration of EC customs valuation rules by Spanish customs authorities and Netherlands customs authorities is summarized, beginning at page 2.

What is especially revealing in this summary is the description of how the Commission dealt with the company's complaint when it was brought to the Commission's attention in September 2000. Rather than refer the matter to the Customs Code Committee, the Commission replied three months later "that the interpretation issues raised by the complainant were a matter for the national customs authorities, and that [the Commission] has no responsibility to undertake a detailed examination of very specific individual cases, this being the task of national administrations."[48] When the company expressly requested referral to the Committee a year later, the Commission "rejected the idea."[49] The company renewed its request in January 2002 and over two years later still had not received a reply from the Commission. The Ombudsman's Decision indicates that following a meeting between agents

[47]Court of Auditors Valuation Report, paras. 73-74 (Exhibit US-14).

[48]Decision of the European Ombudsman on complaint 128/2004/OV against the European Commission, p. 2 (2 June 2004) (Exhibit US-52).

[49]Decision of the European Ombudsman on complaint 128/2004/OV against the European Commission, p. 2 (2 June 2004) (Exhibit US-52).

for the company and officials of the Commission's Directorate for Taxation and Customs Union in May 2004, the complainant stated that "he no longer wished to pursue the complaint."[50] However, it does *not* indicate that the underlying lack of uniformity actually was resolved. The fact that the company is continuing to pursue its appeal through the Spanish courts indicates that, in fact, it has not been resolved.

Finally, it is notable that while the EC characterizes the matter as "relatively complex,"[51] it does not dispute the essential facts as described by the United States. That is, it does not disagree that this case entails differential application of EC valuation rules to a particular importer to determine whether that importer's contracts with non-EC sellers gave rise to a control relationship.

27. In relation to processing under customs control, is the United States concerned with perceived discrepancies in the substantive test as between member States for determining whether the economic conditions justify processing under customs control and/or is the United States concerned with the application of the economic conditions test by member States? If the latter, please provide concrete evidence to support the allegation that such application is in violation of Article X:3(a) of the GATT 1994.

This question highlights the fallacy in the EC's failure to recognize that measures may also serve in the administration of other measures. Processing under customs control is a procedure provided for in Article 130 of the Community Customs Code. Where an importer is permitted to use this procedure, it may bring goods into the territory of the EC without duty being charged, perform certain operations on those goods, and have the resulting goods released for free circulation at the duty rate applicable to the resulting goods. Thus, Article 130 plainly is a "regulation[] . . . pertaining to . . . rates of duty . . . on imports. . ." within the meaning of GATT Article X:1. As such, it must be administered in a uniform manner, pursuant to GATT Article X:3(a).

Under the Community Customs Code and the Implementing Regulation, customs authorities must make an "economic conditions" assessment to determine whether certain applications for processing under customs control should be granted. The manner in which different member State authorities administer that measure of general application is sometimes set forth in manuals or bulletins or other member State-specific documents. These documents explain how member States administer the EC regulations on processing under customs control.

The manuals or bulletins that explain how individual member States apply the EC regulations on processing under customs control serve an administrative function. That is, they prescribe how other laws – certain articles of the Community Customs Code and the Implementing Regulation – will be carried out. To the extent that different member State manuals or bulletins prescribe different means of carrying out the EC rules they evidence non-uniformity in the administration of those rules. To put this in the terms indicated by the Panel's question, the United States is concerned with non-uniformity in the application of the economic conditions test by different member State authorities, which non-uniformity is evident in the substance of manuals and bulletins that prescribe how the test is to be carried out in different member States.

To illustrate this non-uniformity, we contrasted United Kingdom guidance on application of the economic conditions test with French guidance.[52] We demonstrated that under the UK guidance, an applicant must show evidence of both impact on its business and "impact upon any other community producers of the imported goods."[53] By contrast, under the French guidance, an applicant

[50]Decision of the European Ombudsman on complaint 128/2004/OV against the European Commission, p. 4 (2 June 2004) (Exhibit US-52).

[51]EC First Written Submission, para. 407.

[52]US First Written Submission, paras. 105-07.

[53]US First Written Submission, para. 105.

need only present evidence of the creation or maintenance of processing within the EC.[54]

The EC states that the French guidance "also refers to the test relating to the absence of harm to competitors in the EC."[55] The EC refers the Panel to paragraph 78 of the French guidance (Exhibit US-35). However, that reference is simply an introductory paraphrase of certain provisions from the Community Customs Code. After the introduction, the bulletin specifies that the economic conditions test will be carried out according to the modalities set forth thereafter ("il seffectue selon les modalités définies ci-après"). As explained in the US First Written Submission, the relevant modality (in paragraph 83) makes no reference to harm to Community producers.

28. In paragraph 400 of its First Written Submission, the European Communities submits that questions of auditing are not part of customs procedures. Please comment.

We note, first of all, that the EC assertion is entirely unexplained. The EC provides no basis for the proposition that questions of auditing are not part of customs procedures.

Second, the EC appears to be relying on an exceedingly narrow definition of "customs procedures." At the first Panel meeting, we understood the EC to state that by "customs procedures" it meant the term as defined in Article 4(16) of the Community Customs Code. That provision defines "customs procedures" to mean the eight different ways in which goods may be handled upon importation into the territory of the EC (including, for example, release for free circulation and processing under customs control). The term has a particular meaning specific to the context of the Code. However, in other contexts, the EC uses the term "customs procedures" in a broader, more generic sense. For example, as we discussed in our opening statement at the first Panel meeting, the EC's regional trade agreement with Chile requires that "customs provisions and procedures . . . be based upon . . . the application of modern customs techniques, including . . . company audit methods... ".[56]

Third, whether auditing is characterized as a customs procedure or not, audits plainly are tools for administering EC customs laws. Where that underlying set of rules is EC customs law, audit procedures are tools for administering that law. To the extent that different member States use different audit procedures, they administer the underlying law differently. The EC dismisses any differences as "minor in nature."[57] However, the Court of Auditors report tells quite a different story. Thus, it found that in one member State the authorities lacked the authority to perform post-importation audits at all, except in cases of fraud. And, it found that divergences in audit procedures from member State to member State meant that "individual customs authorities are reluctant to accept each other's decisions."[58] It is difficult to see how such differences can be characterized as "minor."

29. In paragraphs 429 – 431 of its First Written Submission, the European Communities submits that penalty provisions, which provide for a sanction in the case of a violation of a provision of customs laws, are not themselves customs laws and, therefore, are not covered by Article X:3(a) of the GATT 1994. Please comment.

There are at least two fundamental flaws with the EC's assertion that Article X:3(a) does not cover penalty provisions. First, it ignores the distinction between the laws that a member State administers and the tools for administering those laws. It assumes, without any foundation, that because penalty provisions take the form of laws they can only themselves be administered, and not also serve as tools of administration of other laws. However, penalty provisions, like audit

[54]US First Written Submission, para. 107.
[55]EC First Written Submission, para. 415.
[56]US Opening Statement, First Panel Meeting, para. 53.
[57]EC First Written Submission, para. 400.
[58]US First Written Submission, para. 97 (quoting from Exhibit US-14).

procedures, presume the existence of other laws – in this case, other EC customs laws. Penalty provisions do not exist in a vacuum. They are intrinsically linked to the underlying laws the compliance with which they are meant to induce.[59] Indeed, the EC recognizes this basic proposition. Thus, the Council Resolution on penalties set forth in Exhibit EC-41 states that "the absence of effective, proportionate and dissuasive penalties for breaches of Community law could undermine the very credibility of joint legislation. . . ."[60]

That penalties are tools for administering EC customs law is demonstrated by the *de Andrade* case cited in the First Written Submission of the United States.[61] The EC measures being administered in that case were Articles 49 and 53(1) of the Community Customs Code. Article 49 prescribes specific time periods for carrying out the formalities necessary for goods covered by a summary declaration to be assigned a customs-approved treatment or use. Article 53(1), in turn, states that "[t]he customs authorities shall without delay take all measures necessary, including the sale of the goods, to regularize the situation of goods in respect of which the formalities necessary for them to be assigned a customs-approved treatment or use are not initiated within the periods determined in accordance with Article 49."

In *de Andrade*, an importer failed to carry out the formalities necessary for goods to be assigned a customs-approved treatment or use within the applicable time prescribed by Article 49 of the Code. Accordingly, the Portugese customs authority administered Article 53(1) – that is, it took measures necessary to regularize the situation – by imposing a penalty provided for under Portugese law. Through application of the penalty provision, the Portugese authority carried out Article 53(1) of the Community Customs Code.

To the extent that different member States have different penalty provisions that apply to the violation of EC customs law – a fact that the EC does not and cannot deny – they administer EC customs law differently. Accordingly, the existence of diverse penalty provisions among the EC member States – whereby the same offense may be treated as a serious criminal act in one state and a minor infraction in another[62] – is evidence of non-uniform administration, in breach of GATT Article X:3(a).

The second fundamental flaw in the EC's argument is its assumption that penalty provisions pertain to "illegitimate actions" and therefore cannot be covered by Article X:3(a).[63] As we discussed in our opening statement, Article X:3(a) makes no distinction between legitimate and illegitimate transactions. Moreover, the EC is simply wrong to assert that penalties apply only to illegitimate transactions. Once again, the *de Andrade* case, where the only offense was to miss a deadline is a case in point; here, a penalty was applied in the context of legitimate trade.

30. Please explain step-by-step the United States' understanding of procedures applicable in the European Communities for:

(a) Clearance of goods for free circulation or otherwise using local clearance procedures; and

(b) Clearance of goods for free circulation not using local clearance procedures.

---

[59]*See The New Shorter Oxford English Dictionary*, Vol. II, pp. 2144-45 (1993) (Exhibit US-53) (defining "penalty," as relevant here, as "punishment imposed for breach of a law, rule, or contract").

[60]Council Resolution of 29 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, p. 1 (Exhibit EC-41).

[61]US First Written Submission, para. 100.

[62]*See An Explanatory Introduction to the Modernized Customs Code*, p. 13 (Exhibit US-32).

[63]EC First Written Submission, para. 432.

The United States' understanding of procedures applicable in the EC for clearance of goods for free circulation is as follows (with references to the Community Customs Code ("CCC") and CCC Implementing Regulation ("CCCIR") noted in parentheses):

> Step 1: Goods are presented to customs. (CCC Art. 40) This usually is the responsibility of the carrier and applies to all goods, irrespective of clearance method.
> Step 2: A summary declaration is presented to customs. (CCC Art. 43) This can be the responsibility of the carrier, port or facility operator, or other person and takes the form of the shipment-level detail manifest. Again, this applies to all goods, irrespective of clearance method. Goods now have the status of being in temporary storage. (CCC Art. 50)
> Step 3: Goods are assigned a customs approved treatment or use. (CCC Art. 48) This is effected by making a declaration to place the goods under a customs procedure. The customs procedure may be either a "normal procedure" (CCC Arts. 62-75) or a "simplified procedure" (CCC Art. 76) Simplified procedures are further separated into three categories: local clearance procedure (CCCIR Arts. 263-267), warehousing (CCCIR Art. 268), and simplified declaration procedure. (CCCIR Arts. 269-271)

In sum, the procedures applicable for normal clearance and clearance using local clearance procedures are the same in the first two steps. At the third step, there is a separation. Where normal procedures apply, the importer must make a full declaration, including supporting documents, and afford the customs authorities the opportunity to examine the goods and take samples prior to release for free circulation. (CCCIR, Arts. 239-252) Where local clearance procedures apply, the importer notifies the customs authorities of arrival of the goods and enters the goods in its records, whereupon they normally may be released for free circulation. (CCCIR, Art. 266). Under local clearance procedures, a supplementary declaration is made after release. As described at paragraphs 109 to 116 of the First Written Submission of the United States, different member States administer the local clearance procedures differently, including with respect to involvement of customs authorities prior to release of goods, post-release requirements, and document retention requirements.

31. In paragraph 419 of its First Written Submission, the European Communities submits that the United States' arguments with respect to local clearance procedures do not differentiate between the summary declaration (dealt with in Article 43 of the Community Customs Code), the local clearance notification (dealt with in Article 266 of the Implementing Regulation) and the supplementary declaration (dealt with in Article 76(2) of the Community Customs Code) and are, therefore, flawed. Please comment.

The lack of differentiation that the EC points to does not affect the essential point of the United States' discussion regarding local clearance procedures. The lack of uniform administration described in our First Written Submission exists whether the particular stages in the clearance process are separately articulated or not.

32. In paragraphs 220-221 of its First Written Submission, the European Communities submits that, where sub-federal laws exist in a particular WTO Member, it is the administration of those laws to which Article X:3(a) of the GATT 1994 refers.

(a) Does Article X:3(a) apply to penal laws?

(b) If so, would the Panel be authorized to consider the administration of member States' penal laws in respect of the United States' claim under Article X:3(a)?

We refer to our response to Question No. 29. As discussed there, penal laws for the violation of customs laws are tools for the administration of those customs laws. They induce compliance with the customs laws. To the extent different EC member States apply different penal laws to violations

of EC customs law, they administer EC customs law differently. Article X:3(a) requires WTO Members to administer their customs laws uniformly. To the extent that penal laws are tools of administration of customs laws and cause the administration of customs laws to be uniform or non-uniform, Article X:3(a) applies to penal laws.

With respect to the second part of the Panel's question, it is important to distinguish between the administration of penal laws and the application of penal laws to administer customs laws of the type described in Article X:1. For the reasons discussed in the preceding paragraph and in our response to Question No. 29, the Panel is authorized to consider penal laws as tools in the administration of EC customs law in respect of the United States' claim under Article X:3(a). It is the fact that different member States have different penal laws and therefore administer the underlying EC customs law non-uniformly that is relevant to the United States' claim under Article X:3(a). Whether each individual member State administers its own penal law uniformly within its own territory is not relevant to our claim.

The EC confuses this distinction by rejecting the proposition that laws may themselves be administrative in nature. In its view, there is no such thing as a law that is administrative in nature. Thus it states, "Where sub-federal laws exist in a particular WTO Member, it is therefore to the administration of those laws that Article X:3(a) GATT refers."[64] It dismisses the possibility that laws at the sub-federal level may be tools for administering laws at the federal level. Yet, that is precisely what customs penalty provisions are. By suggesting that laws at the sub-federal level can never be evaluated for Article X:3(a) purposes as tools for administering laws at the federal level, the EC reads Article X:3(a) in a way that dramatically diminishes its effectiveness. By this logic, where federal level customs laws are administered by sub-federal authorities, almost any instance of non-uniform administration at the federal level could be re-cast as a difference in substantive measures prescribed at the sub-federal level, thereby enabling the federally organized WTO Member to avoid its obligation of uniform administration. Such a reading of Article X:3(a), which deprives it of almost all utility with respect to federal States, is contrary to customary rules of treaty interpretation of public international law and must be rejected.

33. With respect to the four types of "customs procedures" that the United States alleges are illustrative that EC customs rules are not administered uniformly in the European Communities (namely, audit following release for free circulation; penalties for infringements of EC customs laws; processing under customs control; and local clearance procedures):

(a) Please provide all relevant statistical evidence and/or other information to show the incidence of non-uniform administration in the context of the overall administration of the EC customs regime with respect to customs procedures.

(b) To what degree are the examples specifically referred to by the United States in its First Written Submission (concerning audit following release for free circulation; penalties for infringements of EC customs laws; processing under customs control; and local clearance procedures): (i) representative of; (ii) significant for; and (iii) have an impact on the administration of the EC rules on customs procedures as a whole?

The US claim does not turn on the statistical frequency of non-uniform administration with respect to customs procedures. We have referred to particular instances of non-uniform administration with respect to customs procedures strictly by way of illustration, to demonstrate to the Panel the real-world impact of what might otherwise seem to be an abstract and technical problem.

[64]EC First Written Submission, para. 221.

For purposes of the US claim, what is relevant is *the fact* that divergences occur and are not reconciled, *not the frequency* of particular types of divergences. The EC itself acknowledges that divergences occur[65] but argues that there are mechanisms in place to systematically reconcile such divergences. The United States disagrees. The EC system of customs law administration consists of 25 independent member State customs authorities with no central, EC authority or other, similar mechanism overseeing their operation and reconciling divergent administration. Instead, there is a loose web of principles, instruments, and institutions, including non-binding guidance, plus general obligations of cooperation between member States, plus discretionary referrals of matters to the Customs Code Committee. That loose web of principles, instruments, and institutions does not provide the uniform administration of EC customs law required by Article X:3(a).

In any event, it is the EC, rather than the United States, that is likely to have the information sought in this question. While the United States does not believe that the information at issue is necessary for the Panel to find that the EC is not in compliance with its obligation of uniform administration, the United States requests that the Panel exercise its authority under Article 13 of the DSU to seek relevant information from the EC.

The United States recalls that in evaluating the incidence of non-uniform administration with respect to valuation rules, the EC's Court of Auditors had access to "documents handled in the Customs Valuation Committee, customs authority valuation audit files, written valuation rulings, decisions of appeal tribunals and the actual customs declarations" for more than 200 companies and groups of companies.[66] The United States has not had the benefit of such access with respect to any of the matters at issue in this dispute. Therefore, it is difficult to respond directly to the Panel's question. If the Panel were to exercise its authority under Article 13 of the DSU, it might seek information of the type that was made available to the Court of Auditors in preparing its report on valuation.

Additionally, the United States calls to the Panel's attention Exhibit US-33, which is the EC's draft Modernized Customs Code. At page 4 of that document, the EC states, by way of introduction, that "[a]n external study in 2003 has allowed the Commission to gain a clearer understanding of the current situation in the member States and of the potential cost and benefits."[67] The United States requested a copy of this study during consultations, but the EC declined to provide it. The United States also suggests that the Panel request a copy of this study or draw an inference from the EC's refusal to provide it. However, for the reasons discussed in above, the Panel should not need the information sought by this question in order to conclude that the EC fails to comply with its obligation of uniform administration of customs laws.

34. How does the United States ensure uniformity in administration of its customs laws at different points of entry in the United States? In this regard, please provide details regarding all relevant aspects of US customs administration, including in particular those aspects that are not directly linked to the constitutional and institutional structure of US customs administration.

The United States notes, first, that actions of US administrative agencies are not at issue in the present dispute. Nevertheless, in the interest of illuminating the issues that are in dispute, the United States answers as follows.

To achieve uniform customs administration, US Customs and Border Protection (CBP) employs a variety of tools that apply to both first-instance decision making and correction of

[65]*See, e.g.*, EC First Written Submission, paras. 144, 238, 396, 401, 426.
[66]Court of Auditors Valuation Report, para. 10 (Exhibit US-14).
[67]*Draft Modernized Customs Code*, p. 4 (Exhibit US-33).

inconsistent first-instance decisions.

With respect to first-instance decision making, CBP issues detailed regulations and further elaborates on particular issues of interpretation or procedure through Directives, Handbooks and other formal guidance to CBP officials. These are published for wide circulation electronically and readily available for consultation.

CBP also promotes first-instance uniform administration through the direct intervention of experts in the relevant subject areas. Through CBP's National Commodity Specialist Division (NCSD), CBP supervises certain decisions on customs treatment by the Import Specialists who are responsible for treatment decisions in the first instance in the ports of entry. Subject-matter experts at CBP Headquarters also are in daily consultations with field officials as issues arise.

US customs administration also relies heavily on continuous dialogue with importers and other interested persons under the principles of "informed compliance" and "reasonable care."

If definitive information is not available on a particular point, the importer may request a binding ruling on any aspect of customs treatment. Rulings by the NCSD are issued within 30 days; advance rulings issued by CBP Headquarters are issued, except in extraordinary circumstances, within 90 days. The Customs Rulings Online Search System (CROSS) is an essential tool of the binding rulings program. Traders and customs officials constantly refer to the precedents published there for guidance in deciding whether new rulings are needed and on the applicability of previous rulings to rulings in preparation.

When CBP becomes aware of inconsistent decisions, it may correct any rulings less than 60 days old by simple notice to the recipient. More detailed procedures govern the modification or revocation of decisions previously published more than 60 days earlier. Under section 625 of the Tariff Act of 1930, as amended (19 USC 1625), and CBP Regulations (19 CFR 177.12), CBP makes appropriate corrections by giving public notice of the matter for consideration and CBP's proposed modification or revocation, inviting public comment, and then publishing a revision that takes account, as appropriate, of any public comment. Publication of a final section 625 modification or revocation announces the customs treatment that will be given by CBP throughout the customs territory of the United States with regard to the specific good or issue.

Another path for correction of non-uniform customs treatment decisions is administrative protest, pursuant to section 514 of the Tariff Act of 1930, as amended (19 USC 1514). Under this procedure an importer can require CBP to examine and correct non-uniform decisions. Further, an importer has the right to appeal final denial of a protest to the United States Court of International Trade (CIT).

A trader has a right to quickly bring a protested customs decision before a review tribunal. A trader exercises this right by requesting accelerated disposition by the port (19 CFR 174.22). Such a protest not allowed within 30 days is deemed denied; the deemed denial is then ripe for appeal to the CIT without further administrative action.

35. Please specifically identify what the United States is challenging/alleging under Article X:3(b) of the GATT 1994 regarding:

(a) The level of bodies established to review customs decisions and the geographical effect of their decisions (See paragraph 4 of the United States' First Written Submission where it submits that appeals from customs decisions are a matter for each member States and that, currently in the European Communities, there are 25 different appellate regimes, none of which can yield a decision with EC-wide effect);

(b) The procedures in member States regarding appeal mechanisms for review of customs decisions (See paragraph 133 of the United States' First Written Submission, where it notes that the "appellate mechanism in each member State is different" and in paragraph 143 where it states that "appellate procedures vary from member State to member State"); and

(c) Access on the part of traders to the European Court of Justice (See paragraph 5 of the United States' First Written Submission where it states that the European Communities does not afford traders access to the European Court of Justice so as to ensure, inter alia, prompt review and correction of customs decisions).

The United States is alleging that under Article X:3(b) of the GATT 1994, it is the WTO Member (as opposed to regional subdivisions of the Member) that has an obligation to provide tribunals or procedures for the prompt review and correction of administrative action relating to customs matters; that the decisions of such tribunals or procedures must govern the practice of that Member's agencies (here, the EC's agencies, as a whole, not just individual member States' agencies); and that Member's agencies must implement those decisions (again, EC agencies as a whole). The United States also claims that the provision of tribunals or procedures by individual member States within the EC does not satisfy the EC's obligation under Article X:3(b), as the decisions of these tribunals or procedures have effect only within their respective member States and not on EC agencies generally.

The foregoing interpretation of Article X:3(b) is supported by the second sentence of that provision, which states that the tribunals or procedures that a Member provides "shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, *and shall govern the practice of, such agencies*. . . ." (Emphasis added.) The phrase "shall govern the practice of such agencies" requires that enforcement agencies of a Member (here, the EC) follow the reviewing tribunal's decisions. That is, that reviewing tribunal's decisions must be effective with respect to the Member's enforcement agencies, and not just some of them.

Where the German courts decide that a classification rule under the Common Customs Tariff should be interpreted in a particular way, GATT Article X:3(b) requires that decision to govern the practice of the EC's agencies entrusted with administrative enforcement of the Tariff. But because decisions of the German courts apply only to German agencies, they do not govern the practice of all of the EC agencies entrusted with administrative enforcement of the Tariff.

With respect to procedures in member States regarding appeal mechanisms for review of customs decisions, the only allegation the United States is making is that, precisely because the decisions by these appeal mechanisms do not have effect for some of the agencies of the EC, their availability does not discharge the EC's obligation to provide tribunals or procedures for prompt review and correction of customs decisions. The United States is not alleging, as the EC suggests,[68] that the procedures in member States would discharge the EC's obligation if they were sufficiently prompt. The description of diverse member State appeal mechanisms set forth in our First Written Submission was provided by way of background, to demonstrate that the non-uniformity that exists in the administration of EC customs law carries through to the review of decisions by member State customs authorities. In other words, the lack of uniformity of administration that exists in the first instance is not cured by the EC by the provision of review tribunals or procedures that could render decisions with effect throughout the territory of the EC and could, in theory, engender uniformity.

With respect to access on the part of traders to the European Court of Justice, our allegation is

[68]EC Oral Statement, First Panel Meeting, paras. 72-77.

that the access the EC provides to this forum does not discharge the EC's obligation under Article X:3(b). Even though decisions by the ECJ may have effect throughout the territory of the EC, the time it takes for questions to get presented to and decided by the ECJ and the fact that, in general, referral of questions to the ECJ is discretionary (except in the case of referrals by member State courts from which there is no further appeal) means that the ECJ is not a tribunal or procedure for the prompt review and correction of customs administrative decisions.

The EC evidently does not contest this allegation, as it argues that the tribunals or procedures it provides for the prompt review and correction of customs administrative decisions are the member State courts. In this view, the ECJ is not itself a forum for the prompt review and correction of customs administrative decisions but, rather, an EC institution that assists the entities that are fora for the prompt review and correction of customs administrative decisions. For the reasons discussed in the first part of this response, the United States disagrees with the EC's contention that member State courts are fora that fulfill the EC's obligation of prompt review and correction.

36. What body(ies)/procedures are in place in the United States to discharge its obligations under Article X:3(b) of the GATT 1994? Please explain how recourse to this(ese) body(ies)/procedures works in practice.

The United States notes, first, that US institutions and procedures are not at issue in the present dispute. Nevertheless, in the interest of illuminating the issues that are in dispute, the United States answers as follows.

The bodies in place in the United States to discharge its obligations under Article X:3(b) are the Office of Regulations and Rulings within US Customs and Border Protection and the US Court of International Trade (CIT). In general, a trader seeking review and correction of a customs decision made at a port of entry may pursue one of two options. The first option is to seek review by the Office of Regulations and Rulings, through a process known as further review by Headquarters of determinations on protests. Under this process, the Office of Regulations and Rulings provides objective and impartial review of decisions made at the ports of entry. Its decisions are, in turn, appealable to the CIT. The second option, as discussed in response to Question No. 34, is to request accelerated administrative disposition of a protest by CBP, which permits the trader to begin a CIT proceeding 30 days after making such a request if the protest is denied or merely not acted upon by the port.

37. In paragraph 327 and footnote 162 of its First Written Submission, the European Communities suggests that the United States' criticism of the ECJ's decision to allow revocation of binding tariff information in the Timmermans case is inconsistent with its criticism of a UK court's decision to disallow revocation in the Bantex case. Please comment.

Precisely because the EC administers its customs laws through 25 different member State authorities without any centralized customs administration or other mechanism for achieving uniformity, both the situation described in *Timmermans* and the situation described in *Bantex can* engender non-uniform administration. Under the *Timmermans* scenario, a customs authority can revoke BTI on its own initiative notwithstanding the absence of any change in the underlying facts. Where other authorities had relied upon and followed the BTI issued by the first authority, there now arises a non-uniformity. The other authorities are not required by EC law to revise their classifications simply because the first authority decided on its own initiative to revoke BTI.

At the same time, the *Bantex* scenario may also give rise to a non-uniformity. This would occur where a member State has issued BTI, then becomes aware of the existence of conflicting BTI issued by other States, is persuaded that its initial decision was in error and is unable to amend that decision.

The seeming paradox that both of these scenarios may engender non-uniformity is resolved when one recalls that there is no EC-level customs authority or other mechanism to ensure uniform administration. Conversely, if there were a central authority responsible for issuance of BTI, both scenarios would be impossibilities. Any inconsistency that might emerge would be systematically resolved at the EC level. That would be consistent with Article X:3(a). But, it is not what exists today in the EC.

38. In paragraph 454 of the European Communities' First Written Submission, the European Communities submits that, since Article X:3(b) of the GATT 1994 refers to "tribunals" and "procedures" in the plural, this means that WTO Members may have several tribunals, each of them covering a part of its geography and being competent for the review of the administrative decisions taken by their respective customs offices. Please comment.

The significance the EC attributes to use of the plural form in Article X:3(b) is not well founded. Use of the plural form indicates a degree of flexibility. A WTO Member is not constrained to have only a single tribunal or procedure, whether judicial, arbitral or administrative, for the prompt review and correction of administrative action relating to customs matters. A Member might, for example, provide a judicial tribunal but also give traders the option of seeking review and correction by an arbitral tribunal (which might be quicker and less costly). Or, a Member might provide an administrative tribunal for certain types of review (such as protests of classification or valuation decisions) and a judicial tribunal for other types of review (such as the imposition of penalties). Either of these scenarios would be consistent with use of the plural form in Article X:3(b). By contrast, the EC's proposed interpretation would give a meaning to use of the plural form in Article X:3(b) that is inconsistent with the requirement that the decisions of tribunals or procedures for the review and correction of customs administrative action govern the practice of "the agencies entrusted with administrative enforcement."

It is not inconceivable that a WTO Member could provide several review tribunals or procedures, each covering a different part of its geography, in a manner consistent with Article X:3(b). What is important is that the decisions of these tribunals be given effect for the Member's agencies as a whole, so as to govern the practice of the Member's agencies entrusted with administrative enforcement of customs laws and not engender non-uniform enforcement. This might be accomplished where a Member had a single, centralized customs agency, required to give effect throughout the Member's territory to the decisions of any tribunals reviewing its actions. In that case, where the reviewing tribunal covering a given region issued a decision concerning interpretation of classification rules, for example, the customs agency could at once implement the tribunal's decision both in the particular region and throughout the customs territory. This would be consistent with Article X:3(b). However, where – as in the EC – review tribunals cover particular agencies and there is no other mechanism to give effect to the decisions of individual tribunals for the remaining EC agencies (that is, the customs authorities of other member States), the geographical fragmentation of review is inconsistent with Article X:3(b).

39. Please comment on paragraph 79 of the European Communities' Oral Statement at the first substantive meeting to the effect that, on average, review of the most recent 3 classification cases by the USCIT took four years.

Preliminarily, the proposition for which the EC cited the USCIT cases at issue is based on the incorrect premise that the United States is challenging the promptness (or lack of promptness) of review and correction provided by EC member State tribunals. As discussed in response to Question No. 35, *supra*, the United States is not claiming that the EC would fulfill its obligation under GATT Article X:3(b) but for the fact that the review provided by member State tribunals is not prompt. Accordingly, the point that the EC is trying to make by referring to the time for disposition of cases by the USCIT is entirely irrelevant.

Further, the actions of the USCIT are not at issue in the present dispute. Nevertheless, in the interest of illuminating the issues that are in dispute, the United States answers as follows.

First, the EC's discussion at paragraph 79 of its Oral Statement ignores the fact that in the US courts the scheduling of proceedings is, to a significant extent, conducted by mutual consent of the parties, subject to the final control of the court. That was the approach taken in the three cases cited. It is notable that the USCIT itself, once having heard the issues at trial or oral argument, rendered decisions within, respectively, less than four months (Exhibit EC-99); less than four months (Exhibit EC-100); and less than seven months (Exhibit EC-101).

Second, the EC exaggerates the time it took for the USCIT to decide the cited cases by referring to the time from the filing of a formal summons to final disposition. While filing a summons formally commences an action, the action does not really get underway until the plaintiff files a complaint that sets forth his particular allegations. This may occur up to 18 months (or longer, by request) after a summons is filed. Thus, in the case provided as Exhibit EC-101, for example, a summons was filed in April 2001 but was not perfected by submission of a complaint until April 2003.

40. How should "prompt" be defined under Article X:3(b) of the GATT 1994? Please explain how this definition should be applied in practical terms.

The term "prompt" in GATT Article X:3(b) should be defined according to its ordinary meaning, in context, and in light of the object and purpose of the GATT 1994. The ordinary meaning of "prompt," as relevant here, is "without delay." What it means for action to be taken without delay necessarily will depend on context. The word "prompt" does not, by itself, connote a particular passage of time that will be relevant in all contexts. In the context of review and correction of administrative action, promptness may be a function, for example, of the complexity of the case.

From a practical point of view, it should not be necessary for this Panel to determine the precise point at which review and correction ceases to be prompt. As discussed in response to Question No. 35, it is not the claim of the United States that the EC would be in compliance with Article X:3(b) but for the fact that the review and correction provided by member State tribunals is not prompt. Rather, our claim is that given the fact that the decisions of member State tribunals do not govern the practice of EC customs agencies in general, but only particular agencies in that member State, the existence of these tribunals does not discharge the obligation of the EC under Article X:3(b).

The only tribunal whose decisions can be given effect so as to govern the practice of EC customs agencies in general is the ECJ. However, in light of the steps that must be taken in order to get a question reviewed by the ECJ, the review provided by that forum cannot conceivably be characterized as review "without delay." Accordingly, while another dispute may confront a panel with the question of where to draw the line between prompt and not prompt, this Panel does not need to answer that question.

<u>QUESTIONS FOR BOTH PARTIES</u>

89. Could a system in which it is primarily incumbent upon a trader to assert its rights to achieve uniform administration on the part of the customs authorities in a particular WTO Member (for example, by instituting appeals to complain about the decisions/treatment of those customs authorities) comply with the obligations contained in Article X:3(a) of the GATT 1994?

It is difficult to answer this question without knowing about other features of the system hypothesized. Depending on the mechanisms through which traders asserted their rights, such a system might comply with Article X:3(a). For example, a system in which a trader, upon

encountering a case of non-uniform administration, could appeal as a matter of right to a central authority and obtain a resolution of the matter within a relatively brief, set period of time might comply with that obligation. We would contrast this to a system in which the only way to reconcile a non-uniformity as a matter of right is through protracted judicial review of each instance of non-uniform administration separately. That system would not fulfil a Member's obligation under Article X:3(a).

90. At paragraph 11.70 of its report, the Panel in Argentina – Hides and Leather stated that "[t]he relevant question [in determining whether or not Article X:3(a) of the GATT 1994 is applicable] is whether the substance of such a measure is administrative in nature or, instead, involves substantive issues more properly dealt with under provisions of the GATT 1994". Please provide your understanding of this statement, particularly the reference to "a measure that is administrative in nature". In addition, please explain in practical terms how the distinction between measures that are administrative in nature and those that are not is relevant for the application of Article X:3(a).

The United States understands the quoted statement from *Argentina – Hides and Leather* to make clear that the fact that the tools for the administration of laws, regulations, decisions and rulings of the kind described in paragraph 1 of Article X may take the form of measures does not put them outside the scope of Article X:3(a). That article requires that certain specified measures of general application be administered in a uniform manner. The obligation does not concern the substance of the measures being administered but, rather, the manner in which they are administered. Thus, a Member may (as is the case for a part of the US claims under Article X:3(a) in this dispute) challenge the *administration* of a measure without challenging its *substance* (to use the terms in the *Argentina – Hides and Leather* report).

However, the administration of measures may take any number of forms, including ones that are themselves measures. (For example, a penalty provision is a measure that is a means of administration of some other law or rule; it is a means of enforcing compliance with that underlying law or rule.) The statement from *Argentina – Hides and Leather* emphasizes that measures may not only be *objects* of administration, but also *tools* of administration of other measures. Furthermore, measures that are tools of administration (rather than objects of administration) have administration as their "substance" (again, using the terms employed by the *Argentina – Hides and Leather* Panel). So, in the terminology of that report, measures that are administrative in nature are examined under GATT Article X:3(a) for their "substance"; by contrast, measures that do not administer other measures are examined under Article X:3(a) not for their "substance" but to see whether they are being administered in a uniform manner.

The definition of "administrative" is "[p]ertaining to management of affairs; executive."[69] "Executive," in turn, means "[p]ertaining to execution; having the function of putting something into effect. . . ."[70] Thus, a measure is administrative in nature where it has the function of putting something into effect. In other words, it presumes the existence of a distinct law, rule or other measure and serves to execute or carry out that underlying law, rule or other measure. Again, a penalty measure is a good example. A penalty measure necessarily presumes the existence of some underlying measure. It makes no sense to speak of a penalty measure in the abstract, unconnected to a particular measure that is sought to be enforced. A penalty measure has the function of putting into effect underlying measures, such as customs laws.

Audit provisions are another good example. Audit provisions do not exist independently of the rules for which compliance is being audited. They have the function of putting rules into effect by

[69]*The New Shorter Oxford English Dictionary*, Vol. I, p. 28 (1993) (Exhibit US-54).
[70]*The New Shorter Oxford English Dictionary*, Vol. I, p. 877 (1993) (Exhibit US-55).

verifying compliance with those rules.

From a practical point of view, the nature of a measure as administrative is relevant to an evaluation of compliance with Article X:3(a), because such a measure provides evidence of how the measures that it applies to are administered. If different regions within the territory of a WTO Member use different administrative measures to put that Member's customs law into effect then, by definition, the Member does not administer its customs law uniformly.

91. Please provide a copy of the list of proposals made by the United States contained in the document entitled "Elements of Potential EC Customs Reform" dated 22 December 2004.

The list is included with this submission as Exhibit US-49. As the United States explained at the first Panel meeting, we provided this list to the EC in December 2004 in an effort to reach a mutually agreeable solution to the present dispute. The United States views pursuit of the proposals on this list as a reasonable way for the EC to come into compliance with its obligations under Article X:3 but does not view this as the only way for the EC to do so.

92. Please comment on paragraph 7 of its third party submission where the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu argues that the test of "minor administrative variations" under Article X:3(a) of the GATT 1994 referred to by the GATT Panel in EEC– Dessert Apples is not relevant for the present case. Does the applicability of this test depend upon the existence of certain factual/other circumstances? If so, please explain and justify making reference to the specific terms of Article X:3(a).

We agree with the statement by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu for the reasons set out in paragraph 7 of its third party submission. At issue in the *EEC – Dessert Apples* dispute was the fact that different EC member States required applicants to complete different forms for obtaining certain licenses. To the extent the GATT Panel found such inconsistencies to be "minimal" it was because they did not have a material affect on traders. They did not affect traders' liability for customs duties or other aspects of their ability to bring goods into the territory of the EC and distribute and sell them in the EC. Conversely, in the present dispute, we have provided evidence of a system that engenders and fails to cure myriad divergences of administration in matters that go to the core of customs administration and affect traders' liability for customs duty, as well as other aspects of their operations. Such divergences hardly can be described as "minor administrative variations."

93. In paragraph 21 of its Oral Statement at the first substantive meeting, the United States submits that customs laws may be administered through instruments which are themselves laws, such as in the case of penalty laws.

(a) Please comment.

(b) Could this argument apply to all laws, regulations, judicial decisions and administrative rulings of general application referred to in Article X:1 of the GATT 1994?

(c) If so, please identify which types of laws, regulations, judicial decisions and administrative rulings of general application.

(d) What would be the impact and practical effect of such an interpretation on the administration of matters other than customs matters?

With respect to part (a) of this question, we refer the Panel to our responses to Question Nos. 32 and 90.

With respect to parts (b) and (c), it is important to recall that the laws, regulations, judicial decisions and administrative rulings of general application referred to in Article X:1 of the GATT 1994 are the objects of administration under Article X:3(a). That is, they are the measures being administered. In principle, any of these measures is capable of being administered through tools that are themselves laws, regulations or other measures. We see no basis for distinguishing between measures of general application referred to in Article X:1 that are capable of being administered through other measures that are administrative in nature and measures of general application that are *not* capable of being so administered.

With respect to part (d) of the question, we do not see the interpretation propounded as having an impact or practical effect on administration *per se*. Under Article X:3(a), all of the measures of general application referred to in Article X:1 must be administered in a uniform manner. That obligation applies regardless of the form that the administration of a measure takes.

The argument at paragraph 21 of our Oral Statement was a rebuttal to the EC's argument that differences in penalty provisions and audit procedures are outside the scope of Article X:3(a) because they amount to differences of substance rather than differences of administration. The EC assumes, incorrectly, that where provisions manifest themselves as laws, regulations, or other measures they necessarily cannot serve the administration of other measures and provide evidence of non-uniformity of administration of those other measures. Accordingly, the EC contends that with respect to penalty provisions and audit procedures, which in the EC are prescribed separately by each member State, the only obligation under Article X:3(a) is that each member State administer its own penalty provisions and audit procedures uniformly within its own territory.

We countered that the EC's argument glosses over the fact that measures may also serve an administrative function. It ignores the character of penalty provisions and audit procedures as tools for the administration of EC customs law. Viewed that way, differences in penalty provisions and audit procedures from member State to member State are evidence of non-uniformity in the administration of EC customs law.

During discussion of this point at the first Panel meeting, the EC suggested that if the Panel were to accept the US argument with respect to measures such as penalty provisions and audit procedures, it would have widespread implications for matters covered by Article X:1 other than customs matters. The EC noted that in addition to covering customs matters, Article X:1 covers matters that commonly are regulated at regional levels of government, including the sale, distribution, transportation, and insurance of imports. The EC suggested that the US argument concerning penalties and audit procedures would require harmonization in these other areas as well.

The principal flaw in the EC argument remains its disregard of the distinction between measures that are objects of administration and measures that serve in the administration of other measures. The matters other than customs matters described in Article X:1 – such as measures of general application affecting the sale, distribution, transportation, and insurance of imports – are distinguishable from penalty provisions and audit procedures inasmuch as they are objects of administration rather than measures that serve an administrative function. As explained in responses to Question Nos. 29, 32, and 90, *supra*, penalty provisions and audit procedures necessarily presume the existence of some underlying set of laws or rules and serve to carry out that set of laws or rules. This is what makes them administrative in nature. On the other hand, Article X:3(a) requires that measures affecting the sale, distribution, transportation, and insurance of imports themselves be administered in a uniform manner over whatever region within the territory of a WTO Member they apply. Therefore, accepting the US argument concerning penalty provisions and audit procedures would not have the dramatic consequence that the EC suggests of compelling harmonization in a wide array of non-customs areas.

94. With respect to the interpretation of the term "administration" in Article X:3(a) of the GATT 1994, do the parties consider that a distinction should be drawn between, on the one hand, administrative procedures applicable to and the treatment of traders and, on the other hand, substantive decisions and the results of administrative processes that affect traders? If so, please explain the legal basis for the drawing of such a distinction.

The United States sees no basis in Article X:3(a) for the distinction in this question. Article X:3(a) requires uniformity of administration and is indifferent to the different forms that administration may take. This question identifies two alternative forms that administration may take – i.e. administrative procedures applicable to and the treatment of traders, and substantive decisions and the results of administrative processes that affect traders. By the former we understand the Panel to mean, for example, penalty and audit procedures. By the latter we understand the Panel to mean, for example, particular decisions with respect to classification and valuation. A WTO Member would not comply with the obligation of uniform administration by having uniformity with respect to one of these forms of administration but not the other.

QUESTIONS FOR THE PARTIES AND THIRD PARTIES

109. How should the term "administer" be interpreted for the purposes of Article X:3(a) of the GATT 1994?

Interpretation of the term "administer" is discussed at paragraphs 32 to 39 of the First Written Submission of the United States. We also refer the Panel to our answers to Question Nos. 1, 12, and 23, *supra*. Finally, we refer the Panel to our answer to Question No. 90, in which we discuss the meaning of the related term "administrative."

110. Does the uniformity obligation in Article X:3(a) of the GATT 1994 mean that there should be no or only limited possibility for the exercise of discretion in the administration of customs laws?

It is not the case that the possibility of exercising discretion would always lead to non-uniform administration of customs laws, in breach of GATT Article X:3(a). For example, day-to-day operational exercises of discretion – for example, on whether to inspect a particular shipment, whether to perform an audit of a particular importer, or whether to request supplemental documentation in support of a requested classification – probably would not give rise to an absence of uniformity of administration of customs laws.

111. Is the time taken to address a specific issue (including instances of divergences in administration) a consideration to be taken into account for the purposes of the uniformity obligation in Article X:3(a) of the GATT 1994? If so, please explain why, making reference to the specific terms of Article X:3(a).

The time taken to address a specific issue is a consideration to be taken into account for the purposes of the uniformity obligation in Article X:3(a) of the GATT 1994. The time taken to address an issue is relevant to the effectiveness of Article X:3(a). If a Member were permitted to allow non-uniformity of administration to persist for indefinite periods of time, as long as it cured the non-uniformity eventually, the obligation of uniform administration in Article X:3(a) would be rendered meaningless. This would be contrary to the principle of effectiveness in treaty interpretation, as consistently recognized by the Appellate Body.[71]

[71]*See, e.g.*, Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, para. 88 (adopted 12 January 2000); Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 12 (adopted Nov. 1, 1996); Appellate Body

An illustration of the relevance of time to consideration of compliance with the obligation of uniform administration is the case of differential approaches in the EC to the treatment for customs valuation purposes of vehicle repair costs covered under warranty.[72] In its report on administration of valuation rules in the EC, the EC's Court of Auditors stated that it brought this matter to the Commission's attention in 1990.[73] In its First Written Submission, the EC states that it addressed the non-uniformity at issue through the adoption of a regulation in 2002.[74] Thus, while the non-uniformity of administration apparently was cured, it took 12 years to cure it. The United States submits that an interpretation of Article X:3(a) under which a Member will be deemed to administer its laws uniformly where it reconciles non-uniform administration 12 years after such administration is brought to the attention of the relevant authorities would render the obligation of uniform administration a nullity, in contravention of the principle of effectiveness.

112. With respect to the WTO objective of security and predictability in the international trading environment (which was recently referred to by the Appellate Body in the context of tariff commitments at paragraph 243 of its report in EC – Chicken Cuts WT/DS269/AB/R and WT/DS286/R), please explain whether, why and how it is relevant for the interpretation of Article X:3(a) of the GATT 1994.

As we discussed in our opening statement at the first Panel meeting, the EC suggests an exceedingly narrow interpretation of Article X:3(a) of the GATT 1994.[75] It argues that the obligation of uniform administration is subject to a variety of limitations, the net effect of which is to deprive the obligation of uniform administration of any effectiveness. Thus, the EC characterizes Article X:3(a) as a "minimum standards" obligation, qualified by "practical realities," which is breached only when non-uniform administration exhibits a particular pattern.[76]

The Panel should reject the EC's proposed interpretation of Article X:3(a) as lacking any basis in the text and as inconsistent with the principle of effectiveness. In this connection, it would diminish an obligation in a covered agreement, contrary to Article 3.2 of the DSU. As explained in that article, the dispute settlement system provides security and predictability through proper interpretation of the covered agreements and by not adding to or diminishing the rights and obligations of Members.[77]

113. Are the expectations of traders relevant to an interpretation and application of Articles X:3(a) and X:3(b) of the GATT 1994? If so, please explain why and how, making reference to the specific language of those Articles.

The expectations of traders are relevant to an interpretation and application of Articles X:3(a) and X:3(b). Under the customary rules of treaty interpretation of public international law, a treaty must be interpreted in accordance with the ordinary meaning to be given to its terms in their context and in the light of the object and purpose of the treaty.[78] The text and context of Articles X:3(a) and

---

Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, p. 23 (adopted May 20, 1996).

[72]*See* US First Written Submission, paras. 88-89 (discussing Court of Auditors Valuation Report, paras. 73-74 (Exhibit US-14)).

[73]Court of Auditors Valuation Report, para. 73 (Exhibit US-14).

[74]EC First Written Submission, para. 397.

[75]US Oral Statement, First Panel Meeting, paras. 14-23.

[76]*See* EC Oral Statement, First Panel Meeting, para. 24; EC First Written Submission, paras. 235, 238, 241.

[77]The United States also notes that it questions the reference to "security and predictability in the international trading environment" as an object and purpose of the WTO Agreement.

[78]*Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, 1155 U.N.T.S. 331, 8 ILM 679 (July 1969) ("VCLT"), Article 31(1).

X:3(b) indicates that the focus of Article X as a whole is on fairness to traders. Thus, for example, Article X:1 requires Members to publish certain measures of general application "promptly in such a manner as to enable governments *and traders* to become acquainted with them." (Emphasis added.) As the Panel in *Argentina – Hides and Leather* observed, "While it is normal that the GATT 1994 should require this sort of transparency between Members, it is significant that Article X:1 goes further and specifically references the importance of transparency to individual traders. . . . Thus, it can be seen that Article X:3(a) requires an examination of the real effect that a measure might have on traders operating in the commercial world."[79]

Similarly, Article X:3(a) requires not only uniform administration, but also impartial and reasonable administration of customs measures, and Article X:3(b) requires the provision of tribunals or procedures for the prompt review and correction of customs administrative action. The Appellate Body in *US – Shrimp* described these standards as pertaining to "transparency and procedural fairness in the administration of trade regulations."[80] The obvious beneficiaries of the standards pertaining to transparency and procedural fairness are traders.

Moreover, it is notable that the second sentence of Article X:3(b) requires that the practice of agencies entrusted with the administrative enforcement of customs matters be governed by the decisions of reviewing tribunals or procedures "unless an appeal is lodged with a court or tribunal of superior jurisdiction *within the time prescribed for appeals to be lodged by importers*" (emphasis added). In other words, a customs agency may appeal a tribunal's decision, and the tribunal's decision need not govern the agency's practice during the pendency of the appeal, but the agency may not be allowed more time to lodge its appeal than importers would be allowed to lodge their appeals. The reference to the time prescribed for appeals to be lodged by importers as a benchmark is further evidence that the text and context of Articles X:3(a) and X:3(b) supports a focus on traders.

114. Does the obligation contained in Article X:3(a) of the GATT 1994 require overall uniformity in administration or does it require uniformity in administration in each and every case? Does the answer depend upon the nature of the challenge under Article X:3(a)? If so, please explain. If overall uniformity is acceptable under Article X:3(a), what would be the practical/numerical threshold and/or benchmark for demonstrating that Article X:3(a) has been violated?

Article X:3(a) does not specify whether it requires overall uniformity in administration or uniformity in administration in each and every case. However, in the present dispute, the United States is not challenging the EC for failing to achieve uniformity in administration in each and every case. It is challenging the EC for failing to achieve overall uniformity in administration of its customs laws.

For the reasons set forth in our answers to Question Nos. 16, 24, and 33, *supra*, it is not necessary to identify a practical/numerical threshold and/or benchmark for demonstrating that Article X:3(a) has been violated. What the United States has demonstrated is that the system of customs law administration in the EC – consisting of 25 independent authorities, with no central agency or other mechanism to reconcile inconsistencies in administration among those authorities – is such that it does not achieve the uniform administration that Article X:3(a) requires. As it is evidence of how this system is designed and operates that shows the EC's failure to meet its obligation, what is relevant is *the fact* that divergences occur and are not reconciled, *not the frequency* of particular types of divergences.

115. Please comment on the submission made by Japan in paragraph 8 of its third party submission to the effect that, in assessing the United States' claim under Article X:3(a) of the

[79]Panel Report, *Argentina – Hides and Leather*, paras. 11.76-11.77.
[80]Appellate Body Report, *US – Shrimp*, para. 183.

GATT 1994, it is necessary for the Panel to analyze whether the alleged divergences exist, as claimed by the United States, and if so, whether such divergences exist to a degree that would be considered to be inconsistent with Article X:3(a) in light of the particular customs system as a whole.

Please see the US answers to Question Nos. 16, 24, 33, and 114, *supra*. Japan's suggestion for assessing the United States' claim "in light of the particular customs system as a whole" would appear to carry a danger of creating a separate Article X:3(a) standard for every single WTO Member. At issue is one of the most important aspects of the rules-based trading system, and assessment of whether uniformity of administration is being achieved cannot vary in this fashion.

116. In paragraph 2 of Japan's Oral Statement at the third party session of the first substantive meeting, Japan relies upon the "minimum standards" of transparency and procedural fairness referred to by the Appellate Body in US – Shrimp to argue that "[a]n administration of regulations lacking 'uniformity' [for the purposes of Article X:3(a) of the GATT 1994] would in general terms be unjust, biased, inequitable, partial and opaque – in other words, unfair and nontransparent". Following this line of reasoning, would the requirements of transparency and procedural fairness apply to: (i) the processes or the treatment of traders in the context of the application of customs laws; and/or (ii) the substantive customs decisions to which traders are subject?

We refer the Panel to our response to Question No. 94, *supra*.

117. In paragraph 7.268 of its report, the Panel in US – Hot Rolled Steel (WT/DS184/R) stated that "we note that Japan has not even alleged, much less established, a pattern of decision-making with respect to the specific matters it is raising which would suggest a lack of uniform, impartial and reasonable administration of the US anti-dumping law [under Article X:3(a) of the GATT 1994]". Please comment on the Panel's finding that a pattern of decision-making is needed in order to prove a violation of Article X:3(a).

We refer the Panel to our response to Question No. 9, *supra*.

118. What is meant by the words "pertaining to" in Article X:1 of the GATT 1994? Would rules governing the operational procedures of bodies that oversee or are somehow involved in the administration of customs laws – such as, for example, the EC Customs Code Committee – qualify as laws, regulations, judicial decisions and administrative rulings of general application "pertaining to" the classification or the valuation of products for customs purposes?

The words "pertaining to" in Article X:1 have their ordinary meaning, which, in this context, is "[h]av[ing] reference or relation to."[81] These words stand in distinction to the word "affecting," the other connector term in the first sentence of Article X:1. That is, the first sentence describes two categories of laws, regulations, judicial decisions and administrative rulings of general application: (1) those that pertain to certain subject matter, and (2) those that affect certain other subject matter. The word "affecting," as used here, means "influenc[ing]."[82]

In the view of the United States, it is unlikely that rules governing the operational procedures of bodies that oversee or are somehow involved in the administration of customs laws – such as, for example, the EC Customs Code Committee – would qualify as laws, regulations, judicial decisions and administrative rulings of general application "pertaining to" the classification or the valuation of products for customs purposes**.** Such rules governing operational procedures may lack the relation to the subject matter of classification and valuation necessary to qualify as "pertaining to" that subject

[81] *The New Shorter Oxford English Dictionary*, Vol. II, p. 2173 (1993) (Exhibit US-56).
[82] *The New Shorter Oxford English Dictionary*, Vol. I, p. 35 (1993) (Exhibit US-57).

matter.

119. Do penalty laws/provisions applicable to violations of customs laws fall within the scope of the measures referred to in Article X:1 of the GATT 1994? If so, please explain making reference to the relevant terms of Article X:1.

We refer the Panel to our responses to Question Nos. 29 and 32, *supra*.

120. What is the significance of Article XXIV:12 of the GATT 1994 for the interpretation of Article X:3(a) of the GATT 1994?

In its First Submission, the EC suggests that its obligations under Article X:3(a) are somehow qualified by Article XXIV:12.[83] This is not the case. Article XXIV:12 requires each WTO Member to "take such reasonable measures as may be available to it to ensure observance of the provisions of [the GATT] by the regional and local governments within its territories." It is a recognition that for certain WTO Members, particular regulatory matters implicated by GATT obligations may be constitutionally outside the competence of the central government. In such cases, the central government is required to take such reasonable measures as may be available to it to ensure that regional and local governments comply with the relevant obligations. As the EC itself has argued in prior GATT disputes,[84] this is a narrow provision concerning the implementation of certain obligations. It is not a general excuse from or limitation on the applicability of Article X:3(a). Indeed, the panels that have examined Article XXIV:12 have consistently recognized that it must be construed narrowly, to avoid "imbalances in rights and obligations between unitary and federal States."[85]

121. Making reference to the specific terms of Article X:3(b) of the GATT 1994, please explain whether or not the obligation to ensure prompt review and correction of administrative action is confined to first instance reviews by administering authorities.

Article X:3(b) refers to tribunals or procedures for the "prompt review and correction of administrative action relating to customs matters." It is "administrative" action that must be eligible for prompt review and correction under this provision, as opposed to adjudicatory action by inferior tribunals or procedures. This reference suggests that the obligation of prompt review and correction applies to the first tribunal or procedure that a Member provides for the purpose of review and correction that meets Article X:3(b)'s requirement of independence of the agencies entrusted with administrative enforcement. This interpretation is supported by the separate reference in Article X:3(b) to appeals to a "court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers."

122. What does "correction" mean in Article X:3(b) of the GATT 1994?

We understand "correction" as used in Article X:3(b) to have its ordinary meaning, which in this case is "[t]he action of putting right or indicating errors."[86] The tribunals or procedures that a Member provides pursuant to Article X:3(b) must have the authority not only to review administrative

[83]EC First Written Submission, para. 220.

[84]*See, e.g.*, GATT Panel Report, *Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, L/6304, BISD 35S/37, para. 3.52 (adopted 22 March 1988).

[85]GATT Panel Report, *Canada – Measures Affecting the Sale of Gold Coins*, L/5863, paras. 63-64 (17 September 1985) (not adopted); *see also* GATT Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R, BISD 39S/206, para. 5.79 (adopted 19 June 1992) (supporting narrow construction of Article XXIV:12).

[86]*The New Shorter Oxford English Dictionary*, Vol. I, p. 516 (1993) (Exhibit US-58).

action but also to put right errors made by the administrative agencies whose actions they are reviewing.

123. What is the legal relationship between Article X:3(a) of the GATT 1994 and Article X:3(b) of the GATT 1994, if any?

Articles X:3(a) and X:3(b) each provide obligations concerning transparency and procedural fairness to traders. As a legal matter, each subparagraph provides context for the interpretation of the other in accordance with the customary rules of treaty interpretation reflected in Article 31(1) of the Vienna Convention.

ANNEX A-2

RESPONSES OF THE UNITED STATES TO QUESTIONS POSED BY THE EUROPEAN COMMUNITIES AFTER THE FIRST SUBSTANTIVE MEETING

(23 September 2005)

1. In the United States, matters pertaining to taxes or other charges, or affecting the sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use of products, are frequently governed by laws or regulations of the 50 states. The content of such laws and regulations may vary considerably. Does the United States consider that the administration of such state laws and regulations is uniform, as required by Article X:3(a) GATT? Please explain.

The United States notes that the administration of measures of the United States is not at issue in the present dispute. In addition, we note that the question by the European Communities (EC) does not concern customs law, which is the type of measure whose administration is in dispute in these proceedings.[1] Finally, we do not understand the EC to be contending that its substantive customs law varies from place to place within the territory of the European Communities.

2. Does the United States consider that the US Court of International Trade has provided prompt review in the cases referred to as Exhibits EC-99 to EC-101? Please explain.

Please see the US answer to Panel Question No. 39.

3. According to US law (19 US 1515 [a], Exhibit EC-66), US Customs shall normally decide on a protest within two years from the date the protest was filed. Does the United States consider this provision to be in accordance with Article X:3(b) GATT? Please explain.

As was the case with Question No. 2, this question appears to be based on the mistaken premise that the United States is challenging the promptness (or lack of promptness) of review and correction provided by EC member State tribunals. Further, the practices of US Customs are not at issue in the present dispute. Nevertheless, in the interest of illuminating the issues that are in dispute, the United States answers as follows.

The United States considers that its system for the review and correction of customs administrative decisions is entirely consistent with its obligations under GATT 1994 Article X:3(b). Under the provision cited in this question, a protest filed by an importer serves to maintain the status quo pending decision. If the importer prevails, he is entitled to accrued interest on any amounts to be refunded. He is thus fully indemnified.

Moreover, an importer is not compelled to follow the protest procedure referred to in this

[1]Moreover, the premise to this question is incorrect, inasmuch as the scope of the laws and regulations to which it refers does not reflect the text of Article X of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). The obligation of uniform administration in Article X:3(a) concerns the administration of laws, regulations, decisions and rulings of the kind described in Article X:1. The laws, regulations, decisions and rulings of the kind described in Article X:1, in turn, are not laws, regulations, decisions and rulings pertaining to any "taxes or other charges" – as this question suggests. Nor are they laws, regulations, decisions and rulings affecting the sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use "of products" generally – as the EC question also suggests. In both cases, rather, Article X:1 establishes a link to "imports or exports," which this question ignores.

question. A trader is entitled to ask for accelerated disposition of a protest by the port. If the port does not allow such a protest within 30 days it is deemed denied; the deemed denial is then ripe for appeal directly to the US Court of International Trade (USCIT) without further administrative action.

4. Under Article X:3(b) GATT, tribunals or procedures for the review of customs decisions shall be independent of the agencies entrusted with administrative enforcement. Does the United States consider that the review provided by US Customs is in accordance with this requirement? Please explain.

The United States notes that the review of customs administrative decisions in the United States is not at issue in the present dispute. Nevertheless, in the interest of illuminating the issues that are in dispute, the United States answers as follows.

The review provided by US Customs is in accordance with the requirement of Article X:3(b) that a tribunal or procedure for review and correction be independent of the agencies entrusted with administrative enforcement. The office in Customs that is responsible for reviewing customs administrative actions is the Office of Regulations and Rulings, which is part of Customs and Border Protection headquarters. That office is functionally independent of the ports whose decisions it reviews. It comes under the jurisdiction of the Assistant Commissioner of Customs for the Office of Regulations and Rulings whereas the ports come under the jurisdiction of the Assistant Commissioner for Field Operations. And, as an office that is separate and independent from the ports, the Office of Regulations and Rulings in fact provides for an objective and impartial review of administrative action.

5. Does the United States consider that Article X:3(b) GATT requires WTO Members to establish or maintain a tribunal for the review of customs decisions with competence for the entire territory of the WTO Member in question? Does the United States consider that such a tribunal must be a tribunal of first instance, or could it also be a tribunal of higher instance? Please explain.

Please see the US answers to Panel Question Nos. 35 and 121.

ANNEX A-3

RESPONSES OF THE EUROPEAN COMMUNITIES TO QUESTIONS POSED BY THE PANEL AFTER THE FIRST SUBSTANTIVE MEETING

(23 September 2005**)**

QUESTIONS FOR THE EUROPEAN COMMUNITIES:

41. As a matter of EC law, are the European Communities and/or the member States of the European Communities responsible for discharging the obligations contained in Articles X:3(a) and X:3(b) of the GATT 1994?

As a matter of EC law, both the institutions of the European Communities (EC) and the authorities of the member States, each of them acting within their sphere of competences, are responsible for discharging the obligations contained in Articles X:3(a) and (b) GATT.

As a matter of international law, the EC is solely responsible for discharging the obligations contained in Articles X:3(a) and (b) GATT.

42. As a matter of EC law, are the European Communities and/or the member States of the European Communities responsible for the administration of: (a) Council Regulation (EEC) No. 2913/92 of 12 October 1992; (b) Commission Regulation (EEC) No. 2454/93 of 2 July 1993; (c) the Integrated Tariff of the European Communities established by Council Regulation (EEC) 2658/87 of 23 July 1987?

As a matter of EC law, both the institutions of the EC and the authorities of the member States, each of them acting within their sphere of competences, are responsible for the administration of the instruments referred to in the Panel's question.

43. The minutes of the DSB meeting held on 21 March 2005 (WT/DSB/M/186, para. 29) record the European Communities as having stated that the European Communities has in place harmonized customs rules and institutional and administrative measures – enforced by the Commission and the European Court of Justice – to prevent divergent practices. With respect to those comments, please clarify which "divergent practices" the European Communities was referring to?

The EC was referring to any divergent practices which, in the absence of the EC instruments currently in place to secure uniform administration, might arise in the area of EC customs administration. The EC was not referring to any actual examples of divergent practices.

44. In paragraph 22 of its Oral Statement at the first substantive meeting, the European Communities submits that, where laws and regulations exist at a sub-federal level, all that Article X:3(a) of the GATT 1994 requires is that such laws are administered in a uniform manner in the area where they apply. How is this argument relevant in the area of EC customs law which is within the Community's exclusive competence?

This argument is not relevant where the EC has exclusive competence, and where no laws of the member States exist. However, the US claims also relate to areas where the EC does not have exclusive competence, and where member States have legislated. One example is penalties for violations of customs laws, which are set out in laws of the EC member States. Another example

might be the general administrative laws of the member States, where such laws are relevant to the activities of the customs authorities in areas which are not harmonized by EC legislation.

45. In paragraph 16 of its Oral Statement at the first substantive meeting, the United States submits that "the EC suggests a limitation of 'practical realities' but identifies no standard by which that limitation might be assessed. Similarly, while it asserts that 'a minimum degree of non-uniformity is de facto unavoidable' it offers no standard for judging the degree of non-uniformity that may exist without running afoul of Article X:3(a)". Please respond to the United States' comments.

The EC does not agree with the US comment. In paragraph 241 of its First Written Submission, the EC has described the applicable standard as follows:

> Accordingly, whether a particular member meets the requirement of "uniformity" cannot be established merely by looking at an individual example of practice. Rather, uniformity can be assessed only on the basis of an overall pattern of customs administration. Only if, on the basis of such general patterns, a WTO Member's administration of its customs laws can be shown to be non-uniform, is the standard of Article X:3(a) GATT violated.

This standard is fully based on the findings of the Panel in *US – Hot Rolled Steel* .[1] The same approach was followed by the Panel in *US – Corrosion-Resistant Steel Sunset Review*.[2]

Several of the third parties have advocated a very similar test to be applied under Article X:3(a) GATT. For instance, Australia has argued that "given the complex nature of customs systems, some divergences may occur from time to time, but these should not be so widespread or frequent as to render the customs administration inconsistent with Article X:3(a) GATT".[3] Similarly, Japan has submitted the following:[4]

> Therefore, if the Panel considers the cases referred to by the United States as divergences, then further examination is necessary to determine whether the EC's administration lacks uniformity to the "degree" that would be inconsistent with Article X:3(a) of the GATT. Such a determination should be based on whether the cases mentioned by the United States are individual outcomes of the EC's customs administration, or evidences of the non-uniformity of the overall administration of the EC's customs regulation that may have a significant impact on the competitive situation.

It is noteworthy that in other cases, the United States has itself argued in favour a very similar test. For instance, in *US – Hot Rolled Steel*, the US argued as follows:[5]

> The United States also warns that a distinction must be made between the way one specific case was dealt with and the overall administration of laws and regulations envisaged in Article X:3. The

[1] Panel Report, *US – Hot Rolled Steel*, para. 7.268.
[2] Panel Report, *US – Corrosion Resistant Steel Sunset Review*, para. 7.310.
[3] Australia, Oral Statement, para. 6.
[4] Japan, Oral Statement, para. 5.
[5] Panel Report, *US – Hot Rolled Steel*, para. 7.264. Similar arguments were also advanced by the United States in Panel Report, *US – Stainless Steel*, para. 6.47.

> United States stresses the fact that Japan is not arguing that the overall AD practice of the United States is arbitrary or does not ensure the necessary due process rights, but only challenges the way this case has been dealt with.

The US is therefore wrong to submit that the EC suggests no standard for the application of Article X:3(a) GATT. The standard proposed is the one supported by the existing case law under Article X:3(a) GATT, which has been endorsed by numerous members of the WTO, including the United States itself.

At what point instances of non-uniformity would have to be regarded as so widespread and frequent as to constitute an overall pattern of non-uniformity will have to be decided on the facts of the particular case, taking into account the features of the system of customs administration in question. However, that this standard is difficult to define in numerical terms in the abstract does not mean it could not be applied by a Panel.

The United States has not provided a single example of lack of uniformity in the EC's system of customs administration, let alone demonstrated the existence of an overall pattern of non-uniformity. A small number of cases in a particular area clearly would not suffice for the purposes of establishing an overall pattern of non-uniformity. Since the US has so far not come close to discharging its burden of proof, the EC considers it dispensable for the Panel to define which specific number of cases in a given area might constitute a pattern of non-uniformity.

46. In paragraph 25 of its Oral Statement at the first substantive meeting, the European Communities submits that "there is a minimal threshold in Article X:3(a) of the GATT, which implies that a variation in administrative practice must have a significant impact on the administration of customs laws in order to constitute a breach of Article X:3(a) GATT". Please clarify in practical/quantitative terms what the European Communities means by a "minimal threshold" in this respect.

In *EEC – Dessert Apples*, the Panel held that minor variations in the administrative practice of EC member States could not be held to be contrary to Article X:3(a) GATT.[6]

The EC believes that this minimum threshold reflects the fact that Article X:3(a) GATT does not require uniformity for its own sake, but rather intends to protect the interests of traders. This has been recognized by the Panel in *Argentina – Hides and Leather*, which has stated that Article X:3(a) GATT requires an examination of the real effect which a measure might have on traders:[7]

> Thus, it can be seen that Article X:3(a) requires an examination of the real effect that a measure might have on traders operating in the commercial world. This, of course, does not require a showing of trade damage, as that is generally not a requirement with respect to violations of the GATT 1994. But it can involve an examination of whether there is a possible impact on the competitive situation due to alleged partiality, unreasonableness or lack of uniformity in the application of customs rules, regulations, decisions, etc.

From the reports in *EEC – Dessert Apples* and *Argentina – Hides and Leather*, it can thus be deduced that in order to constitute a violation of Article X:3(a) GATT, a pattern of non-uniformity in

[6] GATT Panel Report, *EEC – Dessert Apples*, para. 12.30 (for the full citation, cf. EC First Written Submission, para. 233).
[7] Panel Report, *Argentina – Hides and Leather*, para. 11.77.

the administration of laws must have an impact on the competitive situation of traders, and that this impact must be significant.

The EC does not contest that non-uniformity with respect to matters which have an impact on customs duties owed by the trader could have a significant impact on the competitive situation, and would thus be relevant under Article X:3(a) GATT. For this reason, differences in tariff classification or customs valuation will, if they entail differences in duties payable, constitute more than a minor variation from the point of view of Article X:3(a) GATT, provided they occur on a large scale.

However, the US has also raised claims regarding issues where there is no obvious impact on the competitive situation of traders. One example would be the alleged procedural differences regarding the local clearance procedure, where it is not clear in which way such differences, even if they existed, would have a significant impact on traders.[8] Another example would be the claims made by the US regarding valuation audits.[9]

The EC would point out also that as the complaining party, it is for the US to show that there is an impact on traders, and that such an impact is significant from the point of view of Article X:3(a) GATT.

47. United States refers to divergent decisions taken by member State authorities throughout its First Written Submission. For example, the United States refers to divergence in classification decisions: generally (paragraph 21); with respect to network cards for personal computers (footnote 33); with respect to drip irrigation product (footnote 33); and with respect to unisex articles or shirts (paragraph 76). Further, the United States refers to divergence in customs valuation decisions (paragraphs 25 and 93). Can such divergence in decisions be challenged under Article X:3(a) of the GATT 1994?

First, the EC would like to stress that it contests that there is a divergence in decisions taken by member States both generally and in respect of the specific issues referred to by the US.[10]

Second, whereas individual decisions may constitute relevant evidence for establishing whether there is a pattern of non-uniformity, individual decisions cannot be challenged under Article X:3(a) of the GATT. In this respect, the EC can refer to its answer to the Panel's Question No. 45.

48. In paragraph 5 of its First Written Submission, the European Communities submits that Article X:3(a) of the GATT 1994 is a provision laying down minimum standards for the administration of customs law, not a legal basis for harmonization of the systems of customs administrations of WTO Members. In addition, in paragraphs 231 and 232 of its First Written Submission, the European Communities submits that, since Article X:3(a) only lays down minimum standards, it does not oblige WTO Members to meet the highest possible standards achievable at a given point in time. Please explain what "minimum standards" are demanded with respect to the uniformity obligation in Article X:3(a). Please explain in practical terms how these "minimum standards" can and should be applied with respect to the specific areas of customs administration referred to by the United States – namely, tariff classification, customs valuation and customs procedures.

Article X:3(a) GATT merely requires that WTO Members administer the laws and regulations covered in Article X:1 GATT in a uniform manner. This means that on the basis of the

[8] US First Written Submission, para. 116.
[9] US First Written Submission, para. 96.
[10] Cf. EC First Written Submission, footnotes 158 and 177.

overall pattern of administration, the trader should have a reasonable assurance as to the way in which the WTO Member in question will administer its laws and regulations.

In contrast, Article X:3(a) GATT does not specify in which way a WTO Member should administer its laws and regulations, or which tools it should employ in order to ensure a uniform administration of such laws and regulations. It is on this basis that the EC has submitted that Article X:3(a) GATT is no basis for the harmonization of the customs laws of WTO Members. That Article X:3(a) GATT is not a prescriptive provision has also been stressed by a number of the third parties in the present case.[11]

49. Please comment on the substance of the following statement by the Advocate General in the Timmermans case (paragraph 41 of Exhibit US-21):

> **"... the tariff classification of equivalent goods cannot vary from one member State to another according to the differing assessments given by the various national customs authorities, as this would fail to take into account the objective of securing the uniform application of the customs nomenclature within the Community, which is intended, inter alia, to avoid the development of discriminatory treatment as between the traders concerned."**

The EC agrees with this statement. Community law does not permit identical[12] goods to be classified in different ways.

The EC would like to remark that in this respect, Community law is more demanding than Article X:3(a) GATT, which is concerned only with the overall administration of a Member's laws and regulations, and not with individual instances of tariff classification.

50. Please explain the purpose of binding tariff information, making reference to relevant provisions of EC rules where possible. To the extent that there is any inconsistency, please explain how such purpose can be reconciled with the following statement by the Advocate General in the Timmermans case (Exhibit US-21, para. 60): "As regards the objective of the uniform application of the customs nomenclature, I consider that, while a Commission decision ordering the revocation of BTI is necessarily aimed at, and has the effect of, ensuring the correct and uniform application of the customs nomenclature, the same cannot be said of the practice whereby the customs authorities decide at their own discretion to revoke BTI which they have issued following a change in their own interpretation of the relevant nomenclature, even though, in so doing, the authorities in question may be motivated by the desire to align their interpretation with that given by other customs authorities".

The purpose of binding tariff information is to provide holders with a measure of legal certainty as regards the tariff classification of goods throughout the EC. To this extent, BTI also has the objective of contributing to the uniform administration of tariff classification rules throughout the EC.

---

[11] Australia, Oral Statement, para. 5; Japan, Oral Statement, para. 4.

[12] The EC understands as "identical" goods which correspond to one another in all respects which are relevant for the tariff classification in question. It appears that the Advocate General used the term "equivalent" in the same sense.

This objective can be deduced from numerous provisions of Community law concerning the granting and effect of binding tariff information, in particular Article 12 of the CCC and Articles 5, 10, and 11 of the Implementing Regulation.

The EC disagrees with the statement of Advocate General Léger referred to above. The statement of the Advocate General assumes that a revocation of BTI could be decided by the customs authorities "at their own discretion". The correct classification in the combined nomenclature is not a matter of discretion, and neither is the revocation of BTI which has been found to be incompatible with the combined nomenclature. Similarly, the customs authorities must not align themselves to just any interpretation of the combined nomenclature, but to the correct interpretation.

Furthermore, it must be remembered that like the Commission, the customs authorities of the member States are bound by the combined nomenclature, which they must interpret and apply correctly. Therefore, the Advocate General is wrong to suggest that unlike a revocation by the Commission, a revocation by the customs authorities of a member State cannot be assumed to serve the purpose of a uniform interpretation of the Combined Nomenclature.

It is important to note that the Advocate General was not followed by the Court in Timmermans. In its judgment, the Court did not refer to any discretion to be exercised by the customs authorities. Rather, the Court made clear that the Customs authorities may revoke the BTI only if it is wrong: [13]

> The issue of a BTI is made on the basis of an interpretation by the customs authorities of the legal provisions applicable to the tariff classification of the goods concerned and is subject to proper justification for that interpretation.
>
> Where, on more detailed examination, it appears to the customs authorities that that interpretation is wrong, following an error of assessment or evolution in the thinking in relation to tariff classification, they are entitled to consider that one of the conditions laid down for the issue of a BTI is no longer fulfilled and to revoke that BTI with a view to amending the tariff classification of the goods concerned.

That the application of this case law helps, rather than hinders, the uniform application of EC customs law is convincingly illustrated by the Bantex case, in which the UK customs authorities relied on the Timmermans judgment to revoke a BTI which had erroneously been issued contrary to an applicable classification regulation.[14]

On a more general note, the EC would like to remark that opinions of Advocate Generals are not legally binding in any sense, and are of limited legal value. The opinion rendered by an Advocate General is not in any way biding on the Court, and does not form part of its judgment. Rather, as the Court of Justice has clarified, it constitutes an "individual reasoned opinion" of the Advocate General as a Member of the Court of Justice.[15]

The opinion of the Advocate General may provide useful background for the interpretation of a judgment of the Court of Justice where the Court has followed the Advocate General. In contrast,

---

[13] Exhibit US-2, paras. 24-25 (emphasis added).

[14] Cf. EC First Written Submission, fn. 162 and para. 469.

[15] Order of the Court of Justice, Case C-17/18, *Emesa Sugar*, [2000] ECR I-665, para. 14 (Exhibit EC-102).

where, as in Timmermans, the Court has not followed the Advocate General, the Opinion of the Advocate General is of very limited legal relevance, and cannot be relied upon for ascertaining the correct interpretation of EC law.

51. Article 11 of the Implementing Regulation provides that "[b]inding tariff information supplied by the customs authorities of a member State since 1 January 1991 shall become binding on the competent authorities of all the member States under the same conditions". In light of this provision:

(a) Please identify the practical measures in place to enforce Article 11 of the Implementing Regulation and explain how those practical measures operate in practice.

Article 11 is contained in a regulation of the European Commission. In accordance with Article 249 (2) EC Treaty, a regulation is binding in its entirety and directly applicable in all member States. Accordingly, no further general measures are necessary to ensure the applicability of this provision.

Should a member State fail to respect its obligation under Article 11 of the Implementing Regulation, the normal mechanisms for securing the application of Community law would apply. Any holder of BTI which is not recognized contrary to the provisions of Community law could obtain judicial protection before the courts of the member State in question. In addition, the European Commission could bring infringement proceedings against a member State which does not respect its obligation to recognize BTI.

(b) Please explain whether and, if so, in what circumstances, binding tariff information that is issued by one member State is binding on the competent authorities of other member States, making reference to all relevant EC rules.

Article 5 Nr. 1 of the Implementing Regulation provides that BTI is binding on the administrations of all member States when the conditions laid down in Articles 6 and 7 are fulfilled. Accordingly, all BTI issued in accordance with Community law, and which continues to be valid, is binding on the competent authorities of all member States.

(c) Are there any circumstances when binding tariff information that is issued by one member State is not binding on the competent authorities of other member States? If so, please explain in what circumstances that will be the case, making reference to all relevant EC rules.

No. If BTI is binding on one member State, it is binding on all member States, and vice versa. As regards the conditions under which BTI may cease to be valid, the EC can refer to paragraph 115 of its First Written Submission.

52. Article 8.1 of the Implementing Regulation provides that "[a] copy of the binding tariff information notified ... and the facts ... shall be transmitted to the Commission without delay by the customs authorities of the member State concerned". Does the transmission of binding tariff information from customs authorities to the Commission contemplated by Article 8.1 of the Implementing Regulation occur in practice? What does the Commission do with the binding tariff information once notified pursuant to Article 8.1 of the Implementing Regulation?

The transmission of binding tariff information from the customs authorities to the Commission contemplated by Article 8.1 of the Implementing Regulation does occur in practice. The

data received by the Commission is introduced into the EBTI data base in accordance with Article 8.3 of the Implementing Regulation.

53. Article 10(2)(a) of the Implementing Regulation provides that the customs authorities may require the holder of binding tariff information, when fulfilling customs formalities, to inform the customs authorities that he is in possession of binding tariff information in respect of goods being cleared through customs. Please provide evidence of how often and in what circumstances customs authorities exercise their discretion in Article 10(2)(a) to require disclosure of relevant binding tariff information.

Member States may invoke Article 10 (2) (a) of the Implementing Regulation wherever this is warranted by the particular circumstances of the case, in particular if there is a doubt about the correct classification of the good and if there is a suspicion that the trader may be in possession of BTI. The member States and the European Commission do not keep statistics on the number of times this provision is invoked.

54. Please comment on the EC Commission's statement at page 12 of An Explanatory Introduction to the modernized Customs Code (Exhibit US-32) that "it is proposed to extend the binding effect of [binding tariff information] also to the holder(s) of the decision in order to avoid the system only being used where the applicant is satisfied with the result" in light of paragraph 308 of the European Communities' First Written Submission calling into question the United States' submission that binding tariff information is not binding on holders thereof.

Currently, BTI is binding only on the customs authorities (cf. Article 5 of the Implementing Regulation). In contrast, no provision currently provides that BTI is binding on the holder, although the customs authorities may, on the basis of Article 10 (2) (a) of the Implementing Regulation, require the holder to inform them, when fulfilling customs formalities, that he is in the possession of BTI.

The Commission services are currently considering including a provision in the modernized customs code which would render BTI binding also on the holder. The provision as currently envisaged would read as follows:[16]

> Classification or origin decisions shall be binding only in respect of the tariff classification or determination of the origin of goods and on
>
> – the customs authorities, as against the holder, only in respect of goods on which customs formalities are completed after the date of the decision;
>
> – on the holder, as against the customs authorities, from the date he receives notification of the decision.

The objective of such a provision would be to achieve a balance of obligations between the customs authorities and the holder, and to further increase the transparency of the BTI system. In this way, the provision in question reflects the EC's commitment to the continuous development and modernization of EC customs legislation.

In contrast, the EC does not consider that the provision in question is in any way essential for compliance with the EC's obligation under Article X:3(a) GATT. As the EC has already explained,[17]

[16] Exhibit US-33, Article 14 (3). It should be stressed that this provision, as all other provisions in Exhibit US-33, is purely a working text, and does not constitute the official position of the European Commission, or of any other EC institution.

BTI is granted primarily for the benefit of the holder, who can therefore normally be expected to invoke it. If the holder is dissatisfied with the BTI he has received, the normal course of action would be for the holder to challenge the BTI in the courts. Moreover, there is no reason to assume that other EC customs authorities would classify the good in question differently just because the BTI is not invoked.

Finally, it should be noted that the version of the EBTI data base available to the customs authorities allows the customs authorities to search for the name of the applicant or of the holder.[18] Accordingly, if there is a suspicion that a particular trader may be a holder of BTI for the goods in question, this can easily be confirmed through consultation of the data base.

55. In light of the "Administrative Guidelines on the European Binding Tariff Information (EBTI) System and its Operation" (Exhibit EC-32), which expressly state that the Guidelines are not legally binding, are customs authorities required to make reference to the EBTI system before issuing binding tariff information? If so, please indicate the legal basis for such an obligation and the circumstances in which reference to the EBTI system is required.

The Administrative Guidelines as such are not legally binding. However, in the administration of EC customs law, all member States are bound by the duty of cooperation (Article 10 EC).

This means that member States must take due account of the administrative guidelines. Moreover, they must use all tools available to ensure the proper and uniform administration of EC customs law. In this context, it is noted that the establishment of the EBTI data base is explicitly foreseen in Article 8 (3) of the Implementing Regulation.

On this basis, member States are required to duly consult the EBTI data base in all appropriate cases. In which specific cases consultation of the EBTI data basis should occur, and how extensive a particular search should be, has to be determined on a case-by-case basis. In this context, the EC member States are guided by the criteria set out in the Administrative Guidelines on the EBTI system.[19]

56. The "Administrative Guidelines on the European Binding Tariff Information (EBTI) System and its Operation" state at page 8 that, where two or more member States disagree on the correct classification for a particular good, the Customs Code Committee should be informed. Please explain the practical mechanisms in place to ensure that the Customs Code Committee is duly informed in such circumstances.

As a first step, the member States concerned should consult with one another. Such consultation can be done through any appropriate means. member States have a list of contact persons in each customs authority which they can contact in such cases, which is made available to the member States through the Circa Extranet.

If the disagreement persists, the matter must be raised to the Customs Code Committee. In legal terms, the basis for this is Article 249 CCC and Article 8 of Regulation 2658/87, according to which the Customs Code Committee may examine any question concerning customs legislation or the common customs tariff, either at the initiative of the chairman or at the request of a member State's representative. In practice, the responsible official in the member State concerned will submit the

[17] Cf. EC First Written Submission, para. 309.
[18] EC First Written Submission, para. 111.
[19] Cf. Exhibit EC-32, p. 7.

issue to the Commission, which will then put it on the agenda of the Customs Code Committee in accordance with Article 3 (2) (c) of the Committee's Rules of Procedure.[20]

57. In paragraph 320 of its First Written Submission, when discussing the utility of the EBTI system for detecting divergences in binding tariff information issued by different customs authorities, the European Communities concedes that product descriptions might vary but that searches can be undertaken using a variety of other parameters. Please explain using concrete examples which parameters could be used in order to ensure that such divergences can be detected.

First of all, it appears necessary to recall that there are two versions of the EBTI data base, one available to the public, the other, containing additional information, accessible to the Commission and the customs authorities of the member States.[21] The EC understands the Panel's question to relate to the public version of the data base.

The public version of the EBTI data base allows searches of valid BTI by issuing country, start and end date of validity, BTI reference, CN code, keyword, or product description. As the EC has explained, the keyword facility also includes a translation facility, which allows translation of keywords into the official Community languages.

Typically, therefore, if a search using the product description does not yield results, a promising search strategy will be to identify the CN codes which might be considered for the classification of the products, and to search them using appropriate keywords.

Furthermore, to help enquiries using keywords, the enquirer can make a "keyword search". Such a search reveals all keywords available in alphabetical order. To use the keyword search, the enquirer need only insert the first few letters of a word and all words in the browse that begin with those letters will be shown.

Finally, it should be mentioned that BTI often also contain an image of the product concerned, which will help with assessing whether a product classified in an existing BTI is identical to the product being considered by the enquirer

58. With respect to the work undertaken by the Customs Code Committee:

(a) In respect of which specific customs matters does the Customs Code Committee have the authority to reconcile differences among the member States?

On the basis of Article 249 CCC, the Customs Code Committee may deal with any issue concerning the interpretation or application of customs legislation. Similarly, on the basis of Article 8 of Regulation 2658/87, the Committee may deal with any matter concerning the Combined Nomenclature or the Taric nomenclature.

With respect to the present and the following questions, the EC would like to clarify that it is not entirely precise to refer to the Committee as "reconciling differences". In particular, this is not correct in all cases where the Committee is consulted on measures intended to ensure uniformity, such as for instance classification regulations or explanatory notes. In these cases, it is the instrument itself which will ensure a uniform application of Community law; it is not the Committee as such which is "reconciling" a difference.

(b) As a practical matter, how does the Customs Code Committee prioritize matters before it?

[20] Exhibit US-9.
[21] EC First Written Submission, para. 110.

First of all, the work of the Committee is carried out in the various sections of the Committee, as listed in Article 1 (1) of the Committee's Rules of Procedure.

For each meeting of the Committee, the Chairman will draw up the agenda in accordance with Article 3 of the Committee's Rules of Procedure. The agenda will include all matters put before the Committee by the Commission, including drafts of all measures on which the Committee is to be consulted under the comitology procedure, as well as all matters referred to the Committee by a member State.

From a practical point of view, the Chairman may tend to address more urgent matters earlier than less urgent matters. However, the Committee will address all issues that need attention at a given point in time.

(c) How frequently do each of the various sections of the Customs Code Committee meet?

From 2002 to 2004, the number of meetings of the Customs Code Committee has been as follows:

2002	Total number of meetings of the Customs Code Com.	77
2002	Total number of days	113,5
2003	Total number of meetings of the Customs Code Com.	47
2003	Total number of days	77,5
2004	Total number of meetings of the Customs Code Com	85
2004	Total number of days	118,5

An overview of the number of meetings per section is provided as Exhibit EC-103.

(d) Can working groups of the Customs Code Committee make decisions and/or take action that could be considered as decisions/action of the Customs Code Committee? If so, please identify the types of decisions/action.

No. Working groups merely prepare the work of the Committee.

(e) In paragraph 87 of its First Written Submission, the European Communities submits that, where justified by the complexity of a particular issue, the Customs Code Committee may hear representatives of the concerned industry or traders and has done so in the past. Please identify the number of occasions and circumstances in which industry representatives and traders were consulted by the Customs Code Committee.

A list of organizations and traders invited to take part in meetings of the Customs Code Committee with indication of the subject, number of the meeting and the day in which it took place is attached as Exhibit EC-126. It covers the period from end-1999 to today.

(f) What criteria does the Customs Code Committee rely upon in determining whether or not divergence in a particular area of customs administration should be the subject of an EC Regulation?

A regulation will always be an act of the Commission, not of the Committee. Therefore, it is in the first place the Commission, not the Committee which must decide whether a regulation would be the appropriate measure. Where required by Community law, the Committee will of course be consulted on the proposed measure in accordance with the applicable comitology procedure.

The question whether a specific matter should be addressed through a regulation or through other instruments cannot be answered in general, but would depend on the specific issue in question. One relevant factor would certainly be whether the issue must be addressed through an instrument which is legally binding and directly applicable in all member States, in which case a regulation might be the preferred instrument.

(g) In paragraph 277 of its First Written Submission, the European Communities submits that "[d]ocuments relating to the Customs Code Committee, including agendas and summary records of meetings, are available on the public register of comitology of the European Commission, which is available to the public through the internet". The excerpt of the webpage through which these documents are available (contained in Exhibit EC-73) states that the "register does not contain those documents that are not sent to the European Parliament". Does this mean that agendas and summary records of meetings are sent to the European Parliament? Which other documents "relating to the Customs Code Committee" are available through the relevant website?

Yes, agendas and summary records are sent to the European Parliament. Generally speaking, no other documents are available through the relevant website.

(h) Could the exception contained in Article 4(3) of Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (Exhibit EC-74) ever be invoked with respect to any documents prepared by the Customs Code Committee? If so, please explain in what circumstances, providing relevant practical examples, if possible.

The exception contained in Article 4(3) of Regulation (EC) No. 1049/2001 can in principle also apply to documents relating to the Customs Code Committee. In accordance with Article 4 (3), this would require that disclosure of the document would seriously undermine the institution's decision-making process.

This provision has been invoked in one case concerning access to working documents of a working group of the Tariff and Statistical Nomenclature Section of the Customs Code Committee. An annulment action against the decision to refuse access to the documents is currently pending before the Court of First Instance.

(i) Regarding binding tariff information:

(i) For the purposes of Article 9 of the Implementing Regulation, how are differences in binding tariff information identified?

As the EC has already set out in its First Written Submission,[22] differences in tariff classification may be identified in a number of ways. First, the difference may be noted by the customs authorities in the course of their normal work when classifying products or deciding on requests for BTI. One tool through which the customs authorities may detect divergences is the EBTI data basis. However, customs authorities may also learn about divergent practices in other ways, e.g.,

[22] EC First Written Submission, para. 314.

through discussions of classification issues with their contact points in other administrations or within the Customs Code Committee, or through public sources.

Moreover, traders may also draw the attention of the member States' customs authorities or of the Commission to the existence of practices in the field of tariff classification.

(ii) How are differences in binding tariff information brought to the attention of the Committee?

The EC can refer to its answer to the Panel's Question No. 56.

(iii) Please explain in practical terms how the Committee reconciles differences in binding tariff information that are brought to its attention pursuant to Article 9 of the Implementing Regulation. Please make reference to any relevant examples.

The Committee[23] is frequently asked to give an opinion on measures proposed by the Commission which will secure a uniform application of the CN, such as classification regulations and EC explanatory notes. In addition, the Committee also may adopt opinions on specific issues of tariff classification, which will be reflected in the records of its meetings.

(iv) How many cases of differences in binding tariff information have been put forward to the Committee for reconciliation? How did those cases come to be on the Committee's agenda? What was the outcome in each of those cases, including the proposals made by the Committee and the action taken by the EC Commission, if any? How long did it take to resolve those cases?

Given the short amount of time available, the EC is not yet able to provide an answer to this part of the question. The EC will provide its answer to this part of the Panel's question as soon as possible.

(Reply received on 3 October 2005):

From 1.1.2000 until today, 196 cases involving perceived divergences between BTIs have come before the Customs Code Committee.

Out of these cases, 178 were referred by the customs authorities of one or more member States, whereas 18 were brought before the Committee by the Commission.

3 of these cases were resolved following a judgment of the Court of Justice, 78 led to the adoption of a classification regulation by the Commission, 9 to the adoption of a CN explanatory note, 3 to the adoption of a Commission decision on the invalidation of BTI, 43 cases led to conclusions of the Committee, and in 4 cases, the matter was submitted to the HS committee.

The average processing time until conclusion has been about 13 months. This average includes periods necessary for translation of legal measures and internal decision-making of the European Commission.

(j) Regarding customs valuation:

(i) In paragraph 77 of its First Written Submission, the United States submits that the Customs Code Committee does not have the authority

[23] On the term "reconciliation", cf. above the EC's answer to Question No. 58 (a).

to examine individual customs valuation cases with a view to reconciling differences in administration from member State to member State. Please comment.

In accordance with Article 249 CCC, the Committee may address any question concerning customs legislation, including valuation issues. The Committee may thus examine any question regarding the interpretation and application of valuation rules, including the question whether divergences have occurred in particular instances.

Another matter is that the function of the Committee is not to administer valuation rules in individual instances. Accordingly, the Committee will not substitute itself for the individual customs authorities or the competent courts of the member States in pending cases.

(ii) In what circumstances will/must the Customs Code Committee consider divergences among member States in their application of EC rules on customs valuation?

The Committee will consider any divergence in the application of EC valuation rules which is brought before it by the Commission or a member State.

(iii) Please explain in practical terms how the Committee reconciles differences in the application of EC rules on customs valuation. Please make reference to any relevant examples.

The Committee may issue opinions, which can take the form of conclusions or commentaries to the EC valuation rules. The conclusions of the Committee are contained in the EC Valuation Compendium.[24] The Commission will also consult the Committee on any draft amendments to the valuation rules contained in the Implementing Regulation.

(iv) How many cases of divergences in application of rules on customs valuation have been put forward to the Committee for reconciliation? How did those cases come to be on the Committee's agenda? What was the outcome in each of those cases, including proposals made by the Committee and the action taken by the EC Commission, if any? How long did it take to resolve those cases?

An overview of issues discussed in the valuation section of the Customs Code Committee in the 3-year period from mid 2002 to mid 2005 is attached as Exhibit EC-104.

(v) In paragraph 29 of the Commission's replies to the Court of Auditors Special Report No 23/2000 concerning valuation of imported goods for customs purposes (Exhibit US-14), the Commission states that "[u]nder the rules of the Customs Code regarding the Valuation Committee the Commission has no power to ask member States' administration to render account of the treatment applied to a given operator in each of these states. The Code Committee tries to establish rules, guidelines or other conclusions, usually without examining individual cases". Please comment.

[24] Cf. EC First Written Submission, para. 130, and Exhibit EC-37.

It is correct that under the Rules of Procedure of the Customs Code Committee, there is no specific provision given the Commission a power to ask member States' to provide specific information.

However, in the administration of customs laws, as in the administration of EC law generally, member States are bound by the duty of cooperation (Article 10 EC). This duty of cooperation implies a duty of facilitating the Commission's tasks as guardian of the Treaty, including a duty to provide all information which is necessary for the Commission in order to ascertain whether member States have applied Community law correctly. This has been explicitly confirmed by the European Court of Justice in its case law:[25]

> The member States are under a duty, by virtue of Article 5 of the Treaty, to facilitate the achievement of the Commission' s tasks, which consist in particular, pursuant to Article 155 of the EEC Treaty, in ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied. A member State's refusal to cooperate with the Commission for the purpose of the latter' s investigations to establish whether or not Community law has been infringed by rules and practices applied in that State therefore constitutes a failure by that State to fulfil its obligations.

Moreover, there is no general problem with transmission of information by the member States to the Commission in the area of customs valuation. Another matter is, as the EC has already remarked, that it is not the function of the Committee to substitute itself for the individual customs authorities or the competent courts of the member States in pending cases.

(k) With respect to paragraphs 103–104 of the European Communities' First Written Submission:

(i) Please clarify with respect to which matters does the Customs Code Committee adopt opinions through the comitology procedure.

The Customs Code Committee adopts opinions under the comitology procedure in the following matters:

- General legislation
- Counterfeit and pirated goods
- Customs procedures with economic impact
- Customs valuation
- Customs warehouses and free zones
- Duty-free arrangements
- Favourable tariff treatment (end-use of goods)
- Movements of air or sea passengers' baggage
- Origin
- Repayment
- Single Administrative document
- Tariff and statistical nomenclature – tariff classification//HS//TARIC/Textile/BTI
- Economic Tariff questions - Quotas
- Transit

[25] Case 272/86, *Commission/Greece*, [1988] ECR 4875 (Exhibit EC-105). Article 5 EC is now Article 10 EC.

(ii) Please provide detail regarding the subject-matter of opinions adopted by the Customs Code Committee on questions relative to the application and interpretation of the combined nomenclature. What procedures apply with respect to such opinions?

Opinions of the Customs Code Committee may relate to any matter of EC customs law.

From the legal point of view, where the Committee adopts opinions outside of the regulatory or management procedure, the Committee may do so by simple majority.[26] Typically, however, opinions of the Committee will be adopted in cases where the approach is the subject of broad agreement in the Committee. Where issues are controversial, a legally binding measure may be preferred.

(iii) Can the Customs Code Committee adopt opinions on matters other than those adopted through the comitology procedure and those adopted on questions relative to the application and interpretation of the combined nomenclature? If so, please identify and explain the procedures for their adoption.

In accordance with Article 249 CCC, the Committee can adopt opinions on all matters of Community customs legislation. The procedures are those explained in the answer to the preceding question.

(l) In paragraph 4 of Joined Cases 69 and 70/76, Dittmeyer, [1977] ECR 231 (Exhibit EC-31), the European Court of Justice notes that the opinions of the Customs Code Committee are not legally binding and suggests that such opinions may not be followed in certain circumstances. Please specifically identify the circumstances in which an opinion of the Customs Code Committee may not or will not be followed by the EC Commission, authorities of member States and/or any other relevant body. Please provide statistics, if any, of instances when the opinion of the Customs Code Committee has not been adopted/followed.

Opinions of the Customs Code Committee are not legally binding. However, as the Court has also stated in the judgment in question, they constitute an important means of ensuring the uniform application of the common customs tariff and as such may be considered as a valid aid to the interpretation of the tariff.

Member States' customs authorities are not legally bound by the opinions of the Customs Code Committee. However, they are bound by the duty of cooperation (Article 10 EC), which includes an obligation to contribute to the uniform application of Community law. For this reason, EC member States are bound to give due weight to interpretations of EC customs law set out in opinions of the Customs Code Committee.

From a practical point of view, it must be underlined that opinions of the Committee typically reflect a common approach agreed by all member States. Accordingly, member States will normally observe such agreed opinions as a matter of course.

59. In paragraph 316 of its First Written Submission, the European Communities submits that individual traders "frequently approach the Commission or member States authorities with particular problems of customs classification, who can then decide to take the necessary action, including raising the issue before the Customs Code Committee". Are there any rules

[26] Cf. Article 3 of the Comitology Decision (Exhibit US-10).

and/or guidelines in addition to the principles of good administrative behaviour applicable to the EC Commission indicating what the Commission and member State authorities should do and within what timeframes when approached by individual traders?

If a trader submits a complaint regarding an infringement of Community law by the authorities of a member State, the principles set out in the Commission Communication on the relations with the complainant (Exhibit EC-11) will apply.

Otherwise, the Commission's Code of Conduct contained in Annex to the Commission's Rules of Procedure (Exhibit EC-12) will be applicable. Point 4 of the Code of Conduct contains rules for dealing with inquiries. According to these rules, the Commission services undertake to answer enquiries in the most appropriate manner and as quickly as possible. Moreover, correspondence is normally to be replied to within 15 days, unless the complexity of the matter does not allow a response within such time-frame

60. According to the binding tariff information issued by the customs authorities of the United Kingdom, Ireland and the Netherlands (contained in Exhibit US-22), the blackout drapery lining the subject of the binding tariff information were coated with textile flocking and were classified under heading 5907 of the EC Combined Nomenclature. Please explain why these products should be classified under heading 5907 making reference to the specific terms and meaning of heading 5907.

The products subject of these BTI are products where textile fabric has been coated with plastics which in turn has been coated by textile flock. The classification in these BTI has been made in accordance with General Interpretative Rules 1 and 2 of the Harmonized System and the Harmonized System Explanatory Note (G) (1) to heading 59.07 (Exhibit EC-127).

61. Providing all relevant evidence, please explain whether and, if so, how the allegedly conflicting binding tariff information for blackout drapery lining came to the attention of the EC Commission.

On a preliminary point, the EC would like to recall that Germany has not issued any BTI, so that there can be no conflicting BTI. Moreover, as the EC has already explained, there is no contradiction between the BTI issued and the classification decision of the German customs authorities.[27]

The EC institutions first became aware of this case first through Inside US Trade of November 12, 2004 (Exhibit EC-1), which reported on a submission made by Rockland Industries to USTR following USTR's request for comments on the US consultation request in the present case.

The US raised the case directly with the EC for the first time in its First Written Submission in the present case. Since then, the US has also raised the BDL case at a technical meeting between US Customs and Border Protection and DG TAXUD in Washington on 14 July 2005. A copy of a note handed over by US Customs to DG TAXUD is attached as Exhibit EC-106.

62. In paragraph 407 of its First Written Submission, the European Communities submits that the Valuation Section of the Customs Code Committee examined the issue of the application of Article 143(1)(e) of the Implementing Regulation by Spanish customs authorities but did not establish any incompatibility with EC law or lack of uniformity. If so, why was the matter referred to a working group of the Committee? Currently, at what stage are discussions

[27] EC First Written Submission, para. 331 et seq.

of the working group with respect to this issue? When is a final decision due by the Committee on this issue? How long will it take before the issue is finally resolved by the Commission?

In the case of Reebok, the firm concerned has not accepted the position of the Spanish administration on the application of certain provisions of the EC Customs Code and Implementing Provisions[28] to a particular commercial situation and following various interventions the Commission presented the elements provided by Reebok to the Committee (for confidentiality reasons, Reebok was not identified as such).

During the meetings of the Customs Code Committee on 1st October and 20th December 2004, the views of delegates were that the facts tended to show that the parties were related, as was previously concluded by the Spanish authorities.

Since similar cases had been raised by two other member States in was considered that, in 2005, further work was desirable in this context. It was also recalled that since similar cases had come in for attention, and these relate to manufacturing and processing operations which have become significant in trade and economy terms, the Commission decided to carry further the work on the basis of a working group of the Committee.

In August 2005 Reebok submitted, at the Commission's request, material indicating that there could be a divergent approach in another member State. This material will now be looked at.

The working group will begin to meet and work shortly. It is intended that the group will produce concrete outputs which will both address the general interpretation and application of Article 143(1)(e), and the specific elements which have been the subject of disagreement between the customs authorities in Spain and the firm in question.

63. In paragraph 44 of its Oral Statement at the first substantive meeting, the European Communities submits that "EC valuation rules are quite detailed and guide the EC customs authorities in all relevant circumstances". Please explain how this statement can be reconciled with the EC Commission's replies to the Court of Auditors Special Report No 23/2000 concerning valuation of imported goods for customs purposes (Exhibit US-14) to the effect that EC valuation rules are, to a large extent, based on simple but imprecise concepts which the WTO legislator has tried to clarify in particular by establishing a range of sub-concepts without however the margin of appreciation for the customs authorities being in reality significantly reduced.

The EC would like to remark that the statement referred to in the question refers in the first place to the rules of the WTO Valuation Agreement.

As regards EC valuation rules, the EC maintains that these rules are detailed and cover all relevant aspects of valuation practice, and thus provide comprehensive guidance for EC customs authorities on all questions of customs valuation. That valuation rules acquire application to complex factual situation, and that occasionally, difficulties of interpretation or application may occur, is not in contradiction with this assessment.

64. With reference to paragraph 400 of the European Communities' First Written Submission:

(a) What is the definition of a "customs procedure" under EC customs law?

[28] Article 29(2) of the Customs Code and Articles 143(1)(e) and 147 of the Customs Code Implementing Provisions.

Article 3 (16) CCC defines a "customs procedure" as any of the following:

- release for free circulation;
- transit;
- customs warehousing;
- inward processing;
- processing under customs control;
- temporary admission;
- outward processing;
- exportation.

(b) What is the significance of categorising a matter as a "customs procedure" for the purposes of EC customs law?

Numerous provisions of the Customs Code refer to the term "customs procedure". One example would be Article 250 CCC, to which the Panel's Question No. 67 refers.

(c) Please explain why the definition of "customs procedures" under EC customs laws should govern whether or not such procedures fall within the scope of Article X:3(a) of the GATT 1994.

These are independent questions. The term "customs procedure" is a term of EC law. The scope of Article X:3(a) GATT depends on whether the law or regulation which is administered pertains to one of the subject matters enumerated in Article X:1 GATT.

(d) Please identify the main purpose of post-release audits.

In accordance with Article 78 (2) CCC, the purpose of post-release audits is to assess whether import declarations have been filed accurately.

(e) Why are post-release audits not considered as "customs procedures"?

Because they are not one of the procedures referred to in Article 3 (16) CCC.

65. The Council Resolution 95/C 188/01 of 29 June 1995 on the effective uniform application of Community law and on the penalties applicable for breaches of Community law in the internal market (Exhibit EC-41) provides that the Council agrees "that if there prove to be serious difficulties for the smooth operation of the internal market due to disparities in national penalty arrangements, solutions will have to be sought when necessary, so that penalties are such as to ensure that legislation is applied equally effectively throughout the Union, with due regard for the respective jurisdictions of the Community and the member States and the principles of the member States' national law, and in the light of the subsidiarity and proportionality principles". Have any "solutions" ever been taken by the Council in accordance with this provision? If so, please explain the situations in which such solutions were sought and why they were considered necessary.

No.

66. Making reference to the relevant provisions of EC customs law, please explain the circumstances in which an economic conditions assessment is needed at the member State level and/or at the EC level in determining whether or not processing under customs control should be authorized.

As the EC already explained in paragraphs 135 to 138 of its First Written Submission, for the types of goods and operations mentioned in Annex 76, Part A, of the Implementing Regulation (Exhibit US-6), which represent the majority of the cases, the economic conditions shall be deemed to be fulfilled in accordance with Article 552(1) first subparagraph of the Implementing Regulation). This means that, in these cases, customs authorities do not examine the economic conditions.

For the types of goods and operations mentioned in Annex 76, Part B, of the Implementing Regulation and not covered by Part A of that Annex, the examination of the economic conditions shall take place at Community level, through the relevant Committee procedure. This means that a uniform application of the assessment of the economic conditions is ensured for so-called sensitive goods because the examination has to take place at Community level (see Article 552[2] of the Implementing Regulation).

Third, for the types of goods and operations not mentioned in Annex 76 of the Implementing Regulation, the examination of the economic conditions shall take place at national level (Articles 502(1) and 552(1), second subparagraph, of the Implementing Regulation). An examination at national level is required only in rare cases because, as mentioned before, either the economic conditions are deemed to be fulfilled or the examination takes place at Community level. Nevertheless, transparency and uniform application of the assessment of the economic condition is also ensured in these rare cases because member States have to communicate to the Commission relevant information in accordance with Article 522 of the Implementing Regulation. The Commission makes these particulars available to the customs administrations. Furthermore, if a member State objects to an authorization issued or if the customs authorities concerned wish to consult before or after issuing an authorization, an examination of the economic condition may take place at Community level (see Articles 503 and 504 of the Implementing Regulation).

If there are still unclear elements in the above description, the EC would be happy to provide further clarification upon request.

67. Please explain the scope and effect of Article 250 of the Community Customs Code.

This provision provides that where a customs procedure is used in several member States, decisions, identification measures, documents issued, and findings made, shall have the same legal force in all of the member States involved. "Customs procedure" in this context means any of the procedures referred to in Article 3 (16) CCC. Article 250 CCC applies in the context of a specific customs procedure involving the same goods.

Article 250 CCC has the purpose of ensuring that customs procedures which take place on the territory of several member States can be carried out efficiently and coherently.

68. With respect to paragraphs 220-221 of its First Written Submission, is the sole purpose of the European Communities' reference to Article XXIV:12 of the GATT 1994 to support its argument that Article X:3(a) does not require customs laws to be regulated at the central level? If so, please explain in practical terms what this means for the administration of EC customs laws. If not, please explain the other bases upon which the European Communities seeks to rely upon Article XXIV:12.

The EC has referred to Article XXIV:12 GATT, and the GATT Panel Report in *Canada – Gold Coins*, as support for its argument that Article X:3(a) GATT does not affect the federal distribution of competences within a WTO Member, and therefore does not require the harmonization of laws within a WTO Member. This means that where, within a WTO Member, certain matters are regulated at the sub-federal level, Article X:3(a) GATT requires merely that these laws or regulations be administered in a uniform manner. It does not require that such laws be replaced by a harmonized

law at the central level. An example for this is sanctions, which, within the EC, are regulated in laws of the EC member States.

This interpretation is fully in line with the object and purpose of Article X:3(a) GATT. Article X:3(a) GATT wants to provide a minimum level of security and predictability for traders with respect to the matters referred to in Article X:1 GATT. This objective is fully ensured if laws which exist at the sub-federal level are administered in a uniform manner in the territory in which they apply. It In order to achieve the purpose of Article X:3(a) GATT, it is not necessary to require WTO Members to harmonize the laws applicable within a WTO Member at sub-federal level.

69. With respect to appeals to each of the 25 member State courts responsible for review and correction of customs matters:

The EC is willing to provide to the Panel information regarding the EC Court system, including the member States' courts. However, it would like to underline that this exercise forms part of the burden of the proof, which is incumbent on the United States as complainant. The EC has repeatedly insisted on this issue in its First Written Submission (para. 474) and in its First Oral Statement (paras. 63 to 66).

(a) What is the standard of review in the courts for each of the member States with respect to administrative decisions of customs authorities?

The Courts of all member States review and correct the legality of the administrative decisions adopted in customs matters, including the control of discretionary powers. The control of legality also includes the compatibility with Community law. Though some legal orders include a classification of grounds for review comparable to that laid down by Article 230 of the EC Treaty (see hereunder the answer to Question No. 71), this does not entail any significant differences in the type of control ensured by national courts.

(b) In practical terms, what are the steps necessary to bring a case before each of those courts (including details of cases when first instance reviews by the relevant administering authorities are required)?

Most of the EC member States require the trader to lodge a request for an administrative review before appealing to the relevant court. The exceptions are Belgium, Estonia, Greece, Cyprus, France, Malta and Portugal, where administrative reviews are voluntary, and Sweden, where there is no administrative review and the administrative decision has to be appealed directly to the courts.

In the case of Spain, Italy, Ireland (second instance of the administrative review) and Denmark, the administrative review is carried out by a body that is independent of the agencies entrusted with administrative enforcement.

(c) How long does the appellate process in respect of customs matters take in each of those courts (including time taken for first instance reviews by the relevant administering authorities, when they occur/are required)?

Most of the EC member States normally ensure the completion of an administrative review in less than 6 months. In several cases the average time limit is even more limited (around 1 month): Czech Republic, Estonia, Greece, Spain, Ireland, Cyprus, Latvia, Lithuania, Hungary and Slovakia. Only in Denmark and Italy between 1 to 1,5 years are needed to take a decision in administrative reviews.

In relation to judicial review, ten EC member States carry out a first instance review normally in less than one year: Czech Republic, Spain, Cyprus, Hungary, Austria, Poland, Slovakia, Finland,

Sweden and United Kingdom. Between 1 to 2 years is the time spent in Germany, Estonia, Latvia and the Netherlands. In the rest, an average of 2 to 3 years is required.

70. With respect to: (i) direct appeals to the Court of First Instance and the European Court of Justice; and (ii) requests for preliminary ruling from the European Court of Justice:

(a) In practical terms, what are the steps necessary to bring a case before the Court?

There is no administrative review to appeal before the Court of First Instance or the European Court of Justice an administrative decision adopted by the EC institutions on customs matters. An action for annulment must be brought directly to the relevant Court within two months from the notification or the publication of the decision (Article 230 (5) of the EC Treaty). Under Articles 81 (2) and 102 (2), respectively, of the Rules of Procedure of the Court of Justice and the Court of First Instance, this time limit is always expanded 10 further days to take into account of the distance (Exhibits EC-107 and EC-108). According to the "Practice Directions" adopted by each of the Courts, a copy of the signed original of a procedural document may be transmitted to the Registry either by telefax or as an attachment to an electronic mail, provided that the signed original itself reaches the Registry within ten days following such lodgement (Exhibits EC-109 and EC-110).

Decisions to refer for a preliminary ruling are taken by the member States courts, which will normally hear both parties before making a reference, though they are not bound by the parties' position in relation to the convenience or need to refer. Furthermore, it is not necessary for the parties in the case to raise the question, which can be decided by the national court of its own motion. The national court is entitled to decide at what stage of the proceedings the reference is made, provided that the case has not been decided yet. Further explanations on this procedure may be found in the Information Note on references from national courts for a preliminary ruling adopted by the Court of Justice (Exhibit EC-55).

(b) How long does the appellate/preliminary ruling process in respect of customs matters normally take?

A case for annulment takes an average of 24 months: a representative example is the Sony Playstation2 case (Exhibit US-12), where the application was lodged on 3 October 2001 and the judgement was given on 30 September 2003.

Preliminary references need an average of 19 to 20 months to be completed, though, in some cases, they can take up to 22 months. As an example, the judgement in the case C-396/02, DFDS, (Exhibit EC-25) was given in this latter time limit (from 11 November 2002, date of reception, to 16 September 2004, date of the judgement).

71. Please identify how the following bodies "correct" administrative action (including customs decisions) that is subject to challenge before those bodies (for example, annulment, suspension, revocation etc.):

(a) the Court of First Instance;

(b) European Court of Justice;

Under Articles 231 (1) and 224 (6) of the EC Treaty, in an action for annulment the European Court of Justice and the Court of First Instance must either declare the contested act void or dismiss the action. They have no jurisdiction to replace or amend the act in question, though they are allowed to declare only part of a measure void. The grounds of illegality which parties may plead in an action for annulment are lack of competence, infringement of an essential procedural requirement,

infringement of the Treaty or of any rule of law relating to its application or misuse of powers (Article 230, second paragraph, EC Treaty).

Both Courts may order that the application of an act challenged in proceedings before them be suspended (Article 242 EC Treaty). They may also prescribe any other interim measures (Article 243 EC Treaty). Urgency, the establishment of a prima facie case and the balance of interests at stake are necessary for granting interim relief.

(c) Courts of the member States; and

Most of the member States Courts are only entitled to annul the administrative decision should they consider it unlawful. However, in some cases, the courts may substitute its own decision in cases involving payment of duties. A few national courts have the power to substitute or amend the administrative decision challenged: Denmark, Latvia, the Netherlands, Sweden and Slovenia.

(d) Bodies charged with undertaking first instance review of customs decisions in the European Communities.

Administrative authorities in the EC member States can repeal, revoke, alter or replace a disputed administrative decision. During the proceedings, the implementation of the disputed decision may be suspended on the basis of Article 244, second subparagraph, CCC.

72. What mechanisms exist, if any, to ensure that the outcome of review of a customs decision in one member State court is notified to the courts of other member States?

As in most legal systems, such mechanisms do not exist in the EC. Due to the high number of cases, the notification of the outcome of review of customs decisions in one member State court to the courts of the other member States would be burdensome and ineffective: a rough estimate of the cases brought before the national member States courts of first instance gives a figure higher than 7,500.

73. Are national courts of the member States bound by preliminary rulings issued by the European Court of Justice in all cases? If not, please explain the circumstances in which the preliminary rulings are not binding.

As the EC already explained in paragraph 188 of its First Written Submission, a preliminary ruling is binding on the referring court, which must apply it to the case in which the reference is made.

In relation to references on validity, if the Court of Justice decides that a Community measure is invalid, it has to be regarded as invalid for all purposes and in all courts: case 66/80, *Spa International Chemical Corporation*, [1981] ECR 1191, paras 11-13 (Exhibit EC-111).

Rulings of the Court of Justice on interpretation have been considered binding on other courts by virtue of the purpose of the preliminary ruling procedure, which is to secure uniformity of Community law (joined cases 28 to 30/62, *Da Costa*, [1963] ECR 31) (Exhibit EC-112). A member State's court may nevertheless refer another question to the ECJ if the issue being considered seems not to be materially identical with that which has already been the subject of a preliminary ruling in a similar case or if the previous preliminary ruling has been given long time ago.

74. In paragraph 142 of its First Written Submission, the United States submits that, even if the national courts of the member States could be regarded as meeting the requirements of Article X:3(b) of the GATT 1994, there is nothing in the Community Customs Code that requires review by those national courts to be "prompt". Please comment.

First of all, it should be noted that Article X:3(b) GATT merely requires review to be prompt. It does not require Members to take particularly measures for this purpose, such as setting time-limits. So far, the US has not argued that review by the courts of the EC member States is not prompt, let alone has provided any evidence in this respect.

Though the CCC does not contain any provision requiring review by national courts to be "prompt", this requirement is recognized in Community law or in the legal systems of the member States. Indeed, "promptness" forms part of the core of the right to an effective judicial protection.

According to settled case-law, fundamental rights form an integral part of the general principles of law, the observance of which the European Court of Justice ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the member States and from the guidelines supplied by international treaties for the protection of human rights on which the member States have collaborated or to which they are signatories (see, i.a.: case C-71/02, *Karner*, [2004] not yet reported, para. 48) (Exhibit EC-113).

The European Court of Justice has manifested that the European Convention on Human Rights has special significance in that respect and the EC has already explained in paragraph 174 of its First Written Submission that Article 6 (1) of the Convention lays down the right to a fair trial by an independent and impartial tribunal established by law (Exhibit EC-49).

Furthermore, as it was already mentioned in paragraph 174 of the EC First Written Submission, the right to an effective remedy before a tribunal is recognized in Article 47 of the Charter of Fundamental Rights of the European Union (Exhibit EC-48).

Finally, the EC notes that there also seem to be no particular US measure which would ensure that revision by USCIT be prompt.

75. In its First Written Submission, the European Communities refers to a number of different institutions and mechanisms, which it submits help to ensure uniform administration of EC customs laws (in particular, the Customs Code Committee, the European Court of Justice, the supremacy and direct effect of EC law, the duty of cooperation, infringement proceedings, the various instruments of EC customs cooperation, and budgetary control measures). To the extent that the European Communities has not already done so in its First Written Submission, please specifically explain how each of these institutions and mechanisms achieve uniformity with respect to the aspects of customs administration specifically identified by the United States, namely: tariff classification; customs valuation; audit following release for free circulation; penalties for infringements of customs laws; processing under customs control and local clearance procedures.

The EC believes that it has given a comprehensive explanation of the EC's system of customs law and administration. In principle, the general mechanisms and instruments described in the EC's First Written Submission are applicable in respect of all areas of customs law. However, to the extent that the Panel has specific questions as to how specific instruments relate to a particular issue, the EC is happy to provide further explanations upon request.

76. Please comment on the submission made by the United States in paragraph 44 of its Oral Statement at the first substantive meeting that traders' right of appeal, which the European Communities submits is part of the framework to ensure uniform administration of EC customs laws, only relates to substantive violations rather than divergent administration of substantive law. Further, please specifically identify steps traders can take in the event that they encounter such divergent administration, making reference to all relevant EC rules and guidelines.

The right to obtain judicial review before the Courts of the member States applies to all violations of Community law, regardless of what the issue in question might be.

The EC is not certain it understands the distinction between "substantive violations" and "divergent administration of substantive law". A right of appeal if provided only if there is a violation of Community law, regardless of whether it is "substantive" or not. By definition, in any case of a non-uniform application of the law, an illegality will exist.

For this reason, the EC is not sure in which cases there could be said to be a "divergent administration of the law" which does not involve an illegality. To the extent that the administration of the law might involve discretion, and that such discretion is exercised in conformity with the applicable law, there is obviously no right of appeal.

In any event, the EC would suggest that the US might specify which specific cases it is referring to. The EC would also ask whether in the United States, there is a right of appeal against practices of administrative agencies which are in conformity with US law.

77. In Case 106/77, Simmenthal II, [1978] ECR 629 (Exhibit EC-5), the European Court of Justice found that "the direct applicability of Community law means that its rules must be fully and uniformly applied in all the member States from the date of their entry into force and for so long as they continue in force". Please explain in practical terms what is meant by this finding insofar as it suggests that the member States must "uniformly" apply EC customs law.

This finding means that all authorities of the member States, including the administrative agencies and the Courts, must apply EC law uniformly. Concretely, this means that they should interpret and apply Community law in accordance with all available guidance as to its proper meaning, including the case law of the Court of Justice. Where national law conflicts with provisions of Community law, the courts must set aside such provisions. For the Courts of the member States, one additional tool for ensuring that they apply Community law in a uniform manner is requests for preliminary rulings in accordance with Article 234 EC. For a more detailed explanation, the EC refers to its First Written Submission. [29]

78. In paragraph 35 of its First Written Submission, the European Communities notes that Article 249(2) of the EC Treaty provides inter alia that: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all member States". To what extent does Article 249(2) allow member States to supplement provisions contained in EC law in practice? What measures exist to prevent member State customs authorities from relying upon policies/guidelines that are particular to that member State in the interpretation of EC customs law?

A member State may act to supplement provisions contained in a Community regulation if it is explicitly authorized to do so, or if a specific issue is not covered in the act of Community law. However, any national legislation must strictly respect the Community legislation, and may otherwise be set aside by the courts.[30]

The Court has also clarified that the direct effect of regulations cannot be hampered by any domestic practices or provisions.[31] Moreover, the Court has stated that national authorities cannot issue binding guidelines for the interpretation of Community law.[32] Accordingly, the interpretation of

[29] EC First Written Submission, para. 35 et seq.
[30] Case 230/78, *Eridania-Zuccherifici*, [1979] ECR 2749, para. 34 (Exhibit EC-114).
[31] Case 93/71, *Leonesio*, [1972] ECR 287, para. 22 (Exhibit EC-115).
[32] Case 94/77, *Fratelli Zerbone*, [1978] ECR 99, para. 27 (Exhibit EC-116).

Community law by national administrations and courts must be guided exclusively by the text of Community law, and all contrary provisions or guidelines of national origin must be set aside.

79. Is there any obligation in EC law requiring member State customs authorities to consult other member States before making customs decisions. If so, please identify and explain.

There is no general obligation in EC law requiring member States' customs authorities to consult other member States before making customs decisions. Such an obligation would be disproportionate, since millions of customs decisions are taken each year, and the great majority of them pose no particular problem, and do not require any consultation between customs authorities.

This being said, obligations of mutual consultation may arise in application of the duty of cooperation in specific situations, for instance in the context of the issuing of BTI (cf. EC answer to the Panel's Question No. 56). Specific provisions of EC customs law may also impose an obligation of mutual cooperation in certain circumstances. Examples would include the following provisions:

- Single authorization for end-use (Article 292 [2] CCIP)
- Customs procedures with economic impact (Article 500 CCIP)
- Regular shipping service (articles 313a-313b CCIP)
- Proof of Community status by authorized consignor (article 324e CCIP)
- Simplified transit procedure for air transport - level 2 (article 445 CCIP)
- Simplified transit procedure for sea transport - level 2 (article 448 CCIP)

Finally, a general framework for mutual cooperation and assistance between member States' customs authorities is provided by Regulation 515/97 (Exhibit EC-42).

80. The preamble to Council Regulation (EC) No. 515/97 of 13 March 1997 (Exhibit EC-42) on mutual assistance between the administrative authorities of the member States and co-operation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters states that:

> **"Whereas the Commission must ensure that economic operators are treated equally and that the application by the member States of the mutual administrative assistance system does not lead to discrimination between economic operators in different member States; ..."**

Please explain what is meant by "treated equally" and "discrimination".

The two terms refer to the objective of ensuring that economic operators are treated alike in all relevant aspects by member States' customs authorities, thus preventing a distortion of the conditions of competition between economic operators.

81. Article 3(2) of Decision No. 253/2003/EC of the European Parliament and the Council of 11 February 2003 adopting an action programme for customs in the Community (Exhibit EC-43) refers to the "Customs Policy Group". Please explain what the role(s)/function(s) of this Group are.

The Customs Policy Group is a high level working group, chaired by the Commission, and comprised of heads of customs administrations or their deputies.

The Customs Policy Group enables the Commission and the member States of the European Union to work in partnership to ensure that the common approach to customs policy is continuously

adapted to new developments. Its role is to deal with any customs issues of a political nature and in particular to:

- review and, as necessary, adapt the common policy approach;
- analyse strategy (including training, computerization and external affairs);
- consider issues of principle referred to it by the Customs 2007 Committee;
- consider customs issues beyond the scope of the Customs 2007 programme;
- consider the implementation of the results obtained from Customs 2007 actions (e.g., use of guidelines, development of risk management, measurement of results, etc.)

82. In paragraph 156 of the European Communities' First Written Submission, the European Communities refers to a number of "action programmes" aimed at strengthening the effective implementation of the EC customs union, including training activities.

(a) Does training of member State customs officials occur at the member State and/or EC level?

The training of customs officials takes place primarily at national level. However, to reach a harmonization in the training field, and in order to promote and common understanding the field of customs administration, a "Common Customs Training Programme" was developed under a predecessor programme of Customs 2007. The programme sets binding minimum standards for the national basic training of Customs officials throughout the Community. The related "Common Training modules" are currently being updated (finalized by end 2005).

The programme supports national training activities and supplements this training from a central point of view with common training projects wherever needed. The development of such common training projects (mainly for advanced vocational training) are usually managed by the Commission with support from member States subject experts and training specialists (e.g., development of common training material, other training support like training material catalogues, good practice guides or e-learning modules with blended learning approach).

A further mission of the Customs 2007 training programme is the development of an organizational framework for customs training. For this purpose, the European Commission is developing the Virtual Customs Academy. This is the defined as the provision of customs training and best practice in various forms shared by member States with the support of the Commission in the context of the Customs 2007 Programme.

Customs 2007 seminars or conferences are organized and chaired by the Commission in partnership with the host administration. Seminars or conferences organized within Customs 2007 are often used as a tool to

- Update and enhance member States' knowledge on common legislation;
- Establish a forum for best common practice and develop practical guidance for implementing common legislation;
- Provide a vehicle to exchange information and share knowledge, specialization and experience between member States;
- Launch new initiatives in the customs area.

Therefore, most of the seminars indeed contain an information/knowledge sharing part which can be considered as a training method in the broad sense. For instance, the seminars dispose of such an information sharing component during which the Commission presents new or modified common

legislation. Also the more practical oriented workshops organized by the Commission are in a way a tool to disseminate information to member States' experts (e.g., NCTS workshop, RIF workshop, etc).

(b) If so, please explain the nature and purpose of such training. Is such training aimed at assimilating the most recently acceded 10 EC member States and/or is it part of longstanding and ongoing training for customs officials of all the EC member States?

Today, the 10 new member States are full partners in this process and they benefit furthermore from all training material and modules which were developed before their accession to the EU.

Moreover, already prior to accession, one of the priorities within the Customs 2007 Programme has been the preparation for enlargement. According to Article 2 (2) of Decision 253/2003, the programme is open for participation by candidate countries for accession to the EC. Several actions were set up specifically for candidate countries to enable them to comply with Community customs legislation (tariff seminars, training sessions for tariff applications, etc) and to provide them with assistance as regards interconnectivity (IT systems) and operational capacity. Besides these special provisions, the candidate countries have been invited to each single seminar and to most of the other full-board activities organized for member States.

83. Please indicate whether and, if so, what action has been taken pursuant to the following paragraphs of Article 4 of Decision No. 253/2003/EC of the European Parliament and the Council of 11 February 2003 adopting an action programme for customs in the Community:

...

(b) to identify, develop and apply best working practices, especially in the areas of post-clearance audit control, risk analysis and simplified procedures;

...

(e) to improve the standardization and simplification of customs procedures, systems and controls;

(f) to improve the coordination of and co-operation between laboratories carrying out analysis for customs purposes in order to ensure, in particular, a uniform and unambiguous tariff classification throughout the European Union;

...

(k) to develop common training measures and the organizational framework for customs training that would respond to the needs arising from programme actions.

A list of programme actions which fall into the above mentioned objective categories is attached as Exhibit EC-117.

The European Community and its member States have undertaken a series of actions to improve working practices. These are carried out in a variety of ways, including benchmarking, drafting of guidelines, creation of contact groups to share information and best practice, use of targeted groups to follow up specific subjects etc. In the specific areas mentioned the European Community has produced a guide to post clearance audit,[33] which sets out the recommended approach to such controls.

[33] Exhibit EC-90.

The European Community has also worked on risk management for a number of years. Following the introduction of the first Risk Analysis guide, actions have been focussed on promoting a common approach to risk management. A Community-wide seminar on risk analysis led to work focussing upon establishing a Community framework for risk management. Since then, efforts have turned towards creating a secure Community risk information exchange system based on the principles set out in the framework. Such a system has been running on a pilot basis for over a year. The recent amendment to the Community customs code has introduced a legal obligation for a Community Risk Management system. The Commission and its member States are now finalising such a system which will operate on the secure IT base already piloted and enable the introduction of Community risk profiles and effective exchange of risk information.

In addition to the work on risk management which sets out a common control approach, the Community develops standardized approaches to systems and controls via a range of methods. These include the exchange of officials, use of benchmarking and project groups to examine specific subjects (such as Single European Authorizations, production of guides, manuals etc.), training and the development of IT systems. Targeted actions may also be developed for more specialized controls, such as anti-counterfeiting.

84. Please explain what information/data is contained in the information system on the integrated tariff of the Community (TARIC) referred to in Article 5(1)(d) of Decision No. 253/2003/EC of the European Parliament and the Council of 11 February 2003 adopting an action programme for customs in the Community.

The Taric includes all the information referred to in Article 2 (2) of Regulation 2658/87, which is drafted as follows:

> The tariff shall be based on the Combined Nomenclature and include:
>
> (a) the measures contained in this Regulation;
>
> (b) the additional Community subdivisions, referred to as 'Taric subheadings', which are needed for the implementation of specific Community measures listed in Annex II;
>
> (c) any other information necessary for the implementation or management of the Taric codes and additional codes as defined in Article 3(2) and (3);
>
> (d) the rates of customs duty and other import and export charges, including duty exemptions and preferential tariff rates applicable to specific goods on importation or exportation;
>
> (e) measures shown in Annex II applicable on the importation and exportation of specific goods.

Annex II, which is referred to in Article 2 (2) (b) and (e) of Regulation 2658/87, is currently contained in Annex II to Commission Regulation 1810/2004 (Exhibit EC-118).

85. In areas that are not specifically regulated by EC law so that, effectively, member State authorities have discretion in the interpretation and application of law with respect to those areas, what mechanisms, if any, are in place to ensure uniform interpretation and application of the law throughout all the member States?

In areas which are not regulated by EC law, including primary EC law, member States are free to legislate and to administer their own laws. There are no mechanisms in place at the level of the EC to ensure a uniform interpretation and application of the laws of member States in areas which are not regulated by EC law.

It should be noted, however, that even where secondary Community law has not specifically regulated an area, the member States may still be required to respect certain principles of EC law. An example is the area of penalties for violations of Community law, where Article 10 EC requires that member States provide penalties which are effective, proportionate and dissuasive.[34]

86. Please explain the current status of the Modernized Customs Code contained in Exhibit US-33? Please clarify for how long the revision process has been ongoing. Please identify when and how public/third party consultation took place with respect to this revision process.

The draft Modernized Customs Code Contained in Exhibit US-33 is a working document of the services of the European Commission. It is not the official position of the European Commission, or of any other EC institution.

The Modernized Customs Code is a major project aiming at the recodification, modernization and simplification of EC customs law, building on the experience gained since the entry into force of the Community Customs Code. The Commission first announced its intention to modernize and simplify customs law in 2003. A first public consultation on a draft modernized Customs Code was held in July and August 2004. A second public consultation on a revised version of the code was held in January 2005 (cf. Exhibit EC-47).

87. What is the legal relationship between Article X:3(a) of the GATT 1994 and Article X:3(b) of the GATT 1994, if any? In this regard, please specifically comment on the following submissions made by the United States in its Oral Statement at the first substantive meeting:

As the EC has already stated in its First Written Submission (paras. 461 and 466) and in its First Oral Statement (paragraph 60), Article X:3(a) and (b) GATT are separate obligations and it cannot be considered that there is a legal relationship between both provisions.

Article X:3(a) GATT provides for an obligation to administer the laws and regulations referred to in Article X:1 GATT in a uniform, impartial and reasonable manner. In contrast, Article X:3(a) GATT requires each party to provide for prompt review of customs decisions.

The fact that these provisions are contained in the same article does not mean that they should be interpreted in such as way as to blur the distinction between the obligations which they contain. Obviously, the two provisions must be interpreted in a harmonious way, taking into account their respective object and purpose. However, this does not mean that obligations from one provision can simply be imported into the other.

In particular, the EC attaches great importance to the fact that Article X:3(a) GATT does not concern the administration of laws concerning the judicial procedure and judicial organization, since such laws are not among those referred to in Article X:1 GATT. Accordingly, Article X:3(a) GATT can not be construed so as to require a harmonization of laws regarding judicial procedure and judicial organization within a WTO Member.

[34] Cf. EC First Written Submission, para. 144 et seq.

(a) the EC argument that appeals to the European Court of Justice form an important instrument of uniform administration is inconsistent with its contention in the context of Article X:3(b) of the GATT 1994 that the obligation of uniform administration and the obligation to provide remedies from administrative action are discrete obligations without any inherent link to one another (paragraph 42);

This argument presented by the US is based on an inaccurate interpretation, in that, according to the US, preliminary references to the Court of Justice have the nature of an appeal. On the contrary, that procedure is based on a cooperative relationship between the Court of Justice and national courts, not a hierarchical one. The EC has already underlined this issue in paragraph 470 of its First Written Submission.

As the Court of Justice does not act as an appeal court when dealing with preliminary references, its role has to be understood in relation to the obligation laid down by Article X:3(a) GATT to ensure uniform administration of all laws, regulations, decisions and rulings described in paragraph 1 of that Article. In fact, preliminary rulings by the ECJ are one important instrument to ensure uniform administration among all the other instruments described by the EC in its First Written Submission. Prompt review and correction of administrative action relating to customs matters required by Article X:3(b) GATT is ensured by the referring national court, not by the Court of Justice.

(b) the link between Article X:3(a) and Article X:3(b) arises through the reference in Article X:3(b) of the GATT 1994 to "administrative enforcement", which is the subject of Article X:3(a) (paragraph 59).

Similarly, the EC considers that the term "administrative enforcement" in Article X:3(b) GATT does not establish a link between this provision and Article X:3(a) GATT. Article X:3(b) GATT refers to "agencies entrusted with administrative enforcement" to identify the agencies which are subject to prompt review, and from which the tribunals or procedures must be independent. This does not mean that administration as such becomes the subject matter of Article X:3(b) GATT.

88. Does the obligation for prompt review and correction of administrative action in Article X:3(b) of the GATT 1994 have direct effect in the member States? If so, what does this mean in practical terms for the review of customs decisions by member State bodies?

The European Court of Justice and the Court of First Instance have held that, having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions (Case C-149/96, *Portugal/Council*, [1999] ECR I-8395, paras. 42-46 (Exhibit EC-119), case C-377/02, *Van Parys*, [2005] not yet reported, para. 39 (Exhibit EC-120), and case T-19/01, *Chiquita/Commission*, [2005] not yet reported, para. 114 (Exhibit EC-121). Consequently, Article X:3(b) GATT does not create rights upon which individuals may rely directly before the courts by virtue of Community law.

However, the EC would like to refer to its reply to Question No. 74, where it has explained that the principle of "prompt review" is in any case inherent to the right to an effective judicial protection, which is part of the general principles recognized in all member States as well as part of the EC legal system, as recognized by the ECJ.

<u>QUESTIONS FOR BOTH PARTIES</u>:

89. Could a system in which it is primarily incumbent upon a trader to assert its rights to achieve uniform administration on the part of the customs authorities in a particular WTO

Member (for example, by instituting appeals to complain about the decisions/treatment of those customs authorities) comply with the obligations contained in Article X:3(a) of the GATT 1994?

Whether the practice of a WTO Member is in compliance with Article X:3(a) GATT must be assessed on the basis of the overall pattern of administration of such member, taking into account all elements of the system of that Member as a whole. For this reason, it is difficult to provide a general answer to the Panel's question.

This being said, the EC believes that whereas procedural possibilities given to traders can play an important role in securing uniformity of administration, normally, the uniform administration of the law should also be an objective of the public authorities. What specific tools should be at the disposal of the authorities, and what tools should be available to private parties depends on the overall design of the particular system, and cannot therefore be answered in the abstract.

90. At paragraph 11.70 of its report, the Panel in *Argentina – Hides and Leather* stated that "[t]he relevant question [in determining whether or not Article X:3(a) of the GATT 1994 is applicable] is whether the substance of such a measure is administrative in nature or, instead, involves substantive issues more properly dealt with under provisions of the GATT 1994". Please provide your understanding of this statement, particularly the reference to "a measure that is administrative in nature". In addition, please explain in practical terms how the distinction between measures that are administrative in nature and those that are not is relevant for the application of Article X:3(a).

The EC believes that this statement is not directly relevant to the present case. The Panel in *Argentina – Hides and Leather* had to decide on a challenge brought by the EC that a specific Argentinian regulation which foresaw the presence of representatives of the Argentinian tanning industry in the administrative procedure entailed an unreasonable, partial and non-uniform administration.[35] Argentina defended itself by arguing that the EC was challenging the substance of a rule, and not its administration.[36]

In essence, what the Panel said in *Argentina – Hides and Leather* was thus that if a particular law or regulation mandates administrative behaviour that is unreasonable, non-uniform, or impartial, then the law the law itself constitutes a violation of Article X:3(a) GATT. This is the sense in which the Panel distinguished between administrative and substantive measures. Clearly, the Panel did not intend to derogate in any way from the fact that Article X:3(a) GATT relates only to the administration of laws and regulation.

In the present case, no EC measure mandates in any way a non-uniform administration of EC customs law. On the contrary, EC laws and regulations are designed to avoid any lack of uniformity. Accordingly, the EC understands that the US case refers not to the EC customs laws as such, but rather to the administration of these laws.

Contrary to the submission of the United States,[37] the Panel in *Argentina – Hides and Leather* does not support the measure that a WTO Member is not allowed to maintain laws at a sub-federal level, as is the case in the EC for penalties. First of all, it is unclear how the US defines "administrative", and why it would consider penalty provisions as "administrative" rather than "substantive".

[35] Panel Report, *Argentina – Hides and Leather*, para. 11.58.
[36] Panel Report, *Argentina – Hides and Leather*, para. 11.69.
[37] US First Oral Statement, para. 47.

More importantly still, the fact that there exist, within a WTO Member, laws at the sub-federal level which govern matters falling under Article X:1 GATT has nothing to do with the situation that the Panel dealt with in *Argentina – Hides and Leather*. For instance, penalty provisions contained in the laws of the EC member States do not in any way entail a non-uniformity in the administration of these laws. This is entirely different from the situation in *Argentina – Hides and Leather*, where the Argentinian measure mandated the presence of partial and interested industry representatives, which necessarily entailed a lack of reasonableness and impartiality in the administration.

91. Please provide a copy of the list of proposals made by the United States contained in the document entitled "Elements of Potential EC Customs Reform" dated 22 December 2004.

A copy of the document is attached as Exhibit EC-122. This document was transmitted by the US to the EC on 22 December 2004 as a follow-up to the consultations held on 16 November 2004.

92. Please comment on paragraph 7 of its third party submission where the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu argues that the test of "minor administrative variations" under Article X:3(a) of the GATT 1994 referred to by the GATT Panel in EEC– Dessert Apples is not relevant for the present case. Does the applicability of this test depend upon the existence of certain factual/other circumstances? If so, please explain and justify making reference to the specific terms of Article X:3(a).

In this respect, the EC can refer to its answer to the Panel's Question No. 46.

93. In paragraph 21 of its Oral Statement at the first substantive meeting, the United States submits that customs laws may be administered through instruments which are themselves laws, such as in the case of penalty laws.

(a) Please comment.

The EC disagrees with this submission. As the EC has explained in response to the Panel's Question No. 109, the term to "administer" in Article X:3(a) GATT means to "execute" or to "apply". In the concrete context, this means that Article X:3(a) GATT refers to the execution in concrete cases of the laws, regulations, decisions and rulings of general application referred to in Article X:1 GATT.

A law, such as the laws of the member States containing provisions on penalties, is itself of general application, and itself needs to be executed or applied. Accordingly, it cannot be said that such a law "executes" or "applies" another. The US submission is therefore not in accordance with the ordinary meaning of the terms of Article X GATT.

In addition, the US submission is incompatible with the case law of the Appellate Body in *EC – Bananas III*, according to which Article X:3(a) GATT does not apply to the laws and regulations themselves, but rather to the administration thereof.[38] By arguing that a law can itself constitute "administration" of a law, the US is undermining the clear distinction between the administration of laws and the laws themselves. According to the United States, any law-making activity could also be argued to be administration. This is clearly not within the object and purpose of Article X:3(a) GATT.

(b) Could this argument apply to all laws, regulations, judicial decisions and administrative rulings of general application referred to in Article X:1 of the GATT 1994?

[38] Appellate Body Report, *EC – Bananas III*, para. 200.

This argument cannot apply to any of the instruments referred to in Article X:1 GATT. The laws, regulations, judicial decisions and administrative rulings referred to in this provision all have in common that they must be "of general application". As such, they cannot be said to be executed or applied by another law which is equally of general application.

(c) If so, please identify which types of laws, regulations, judicial decisions and administrative rulings of general application.

Cf. answer to the preceding question.

(d) What would be the impact and practical effect of such an interpretation on the administration of matters other than customs matters?

These consequences would be extremely serious for any WTO Member where laws, regulations, or other measures of general application exist at a sub-federal, regional or even local level.

If the United States were correct, any such sub-federal law, if it had any link with a law existing at federal level, for instance because it is supplementing or complementing its provisions, could be said to constitute "administration" of the law. Accordingly, if several such laws exist within different parts of the territory of a WTO Member, and if their content is not identical, the WTO Member would be in violation of Article X:3(a) GATT.

Such an interpretation would affect all WTO Members where legislation is not only present at the central, but also at a lower level. It is a common phenomenon of federal-type systems that legislation at the federal and sub-federal level is mutually complementary and interlocking. Accordingly, the interpretation of Article X:3(a) GATT proposed by the US would seriously interfere with the constitutional distribution of powers within most WTO Members with a federal structure, and consequently should be rejected.

94. With respect to the interpretation of the term "administration" in Article X:3(a) of the GATT 1994, do the parties consider that a distinction should be drawn between, on the one hand, administrative procedures applicable to and the treatment of traders and, on the other hand, substantive decisions and the results of administrative processes that affect traders? If so, please explain the legal basis for the drawing of such a distinction.

The EC considers that such a distinction should be drawn. As the EC has stated earlier,[39] Article X:3(a) GATT does not exist for its own sake, but in order to provide certain minimum standards of predictability for traders. Accordingly, Article X:3(a) is primarily concerned with the administrative outcomes affecting traders, and not with laws and procedures as such. As the EC has also said,[40] only to the extent that a particular procedure results necessarily and inevitably in a violation of Article X:3(a) GATT could such a procedure itself be said to be in violation of this provision.

QUESTIONS FOR THE PARTIES AND THIRD PARTIES:

109. How should the term "administer" be interpreted for the purposes of Article X:3(a) of the GATT 1994?

[39] EC Response to the Panel's Question No. 46.
[40] EC Response to the Panel's Question No. 90.

The term "administer" is defined as "manage as a steward; carry on or execute".[41] In other words, the term "administer" relates to the execution of something. In the case of Article X:3(a) GATT, this administration relates to the laws, regulations, decision and rulings of general application referred to in Article X:1 GATT. In other words, in Article X:3(a) GATT, to "administer" means to execute the general laws and regulations, i.e. to apply them in concrete cases.

This interpretation is also confirmed by the French and Spanish text, which use the terms "appliquera" or "aplicará", respectively, which can be translated as "to apply". Therefore, the French and Spanish also confirm that Article X:3(a) GATT is concerned with the application of the general laws and regulations referred to in Article X:1 GATT.

110. Does the uniformity obligation in Article X:3(a) of the GATT 1994 mean that there should be no or only limited possibility for the exercise of discretion in the administration of customs laws?

No. The exercise of discretion is a normal phenomenon in administrative law. The granting of a discretion may be necessary where complex factual aspects of the particular case have to be taken into account, or conflicting interests may need to be weighed and balanced, and where it is not possible to determine the specific outcome for each case in a measure of general application. Typically, the exercise of discretion granted by the authorities will be limited by law, and will be governed by certain principles, such as the principle of non-discrimination. The proper exercise of discretion granted by law can therefore not be regarded as a lack of uniformity contrary to Article X:3(a) GATT.

111. Is the time taken to address a specific issue (including instances of divergences in administration) a consideration to be taken into account for the purposes of the uniformity obligation in Article X:3(a) of the GATT 1994? If so, please explain why, making reference to the specific terms of Article X:3(a).

In principle, Article X:3(a) GATT is concerned with the outcome of the administration of laws. For this reason, it is not incompatible with Article X:3(a) GATT if administrative instruments which are intended to ensure uniformity may not take effect immediately, as long as they ensure a uniform application of the law within a reasonable time frame. In addition, the time needed for addressing a specific issue may also depend on the complexity and the circumstances of the case.

112. With respect to the WTO objective of security and predictability in the international trading environment (which was recently referred to by the Appellate Body in the context of tariff commitments at paragraph 243 of its report in EC – Chicken Cuts WT/DS269/AB/R and WT/DS286/R), please explain whether, why and how it is relevant for the interpretation of Article X:3(a) of the GATT 1994.

The EC can refer to its response to the Panel's Question No. 46.

113. Are the expectations of traders relevant to an interpretation and application of Article X:3(a) and X:3(b) of the GATT 1994? If so, please explain why and how, making reference to the specific language of those Articles.

The EC can refer to its Response to the Panel's Question No. 46.

[41] *The New Shorter Oxford English Dictionary*, Clarendon Press, Oxford, 1993, Volume 1, at 28 (Exhibit EC-123).

114. Does the obligation contained in Article X:3(a) of the GATT 1994 require overall uniformity in administration or does it require uniformity in administration in each and every case? Does the answer depend upon the nature of the challenge under Article X:3(a)? If so, please explain. If overall uniformity is acceptable under Article X:3(a), what would be the practical/numerical threshold and/or benchmark for demonstrating that Article X:3(a) has been violated?

The EC can refer to its response to the Panel's Question No. 45.

115. Please comment on the submission made by Japan in paragraph 8 of its third party submission to the effect that, in assessing the United States' claim under Article X:3(a) of the GATT 1994, it is necessary for the Panel to analyze whether the alleged divergences exist, as claimed by the United States, and if so, whether such divergences exist to a degree that would be considered to be inconsistent with Article X:3(a) in light of the particular customs system as a whole.

The EC agrees with Japan's Statement. As for the remaining aspects of the question, the EC would refer to its response to the Panel's Question No. 45.

116. In paragraph 2 of Japan's Oral Statement at the third party session of the first substantive meeting, Japan relies upon the "minimum standards" of transparency and procedural fairness referred to by the Appellate Body in *US – Shrimp* to argue that "[a]n administration of regulations lacking 'uniformity' [for the purposes of Article X:3(a) of the GATT 1994] would in general terms be unjust, biased, inequitable, partial and opaque – in other words, unfair and nontransparent". Following this line of reasoning, would the requirements of transparency and procedural fairness apply to: (i) the processes or the treatment of traders in the context of the application of customs laws; and/or (ii) the substantive customs decisions to which traders are subject?

The EC agrees with Japan that the Statement of the Appellate Body in *US – Shrimp* is relevant for the interpretation of the term "uniformity" in Article X:3(a) GATT. As to the specific questions put by the Panel, the EC can refer to its response to the Panel's Question No. 94.

117. In paragraph 7.268 of its report, the Panel in *US – Hot Rolled Steel* (WT/DS184/R) stated that "we note that Japan has not even alleged, much less established, a pattern of decision-making with respect to the specific matters it is raising which would suggest a lack of uniform, impartial and reasonable administration of the US anti-dumping law [under Article X:3(a) of the GATT 1994]". Please comment on the Panel's finding that a pattern of decision-making is needed in order to prove a violation of Article X:3(a).

The EC can refer to its response to the Panel's Question No. 45.

118. What is meant by the words "pertaining to" in Article X:1 of the GATT 1994? Would rules governing the operational procedures of bodies that oversee or are somehow involved in the administration of customs laws – such as, for example, the EC Customs Code Committee – qualify as laws, regulations, judicial decisions and administrative rulings of general application "pertaining to" the classification or the valuation of products for customs purposes?

To "pertain to" is defined as "belong or be attached to, have reference or relation to".[42] In other words, the subject matter of the laws, regulations, decisions and rulings of general application

[42] *The New Shorter Oxford English Dictionary*, Clarendon Press, Oxford, 1993, Volume 2, at 2173 (Exhibit EC-123).

must belong to, have reference to, or be related to the subjects which are enumerated in Article X:1 GATT, i.e. 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 affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use.

Rules governing the operational procedures of bodies that oversee or are somehow involved in the administration of customs laws do not as such qualify as laws, regulations, judicial decisions and administrative rulings of general application "pertaining to" the classification or the valuation of products for customs purposes. Such laws may ensure that a Member fulfils its obligations under Article X:3(a) GATT. However, this does not mean that such laws governing operational bodies do themselves become laws "pertaining to the classification or valuation of goods".

119. Do penalty laws/provisions applicable to violations of customs laws fall within the scope of the measures referred to in Article X:1 of the GATT 1994? If so, please explain making reference to the relevant terms of Article X:1.

As the EC has explained in response to the preceding question, Article X:1 GATT only covers those laws which pertain to the subjects which are enumerated in Article X:1 GATT, i.e. 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 affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use.

Penalties for violations of customs laws are not among the matters referred to in Article X:1 GATT. It can also not be considered that penalties for violations of customs laws necessarily "pertain to" the classification or the valuation of products, or to rates of duties. For instance, the law of a Member may set out a penalty for failure to declare a good upon importation. It does not appear that it could be said that such a law would pertain to the classification or valuation of goods, or to rates of duties.

It should be noted that by the very nature of penalties, a requirement of uniform administration does appear somewhat problematic. Penalty provisions, and in particular provisions of criminal law, typically give the authorities a margin within which to assess the penalty applicable in the particular case. Such a margin is particularly necessary in order to take into account the individual guilt of the defendant. By definition, in the application of penalty provisions, a wider margin of freedom is required than in the application of provisions regarding classification, valuation, and rates of duty.

This is implicitly also recognized by Article VIII:3 GATT, which only provides for certain minimum standards of proportionality as regards the imposition of penalties for breaches of customs regulations and procedural requirements. Moreover, given the explicit reference to penalties as contained in Article VIII:3 GATT, it appears that had the drafters of the GATT intended to include penalties in Article X:1 GATT, they would have explicitly referred to them in this provision.[43]

120. What is the significance of Article XXIV:12 of the GATT 1994 for the interpretation of Article X:3(a) of the GATT 1994?

[43] In the context of the Doha Trade Facilitation Negotiations, Japan, Mongolia, Chinese Taipei and Peru, have made the proposal to include a provision for "clearly stating and publicizing penalty provisions against breaches of import and export formalities in relevant laws and regulations"; cf. the compilation prepared by the Secretariat, TN/TF/W/43/Rev.1, p. 11 (Exhibit EC-70).

The EC can refer to its Response to the Panel's Question No. 68.

121. Making reference to the specific terms of Article X:3(b) of the GATT 1994, please explain whether or not the obligation to ensure prompt review and correction of administrative action is confined to first instance reviews by administering authorities.

Article X:3(b) GATT provides that tribunals or procedures ensuring the prompt review and correction of administrative action on customs matters shall be independent of the agencies entrusted with administrative enforcement. Only if the first instance administrative review fulfils this requirement of independence, this type of review may be considered a sufficient implementation of the obligation to ensure prompt review and correction of administrative action.

122. What does "correction" mean in Article X:3(b) of the GATT 1994?

"Correction" has to be interpreted coupled with its accompanying term "review". Both should cover the ordinary tasks of the courts and tribunals in controlling the Administration: to verify that administrative decisions abide with the law and to provide the complainant with a remedy that removes the illegality.

The EC considers that the term "review" refers to the first task, while "correction" describes the second one.

This interpretation is comforted by the definition of both terms that may be found in the dictionaries. Thus, while the term "review" refers in legal English to the "consideration of a judgement, sentence, etc., by some higher court or authority", "correction" is "an act or instance of emendation" or "the neutralization of anything harmful".[44] Similar definitions can be found in Spanish and French. "Revisar" in Spanish is "examinar una cuenta, unas notas, un trabajo hecho, etc., para asegurarse de que está bien o completo" and "rectificar" means "corregir a alguien su conducta".[45] In French, "réviser" means "examiner de nouveau pour changer, corriger », and « rectifier » is «faire disparaître en corrigeant».[46]

123. What is the legal relationship between Article X:3(a) of the GATT 1994 and Article X:3(b) of the GATT 1994, if any?

The EC can refer to its response to the Panel's Question No. 87.

[44] *The New Shorter Oxford English Dictionary*, Clarendon Press, Oxford, 1993, Volume 2, at 2582, and Volume 1, at 516 (Exhibit EC-123).

[45] María Moliner, *Diccionario del uso del español*, Editorial Gredos, Madrid, 1988, at 1003 and 960 (Exhibit EC-124).

[46] *Le nouveau petit Robert*, Dictionnaires Le Robert, Paris, 2003, at 2296 and 2201 (Exhibit EC-125).

ANNEX A-4

RESPONSES OF THE EUROPEAN COMMUNITIES TO QUESTIONS POSED BY THE UNITED STATES AFTER THE FIRST SUBSTANTIVE MEETING

(23 September 2005)

1. At paragraphs 46 to 48 of its First Written Submission, the EC refers to the fact that the Commission may bring infringement proceedings against member States and that individuals play a vital role in bringing allegations of infringement to the Commission's attention.

(a) Since 1995, how many complaints by individuals regarding infringement have been submitted to the Commission concerning member State administration of customs law?

The answer is 51.

(b) Since 1995, how many infringement proceedings has the Commission commenced against member States concerning administration of customs law?

The answer is 83.

2. At paragraph 38 of its Opening Statement, the EC states that "the EC is under no obligation under Article X:3(a) GATT to establish a BTI system, let alone to design this system in a particular way." Is it the EC's position that where a device – such as BTI – is not specifically required by WTO obligations there is no obligation to administer that device in a uniform manner?

As the EC has stressed repeatedly, Article X:3(a) GATT concerns the administration of the laws and regulations pertaining to the matters referred to in Article X:1 GATT.

Since BTI pertains to the classification of goods, the EC does not contest that the EC's BTI practice must be compatible with Article X:3(a) GATT.

However, the US so far has not shown any actual inconsistency in the EC's BTI practice, but rather criticized specific aspects of the design of the EC's BTI system. This is not sufficient for showing a violation of Article X:3(a) GATT.

As concerns the US reference to other "devices", the EC would repeat that Article X:3(a) GATT applies only to administration of the laws and regulations referred to in Article X:1 GATT. In this respect, the EC can refer to its response to the Panel's Question No. 118.

3. When an importer seeks classification of a good imported into a given member State, is the member State's customs authority required to search the EBTI database to determine whether one of the other 24 member State authorities has issued BTI classifying that good?

The EC understands the US question to refer to the classification of products in the course of normal customs procedures, and not to the issuance of BTI.

There is no general obligation to consult the EBTI data base whenever customs authorities classify a good. EC customs authorities have to deal with millions of customs declarations each year. In the large majority of cases, the classification of the goods in question is unproblematic. It would

therefore be completely disproportionate, and result in a considerable slowing-down of customs procedures, to require consultation of the EBTI data base in each and every case involving a classification of goods.

Of course, when classifying products, as in any other area of customs administration, the customs authorities are under the general duty of cooperation (Article 10 EC). This means that they must exercise due care, and use all necessary means, to decide on the concrete application of the Combined Nomenclature. Wherever there is a doubt as to the correct classification of the good in question, the available means which member States customs authorities have recourse to also include consultation of the EBTI data base.

4. At paragraph 26 of its Opening Statement, the EC states that "where an individual trader does not exhaust all the remedies and procedural possibilities afforded to him by the system of a WTO Member, a resulting lack of uniformity cannot be attributed to a failure in that Member's system." Is it the EC's position that the burden of ensuring uniform administration lies with individual traders?

No. The EC institutions and the member States customs authorities are also responsible for ensuring a uniform interpretation and application of EC customs law.

However, as the EC has explained, in any system of customs administrations, individuals also have a role to play. If a trader decides not to appeal a decision in particular issue, even though a possibility of appeal exists, this decision cannot be attributed to the customs authorities. If, due to the decision of an individual trader, a wrong decision is allowed to stand, this cannot be regarded as a lack of uniformity attributable to that Member's system of customs administration.

5. In Question No. 27 of the Panel's provisional questions to the parties, the Panel asked the EC to comment on the substance of the following statement by the Advocate General in the Timmermans case (para. 41 of Exhibit US-21):

> **"... the tariff classification of equivalent goods cannot vary from one member State to another according to the differing assessments given by the various national customs authorities, as this would fail to take into account the objective of securing the uniform application of the customs nomenclature within the Community, which is intended, inter alia, to avoid the development of discriminatory treatment as between the traders concerned."**

We understood the EC, in its response at the 15 September 2005 Panel meeting, to state that the term "equivalent goods" as used in the quoted statement should be understood to mean "identical goods."

(a) Could the EC please confirm that this is its position?

(b) If so, what is the EC's basis for stating that the term "equivalent goods" as used in the quoted statement should be understood to mean "identical goods"?

The EC would refer the US to its response to the Panel's Question No. 49.

6. Question No. 30 of the Panel's provisional questions to the parties asked the EC to comment on the Commission 's statement at page 12 of An Explanatory Introduction to the modernized Customs Code (Exhibit US-32) that "it is proposed to extend the binding effect of

[binding tariff information] also to the holder(s) of the decision in order to avoid the system only being used where the applicant is satisfied with the result." We understood the EC to state that the situation described in the quoted statement – i.e. "the system only being used where the applicant is satisfied with the result" – is a rather rare circumstance.

If it remains the EC's view that the situation described is a rather rare circumstance, what is the basis for that view? Please supply any data on which the EC bases its view.

The EC does not have any evidence that would indicate that such situations are frequent. The EC cannot reasonably be expected to prove that something is "rare".

Moreover, the EC would remark that the burden of proof in this case is on the US as the complainant. Accordingly, it is for the US, not for the EC, to provide evidence that would show that the situation referred to is a frequent circumstance.

7. Paragraph 407 of the EC's First Written Submission states, in the last sentence: "However, it was decided that the case could be further examined through a working group of the [Customs Code] Committee." In explaining this statement during the course of the 15 September 2005, Panel meeting, we understood the EC to state that the reference to "the case" in the quoted statement pertains not to the case of RIL but to the general matter of what constitutes a control relationship for customs valuation purposes. Could the EC please confirm this understanding?

The EC would refer the US to its response to the Panel's Question No. 62.

ANNEX A-5

RESPONSES OF ARGENTINA TO QUESTIONS POSED BY THE PANEL AFTER THE FIRST SUBSTANTIVE MEETING

(23 September 2005)

QUESTIONS FOR ALL THE THIRD PARTIES

103. What is meant by the term "uniform" in Article X:3(a) of the GATT 1994?

Argentina reiterates[1] that the term "uniform" is defined as "of one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times", as indicated in WTO case law[2].

104. How do the third parties ensure uniformity in administration of their respective customs laws at different points of entry? In this regard, please provide details regarding all relevant aspects of customs administration, including in particular those aspects that are not directly linked to the constitutional and institutional structure of customs administration.

No response provided.

105. What body(ies)/procedures are in place in the third parties to discharge their obligations under Article X:3(b) of the GATT 1994? Please explain how recourse to this(ese) body(ies)/procedures works in practice, including how long the review and correction process takes.

No response provided.

106. The United States refers to divergent *decisions* taken by member State authorities throughout its First Written Submission. For example, the United States refers to divergence in *classification decisions*: generally (paragraph 21); with respect to network cards for personal computers (footnote 33); with respect to drip irrigation product (footnote 33); and with respect to unisex articles or shirts (paragraph 76). Further, the United States refers to divergence in *customs valuation decisions* (paragraphs 25 and 93). Can such divergence in decisions be challenged under Article X:3(a) of the GATT 1994?

Argentina considers such divergence to be challengeable under Article X:3(a), as it may imply non-uniform administration of regulations or administrative rulings of a general nature pertaining to the classification or valuation of products for customs purposes.

"Divergence" in the administration of such regulations or administrative rulings would make it impossible for every exporter and importer to be able "*to expect treatment of the same kind, in the*

[1] We refer to Argentina's Third Party Oral Statement of 15 September 2005, footnote 5, which in turn refers to the Panel Report in *Argentina – Measures* Affecting *the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, paragraph 11.83 (hereinafter *Argentina – Hides and Leather*).

[2] Panel Report in *Argentina – Hides and Leather*, WT/DS155/R, paragraph 11.80 *et seq.* which in turn refers to *The New Shorter Oxford English Dictionary*, volume II, Oxford (1993), page 3488. In our view, the concept of uniformity should be separated from the concept of non-discrimination, as indicated by the Panel in *Argentina – Hides and Leather*, WT/DS155/R, paragraph 11.84.

same manner both over time and in different places and with respect to other persons"[3]. Consequently, administration would not be uniform and this would infringe the obligation under Article X:3(a) of the GATT 1994.

In other words, any divergence in these "decisions" would be inconsistent with the requirement of "*uniform administration of Customs laws and procedures between individual shippers and even with respect to the same person at different times and different places*"[4].

107. In paragraphs 220-221 of its First Written Submission, the European Communities submits that, where sub-federal laws exist in a particular WTO Member, it is the administration of those laws to which Article X:3(a) of the GATT 1994 refers.

(a) Does Article X:3(a) apply to penal laws?

Argentina considers Article X:3(a) to be applicable to penal laws insofar as the latter cover conduct 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 affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use" (Article X:1).

(b) If so, would the Panel be authorized to consider the administration of member States' penal laws in respect of the United States' claim under Article X:3(a)?

In Argentina's opinion, yes, insofar as such laws refer to the administration of EC legislation. We reiterate our view that, since its membership of the WTO is separate from that of its component States, it is the EC that is bound to comply with the requirements of Article X:3(a) of the GATT 1994[5].

108. How should "prompt" be defined under Article X:3(b) of the GATT 1994?

Argentina refers the Panel to its third party statement at the first Panel hearing[6].

QUESTIONS FOR THE PARTIES AND THIRD PARTIES:

109. How should the term "administer" be interpreted for the purposes of Article X:3(a) of the GATT 1994?

No response provided.

110. Does the uniformity obligation in Article X:3(a) of the GATT 1994 mean that there should be no or only limited possibility for the exercise of discretion in the administration of customs laws?

No response provided.

---

[3] Panel Report in *Argentina – Hides and* Leather, WT/DS155/R, para. 11.83, referring to the concept of uniformity.

[4] Panel Report in *Argentina – Hides and Leather*, WT/DS155/R, para. 11.83, referring to the term "uniform".

[5] Argentina's First Third Party Oral Statement, 15 September 2005, para. 10.

[6] Argentina's First Third Party Oral Statement, 15 September 2005, paras. 11 *et seq*. which refer to the First Written Submission of the EC, para. 459.

111. Is the time taken to address a specific issue (including instances of divergences in administration) a consideration to be taken into account for the purposes of the uniformity obligation in Article X:3(a) of the GATT 1994? If so, please explain why, making reference to the specific terms of Article X:3(a).

No response provided.

112. With respect to the WTO objective of security and predictability in the international trading environment (which was recently referred to by the Appellate Body in the context of tariff commitments at paragraph 243 of its report in *EC – Chicken Cuts* WT/DS269/AB/R and WT/DS286/R), please explain whether, why and how it is relevant for the interpretation of Article X:3(a) of the GATT 1994.

No response provided.

113. Are the expectations of traders relevant to an interpretation and application of Articles X:3(a) and X:3(b) of the GATT 1994? If so, please explain why and how, making reference to the specific language of those Articles.

Argentina reiterates its opinion that exporters and importers are the main beneficiaries of the obligations established under Article X of the GATT 1994[7]. This follows both from the provisions of the GATT 1994 themselves – Article X:3(b) specifically refers to "importers", and Article X:1, referred to under Article X:3(a), refers to "traders" and "enterprises, public or private"- and from WTO case law[8].

114. Does the obligation contained in Article X:3(a) of the GATT 1994 require *overall* uniformity in administration or does it require uniformity in administration *in each and every case*? Does the answer depend upon the nature of the challenge under Article X:3(a)? If so, please explain. If overall uniformity is acceptable under Article X:3(a), what would be the practical/numerical threshold and/or benchmark for demonstrating that Article X:3(a) has been violated?

No response provided.

115. Please comment on the submission made by Japan in paragraph 8 of its third party submission to the effect that, in assessing the United States' claim under Article X:3(a) of the GATT 1994, it is necessary for the Panel to analyze whether the alleged divergences exist, as claimed by the United States, and if so, whether such divergences exist to a degree that would be considered to be inconsistent with Article X:3(a) in light of the particular customs system as a whole.

No response provided.

116. In paragraph 2 of Japan's Oral Statement at the third party session of the first substantive meeting, Japan relies upon the "minimum standards" of transparency and procedural fairness referred to by the Appellate Body in *US – Shrimp* to argue that "[a]n

---

[7] Argentina's First Third Party Oral Statement, 15 September 2005, para. 15.

[8] Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, paras. 11.68, 11.76 and 11.77; Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/R, para. 21; Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, paras. 6.50 and 6.51.

administration of regulations lacking 'uniformity' [for the purposes of Article X:3(a) of the GATT 1994] would in general terms be unjust, biased, inequitable, partial and opaque – in other words, unfair and non-transparent". Following this line of reasoning, would the requirements of transparency and procedural fairness apply to: (i) the processes or the treatment of traders in the context of the application of customs laws; and/or (ii) the substantive customs decisions to which traders are subject?

No response provided.

117. In paragraph 7.268 of its report, the Panel in *US – Hot Rolled Steel* (WT/DS184/R) stated that "we note that Japan has not even alleged, much less established, a pattern of decision-making with respect to the specific matters it is raising which would suggest a lack of uniform, impartial and reasonable administration of the US anti-dumping law [under Article X:3(a) of the GATT 1994]". Please comment on the Panel's finding that a pattern of decision-making is needed in order to prove a violation of Article X:3(a).

No response provided.

118. What is meant by the words "pertaining to" in Article X:1 of the GATT 1994? Would rules governing the operational procedures of bodies that oversee or are somehow involved in the administration of customs laws – such as, for example, the EC Customs Code Committee – qualify as laws, regulations, judicial decisions and administrative rulings of general application "pertaining to" the classification or the valuation of products for customs purposes?

No response provided.

119. Do penalty laws/provisions applicable to violations of customs laws fall within the scope of the measures referred to in Article X:1 of the GATT 1994? If so, please explain making reference to the relevant terms of Article X:1.

No response provided.

120. What is the significance of Article XXIV:12 of the GATT 1994 for the interpretation of Article X:3(a) of the GATT 1994?

No response provided.

121. Making reference to the specific terms of Article X:3(b) of the GATT 1994, please explain whether or not the obligation to ensure prompt review and correction of administrative action is confined to first instance reviews by administering authorities.

No response provided.

122. What does "correction" mean in Article X:3(b) of the GATT 1994?

No response provided.

123. What is the legal relationship between Article X:3(a) of the GATT 1994 and Article X:3(b) of the GATT 1994, if any?

Argentina refers the Panel to what it said in its third party statement at the first Panel hearing[9].

[9] Argentina's First Third Party Oral Statement, 15 September 2005, paras. 5 – 10.

ANNEX A-6

RESPONSES OF CHINA TO QUESTIONS POSED BY THE PANEL AFTER THE FIRST SUBSTANTIVE MEETING

(23 September 2005)

QUESTIONS FOR CHINA

95. In relation to paragraph 5 of its third party submission, please specify the starting point and the ending point of the extra time China submits is granted by virtue of the application of Article XXIV:12 of the GATT 1994.

Article XXIV:12 doesn't explicitly define the starting point and the ending point of the extra time. However, the text a well as the purpose of Article XXIV:12 indicates that the starting point of the extra time is no later than the date when the measure taken by the local level authority of a contracting party is found to be inconsistent with the provisions of GATT. And the ending point of the extra time is the date when the measure inconsistent with the provisions of GATT by local authorities is removed. Although it is desirable that the extra time should be as short as possible, it is necessary for the federal government of a contracting party to be allowed enough time to overcome the domestic difficulties encountered.

96. With reference to paragraph 6 of China's third party submission, does China consider that Article XXIV:12 of the GATT 1994 cannot apply to the substance and/or administration of measures adopted at the federal/central level?

No, Article XXIV:12 of the GATT 1994 cannot apply to the substance and/or administration of measures adopted at the federal/central level. China agrees with the GATT Panel in *Canada – Gold Coins* that stated: "[t]his drafting history indicates, in the view of the Panel, that Article XXIV:12 applies *only* to those measures taken at the regional or local level which the federal government cannot control because they fall outside its jurisdiction under the constitutional distribution of competence.[1] (Emphasis added by China)" Measures and/or administration of measures adopted at the federal/central level is under the control of the federal/central government of a contracting party and within the jurisdiction of the federal/central government.

97. In its third party submission, China appears to affirm the Panel's interpretation of the term "uniform" in *Argentina – Hides and Leather* for the purposes of Article X:3(a) of the GATT 1994. Does China understand that interpretation to mean that the administration of customs rules must not vary over time?

China does not believe that the Panel's interpretation of the term "uniform" in *Argentina – Hides and Leather* to mean that the administration of customs rules *must not* vary over time. That is to say, China does not believe that the Panel indicated in *Argentina – Hides and Leather* that the administration of customs rules should be the same over time. What the Panel in *Argentina – Hides and Leather* meant is that the administration of customs rules cannot vary from time to time to the extent that the predictability does not exist. The Panel in *Argentina – Hides and Leather* meant that administration of customs rules should be stable over time or in the reasonable period of time. Although the administration of customs rules may vary at the beginning phase, it shall have a mechanism to correct the varied aspects so as to administer uniformly.

[1] GATT Panel Report, *Canada – Gold Coins*, para. 65

QUESTIONS FOR ALL THE THIRD PARTIES (103 – 108)

No responses provided.

QUESTIONS FOR THE PARTIES AND THIRD PARTIES (109 – 123)

No responses provided.

ANNEX A-7

RESPONSES OF JAPAN TO QUESTIONS POSED BY THE PANEL AFTER THE FIRST SUBSTANTIVE MEETING

(23 September 2005)

QUESTIONS FOR JAPAN

98. Please explain in practical terms what is meant by the reference to "results" in paragraph 9 of Japan's Third Party Submission.

The term "results" in paragraph 9 of Japan's third party submission means the actual administrations of customs regulations, i.e. the "application of" trade regulations pertaining to customs classification or valuation and other matters described in Article X:1 of the GATT.

For example, in a case where a Member has not introduced a sufficient system of the so called "advance ruling system", but the particular Member's trade regulation is administered uniformly as a result of implementation of other measures to ensure uniform administration, we are of the view that the administration is consistent with Article X:3(a) of the GATT, and the "results" in this case, in light of the usage we made in our submission, would be the actual application of the measures to ensure uniformity by this Member.

99. With respect to paragraph 17 of its Third Party Submission, is Japan arguing that, under Article X:3(a) of the GATT 1994, the *outcome* of review and correction procedures provided for under Article X:3(b) of the GATT 1994 must be uniform? If so, please justify making reference to the text of Articles X:3(a) and X:3(b)

No. The point of paragraph 17 in Japan's third party submission is that Article X:3(b) of the GATT obligates Members to maintain, or institute as soon as practicable, tribunals or procedures of review for "prompt review and correction of administrative action relating to customs matters" – the matter of uniform implementation of such tribunals or procedures is a matter under Article X:3(a) of the GATT, where applicable.

100. With respect to paragraph 2 of Japan's Oral Statement at the third party session of the first substantive meeting, does Japan consider that "transparency" and "procedural fairness" are the only "minimum standards" that characterize the requirements of Article X:3(a), including, in particular, the uniformity requirement? If not, please identify any other relevant "minimum standards"

The relevant part of paragraph 2 of Japan's Oral Statement indicates Japan's view on what the Appellate Body in *US – Shrimp* had characterized as minimum standards of the requirements of Article X:3(a). We stated in there that the requirements set out in Article X:3(a) are minimum standards, as the definition of transparency and procedural fairness overlap in part with uniformity – we did not suggest whether these were the only characteristics of the requirements thereof. As to whether there are any other relevant "minimum standards", Japan's point had been that uniformity, as well as other requirements under Article X:3(a), i.e. impartiality and reasonability, are considered to be "minimum standards" by the Appellate Body in *US – Shrimp*.

QUESTIONS FOR ALL THIRD PARTIES

103. What is meant by the term "uniform" in Article X:3(a) of the GATT 1994?

As we have submitted in our Third Party Submission and Oral Statement, we support the following findings by panels, which define and give context to the meaning of the term "uniform" in Article X:3(a) of the GATT 1994.

The Panel in *Argentina – Hides and Leather* determined that "uniform" in Article X:3(a) of the GATT 1994 meant that uniformity meant Aunchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times"[1], and that:

> Customs laws should not vary, that every exporter and importer should be able to expect treatment of the same kind, in the same manner both over time and in different places and with respect to other persons. Uniform administration requires that Members ensure that their laws are applied consistently and predictably and is not limited, for instance, to ensuring equal treatment with respect to WTO Members. That would be a substantive violation properly addressed under Article I. This is a requirement of uniform administration of Customs laws and procedures between individual shippers *a*nd even with respect to the same person at different times and different places.[2]
>
> We are of the view that this provision should not be read as a broad anti-discrimination provision. We do not think this provision should be interpreted to require all products be treated identically. That would be reading far too much into this paragraph which focuses on the day to day application of Customs laws, rules and regulations. There are many variations in products which might require differential treatment and we do not thinks this provisions should be read as a general invitation for a panel to make such distinctions.[3]

Therefore, in addition to the meaning given to the term "uniform" that customs laws "should not vary, that every exporter and importer should be able to expect treatment of the same kind, in the same manner both over time and in different places and with respect to other persons…consistently and predictably", Article X:3(a) shall be interpreted in the context of the "day to day application of Customs laws, rules and regulation". It is also necessary to take note that there is an extent to which such uniformity required under Article X:3(a) of the GATT 1994. The Panel in *US – Hot-Rolled Steel* clarified that a Member's measure to be in consistent with GATT X:3(a) of the GATT, it would have to have a significant impact on the overall administration of that Member's law and not simply on an impact on the outcome in the single case in question.[4] The GATT Panel in *EEC – Dessert Apples* found that minimal differences such as the form in which licence applications could be made and the requirement of pro-forma invoices did not in themselves establish a breach of Article X:3.[5]

104. How do the third parties ensure uniformity in administration of their respective customs laws at different points of entry? In this regard, please provide details regarding all relevant

---

[1] Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather (Argentina – Bovine Hides)*, WT/DS155/R and Corr.1, adopted 16 February 2001, para. 11.80 (quoting *The New Shorter Oxford English Dictionary*, Vol. II at 3488 (1993)).

[2] *Ibid.*, para. 11.83.

[3] *Ibid*., para. 11.84.

[4] *See* the Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (US – Hot-Rolled Steel)*, WT/DS184/R, adopted 23 August 2001, para. 7.268.

[5] *See* the GATT Panel Report, *EEC – Restrictions on Imports of Dessert Apples* (L/6491-36S/93) (*EEC – Dessert Apples*), adopted on 22 June 1989, para.12.30.

aspects of customs administration, including in particular those aspects that are not directly linked to the constitutional and institutional structure of customs administration.

Japan Customs administrates various measures to ensure the uniform customs administration, varying from common methods such as consultations and meetings within and between (a) regional customs to mechanisms at the national level, of which major measures are as follows:

With a view to ensure the uniform administration of customs regulations, Japan Customs functions as the central authorities for tariff classification and valuation, the function of which is to carry the primary responsibility to interpret trade regulations relating to customs classification, customs valuation as well as some relevant matters. When issuing decisions of advance rulings (which are explained below) of difficult matters, regional customs are obliged to consult with the central authorities. The central authorities maintain databases of the decisions made by regional customs, and also provide various trainings for officials of regional customs in order to ensure uniform administration of trade regulations throughout Japan.

Japan has implemented the advance ruling system for customs related matters regarding imports since 1966. Under this system, the customs authorities informs, either orally (application and ruling communicated through e-mail is treated as an "oral" ruling) or in a written form (application and ruling via CuPES (Customs Procedure Entry System), a system that allows application through the web-system, istreated as a "written" ruling), the appropriate tariff classification, etc., to the applicant (importers or other concerned parties of the goods to be imported) who has requested for an advanced ruling. These rulings may be given concerning: tariff classification, tariff rates, origin of goods and customs valuation. In addition, where a written decision is made, such decisions are publicized and provided to the public as a database on the internet at the official website of the Japan Customs, in principle, except for commercially sensitive cases where publication is withheld.

Please also see our answer for Question No. 105 below, which explains the tribunals/procedures which help implement a uniform administration of trade regulations in Japan.

105. What body(ies)/procedures are in place in the third parties to discharge their obligations under Article X:3(b) of the GATT 1994? Please explain how recourse to this(ese) body(ies)/procedures works in practice, including how long the review and correction process takes.

Japan provides both administrative procedures and judicial procedures for the purpose of prompt review and correction of administrative action relating to customs matters. The administrative procedures cannot be abbreviated before filing a case to a judicial tribunal for some cases designated by law, such as decisions to impose customs tariff. The details of each procedure are as follows:

First, any person who is not satisfied with an action taken by a regional customs may make an objection to the Director-General (DG) of the particular regional customs, within two months after the day following the date which the person became aware of the particular action. The DG is expected to make a decision regarding whether the action had been appropriate within three months after receiving such objection (if the decision is not made within that period, the person who made an objection can move to the next procedure explained in the last paragraph of this reply).

Any person who is not satisfied with a decision made by the DG of the regional customs in response to the objection made may file an appeal to the Minster of Finance within one month after the day following the date the person receives the notification of the DG's decision. The Minister of Finance is expected to make a decision regarding whether the action had been appropriate within three months after receiving the appeal (if the decision is not made within that period, the person who made

an objection can move to the next procedure explained in the first paragraph of the reply to Question No. 106 below).

In addition, any person who is not satisfied with the decision made by the Minister of Finance (or for some cases where the above procedures may be abbreviated, an action taken by a regional customs) may file a case to a judicial tribunal within six months after the date after becoming aware of the decision (or action), or a year after the date of the decision (or action), in principle (this term may be extended for certain cases).

106. The United States refers to divergent *decisions* taken by member State authorities throughout its First Written Submission. For example, the United States refers to divergence in *classification decisions*: generally (paragraph 21); with respect to network cards for personal computers (footnote 33); with respect to drip irrigation product (footnote 33); and with respect to unisex articles or shirts (paragraph 76). Further, the United States refers to divergence in *customs valuation decisions* (paragraphs 25 and 93). Can such divergence in decisions be challenged under Article X:3(a) of the GATT 1994?

The nature of custom administration is that it often involves vast numbers of imports and numerous different products which are complicated to classify, reflecting the realities such as the speed of technological advances and the resulting production of new products. Therefore, the fact divergences between individual decisions of various customs authorities may exist in itself is not inconsistent with Article X:3(a) of the GATT.

Taking into account the above, if the cases mentioned by the United States substantiates the non-uniformity of the overall administration of EC's customs regulation that may have a significant impact on the competitive situation, then these *decisions*, which are implementations of "laws, regulations, judicial decisions and administrative rulings", would be divergences that reach the degree which is inconsistent with Article X:3(a).

107. In paragraphs 220-221 of its First Written Submission, the European Communities submits that, where sub-federal laws exist in a particular WTO Member, it is the administration of those laws to which Article X:3(a) of the GATT 1994 refers.

(a) Does Article X:3(a) apply to penal laws?

Yes, as long as such law is a penalty against violations of relevant trade regulations. Article X:3(a) GATT applies to "laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article". Article X:1 GATT thus specifies the scope of the "regulations, decisions and rulings of the kind" in Article X:3(a) GATT, and stipulates as follows:

> Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use.

Penalties for violation of customs law are laws, regulation, decisions and rulings that are imposed against violations of customs law, i.e. "pertain to" "the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges…", and/or affects "their sale, distribution …" and therefore fall within the scope of Article X:3(a) GATT.

Although Article VIII:3 GATT does prohibit from imposing substantial penalties for minor breaches and sanctions, this is not the same as, and does not necessarily ensure a uniform administration of sanctions, as the EC suggests.[6]

However, as it is not specifically set out in Article X:1 that penalties are included, and it is cumbersome to interpret whether penalties are included in the scope of regulations set out in Article X:1. In connection with the efforts to *clarify* and improve Article VIII, as well as better meeting the objective of Article X, Japan has proposed that penalty provisions against breaches of import and export formalities in relevant laws and regulations be "clearly stated and publicized in the negotiation of trade facilitation[7].

(b) If so, would the Panel be authorized to consider the administration of member States' penal laws in respect of the United States' claim under Article X:3(a)?

Yes, in our view, the Panel would be authorized to do so.

108. How should "prompt" be defined under Article X:3(b) of the GATT 1994?

In addition to what Japan has stated in paragraph 18 of its third party submission, we view that the appropriate definition of "prompt" in this sense means "being ready and quick to act as occasion demands"[8] as well as "without delay", while "delay" is "(a period of) time lost by inaction or inability to proceed", as EC has stated in paragraph 459 of its First Written Submission. As to how to determine whether a review had been conducted "ready and quick to act as occasion demands" or "without delay", it would depend in accordance with the specific circumstances surrounding the particular system, and should be decided in light of the totality of the relevant situation.

With the above in view, the administrative tribunal procedures of Japan may serve as a reference. As stated in our answer for Question No. 11 above, in Japan's administrative tribunal procedures for Customs procedures, the DG of a regional customs makes a decision on a claim within five months after the action at issue is administered by the particular regional customs (taking into account the two month term for the applicant to make an objection and the three months for the DG to make a decision in our answer for Q.11 above) in principle, and the Minister of Finance makes a decision on an appeal against the decision of the DG within nine months after the action at issue is administered in principle.

QUESTIONS FOR THE PARTIES AND THIRD PARTIES:

109. How should the term "administer" be interpreted for the purposes of Article X:3(a) of the GATT 1994?

No response provided.

110. Does the uniformity obligation in Article X:3(a) of the GATT 1994 mean that there should be no or only limited possibility for the exercise of discretion in the administration of customs laws?

No response provided.

---

[6] *See* the First Written Submission of the European Communities, para. 441.
[7] Section IV, TN/TF/W/17.
[8] *Merriam-Webster Online Dictionary*, http://www.m-w.com/cgi-bin/dictionary.

111. Is the time taken to address a specific issue (including instances of divergences in administration) a consideration to be taken into account for the purposes of the uniformity obligation in Article X:3(a) of the GATT 1994? If so, please explain why, making reference to the specific terms of Article X:3(a).

No response provided.

112. With respect to the WTO objective of security and predictability in the international trading environment (which was recently referred to by the Appellate Body in the context of tariff commitments at paragraph 243 of its report in *EC – Chicken Cuts* WT/DS269/AB/R and WT/DS286/R), please explain whether, why and how it is relevant for the interpretation of Article X:3(a) of the GATT 1994.

As Article X:3(a) is a provision which contributes to the security and predictability in international trading environment by ensuring uniform, impartial and reasonable administration of trade regulations, such WTO objective is relevant, and Article X:3(a) should be interpreted in light of such objective.

113. Are the expectations of traders relevant to an interpretation and application of Articles X:3(a) and X:3(b) of the GATT 1994? If so, please explain why and how, making reference to the specific language of those Articles.

No response provided.

114. Does the obligation contained in Article X:3(a) of the GATT 1994 require *overall* uniformity in administration or does it require uniformity in administration *in each and every case*? Does the answer depend upon the nature of the challenge under Article X:3(a)? If so, please explain. If overall uniformity is acceptable under Article X:3(a), what would be the practical/numerical threshold and/or benchmark for demonstrating that Article X:3(a) has been violated?

No response provided.

115. Please comment on the submission made by Japan in paragraph 8 of its third party submission to the effect that, in assessing the United States' claim under Article X:3(a) of the GATT 1994, it is necessary for the Panel to analyze whether the alleged divergences exist, as claimed by the United States, and if so, whether such divergences exist to a degree that would be considered to be inconsistent with Article X:3(a) in light of the particular customs system as a whole.

No response provided.

116. In paragraph 2 of Japan's Oral Statement at the third party session of the first substantive meeting, Japan relies upon the "minimum standards" of transparency and procedural fairness referred to by the Appellate Body in *US – Shrimp* to argue that "[a]n administration of regulations lacking 'uniformity' [for the purposes of Article X:3(a) of the GATT 1994] would in general terms be unjust, biased, inequitable, partial and opaque – in other words, unfair and non-transparent". Following this line of reasoning, would the requirements of transparency and procedural fairness apply to: (i) the processes or the treatment of traders in the context of the application of customs laws; and/or (ii) the substantive customs decisions to which traders are subject?

No response provided.

117. In paragraph 7.268 of its report, the Panel in *US – Hot Rolled Steel* (WT/DS184/R) stated that "we note that Japan has not even alleged, much less established, a pattern of decision-making with respect to the specific matters it is raising which would suggest a lack of uniform, impartial and reasonable administration of the US anti-dumping law [under Article X:3(a) of the GATT 1994]". Please comment on the Panel's finding that a pattern of decision-making is needed in order to prove a violation of Article X:3(a).

No response provided.

118. What is meant by the words "pertaining to" in Article X:1 of the GATT 1994? Would rules governing the operational procedures of bodies that oversee or are somehow involved in the administration of customs laws – such as, for example, the EC Customs Code Committee – qualify as laws, regulations, judicial decisions and administrative rulings of general application "pertaining to" the classification or the valuation of products for customs purposes?

"Pertain" in the context of Article X:1 means to "have reference or relation to; relate to"[9]. However, this should not mean that any matter, however distantly related, falls within the scope of Article X:1. The distinction should be made based on whether the relevant laws, etc., are relevant enough so that it can be seen to be directly relate to matters indicated in Article X:1. Therefore, whether rules governing the operational procedures of bodies that oversee or are somehow involved in the administration of customs laws pertaining to matters set out in Article X:1 should be determined in light of the content of such rule. If it sets out the details of how to implement trade regulations, then it may "pertain to" trade regulations set out in Article X:1. However, it is difficult to envision that the rules governing operational procedures of bodies is rules of "general application" as required under Article X:1.

119. Do penalty laws/provisions applicable to violations of customs laws fall within the scope of the measures referred to in Article X:1 of the GATT 1994? If so, please explain making reference to the relevant terms of Article X:1.

Please see our answer for Question No. 107 (a) above.

120. What is the significance of Article XXIV:12 of the GATT 1994 for the interpretation of Article X:3(a) of the GATT 1994?

No response provided.

121. Making reference to the specific terms of Article X:3(b) of the GATT 1994, please explain whether or not the obligation to ensure prompt review and correction of administrative action is confined to first instance reviews by administering authorities.

No response provided.

122. What does "correction" mean in Article X:3(b) of the GATT 1994?

No response provided.

[9] *The New Shorter Oxford English Dictionary*, Vol. 2 at 2173 (1993).

123. What is the legal relationship between Article X:3(a) of the GATT 1994 and Article X:3(b) of the GATT 1994, if any?

No response provided.

ANNEX A-8

RESPONSES OF KOREA TO QUESTIONS POSED BY THE PANEL AFTER THE FIRST SUBSTANTIVE MEETING

(23 September 2005)

QUESTIONS FOR KOREA

101. With respect to paragraph 7 of its third party submission, please explain in practical terms how a distinction can be drawn between, on the one hand, a legitimate exercise of discretion and, on the other hand, an instance of non-uniform administration in violation of Article X:3(a) of the GATT 1994?

Discretion a WTO member enjoys under the WTO regime does not mean that the member can justify its deviation from otherwise applicable obligation by referring to the discretion. Discretion for a WTO member is only allowed only to the extent and only if the exercise of such discretion is within the relevant obligations of the WTO regime.

In more practical terms, Korea believes that the EC is free to adopt whatever customs administration system as it pleases – whether it is a centrally-controlled single customs agency system or 25 independent and separate customs agency system. However, as a WTO member, the EC must make sure that administration of the customs laws and regulations is "reliable and predictable" from the perspective of foreign exporters, no matter which member country's customs agency and procedures the exporters decide to utilize. So, Korea is of the opinion that the dividing line between a legitimate exercise of discretion and violation of uniform administration obligation should be whether there is "reliability and predictability" across the board of a WTO member. Korea notes that the EC has not fulfilled this obligation.

102. In paragraph 3 of its third party submission, Korea refers *inter alia* to the "frustrating", "burdensome", "unreasonable" and "unpredictable" administration of EC customs laws from the perspective of foreign exporters. Does Korea have any concrete evidence to support these allegations?

This observation is based upon the compilation of concerns and complaints of some Korean exporters who have had to deal with the EC member country's varying administration of customs laws and regulations. Due to the business confidential nature of the underlying business transactions (that is, as to some Korean exporters, explaining selection of a particular port of entry could reveal their business strategy and plans) and sensitivity of the claims, Korea is not currently in the position of providing concrete evidence in this respect. Korea, however, will make its best effort, if such concrete evidence from the Korean side becomes crucial to the Panel's analysis. Korea notes that the examples provided in the US First Written Submission seems to offer an accurate description of the Korean exporters' problems as well.

QUESTIONS FOR ALL THIRD PARTIES

103. What is meant by the term "uniform" in Article X:3(a) of the GATT 1994?

The "uniformity" standard as included in Article X:3(a) of the GATT 1994 does not mean that a customs authority should render the same decision all the time. Korea does not believe it logistically possible or practicable, given the ever-changing nature of existing products and the advent of new products. In Korea's opinion, the uniformity means that a foreign exporter can expect

"reliable and predictable" administration of customs law and regulations. In other words, if a foreign exporter has to "guess" at the border regarding classification or valuation, it shows the lack of "reliability or predictability" in terms of customs system, which would then lead to "non-uniform" administration of customs laws and regulations.

104. How do the third parties ensure uniformity in administration of their respective customs laws at different points of entry? In this regard, please provide details regarding all relevant aspects of customs administration, including in particular those aspects that are not directly linked to the constitutional and institutional structure of customs administration.

In Korea, the Korean Customs Service is in charge of all customs issues. It applies customs laws and regulations uniformly throughout the Korean territory. As all customs-related issues are monitored and coordinated by a single government agency, a conflicting customs decision rarely occurs, and any such conflict is promptly resolved.

105. What body(ies)/procedures are in place in the third parties to discharge their obligations under Article X:3(b) of the GATT 1994? Please explain how recourse to this(ese) body(ies)/procedures works in practice, including how long the review and correction process takes.

An aggrieved importer can file a protest with the Korean Customs Service for correction or clarification. When a protest is filed, the Korean Customs Service is required to issue a determination within 30, 60 or 90 days depending upon the nature of the protest. If such request is denied, the aggrieved importer can initiate a legal action against Korean Customs Service requesting judicial review of the agency determination. This case can be then reviewed and determined by the Administrative Court, which is a special court in the Korean judicial system to deal with this kind of dispute. The time period for the judicial review is usually about one year, although a complex case may take longer than that.

106. The United States refers to divergent *decisions* taken by member State authorities throughout its First Written Submission. For example, the United States refers to divergence in *classification decisions*: generally (paragraph 21); with respect to network cards for personal computers (footnote 33); with respect to drip irrigation product (footnote 33); and with respect to unisex articles or shirts (paragraph 76). Further, the United States refers to divergence in *customs valuation decisions* (paragraphs 25 and 93). Can such divergence in decisions be challenged under Article X:3(a) of the GATT 1994?

To answer the question upfront, Korea believes that such "divergence" can also be challenged under Article X:3(a) of the GATT 1994. Again, in Korea's opinion, the divergence included in the US submission is simply a showcase of proving the lack of "reliability and predictability" in terms of EC's administration of customs laws and regulations.

If the divergence constitutes a simple aberration due to the inherent nature of customs administration, as the EC attempts to portray, then such divergence may not be challenged under the provision. Korea, however, believes that the examples in the US submission are simply a tip of the iceberg that indicates a chronic problem of divergence, rather than infrequent, inadvertent aberrations.

107. In paragraphs 220-221 of its First Written Submission, the European Communities submits that, where sub-federal laws exist in a particular WTO Member, it is the administration of those laws to which Article X:3(a) of the GATT 1994 refers.

(a) Does Article X:3(a) apply to penal laws?

Korea believes that the answer to the question is in the affirmative. As long as the relevant provisions of the penal laws are directly related to administration of customs laws and regulations, Korea does not see any particular reason to exclude penal laws.

(b) If so, would the Panel be authorized to consider the administration of member States' penal laws in respect of the United States' claim under Article X:3(a)?

Korea notes that the standard should be whether the administration of penal laws by various member states leads to "unreliable or unpredictable" penalization for customs related activities committed by foreign exporters. If that is the case, it may constitute possible violation of Article X:3(a) of GATT 1994.

108. How should "prompt" be defined under Article X:3(b) of the GATT 1994?

Korea believes that the term "prompt" should be interpreted as "without delay" under given circumstances. If a WTO member has a system under which a judicial review systematically takes much longer time than that of other countries, the member fails to provide a "prompt" review. The member should not be allowed to simply cherry-pick an exceptionally time-consuming example from the complaining country and then compare it with its own case in an attempt to justify its alleged "promptness."

QUESTIONS FOR THE PARTIES AND THIRD PARTIES

109. How should the term "administer" be interpreted for the purposes of Article X:3(a) of the GATT 1994?

Korea believes that the term "administer" covers all aspects relating to operation of customs laws and regulations of a WTO member.

110. Does the uniformity obligation in Article X:3(a) of the GATT 1994 mean that there should be no or only limited possibility for the exercise of discretion in the administration of customs laws?

To the extent that a WTO member should not exercise its discretion in a manner that violates its uniformity obligation under Article X:3(a) of the GATT 1994, one could say that there is "limited possibility" for the exercise of discretion in the administration of customs laws and regulations.

111. Is the time taken to address a specific issue (including instances of divergences in administration) a consideration to be taken into account for the purposes of the uniformity obligation in Article X:3(a) of the GATT 1994? If so, please explain why, making reference to the specific terms of Article X:3(a).

Korea believes that the time taken is also one of the elements to be considered in the uniformity obligation under Article X:3(a) of the GATT 1994 because the time taken to address a specific issue can alleviate or exacerbate the alleged divergence. In other words, the longer it takes, the more expansive the divergence would be, and the more likely "non-uniformity" would exist.

112. With respect to the WTO objective of security and predictability in the international trading environment (which was recently referred to by the Appellate Body in the context of tariff commitments at paragraph 243 of its report in *EC – Chicken Cuts* WT/DS269/AB/R and WT/DS286/R), please explain whether, why and how it is relevant for the interpretation of Article X:3(a) of the GATT 1994.

No response provided.

113. Are the expectations of traders relevant to an interpretation and application of Articles X:3(a) and X:3(b) of the GATT 1994? If so, please explain why and how, making reference to the specific language of those Articles.

As noted above, Korea believes that the underlying theme of Article X:3(a) is to preserve a "reliable and predictable" customs system for foreign exporters. As such, in Korea's opinion the provision is relevant to the expectations of traders.

114. Does the obligation contained in Article X:3(a) of the GATT 1994 require *overall* uniformity in administration or does it require uniformity in administration *in each and every case*? Does the answer depend upon the nature of the challenge under Article X:3(a)? If so, please explain. If overall uniformity is acceptable under Article X:3(a), what would be the practical/numerical threshold and/or benchmark for demonstrating that Article X:3(a) has been violated?

Korea believes that the uniformity as used in Article X:3(a) refers to an *overall* uniformity rather than uniformity in each and every case. In other words, the Panel needs to evaluate all relevant facts to determine whether the EC system can indeed guarantee a "reliable and predictable" customs system for foreign exporters.

115. Please comment on the submission made by Japan in paragraph 8 of its third party submission to the effect that, in assessing the United States' claim under Article X:3(a) of the GATT 1994, it is necessary for the Panel to analyze whether the alleged divergences exist, as claimed by the United States, and if so, whether such divergences exist to a degree that would be considered to be inconsistent with Article X:3(a) in light of the particular customs system as a whole.

No response provided.

116. In paragraph 2 of Japan's Oral Statement at the third party session of the first substantive meeting, Japan relies upon the "minimum standards" of transparency and procedural fairness referred to by the Appellate Body in *US – Shrimp* to argue that "[a]n administration of regulations lacking 'uniformity' [for the purposes of Article X:3(a) of the GATT 1994] would in general terms be unjust, biased, inequitable, partial and opaque – in other words, unfair and non-transparent". Following this line of reasoning, would the requirements of transparency and procedural fairness apply to: (i) the processes or the treatment of traders in the context of the application of customs laws; and/or (ii) the substantive customs decisions to which traders are subject?

No response provided.

117. In paragraph 7.268 of its report, the Panel in *US – Hot Rolled Steel* (WT/DS184/R) stated that "we note that Japan has not even alleged, much less established, a pattern of decision-making with respect to the specific matters it is raising which would suggest a lack of uniform, impartial and reasonable administration of the US anti-dumping law [under

Article X:3(a) of the GATT 1994]". Please comment on the Panel's finding that a pattern of decision-making is needed in order to prove a violation of Article X:3(a).

As noted above, Korea believes that what matters in the examination of Article X:3(a) of GATT 1994 is whether the *overall* administration of customs laws and regulations shows the across-the-board uniformity rather than case-by-case approach. In that context, Korea believes that the pattern of decision-making process would be more probative than an individual decision-making process.

118. What is meant by the words "pertaining to" in Article X:1 of the GATT 1994? Would rules governing the operational procedures of bodies that oversee or are somehow involved in the administration of customs laws – such as, for example, the EC Customs Code Committee – qualify as laws, regulations, judicial decisions and administrative rulings of general application "pertaining to" the classification or the valuation of products for customs purposes?

No response provided.

119. Do penalty laws/provisions applicable to violations of customs laws fall within the scope of the measures referred to in Article X:1 of the GATT 1994? If so, please explain making reference to the relevant terms of Article X:1.

No response provided.

120. What is the significance of Article XXIV:12 of the GATT 1994 for the interpretation of Article X:3(a) of the GATT 1994?

No response provided.

121. Making reference to the specific terms of Article X:3(b) of the GATT 1994, please explain whether or not the obligation to ensure prompt review and correction of administrative action is confined to first instance reviews by administering authorities.

Korea believes that the promptness requirement under Article X:3(b) of GATT 1994 is applicable to *all* administrative and legal review procedures of a WTO Member until there is *finality* to the dispute or challenge.

122. What does "correction" mean in Article X:3(b) of the GATT 1994?

No response provided.

123. What is the legal relationship between Article X:3(a) of the GATT 1994 and Article X:3(b) of the GATT 1994, if any?

No response provided.

ANNEX A-9

RESPONSES OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU TO QUESTIONS POSED BY THE PANEL AFTER THE FIRST SUBSTANTIVE MEETING

(23 September 2005)

QUESTIONS FOR ALL THIRD PARTIES

103. What is meant by the term "uniform" in Article X:3(a) of the GATT 1994?

We agree with the ordinary meaning of the term "uniform" as stated by the United States.[1] We also agree wit the GATT Panel Report in *EEC – Restrictions on Imports of Dessert Apples, Complaint by Chile* that uniformity is required "throughout the territories" of the relevant Member "over time". The term "uniform" also refers to the uniformity in administration as well as in the result of administration.

104. How do the third parties ensure uniformity in administration of their respective customs laws at different points of entry? In this regard, please provide details regarding all relevant aspects of customs administration, including in particular those aspects that are not directly linked to the constitutional and institutional structure of customs administration.

We believe that the most important requirement to ensure uniformity is to have a uniform set of laws and regulations for customs authorities to follow. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu has such single and unified set of laws and rules in its territory as the basis for customs officials to carry out their duties. There is also a central government agency responsible for the oversight and monitor of customs administration. We believe the monitoring and overseeing activities are of importance to ensure uniformity. Toward that end, we conduct on-the-job training for our customs officials to ensure that all laws and regulations, whether new ones or ones already in existence, are administered in accordance with Article X:1(a). In addition, we hold coordination meetings among officials from different points of entry, partly for the purpose of eliminating differences.

105. What body(ies)/procedures are in place in the third parties to discharge their obligations under Article X:3(b) of the GATT 1994? Please explain how recourse to this(ese) body(ies)/procedures works in practice, including how long the review and correction process takes.

Under Article 45 of the Customs Law of the Customs Territory of Taiwan, Penghu, Kinmen and Matsu, if a party is not satisfied with the decision of the customs authority regarding the classification of its products, the customs valuation decision, or the amount of duties or special duties to be paid, it is entitled, within 30 days, to seek a review by the customs authority. The party can also provide guarantees or bonds to receive its goods prior to the final decision on the review. Also, under Article 46 of the Customs Law, the customs authority is required to make a decision on the review within two months from the day after the receipt of the request for review. If the party is still unsatisfied with the review decision, it can further make appeal to the Committee of Administrative Appeals of the superior agency. The superior agency shall make its decision on such administrative appeals within three months from the appeal. Extension of the three-month period can

[1] US First Submission, para. 35.

be made once. If the party is not satisfied with the result of the administrative appeal, it can further appeal to High Administrative Court and Supreme Administrative Court.

106. The United States refers to divergent decisions taken by member State authorities throughout its First Written Submission. For example, the United States refers to divergence in classification decisions: generally (paragraph 21); with respect to network cards for personal computers (footnote 33); with respect to drip irrigation product (footnote 33); and with respect to unisex articles or shirts (paragraph 76). Further, the United States refers to divergence in customs valuation decisions (paragraphs 25 and 93). Can such divergence in decisions be challenged under Article X:3(a) of the GATT 1994?

Article X:3(a) of GATT 1994 requires uniform administration of all laws, regulations, decisions and rulings of the kind described in paragraph 1 of the same Article, which includes "laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use." The divergent decisions referred to by the United States can be challenged under Article X:3(a) because they are administrative rulings affecting the classification of certain products. Such rulings have general applicable effect on the subsequent importation of the same products.

107. In paragraphs 220-221 of its First Written Submission, the European Communities submits that, where sub-federal laws exist in a particular WTO Member, it is the administration of those laws to which Article X:3(a) of the GATT 1994 refers.

(a) Does Article X:3(a) apply to penal laws?

(b) If so, would the Panel be authorized to consider the administration of member States' penal laws in respect of the United States' claim under Article X:3(a)?

As a matter of fact, penal law that mandates punishments for infraction of regulations and rulings pertaining to the administration of customs laws could also have great implication on international trade. Penal law can form part of the overall structure of administration of customs laws. We do not see why penal laws should be *per se* excluded from the scope of laws covered by Article X:3(a).

This Panel has the authority to consider the administration of Member's customs laws, regulations, decisions and rulings, which includes penal laws that mandate penalties for the violation of these laws, regulations, decisions and rulings.

108. How should "prompt" be defined under Article X:3(b) of the GATT 1994?

The term "prompt" as defined under Article X:3(b) means no unnecessary or unjustifiable delay or prolonging of the process or procedure to the extent that remedies pursuant to review and correction of administrative action would no longer be enough to repair any injury arising from the measure under review on the relevant party.

QUESTIONS FOR THE PARTIES AND THIRD PARTIES

109. How should the term "administer" be interpreted for the purposes of Article X:3(a) of the GATT 1994?

Administering laws and regulations means applying, carrying out, or enforcing laws and regulations, or making decisions on classification, valuation or other matters included in Article X:3(a) based or not based on the applicable laws or regulations of the kind stated in Article X:3(a).

110. Does the uniformity obligation in Article X:3(a) of the GATT 1994 mean that there should be no or only limited possibility for the exercise of discretion in the administration of customs laws?

In our view, it is possible for customs authorities to have some discretion in the administration of customs laws, within parameters set out by the customs laws that do not violate Article X:3(a). The GATT Panel in *EEC – Dessert Apples* is consistent with our position in that it recognizes that "minor administration variations", which may be the result of such discretion, can exist without violating Article X:3(a).

111. Is the time taken to address a specific issue (including instances of divergences in administration) a consideration to be taken into account for the purposes of the uniformity obligation in Article X:3(a) of the GATT 1994? If so, please explain why, making reference to the specific terms of Article X:3(a).

The requirements under Article X:3(a) include the administration of laws and regulations in a uniform, impartial and reasonable manner. Certainly the time taken to address a specific issue should be a consideration to be taken into account for the purpose of the "uniformity" obligation and the obligation under "reasonableness". If a prolonged time has been consumed to address a specific issue, the relevant Member might not have observed the requirement of administering the laws and regulations in a reasonable manner. Also if different lengths of time have been in place in dealing with similar kind of matters, it could be that the Member has not administered the laws and regulations in a uniform manner.

112. With respect to the WTO objective of security and predictability in the international trading environment (which was recently referred to by the Appellate Body in the context of tariff commitments at paragraph 243 of its report in *EC – Chicken Cuts* WT/DS269/AB/R and WT/DS286/R), please explain whether, why and how it is relevant for the interpretation of Article X:3(a) of the GATT 1994.

We consider the WTO objective of security and predictability in the international trading environment expressed by the Appellate Body to be very relevant to the interpretation of Article X:3(a) of GATT 1994. Article X:3(a) requires Members to administer laws and regulations in a uniform, impartial and reasonable manner. This requirement is the practical manifestation and application of the fundamental principle of security and predictability in the international trading environment. Thus, when interpretation of this particular provision is made, the objective of security and predictability should always be considered as important elements.

113. Are the expectations of traders relevant to an interpretation and application of Articles X:3(a) and X:3(b) of the GATT 1994? If so, please explain why and how, making reference to the specific language of those Articles.

Specific expectations of traders are not directly relevant in the interpretation of Article X:3(a) and (b) in general. However, in applying the standards of reasonableness and

impartiality in Articles X:3(a) and X:3(b), expectations of traders in that particular situation may become an important consideration.

114. Does the obligation contained in Article X:3(a) of the GATT 1994 require overall uniformity in administration or does it require uniformity in administration in each and every case? Does the answer depend upon the nature of the challenge under Article X:3(a)? If so, please explain. If overall uniformity is acceptable under Article X:3(a), what would be the practical/numerical threshold and/or benchmark for demonstrating that Article X:3(a) has been violated?

We are of the view that the obligation contained in Article X:3(a) of GATT 1994 requires uniformity in administration in each and every case over time and across the territory of the Member in question where the same general conditions exist. This view is consistent with the ordinary meaning of the term "uniform". In the real world, divergences do occur in the application. These divergences should be treated as violations. If these violations are not properly addressed domestically, they can be subject to challenge under the WTO.

115. Please comment on the submission made by Japan in paragraph 8 of its third party submission to the effect that, in assessing the United States' claim under Article X:3(a) of the GATT 1994, it is necessary for the Panel to analyze whether the alleged divergences exist, as claimed by the United States, and if so, whether such divergences exist to a degree that would be considered to be inconsistent with Article X:3(a) in light of the particular customs system as a whole.

The United States have provided in this case evidence of the divergences that exist in the administration of EC's customs laws, regulations, decisions and rulings, and our understanding is that the EC disputes the existence of such divergences rather than the degree of divergences. We do not see the textual basis upon which such a two-step analysis is required. The requirements under Article X:3(a) are that the administration must be made uniformly, impartially and reasonably. Any departure from such requirements is violation of this particular provision. It is our view that the "minor administrative variations" indicated as acceptable in *EEC – Dessert Apples* refers to the type of administration upon which variations occur rather than the degree of divergence.

116. In paragraph 2 of Japan's Oral Statement at the third party session of the first substantive meeting, Japan relies upon the "minimum standards" of transparency and procedural fairness referred to by the Appellate Body in *US – Shrimp* to argue that "[a]n administration of regulations lacking 'uniformity' [for the purposes of Article X:3(a) of the GATT 1994] would in general terms be unjust, biased, inequitable, partial and opaque – in other words, unfair and non transparent". Following this line of reasoning, would the requirements of transparency and procedural fairness apply to: (i) the processes or the treatment of traders in the context of the application of customs laws; and/or (ii) the substantive customs decisions to which traders are subject?

Our view is that the transparency and procedural fairness requirements should apply to both the treatment of traders in the context of the application of customs law and the substantive customs decisions, because both of these are within the concept of administration of laws and regulations and because such administration must strictly follow Article X:3(a) of GATT 1994.

117. In paragraph 7.268 of its report, the Panel in *US – Hot-Rolled Steel* (WT/DS184/R) stated that "we note that Japan has not even alleged, much less established, a pattern of decision-making with respect to the specific matters it is raising which would suggest a lack of uniform, impartial and reasonable administration of the US anti-dumping law [under

Article X:3(a) of the GATT 1994]". Please comment on the Panel's finding that a pattern of decision-making is needed in order to prove a violation of Article X:3(a).

We do not agree with the view expressed in the Panel report in *US – Hot-Rolled Steel*. There is no requirement for the existence of a "pattern of decision-making with respect to the specific matters it is raising" in order to find an Article X:3(a) violation. In addition, we are not certain what the threshold is for establishing a "pattern of decision-making" Such a requirement would amount to granting every Member the privilege to violate its obligations under Article X:3(a) until a "pattern of decision-making" can be found.

118. What is meant by the words "pertaining to" in Article X:1 of the GATT 1994? Would rules governing the operational procedures of bodies that oversee or are somehow involved in the administration of customs laws – such as, for example, the EC Customs Code Committee – qualify as laws, regulations, judicial decisions and administrative rulings of general application "pertaining to" the classification or the valuation of products for customs purposes?

According to Oxford English Dictionary, the words "pertaining to" mean to "be appropriate, related, and applicable". This is quite broad. The rules governing the operational procedures of bodies that oversee the administration of customs laws is undeniably related to the laws, regulations, judicial decisions and administration of the customs matters listed in Article X:1. We therefore have to consider that such rules to be within the scope of Article X:1. Unless we adopt such an interpretation, a loophole could exist for Members to deviate from the requirements imposed by Article X:3(a).

119. Do penalty laws/provisions applicable to violations of customs laws fall within the scope of the measures referred to in Article X:1 of the GATT 1994? If so, please explain making reference to the relevant terms of Article X:1.

Article X:1 includes laws and regulations "pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use." Thus the issue, as correctly pointed out by the Panel in the previous question, is whether a law or a regulation pertains to the matters listed in the provision. There is no distinction between penal law and non-penal law for the purpose of the application of this provision. Thus penal laws and provisions pertaining to customs matters as provided in Article X:1 should fall within the scope of this provision.

120. What is the significance of Article XXIV:12 of the GATT 1994 for the interpretation of Article X:3(a) of the GATT 1994?

Article XXIV:12 requires every Member, regardless of its structure of government (not just governments with a federal character), to take reasonable measures to ensure that all levels of its government, including regional and local governments, observe the rules of GATT. This provision is written in the form of an active obligation rather than an exception, and cannot be used, in any event, as a justification for a central government to excuse itself from fulfilling its own WTO obligations, regardless of the structure or organization of the Member's government. If that is the case, all Members would be able to escape from its WTO obligations by delegating the administration of customs matters to regional and local governments. We, therefore, do not believe that Article XXIV:12 has any relevance in the interpretation of Article X:3(a) in this case.

121. Making reference to the specific terms of Article X:3(b) of the GATT 1994, please explain whether or not the obligation to ensure prompt review and correction of administrative action is confined to first instance reviews by administering authorities.

Article X: 3(b) states that "Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters." We cannot find any basis to support that the prompt review and correction of administrative action should be confined to first instance only. In addition, the requirements are "prompt review" and "prompt correction". It is possible that the result of the first instance is incorrect. The party might need to go to second or even third instance for review. If there is no prompt second and third instance, it would not be possible to have "prompt correction" as required by this provision.

122. What does "correction" mean in Article X:3(b) of the GATT 1994?

"Correction" in Article X:3(b), in our view, means modification to remedy and to redress the situation.

123. What is the legal relationship between Article X:3(a) of the GATT 1994 and Article X:3(b) of the GATT 1994, if any?

These two sub-paragraphs require distinctly independent obligations. Article X:3(a) is about the administration of laws and regulations, while Article X:3(b) is about the review and correction of administrative actions. If the review and corrective mechanism is administered in a non-uniform, partial and unreasonable way, Article X:3(a) can also apply, because the review and corrective mechanism is also laws or regulations pertaining to customs matters. Additionally, if a customs law is not administered uniformly and there is no judicial, arbitral or administrative tribunals or procedures to review and correct the decisions, both Article X:3(a) and Article X:3(b) may be violated.