ANNEX B

RESPONSES TO QUESTIONS POSED BY THE PANEL AFTER THE SECOND SUBSTANTIVE MEETING OF THE PANEL

ANNEX B-1

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

(7 December 2005)

QUESTIONS FOR THE UNITED STATES:

124. In its replies to Panel Questions Nos. 1, 3, 5 and 114, the United States submits that it is not challenging specific areas of customs administration under Article X:3(a) of the GATT 1994. Rather, it is challenging the absence of uniformity in the administration of EC customs laws as a whole/overall.

(a) Please make specific reference to the terms of the United States' request for establishment of a panel WT/DS315/8 to support the United States' submission that such a challenge is within the Panel's terms of reference.

(b) Please confirm that the United States is only requesting the Panel to make findings on the conformity or otherwise of the European Communities' system of customs administration as a whole and not on the specific areas of customs administration to which the United States has referred to in its submission to substantiate its claim of violation of Article X:3(a) by the European Communities.

The first sentence of the United States' request for establishment of a panel states that "the manner in which the [EC] administers its laws, regulations, decisions and rulings of the kind described in Article X:1 . . . is not uniform, impartial and reasonable and therefore is inconsistent with Article X:3(a) of the GATT 1994."[1] The request then proceeds to identify the laws and regulations that make up "EC customs laws as a whole." That is, first, it identifies the Community Customs Code ("CCC"), the CCC Implementing Regulation ("CCCIR"), and the Community Customs Tariff ("Tariff Regulation"). These are the principal elements of EC customs law as a whole.[2] The request then identifies several related instruments.

In the third paragraph, the request makes clear that the lack of uniform administration that forms the basis for the US complaint is "manifest in differences among member States in a number of areas, including but not limited to" those that are enumerated. This text, too, reflects the approach of the panel request as a challenge to the absence of uniformity of administration of EC customs law overall and demonstrates that a challenge based on administration of EC customs law as a whole is within the Panel's terms of reference.

With respect to part (b) of the Panel's question, it is correct that the principal finding that the United States is asking the Panel to make is that the EC's system of customs administration as a whole is inconsistent with Article X:3(a) of the GATT 1994. At the same time, making such a finding does not preclude findings on the specific areas of customs administration to which the United States has referred in its submissions and interventions to substantiate its claim of violation of Article X:3(a) by the European Communities. While such findings on specific areas of EC customs administration are

[1] Since first making its request for establishment of a panel, the United States has focused its complaint on non-uniform administration (as opposed to partial or unreasonable administration). *See* US First Written Submission, para. 33 n.15.

[2] *See* EC First Written Submission, para. 63 (describing Community Customs Tariff, CCC, and CCCIR as "[t]he three main instruments of EC customs legislation").

not strictly necessary to make the finding requested with respect to the EC's system of customs administration as a whole, they would tend to support the overall finding requested. Accordingly, the United States would welcome findings on the specific areas, while recognizing that it may be appropriate to exercise judicial economy for findings in these specific areas in light of a finding of a breach concerning the EC's administration as a whole.

In particular, the evidence the United States has presented supports subsidiary findings that the EC fails to meet its GATT Article X:3(a) obligation of uniform administration with respect to the administration of:

- the Tariff Regulation;
- CCC Article 32(1)(c) (regarding treatment of royalty payments for customs valuation purposes);
- CCCIR Article 147 (regarding customs valuation on a basis other than the last sale that led to introduction of a good into the customs territory of the EC);
- CCC Article 29 and CCCIR Article 143(1)(e) (regarding circumstances under which parties are to be treated as related for customs valuation purposes);
- all valuation provisions in the CCC and CCCIR (i.e. CCC, Articles 28 to 36, and CCCIR, Articles 141 to 181a and Annexes 23 to 29), to the extent that different member State authorities employ different audit procedures (with only some providing binding valuation guidance, for example[3]), making "individual customs authorities . . . reluctant to accept each others decisions;"[4]
- all classification and valuation provisions in the Tariff Regulation, CCC, and CCCIR, to the extent that different member State authorities have at their disposal different penalties to ensure compliance with those provisions; and
- CCC Article 133 and CCCIR Articles 502(3) and 552 (regarding assessment of the economic conditions for allowing processing under customs control); and
- CCCIR Article 263-267 (regarding local clearance procedures).

To be clear, the Panel does not need to make the foregoing findings in order to make the overall finding of non-conformity with Article X:3(a) requested by the United States. The systemic breach that the United States has established – the administration of the customs laws by 25 independent, territorially limited customs authorities, coupled with the lack of any effective, binding EC procedures or institutions to ensure these authorities administer EC customs laws uniformly – applies to all aspects of customs administration within the EC. The United States believes that non-conformity with Article X:3(a) can be found on the basis of the design and structure of the EC's system of customs administration.[5] Nevertheless, the divergences in specific areas of customs administration that the United States has identified corroborate what necessarily results from the design and structure of the system. Accordingly, the United States would welcome findings on these specific areas of divergence.

125. With respect to its claim under Article X:3(a) of the GATT 1994, is the United States only challenging non-uniformity of decisions/action taken by the member States or is the United States also challenging non-uniformity of decisions/action taken at the EC-level (e.g., by EC institutions)? If the latter, please elaborate.

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[3] *See* US First Written Submission, paras. 98-99.

[4] 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 the *Official Journal of the European Communities* C84, para. 37 (14 March 2001) ("Court of Auditors Valuation Report") (Exhibit US-14); *see* US First Written Submission, paras. 96-97.

[5] *Cf.* Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, para. 4.601 (adopted 27 September 2004 with Appellate Body report) (EC as third party arguing that violation of GATT obligation may be found on the basis of "structural shortcomings") ("*Canada – Wheat Exports and Grain Imports*").

The United States is challenging non-uniformity in the administration of EC customs law. That law is administered principally by authorities located in each of the EC's 25 member States.[6] As the EC states, "[T]he Commission is not normally directly involved with the administration of EC customs law."[7]

Decisions and actions taken by the Commission and other EC institutions have a role in the administration of EC customs law. But, it is the administration of EC law by the authorities located in each of the EC's 25 member States that is the focus of the US claim.

EC institutions are relevant to the US claim, inasmuch as they do not step in to ensure uniform administration among the separate authorities spread throughout the territory of the EC. In other words, the absence of action by EC institutions is relevant. The absence of such action refutes the argument that even though the administration of EC customs law is carried out by 25 independent, regionally limited authorities, it nonetheless becomes uniform by virtue of the existence of various EC procedures and institutions.

126. Is the United States' case essentially that the design and structure of the European Communities' system of customs administration necessarily results in violation of Article X:3(a) of the GATT 1994? If so:

(a) Please specifically identify the aspects of the European Communities' system that necessarily result in a breach of Article X.3(a).

In answering this question, it is first important to be clear about what the United States understands "design and structure of the European Communities' system of customs administration" to mean. The United States understands that term to refer to the following:

- Customs law in the EC is prescribed by EC institutions: the Council and the Commission.
- EC customs law is administered by 25 different authorities, each responsible for a different part of the territory of the EC.
- The EC has in place certain procedures and institutions which it contends secure uniform administration among the 25 different authorities. These include a general duty of cooperation among member States, guidelines on various matters (e.g., the conduct of customs audits), discretionary mechanisms (e.g., referral of questions to the Customs Code Committee), and the opportunity for traders to appeal customs administrative action to member State courts, with the possibility of such courts eventually referring questions of EC law to the ECJ.

If the design and structure of the EC system of customs administration consisted of nothing more than customs laws prescribed by the Council and Commission and administered by 25 independent, regionally limited authorities, without any mechanism or other means even ostensibly present to ensure that the different authorities acted uniformly, then the EC undeniably would not fulfil its Article X:3(a) obligation. Indeed, the EC evidently does not dispute this point, as it contends that it is "the procedures and institutions of the EC legal system [that] provide for a uniform application and interpretation of EC law, including EC customs law."[8] That is, the very fact of 25 separate, independent authorities having to exercise judgment in interpreting and applying EC customs law, without any procedures or institutions to ensure against divergences or to reconcile them promptly and as a matter of right when they occur *necessarily* would constitute lack of uniform

[6] *See, e.g.*, EC First Written Submission, paras. 78-79.
[7] EC First Written Submission, para. 79.
[8] EC Second Written Submission, para. 76.

administration, in breach of Article X:3(a).

Therefore, it is necessary to examine the "procedures and institutions of the EC legal system" that the EC identifies to determine whether they do, as the EC alleges, "provide for a uniform application and interpretation of . . . EC customs law." The United States submits that the procedures and institutions identified by the EC do not do this. Those procedures and institutions consist of very general obligations (e.g., the obligation of cooperation under Article 10 of the EC Treaty) that are not operationalized in the customs context, non-binding guidelines, and discretionary instruments (e.g., referrals to the Customs Code Committee). The only instrument of a binding character that the EC has identified is the right to appeal to a member State court, with the possibility of a referral to the ECJ. However, the possibility of eventually gaining redress before a review tribunal (which the EC is required to provide pursuant to GATT Article X:3(b)) is not a substitute for administering laws in a uniform manner in the first instance (as the EC is required to do pursuant to GATT Article X:3(a)). In addition, an appeal to a member State court is hardly an effective procedure for ensuring uniform administration, given the discretion a court has to *not* refer a question to the ECJ, even when confronted with a direct conflict in different authorities' administration of EC law,[9] and given the "expensive and time-consuming" nature of the procedure.[10]

In short, it is the *absence* of a critical feature from the design and structure of the EC's system of customs law administration that *necessarily* results in non-uniform administration in breach of GATT Article X:3(a). The missing critical feature is a procedure or institution that ensures that divergences of administration among the 25 different customs authorities do not occur or that promptly reconciles them as a matter of course when they do occur. The procedures and institutions that the EC identifies (even under the EC's characterization of those procedures and institutions) cannot and do not result in uniform administration of EC customs law by 25 independent, regionally limited customs authorities. Rather, the EC's institutions and procedures constitute a loose network within which various responses to non-uniform administration *may* occur but need not necessarily occur.[11]

This point is well illustrated in paragraph 99 of the EC's Opening Statement at the second Panel meeting. There, the EC stated that

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[9] *See* US Second Oral Statement, paras. 31, 35-37.

[10] US Second Oral Statement, para. 38 (quoting Edwin A. Vermulst, *EC Customs Classification Rules: Does Ice-Cream Melt?*, p. 21, posted at http://www.vvg-law.com/publications.htm ("Vermulst, *EC Customs Classification Rules*") (Exhibit US-72)). In this regard, a remark by the EC in its Closing Statement at the second Panel meeting is revealing. With respect to the blackout drapery lining illustration, the EC noted "that both importers concerned by the German decisions, the Bautex GmbH and the Ornata GmbH, have not appealed the decisions. For this reason, the United States cannot now claim there to be a lack of uniformity attributable to the EC system." EC Second Closing Statement, para. 16. This observation actually reinforces the US point with respect to appeals as a tool of securing uniform administration. Given the time and expense required to pursue an appeal – especially if one hopes eventually to reach the ECJ and obtain a judgment with EC-wide effect – a small importer may well find that option not to be cost-effective. In the EC's view, any non-uniformity that persists as the result of such a decision to refrain from pursuing an appeal cannot be the basis for a claim of "lack of uniformity attributable to the EC system." Thus the EC turns GATT Article X:3(a) on its head. It converts it from a provision focused on the obligations of a Member (in this case, the EC) to a provision that imposes a burden on traders to pro-actively seek out uniform administration.

[11] *See* US Closing Statement at Second Panel Meeting, paras. 5-6; US Second Written Submission, paras. 48-52 (discussing various instances in which EC acknowledges general, non-binding, or discretionary nature of procedures and institutions held out as securing uniform administration); *see also* EC Second Opening Statement, paras. 51 ("What matters is not that the duty of cooperation is a general obligation, but that it exists. Moreover, its is legally binding and *can* be sanctioned by the Court of Justice.") (emphasis added), 61 ("*If* a question is referred to the Court of Justice, the normal situation will be that other procedures in which the same question is relevant *can* be suspended until the Court has given judgment.") (emphasis added).

> if a customs agency or a court in a[n] EC member State does not share the interpretation of the EC legislation given by a court of another member State, it *will* take the initiatives that are proper to its respective position in the system: the customs agency *shall* consult and discuss the issue with the Commission and the other member States, the court in another member State *will* or *shall* refer to the EC Court of Justice.[12]

Nowhere does the EC state the basis for its predictions as to what "will" or "shall" happen when a divergence in administration comes to light, and that is precisely the point. The design and structure of the EC system of customs administration lack procedures or institutions to ensure first, that divergences do not occur or, second, that when divergences that necessarily result from the EC's system come to light they "will" or "shall" be reconciled promptly and as a matter of course. As the system lacks any such procedures or institutions, it necessarily results in non-uniform administration in breach of GATT Article X:3(a).

(b) Please explain why those aspects necessarily result in non-uniform administration in violation of Article X:3(a) in respect of each and every area of customs administrations in the European Communities.

With respect to part (b) of the Panel's question, the aspects of the design and structure of the EC customs administration system to which the United States has referred – i.e. administration by 25 separate, independent authorities and lack of procedures or institutions that can ensure against divergences or promptly reconcile them as a matter of course when they occur – result in non-uniform administration with respect to *all* areas of customs administration for the same reason. That is, the administration of classification rules, valuation rules, and customs procedures is subject to the same flawed regime.

In each of these areas, the only procedures or institutions that allegedly secure uniform administration are general, non-binding, discretionary procedures and institutions, with the exception of court review. But, as has been mentioned above, court review does not secure uniform administration, given the discretion that courts have in whether or not to refer matters to the ECJ, the lack of an obligation on the part of the customs authority in a given member State to follow the decisions of courts in other member States, and indeed, the lack of any mechanism to inform the customs authorities in the various member States of relevant customs decisions by courts in other member States.[13]

Finally, it is important to recognize that the US argument does not end with the US demonstration that the design and structure of the EC system necessarily results in non-uniform administration. In addition, the United States has shown throughout its submissions and interventions that the EC and senior EC officials have recognized an absence of uniform administration; it has shown examples of non-uniform administration; and it has shown that practitioners who actually must work within the system understand administration to be non-uniform. In short, while demonstrating that the design and structure of the EC system necessarily results in non-uniform administration is an important part of the US argument, it is not the only part of the US argument.

127. With respect to paragraph 10 of the United States' Oral Statement at the second substantive meeting, please specifically identify the "procedures" and "institutions" to which

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[12] EC Second Oral Statement, para. 99 (emphases added); *see also* EC Replies to First Panel Questions, paras. 47-48, 58; EC First Written Submission, para. 86.

[13] *See* Reply to Question No. 126, *supra*; *see also* US Second Opening Statement, paras. 31, 35-38; US Second Written Submission, paras. 63-71.

the United States refers in support of its claim of violation of Article X:3(a) of the GATT 1994 on the part of the European Communities.

The reference to "procedures" and "institutions" in paragraph 10 of the US Oral Statement at the second substantive meeting is a quotation from paragraph 76 of the EC's Second Written Submission. As noted in the US response to the Panel's Question No. 126, the EC evidently recognizes that, taken by itself, the administration of EC customs law by 25 separate, independent customs authorities would not fulfil the EC's obligation of uniform administration under GATT Article X:3(a). There would have to be procedures or institutions to ensure that the 25 separate, independent authorities administered the law in a uniform manner. Recognizing this point, the EC has identified various procedures and institutions which it claims perform that function, and which the United States has demonstrated do not perform that function, for reasons discussed in response to Question No. 126 and in prior submissions and interventions.

Those procedures and institutions are:

- the general obligation of cooperation among member States set forth in Article 10 of the EC Treaty;
- the possibility, under Article 226 of the EC Treaty, of the Commission bringing an action against a member State for infringing an obligation under EC law;
- the possibility of a question being referred to the Customs Code Committee, at the discretion of a Commission or member State representative;
- the issuance of regulations, non-binding explanatory notes, non-binding opinions by the Customs Code Committee, non-binding guidance and information (as, for example, the compendium on customs valuation, the guidelines on audit procedures, and the Administrative Guidelines on the European Binding Tariff Information System);
- the issuance of BTI by customs authorities in individual member States, which need not be followed in other member States except with respect to the individual holder of the BTI;
- general provisions, including guidance by the ECJ providing that penalty provisions be "effective, proportionate and dissuasive"; provisions on information sharing among member States set forth in Regulation (EC) 515/97; the Customs 2007 action program, which aspires to attain a greater degree of cooperation among customs authorities by the end of 2007; and Council Regulation (EC/Euratom) No 1150/2000 on collection of the EC's "own resources"; and
- the option for an affected party to appeal an adverse customs action to a member State court, with the possibility of eventual referral of relevant questions of EC law to the ECJ.

What is notable, from the perspective of the US GATT Article X:3(a) claim, is that *not one* of the foregoing procedures or institutions ensures against divergences that inevitably result when the 25 independent, regionally limited customs authorities are confronted with the myriad of day-to-day choices in administering the EC's customs law, and *not one* of the foregoing procedures or institutions provides for prompt reconciliation as a matter of right of such divergences that do occur. As explained in the US response to Question No. 126 and in prior US submissions,[14] these procedures and institutions are distinguished by their very general, non-binding, and discretionary qualities. Of all of these procedures and institutions, the only one that a trader can access as a matter of right when it encounters non-uniform administration is the option of appealing an adverse decision to a member State court and urging that court or, eventually, a superior court to exercise its power to refer a question to the ECJ. The existence of that single procedure of a binding nature does not fulfil the EC's Article X:3(a) obligation, as previously discussed.

[14] *See, e.g.*, US Second Written Submission, paras. 48-52; US First Oral Statement, paras. 32-45.

128. In its reply to Panel Question No. 3, the United States explains that, while it is principally challenging 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, these measures are supplemented by miscellaneous Commission regulations and other measures pertaining to customs classification and valuation and customs procedures. Please specifically identify these supplementary measure(s).

First, the United States wishes to make clear that it is not challenging the measures referred to in this question *per se* but, rather, the *administration* of those measures.

The measures identified represent the principal substance of EC customs laws.[15] There are, as the EC has indicated, related regulations and other measures pertaining to customs classification and valuation and customs procedures.[16] As the same system of administration that applies to the three identified measures also applies to the miscellaneous related measures, the problem of non-uniform administration applies equally to those other measures.

The United States has referred to some supplementary measures. For example, the United States has referred to the Council regulation suspending duties on a subset of LCD monitors.[17] The United States also has referred to the explanatory note on the classification of certain camcorders.[18] These are supplementary measures that the EC does not administer in a uniform manner. Like these supplementary measures, other supplementary measures pertain to specific products or groups of products in ways that elaborate on provisions set forth in the three core customs laws. Because of their specificity and the diverse range of issues covered, it would be impossible to identify all such measures.

129. With respect to the United States' argument that certain laws can be considered as administrative in nature" and/or as "tools of administration" for the purposes of Article X:3(a) of the GATT 1994:

(a) Please list all laws/substantive provisions in the EC customs administration regime enacted by the European Communities or by the member States other than penalty laws that the United States classifies as "administrative" in nature and/or that qualify as a "tool of administration".

(b) Referring to the terms of Article X:3(a), would such "tools of administration" have to qualify as laws "of general application" within the meaning of Article X:1 of the GATT 1994?

In addition to penalty laws, other provisions the United States has referred to that are administrative in nature are binding tariff information, member State audit provisions, member State guidelines on applying the economic effects test for deciding whether to allow processing under customs control, and guidelines issued by EC institutions (such as the Community Customs Audit Guide (Exhibit EC-90)). The features common to these various provisions that make them

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

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

[17] *See* US First Written Submission, para. 74 (referring to Council Regulation (EC) No 493/2005 of 16 March 2005, *Official Journal of the European Union* L82/1 (31 March, 2005) (Exhibit US-28)).

[18] US Second Oral Statement, para. 28 (referring to Uniform Application of the Combined Nomenclature (CN), *Official Journal of the European Communities*, 6 July 2001, p. C 190/10 (Exhibit US-61), and Explanatory Notes to the Combined Nomenclature of the European Communities, *Official Journal of the European Communities*, 13 July, 2000, p. 316 (Exhibit US-62)).

administrative in nature are the very features identified by the Panel in *Argentina – Hides and Leather* at paragraph 11.72 of its report. In particular, none of these provisions establish substantive customs rules. The substantive customs rules are set forth in other provisions (notably, the Tariff Regulation, the CCC, and the CCCIR). Furthermore, each of the foregoing provisions simply "provides for a certain manner of applying those substantive rules."[19]

These tools of administration need not necessarily qualify as laws of general application within the meaning of Article X:1 of the GATT 1994. For purposes of Article X:3(a), it is the object of administration – the thing being administered – as opposed to the provision doing the administering, that must be a law of general application within the meaning of Article X:1. This is evident from the grammatical structure of Article X:3(a), in which the phrase "laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article" is the object of the phrase "shall administer in a uniform, impartial and reasonable manner."[20]

130. The Panel in its report in *Argentina – Hides and Leather* stated in paragraphs 11.71 and 11.75 that laws that are "administrative in nature" may be considered for their substance under Article X:3(a) of the GATT 1994. Assuming a distinction between laws that are "administrative in nature" and those that are not is justified under Article X:3(a), what criteria should be applied in determining whether or not a measure is "administrative in nature"?

The Panel in *Argentina – Hides* referred to certain criteria for determining whether a measure is administrative in nature. At paragraph 11.72 of its report, it found that the measure at issue there – Argentina's Resolution 2235 – was administrative in nature. In reaching that conclusion, it noted that "Resolution 2235 does not establish substantive customs rules for enforcement of export laws." It noted that the substantive rules were contained in other laws. It also noted that Resolution 2235 "provide[d] for a certain manner of applying those substantive rules."

These criteria take account of the ordinary meaning of "administrative." A measure is administrative if it is executive in nature, that is, if it has "the function of putting something into effect."[21] Thus, the ordinary meaning of "administrative" suggests a distinction between the thing being put into effect and the thing that does the work of putting it into effect. The criteria identified by the Panel in *Argentina – Hides and Leather* are premised on that distinction and enable an observer to determine on which side of that distinction a given measure falls in view of the applicable analytical framework.[22] The United States submits that they are appropriate criteria for this Panel to apply in determining whether penalty provisions and audit provisions, in particular, are administrative in nature. For reasons the United States has discussed in previous submissions, the answer is that they are administrative in nature.[23]

Penalty and audit provisions do not establish substantive customs rules. Rather, they provide for a manner of applying substantive rules that are set forth in other measures (e.g., the Tariff

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[19] Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, para. 11.72 (adopted 16 February 2001) ("*Argentina – Hides and Leather*").

[20] This does not mean that measures that are tools of administration *do not* qualify as laws of general application within the meaning of Article X:1 of the GATT 1994. In other analytical contexts, such measures may constitute the objects of administration, in which case it would be relevant to consider whether they are laws of general application within the meaning of Article X:1. *See* US Second Oral Statement, paras. 76-77.

[21] *See* US Replies to First Panel Questions, para. 158.

[22] As the United States has discussed (*see* US Second Oral Statement, paras. 76-77), the fact that a given measure may qualify as administrative in one context does not mean that it cannot be characterized as substantive in another context. One mistake the EC makes is to assume that a given measure must be either substantive or administrative for *all* purposes. *See* EC Second Written Submission, para. 193; EC Second Oral Statement, paras. 67, 72. But this simply is not so.

[23] *See, e.g.*, US Replies to First Panel Questions, paras. 118-120, 156-160; US Second Written Submission, paras. 72-98; US Second Oral Statement, paras. 78-81.

Regulation, CCC, and CCCIR). In a system that relies heavily on traders making truthful declarations about their imports, penalty and audit provisions ensure compliance with the substantive rules. Accordingly, they qualify as "administrative in nature" under the criteria in *Argentina – Hides*.

As penalty and audit provisions are administrative in nature, differences in their terms evidence differences in the way that the EC's 25 independent customs authorities administer substantive EC customs rules in different parts of the EC's territory. As the EC itself has acknowledged, the differences among penalty provisions are dramatic, such that for the same infraction a customs authority may impose imprisonment in one part of the EC and a minor fine in another.[24] Similarly, as the EC Court of Auditors observed, auditing practices are sufficiently different as to cause some EC member States not to accept valuation determinations made by other member States.[25] The existence of these significant differences in the terms of the measures that are the tools for administering substantive EC customs laws means that the substantive EC customs laws are not administered in a uniform manner, and this is inconsistent with the EC's obligation under GATT Article X:3(a).

131. In its reply to Panel Question No. 113, the United States notes that, in *US– Shrimp*, the Appellate Body described the standards contained in Article X:3(a) of the GATT 1994 as pertaining to "transparency and procedural fairness in the administration of trade regulations." The United States submits that, accordingly, beneficiaries of the standards pertaining to transparency and procedural fairness are traders. Can this submission be reconciled with the United States' reply to Panel Question No. 8 and paragraph 23 of its Second Written Submission, where the United States appears to question the meaning of and relevance to Article X:3(a) of the "minimum standards" referred to by the Appellate Body in *US – Shrimp*? If so, please explain how.

The US response to Question No. 113 addresses a different point from the US response to Question No. 8 and the statements at paragraph 23 of the US Second Written Submission. In its response to Question No. 113, the United States was noting that the Appellate Body's statement in *US – Shrimp* supports the proposition that Article X:3(a) should be understood as an obligation intended to benefit traders. In its response to Question No. 8 and in paragraph 23 of its Second Written Submission, the United States was noting that the phrase "minimum standards" in the operative passage in *US – Shrimp* was not elaborated on by the Appellate Body and did not need to be elaborated on, as the Appellate Body found that the measure at issue clearly fell below the relevant standards. The United States sees no inconsistency between these two observations. They are not mutually exclusive.

With respect to "minimum standards" the point the United States has stressed is that the passing use of this phrase by the Appellate Body is the only alleged support for the EC's view that Article X:3(a) should be interpreted as a minimum standards provision. In fact, the reference does not support the EC's view. Article X:3(a) must be interpreted in accordance with the ordinary meaning of its terms, in light of their context and the object and purpose of the GATT 1994. Neither the terms, nor the context, nor the object and purpose support the EC's characterization of Article X:3(a) as a minimum standards provision. The Appellate Body's reference to "minimum standards" is not at odds with this.

132. In its reply to Panel Question No. 2, 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 further

[24] European Commission, Directorate-General for Taxation and Customs Union, TAXUD/447/2004 Rev 2, *An Explanatory Introduction to the modernized Customs Code*, p. 13 (24 February 2005) (Exhibit US-32).

[25] Court of Auditors Valuation Report, para. 37 (Exhibit US-14).

notes that it does not argue that the emergence of an inconsistency automatically and necessarily evidences a breach of Article X:3(a) provided that a mechanism – such as a central authority – exists to cure such inconsistencies.

(a) Does the United States mean that a certain number and/or level of inconsistencies should be tolerated under Article X:3(a) provided that a central mechanism exists to cure such deficiencies?

(b) If so, please specifically explain how the number and/or level of inconsistencies that should be tolerated can be identified.

(c) If not, please explain in further detail what the United States means by its submission.

The US reply to Question No. 2 does not mean that a certain number and/or level of inconsistencies should be tolerated provided that a central mechanism exists to cure such deficiencies. Under a system that provides for uniform administration, any differences that may emerge in administration from one region to another should be resolved promptly and as a matter of right. If that happens, then there will be no inconsistencies to be tolerated.

The point the United States was making in response to Question No. 2 was that even where customs laws are administered uniformly, as a practical matter, there may be momentary inconsistencies between regions, which are promptly resolved as a matter of right. This may be a function, for example, of lapses in communication. Officials at a port in one part of the Member's territory may not be immediately aware of a classification ruling issued by the customs authority at the request of an importer at a different port. To the extent that this may give rise to a momentary inconsistency, uniform administration requires that the inconsistency be eliminated promptly and as a matter of right. This is not the same as saying that a threshold level of inconsistencies is tolerable under a system in which the customs laws are administered in a uniform manner.

In the EC, however, there is an absence of any procedures or institutions to resolve differences among materially similar – or even identical – cases promptly and as a matter of right. The ability to go to court to challenge a given administrative action as inconsistent with EC law is not such a procedure or institution. That is, review tribunals (as required by GATT Article X:3(b)) are not a substitute for uniform administration in the first instance (as required by GATT Article X:3(a)). Moreover, as was discussed in the US opening statement at the second Panel meeting, courts in the EC are not compelled to refer questions to the one forum capable of rendering judgments with EC-wide effect, the ECJ, even when they are confronted with direct divergences in the administration of EC law.[26] Even if an appeal eventually brings about uniformity, non-uniformity may persist during the pendency of what may be a long, drawn-out proceeding.[27] And, appellate review as a means of obtaining uniform administration impermissibly puts the onus on the trader to attain a state of affairs that the Member itself is required to provide under GATT Article X:3(a).

The EC has referred, from time to time, to cases in which particular differences in administration emerged and were eventually resolved.[28] However, the divergences at issue resulted precisely from the structure and design of the EC's system of customs administration, and these divergences are further evidence of the EC's failure to administer its customs laws uniformly. Moreover, what is remarkable about these cases is the haphazard way in which differences were resolved and the time it took to resolve them. In each of the cases at issue there was a clearly

[26] US Second Oral Statement, paras. 35-38.

[27] *See* US Second Oral Statement, para. 38 (quoting Vermulst, *EC Customs Classification Rules* (Exhibit US-72)).

[28] *See, e.g.*, EC Second Written Submission, paras. 136, 141, 156.

identified divergence in administration of EC law from region to region, but in none of them was there a clearly identified path for resolving the divergences promptly and as a matter of right. Nor does the fact that particular divergences may have been resolved in an *ad hoc* manner constitute evidence that administration is uniform. Solving one particular problem identified between two authorities is not the same as saying that administration among 25 authorities is uniform, even with respect to that particular issue.

133. In its reply to Panel Question No. 90, the United States submits that measures that are "administrative in nature" are examined under Article X:3(a) of the GATT 1994 for their "substance" whereas 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. Please explain in practical terms the difference(s) in the tests applied under Article X:3(a) to determine whether or not non-uniform administration exists with respect to measures that are "administrative in nature" and those that are not administrative in nature.

The point the United States has made in response to Question No. 90 and elsewhere[29] is not that different tests apply under Article X:3(a) to determine whether non-uniform administration exists with respect to measures that are "administrative in nature" and those that are not administrative in nature. If a measure is the object of administration – if it is the thing being administered – then Article X:3(a) requires that it be administered in a uniform manner.

Some measures are administrative in nature in the sense that they give effect to other measures. Penalty provisions are one example. A penalty provision exists as a tool for administering some other measure by compelling compliance with that other measure. It would be difficult, if not impossible, to analyze a penalty measure separate from the measure with which compliance is sought.[30]

Where a WTO Member employs very different administrative measures in different parts of its territory to give effect to its customs laws – as is the case in the EC – that Member is administering its customs laws differently in different regions. The different tools the EC uses to administer its customs laws in different parts of its territory constitute non-uniform administration of its customs laws.

This is not a question of different tests for different types of laws. For purposes of this dispute, the object of administration – the thing being administered – is the EC's customs laws. The absence of uniform administration of the EC's customs laws is evidenced in part by the indisputable fact that different customs authorities in the EC use different penalty tools to give effect to the EC's customs laws.

In stating (in response to the Panel's Question No. 90) that "measures that are administrative in nature are examined . . . for their substance," the point the United States was making was that where the substance of measures that administer customs laws differs from region to region then, logically, administration of the customs laws is non-uniform. The differences among the tools of administration is *evidence* of the non-uniformity of administration of the underlying customs laws.

The US response to Question No. 90 referred to paragraph 11.70 of the Panel report in

[29] *See, e.g.*, US Second Written Submission, paras. 72-98.

[30] *See* US Replies to First Panel Questions, para. 158. The EC mischaracterizes the US argument in stating that "[l]aws may very well complement one another without for that reason becoming 'administration.'" EC Second Closing Statement, para. 23. The US argument is not that penalty provisions in the EC simply "complement" substantive customs rules. Rather, penalty provisions are instruments for giving effect to those substantive rules, much the same way that the measure at issue in *Argentina – Hides and Leather* was an instrument for giving effect to Argentina's substantive customs rules.

Argentina – Hides. The Panel in that dispute explained that where a measure is a tool of administration of another measure, the substance of the first measure may result in administration of the second in a manner inconsistent with GATT Article X:3(a).

In *Argentina – Hides*, the measure being administered was Argentina's rules on classification and export duties. Resolution 2235 was a separate measure that was a tool for administering those rules. As the Panel put it, Resolution 2235 provided "a means to involve private persons in assisting Customs officials in the application and enforcement of the substantive rules. . . ."[31] To the extent that Resolution 2235 administered the substantive rules in a manner inconsistent with Article X:3(a), Resolution 2235 was a legitimate target of a challenge under GATT Article X:3(a). Likewise, here, as penalty provisions and audit procedures in the EC administer EC customs law in a non-uniform manner, inconsistent with Article X:3(a), they are legitimate targets of the US claim under that article.

134. In its reply to Panel Question No. 118, the United States submits that 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. In light of this reply, please clarify whether or not the United States is challenging the manner in which the Customs Code Committee operates.

The manner in which the Customs Code Committee operates is not itself an instance of non-uniform administration of EC customs law. Therefore, the United States is not challenging the manner in which the Committee operates, *per se*. However, the way in which the Committee operates is relevant to the US Article X:3(a) claim, because the Committee is one of the institutions that the EC holds out as ensuring the uniform administration of EC customs law.

As discussed in the US response to Question No. 126, even the EC does not claim that it would fulfil its obligation of uniform administration absent certain procedures and institutions alleged to prevent divergences or reconcile them promptly. The ultimate question is whether the procedures and institutions identified by the EC in fact do this. The answer is that they do not.

One of the key institutions identified by the EC is the Customs Code Committee. Accordingly, it is important to understand how this committee operates. In particular: Does it operate such that when a trader encounters what it believes to be a divergence in administration between two different EC customs authorities, the trader can bring the allegation to the Committee as a matter of right and have the Committee resolve the question within a relatively brief time certain? That answer is, No. Rather, questions get put before the Committee at the discretion of the Commission or member State representatives. Where a trader asks to have a question put on the Committee's agenda, the Commission or member State representative may or may not acquiesce. Even if the matter does get put on the Committee's agenda, the trader has no right to plead its case before the Committee. And, there is no limit on the time the Committee may take to consider the matter.[32] These observations about how the Committee operates are relevant, because they contradict the EC's assertion that the Committee is a key institution in ensuring uniform administration.

135. In its reply to Panel Question No. 7, in defining the term "administer", the United States emphasises the treatment of "products" and "transactions" but makes no reference to the treatment of "traders". Does this mean that the United States considers that the Panel should

[31] Panel Report, *Argentina – Hides and Leather*, para. 11.72.

[32] *See generally* US First Written Submission, paras. 121-132; Exhibit EC-103 (indicating that section of Customs Code Committee dealing with BTI has met only two to three times in each of the past three years); EC Reply to Panel Question No. 58(i) (iv) (indicating that average time to resolve cases involving alleged divergences in BTI that get referred to Customs Code Committee has been about 13 months).

focus on the treatment of products and transaction rather than on the treatment of traders when determining whether or not there has been a violation of Article X:3(a)?

The US response to the Panel's Question No. 7 focused on use of the word "treatment" in the two statements from the US first written submission referred to in that question. The two statements addressed treatment accorded to products and transactions. Accordingly, the US response elaborated on what the United States had meant by "treatment" in those two contexts. This does not mean that the Panel should focus on the treatment of products and transactions *rather* than on the treatment of traders when determining whether or not there has been a violation of Article X:3(a). The Panel should focus on *both* treatment of products and transactions *as well as* treatment of traders, recognizing that there is a high degree of overlap between the two types of focus.

From a customs point of view, how a trader's goods are classified and valued and, consequently, what duty is assessed on them necessarily will be important to the trader. To the extent that different customs authorities within the EC treat these matters differently they are, by extension, according different treatment to the trader. Different treatment accorded to the classification and valuation of goods will affect how the trader plans its transactions. For example, anticipating a certain classification of its goods in one region of the EC and a different classification in a different region, the trader may be expected to plan its shipments accordingly. It is in this sense that a focus on the treatment of goods and transactions overlaps with a focus on the treatment of traders.

However, according treatment to goods and transactions is not the only means by which a customs authority may accord treatment to a trader. A customs authority also accords treatment to a trader when, for example, it imposes a penalty, performs an audit, or permits a trader to clear its goods through a simplified procedure, such as the local clearance procedure. This point bears emphasis, given the EC's suggestion that a Member administers its customs laws in a non-uniform manner only when it imposes different duties on identical goods with identical value.[33]

The EC's narrow understanding of what it means for a Member to administer its customs laws in a non-uniform manner is at odds with the context of Article X:3(a) which, as the EC acknowledges, indicates a focus on the treatment accorded to traders.[34] As the Panel in *Argentina – Hides and Leather* explained, "Article X:3(a) requires an examination of the real effect that a measure might have on traders operating in the commercial world."[35] Moreover, "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."[36]

The treatment that exporters and importers expect to be of the same kind in different places within the territory of a Member is not limited to the duty assessed on particular goods. It includes, for example, the penalties they may face in different places. The United States emphasizes this point in particular, because the EC has suggested that differences in penalties from region to region do not constitute non-uniform administration, as long as the diverse penalties all dissuade traders from violating EC customs law.[37]

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[33] *See, e.g.*, EC Second Written Submission, para. 123 (arguing that LCD monitor case does not show non-uniform administration in breach of GATT Article X:3(a), because regardless of classification, monitors covered by temporary duty suspension regulation all are subject to 0% tariff rate); EC Replies to First Panel Questions, para. 16; EC Second Closing Statement, para. 24 (arguing that despite significant differences in penalties from member State to member State, uniform administration is "ensured" because "traders will normally respect the substantive provisions of customs law").

[34] *See, e.g.*, EC Replies to First Panel Questions, para. 14; EC Second Oral Statement, para. 18 (urging that "due consideration" be given to "real-world implications of the US claims").

[35] Panel Report, *Argentina – Hides and Leather*, para. 11.77.

[36] Panel Report, *Argentina – Hides and Leather*, para. 11.83.

[37] *See, e.g.*, EC Second Oral Statement, paras. 78-79; EC Second Closing Statement, para. 24.

As the United States explained at the second Panel meeting, a trader may fully intend to comply with the law and still be affected by differences in penalties from region to region. Traders tend to be risk averse and plan their transactions by taking into account a variety of factors, including their potential liability for sanctions. It simply is incorrect for the EC to assert that its customs laws are administered uniformly even though different authorities have at their disposal dramatically different tools for ensuring compliance with those laws. Contrary to this assertion, a general level of compliance across regions does not equate to uniform administration. The EC ignores the fact that differences in administration of the laws, including differences in the penalties that may be applied, affect the way traders plan their shipments. In short, the EC ignores the trader-oriented focus of Article X:3(a).

136. In paragraph 101 of its Second Written Submission, the European Communities submits that, in the United States, binding tariff information is specific to the holder of such information, as is the case in the European Communities.

(a) Please comment.

(b) What measures does the United States have in place to prevent BTI-shopping?

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.

In the United States, a person can seek what US Customs and Border Protection ("US Customs") refers to as a ruling under part 177 of the US Customs regulations. The regulations state that the ruling is the "official position of the Customs Service with respect to the particular transaction or *issue* described therein."[38] Accordingly, the ruling creates rights and responsibilities on the part of the holder of the ruling. However, other persons who are importing merchandise that is identical in all material respects to the merchandise covered by the ruling also have the right to cite an existing ruling as authority for the principle enunciated therein with respect to their merchandise. It is for this reason that prior to modifying or revoking a ruling that has been in effect for at least 60 days, US Customs publishes notice of its intention to modify or revoke the ruling and considers comments from the public on the merits of its proposed action. Thus, the modification and revocation procedure demonstrates that persons whose merchandise is within the ambit of the principle that is enunciated in the ruling can enjoy the benefits of the ruling.

By contrast, the operation of the BTI system in the EC is a dramatic illustration of how the EC fails to administer its customs laws uniformly. Under the EC system, where the EC authority in one region issues BTI to an importer, the EC authority in another region is under no obligation to follow that BTI with respect to identical goods, unless the person invoking the BTI happens to be the very same importer – i.e. the "holder" of the BTI. Even if the person invoking the BTI is an affiliate of the holder of the BTI, the EC authority in the second region is under no obligation to follow the BTI issued by the EC authority in the first region. Thus, the EC customs authority in one member State is free to classify the identical product differently than the EC customs authority in another member State – or, indeed, than the EC customs authorities in any of the other 24 member States.

With respect to part (b) of the Panel's question, it should be noted that BTI shopping occurs when there is non-uniform administration across regions within the territory of a Member. In the United States, as a practical matter, BTI shopping cannot really occur, due to the fact that there is a central office from which to obtain rulings, and, for any given commodity there is a single team of experts – National Import Specialists within the National Commodity Specialist Division ("NCSD") of US Customs and Border Protection – responsible for their issuance. For classification, initial

[38] 19 C.F.R. § 177.9(a) (Exhibit EC-129) (emphasis added).

rulings generally are issued by the NCSD specialist in New York. NCSD rulings are subject to review and correction by US Customs headquarters in Washington, DC. For matters other than classification, rulings are issued centrally by US Customs in Washington, DC. Thus, "BTI shopping" is precluded precisely due to the presence in the United States of what is absent in the EC, a central authority.

137. Please comment on and respond to the following submissions by the European Communities:

(a) With respect to the classification of blackout drapery lining by the Main Customs Office of Bremen, in paragraphs 108 – 109 of its Second Written Submission, the European Communities submits that the letter of the Main Customs Office Hamburg relied upon by the United States contained in Exhibit US-50 relates to an administrative appeal that is not related in any way to the administrative appeal which was the subject of the decision by the Main Customs Office Bremen.

The United States refers the Panel to paragraphs 60 to 64 of its opening statement at the second Panel meeting, wherein this matter is discussed, as well as to the affidavit of Mr. Mark R. Berman (Exhibit US-79), which is discussed in that part of the US opening statement.[39] As explained there, the letter from the Main Customs Office Bremen (Exhibit US-23) and the letter from the Main Customs Office Hamburg (Exhibit US-50) both concern blackout drapery lining produced by Rockland Industries. The Main Customs Office Bremen decided to exclude Rockland's product from classification under Tariff heading 5907 on a ground evidently not applied by other EC customs authorities – i.e. on the ground that the product had plastic in its coating, regardless of whether textile flocking or other elements were mixed into that coating. In its discussion of this case, the EC purported to cast doubt on the proposition that this was the ground for the decision by the Main Customs Office Bremen.[40] The letter from the Main Customs Office Hamburg confirms that this indeed is the approach taken by the customs authority in Germany.

(b) In paragraph 123 of its Second Written Submission, the European Communities argues that Article X:3(a) of the GATT 1994 can only be held to be violated where a variation of practice has a significant impact on traders. The European Communities submits that, in the case of liquid crystal display monitors with digital video interface, even if there were differences in tariff classification for the monitors at issue in this dispute, this would have no financial impact on traders since, pursuant to EC Regulation No. 493/2005, the tariff rate for such monitors would be 0% whether classified under tariff heading 8528 or under 8471.

The United States refers the Panel to paragraphs 52 to 59 of its opening statement at the second Panel meeting, wherein this matter is discussed, as well as to Exhibits US-75 through US-78, which are discussed in that part of the US opening statement. As explained there, four key observations are relevant to this issue. First, EC Regulation No. 493/2005 is a temporary duty suspension regulation which does not actually resolve the underlying classification issue. The EC

[39] In its Closing Statement at the second Panel meeting, the EC questioned the probative value of Mr. Berman's affidavit of Mr. Berman on the theory that Mr. Berman has "a clear interest in the classification of BDL." EC Second Closing Statement, para. 16. However, the EC's argument relies on the patently absurd assumption that Mr. Berman somehow has an interest in the outcome of this WTO dispute. Of course, the outcome of this dispute will have no effect whatsoever on classification of blackout drapery lining in Germany. Neither Mr. Berman nor his company stands to gain anything by this dispute. Accordingly, the basis for the EC's questioning the credibility of Mr. Berman's affidavit is entirely unfounded.

[40] *See* EC First Written Submission, paras. 336-337.

states that "[b]efore its expiration, the EC institutions will obviously review the situation and adopt the measures which will be necessary then."[41] While this may be obvious to the EC, the United States is aware of no provision that compels this outcome. Moreover, as was discussed at the second Panel meeting, the fact that the regulation temporarily suspends duties but does not resolve the underlying classification issue is significant. Traders organize their business affairs with a long-term view, and in making their shipping decisions they are likely to take account of which customs authorities will accord the more favourable tariff treatment after the temporary regulation expires.

Second, the duty suspension regulation addresses the duty treatment of only monitors below a specified size threshold. It has no relevance whatsoever to monitors above that size threshold.[42]

Third, the EC's suggestion that the temporary duty suspension regulation has garnered a general degree of satisfaction within the affected industry is belied by recent communications to the Commission from the major affected industry association in the EC.[43] That association ("EICTA") describes "an unacceptable situation were [sic] various member States are applying classification rules in an inconsistent manner, causing competitive disadvantage for some importers and making the consequences of sourcing and routing decisions almost impossible to predict."[44]

In its Closing Statement at the second Panel meeting, the EC asserted that "the classification of the relevant monitors is an issue which is currently under review, and relevant measures will be submitted to the Customs Code Committee in the very near future."[45] However, as recently as 6 December 2005, EICTA advised the Commission of its profound concerns regarding this matter. EICTA noted not only its substantive disagreement with the Commission's proposed regulation, but also its dismay at the Commission's lack of consultation with the trade association, including its lack of response to the association's 2 September, 2005 letter on this matter (Exhibit US-75).[46]

Finally, as was summarized in the US opening statement at the second Panel meeting, there is a high degree of disarray among customs authorities in the EC over how to deal with the classification of LCD monitors with DVI. The United States pointed to one customs authority (in the UK) that appears to be following the opinion of the Customs Code Committee and classifying all such monitors under heading 8528, regardless of sole or principal use; another customs authority (in the Netherlands) that has abandoned the guidance of the Customs Code Committee for fear of adverse commercial impact and is now applying its own set of criteria for deciding whether to classify monitors under heading 8528 and 8471; and yet another customs authority (in Germany) that has just recently issued BTI classifying an LCD monitor with DVI under heading 8471, based on a finding that it is *principally* for use with computers (i.e. notwithstanding the conclusion of the Customs Code Committee that classification under heading 8471 is appropriate only when a monitor is *solely* for use with computers).[47]

(c) In paragraphs 392 – 393 of its first written submission, the European Communities submits that it is not correct to state that different member States apportion royalties differently to the customs value of identical goods imported by the same company since the examples referred to by the Court of Auditors in

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[41] EC First Written Submission, para. 357.

[42] *See* US First Written Submission, para. 74.

[43] *See* US Second Oral Statement, para. 52 (discussing Letter from Mark MacGann, Director General, EICTA, to Manuel Arnal Monreal, Director International Affairs and Tariff Matters, European Commission, p. 1 (Sep. 2, 2005) ("EICTA September 2005 Letter") (Exhibit US-75)).

[44] EICTA September 2005 Letter, p. 1 (Exhibit US-75).

[45] EC Second Closing Statement, para. 15.

[46] *See* Letter from Mark MacGann, Director General, EICTA, to Manuel Arnal Monreal, Director International Affairs and Tariff Matters, European Commission (6 December 2005) (Exhibit US-81).

[47] US Second Oral Statement, paras. 54-56.

its valuation report mostly involved different subsidiaries established in various member States. The European Communities adds that, following the report of the Court of Auditors, the Commission and the Customs Code Committee worked through the cases examined by the Court of Auditors in order to clarify the issues and establish whether there had been a lack of uniformity. According to the European Communities, in most cases, it was confirmed that the questions involved were purely factual issues concerning the establishment of the conditions of Article 32(2)(e) of the Community Customs Code. The European Communities argues that, since no systematic lack of uniformity was found, it was concluded that no amendment to the Customs Code Committee nor the Implementing Regulation was required.

Even if the EC's assertions were correct, they still would not rebut the broader findings of the Court of Auditors report. For example, the Court of Auditors found "weaknesses" in the EC's administration of customs valuation rules to include, among others, "the absence of common control standards and working practices"; "the absence of common treatment of traders with operations in several member States"; and "the absence of Community law provisions allowing the establishment of Community-wide valuation decisions."[48] The EC's assertions regarding the treatment of royalties do not address any of these broader observations, all of which demonstrate a lack of uniform administration as required by GATT Article X:3(a).

(d) In paragraphs 394 – 396 of its first written submission, the European Communities submits that, with respect to the conditions under which a sale other than the last sale may be used as the basis for establishing the transaction value for customs valuation purposes, Article 147 (1) of the Implementing Regulation provides that, where a price is declared which relates to a sale taking place before the last sale on the basis of which the goods were introduced into the customs territory of the Community, it must be demonstrated to the satisfaction of the customs authorities that this sale of goods took place for export to the customs territory in question. The European Communities submits that, whereas the United States claims that the 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", the Court of Auditors merely stated that "in practice, some customs authorities do impose a form of prior approval". The European Communities submits that, contrary to the impression created by the United States, there is no form of legal requirement of prior approval in order to be able to rely on an earlier sale. Moreover, according to the European Communities, given the potential complexity of the issue involved, it is not unreasonable for a customs authority to encourage traders who want to rely on the possibility of establishing the transaction value on the basis of an earlier sale to have this issue settled in advance. The European Communities submits that, in any event, such a practice constitutes a minor variation in administrative practice, which does not amount to a lack of uniformity incompatible with Article X:3(a) of the GATT 1994.

In response to these EC statements, the United States makes three key observations. First, the EC appears to see a distinction between "requir[ing] importers to obtain prior approval" and "in practice . . . impos[ing] a form of prior approval." The United States fails to see the relevant distinction the EC would make between its characterization of what certain (though not all) EC customs authorities do and the US characterization of what those customs authorities do. The EC evidently attaches significance to its assertion that "there is no form of legal requirement of prior approval in order to be able to rely on an earlier sale." It thus appears to distinguish between a "legal

[48] Court of Auditors Valuation Report, para. 86 (Exhibit US-14).

requirement" and something that is "impose[d]" "in practice."[49] It is not clear to the United States what the relevant distinction is nor, more importantly, how it could possibly matter to a trader who must submit to the prior approval at issue, whether as a matter of "legal requirement" or as a matter of "practice."

Significantly, the Court of Auditors found that "in practice, *some* customs authorities do impose a form of prior approval."[50] The EC does not deny that such differences in administration of CCCIR Article 147(1) exist. The EC states that "it is not unreasonable for a customs authority to encourage traders who want to rely on the possibility of establishing the transaction value on the basis of an earlier sale to have this issue settled in advance." The United States does not disagree. The existence of this practice *per se* is not problematic from the point of view of GATT Article X:3(a). What is problematic is the fact that some customs authorities within the territory of the EC impose a form of prior approval while others do not. Therefore, this is yet another example of non-uniform administration by the EC in breach of Article X:3(a).

Second, it is significant not only that some EC customs authorities administer CCCIR Article 147(1) by imposing a form of prior approval, while others do not, but also that the prior approval obtained from an EC customs authority in one region has no binding force in other parts of the territory of the EC. If an importer obtained prior approval from a customs authority in one EC member State to establish transaction value on the basis of a sale other than the last sale, it would have no assurance that the prior approval would be honored by customs authorities in other EC member States even with respect to identical transactions involving identical goods.

Finally, the EC asserts that the non-uniformity of administration of CCCIR Article 147(1) represents a "minor variation." The United States fails to see the basis for this characterization. To the contrary, from the trader's point of view, whether it must get prior approval in order to base customs value on a sale other than the last sale would be quite material to deciding where to enter its goods into the EC. The EC's characterization of this divergence as a "minor variation" is another example of the EC adopting an erroneous, exceedingly narrow view of non-uniform administration, wherein the only divergences that make a difference from the perspective of Article X:3(a) are the ones that affect the ultimate customs debt owed. In the EC's view, divergences in administration that merely affect the burden on the trader or risk to the trader – whether divergences affecting how a trader gets the right to base transaction value on a sale other than the last sale, the penalty-related risks a trader must take into account, or the ability to obtain reliable, long-term assurance as to the classification of goods even though the goods may be temporarily subject to an EC-wide duty suspension regulation (as in the case of LCD monitors) – are not relevant.

The United States takes a very different view. The United States finds no basis for the proposition that Article X:3(a) is breached only by non-uniform administration that affects the ultimate customs debt owed by the trader but not by non-uniform administration that affects the burden borne or risk faced by the trader. Indeed, it is notable that the Panel in *Argentina – Hides and Leather* found that Argentina's Resolution 2235 breached Article X:3(a), even though that provision did not affect the financial debt owed by traders. Rather, that provision subjected traders to a certain

[49] Curiously, this position appears to be at odds with the EC's position with respect to penalty provisions, where the EC argues that precisely because differences in administration from one authority to another are a matter of different *legal requirements* in different member States, they are beyond the scope of an examination into whether or not the EC is complying with its GATT Article X:3(a) obligation. Here, the EC seems to concede that differences in legal requirements (as opposed to practices) regarding prior approval for valuation on a basis other than last sale would constitute differences in administration cognizable under Article X:3(a). By that logic, differences in legal requirements with respect to penalties are evidence of non-uniform administration of the customs laws whose compliance is ensured through those penalties, as the United States has argued.

[50] Court of Auditors Valuation Report, para. 64 (Exhibit US-14) (emphasis added).

risk, inasmuch as domestic competitors for the purchase of raw hides were entitled to be present at the port along with customs officials inspecting hides prior to their exportation to foreign purchasers.[51]

In sum, Article X:3(a) requires that a Member's customs laws be administered in a uniform manner. That obligation is not limited by the conditions that the EC suggests, such that it is breached only when administration in a non-uniform manner affects the customs debt ultimately owed by the trader.

(e) Regarding local clearance procedures, in paragraph 423 of its first written submission, the European Communities submits that the fact that, at the frontier, anti-smuggling and admissibility checks are made electronically does not mean that there is no involvement of customs prior to release of goods for free circulation. Moreover, if the goods do not fulfil these checks, there will be a customs action (physical check, seizure…). The European Communities' argues that, therefore, it is wrong to state that there is no customs involvement prior to release in the United Kingdom. In paragraphs 422 – 426, concerning the requirements prior to release in the framework of the local clearance procedures, the European Communities submits that shipping manifest data is not required; rather a simplified declaration containing certain data must be submitted. The European Communities adds that the use of both electronic clearance systems and paper-based systems is possible. As regards supporting document requirements, the European Communities submits that all EC member States apply identical rules. In particular, all member States allow operators having regular trade flows with the same suppliers to submit only once the relevant DV1 together with the initial application to benefit from local clearance procedures. Concerning document retention requirements, the European Communities submits that the retention period in the Netherlands is 7 years. The European Communities submits that, besides, Article 16(1) of the Community Customs Code provides that the requisite documents shall be retained for a minimum period of three years, but leaves member States the possibility to stipulate longer periods taking into account their general administrative and fiscal needs and practices.

The EC's statements regarding local clearance procedures identify the outer parameters in which different customs authorities in the EC must operate. The United States does not dispute the EC's characterization of what those outer parameters are. What the United States has argued is that different EC customs authorities administer the local clearance procedures differently within those parameters. For a discussion of how they do so, the United States refers the Panel to paragraphs 109-117 of its first written submission.

138. With respect to the comments made by the United States in paragraph 67 of its Oral Statement at the second substantive meeting, does the United States now accept the European Communities' contention that audit procedures are part of valuation rules rather than constituting customs procedures?

The United States does not accept the EC's characterization of audit procedures as part of valuation rules rather than customs procedures. Audit procedures are more accurately described as customs procedures that verify compliance with valuation rules.

The United States calls to the Panel's attention the discussion at paragraph 83 of the Second Written Submission of the United States. As explained there, the EC's view that audit procedures do not constitute customs procedures is based on its erroneous understanding of the term "customs

[51] *See, e.g.*, Panel Report, *Argentina – Hides and Leather*, paras. 11.91 to 11.93.

procedures" as encompassing only "the procedures referred to in Article 3(16) CCC."[52] While "customs procedures" is indeed a term of art under the CCC (referring to several defined categories of treatment that a customs authority may assign to a particular good), that specialized use of the term has no relevance to the present dispute. In this dispute, the United States has used the term "customs procedures" to refer to the diverse array of rules, other than classification and valuation rules, that govern how goods are treated for customs purposes on importation into the EC. In fact, the EC itself acknowledges that how the concept of "customs procedures" is defined for purposes of EC law, and whether given procedures fall within the scope of Article X:3(a) of the GATT 1994 "are independent questions."[53] As audit procedures are tools for administering substantive rules that indisputably are within the scope of Article X:3(a), differences among audit procedures from region to region within the EC are evidence of non-uniformity in the administration of EC customs laws, regardless of whether they fall within the specialized definition of "customs procedures" in the Community Customs Code.

139. With respect to the United States' arguments concerning processing under customs control, is the United States arguing that the substance of French law implementing EC law that applies in this area is different from the substance of law in other member States (such as the United Kingdom)? Additionally or alternatively, is the United States arguing that the application of French law in this area differs from the application by other member States? If the latter, does the United States have any evidence to support its claim?

The US argument is that the substance of French law implementing EC law (CCC Article 133 and CCCIR Articles 502(3) and 552) identifies a one-prong economic effects test for deciding whether to permit processing under customs control.[54] Other member States – for example, the United Kingdom – identify a two-prong test.[55] A straightforward comparison between the French guidance and the UK guidance demonstrates that France and the United Kingdom are administering CCC Article 133 and CCCIR Articles 502(3) and 552 non-uniformly.

The United States has not made an argument with respect to the application of the French law. There is no need to, as the French law and the UK law – both tools for the administration of the EC law – are facially divergent. The application of each of those laws will thus *necessarily* diverge from each other.

140. In paragraph 75 of the United States' Oral Statement at the second substantive meeting, the United States submits that it is alleging a lack of uniformity on the European Communities' part in the area of processing under customs control. Please specifically identify the acts/omissions on the part of European Communities that are alleged to result in a violation of Article X:3(a) of the GATT 1994 in this area.

Article X:3(a) of the GATT 1994 requires the EC to administer certain laws in a uniform manner. Among the laws that it must administer in a uniform manner are CCC Article 133 and CCCIR Articles 502(3) and 552, which pertain to processing under customs control. The EC law on processing under customs control provides that with respect to certain goods, the customs authority must undertake an economic assessment in order to decide whether to permit processing under customs control.

There is some internal ambiguity within EC law on this issue. CCC Article 133 states that

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[52] EC Replies to First Panel Questions, para. 105.

[53] EC Replies to First Panel Questions, para. 103.

[54] Bulletin officiel des douanes no. 6527 at para. 83 (Aug. 31, 2001, as modified by BOD no. 6609, Nov. 4, 2004) (Exhibit US-35).

[55] HM Customs & Excise, Notice 237, "Processing Under Customs Control (PCC)," § 15 (June 2003) (emphasis added) (Exhibit US-34).

authorization for processing under customs control shall be granted only where, *inter alia*, "the necessary conditions for the procedure to help create or maintain a processing activity in the Community without adversely affecting the essential interests of Community producers of similar goods (economic conditions) are fulfilled." Thus, this article sets out a two-part test: The proposed processing activity (1) must "help create or maintain a processing activity in the Community," and (2) must not "adversely affect[] the essential interests of Community producers of similar goods."

On the other hand, CCCIR Article 502(3) states, "For the processing under customs control arrangements (Chapter 4), the examination shall establish whether the use of non-Community sources enables processing activities to be created or maintained in the Community." CCCIR Article 502(3) makes no reference to the second part of the economic effects test described in CCC Article 133 – the requirement that the proposed activity not "adversely affect[] the essential interests of Community producers of similar goods."

The EC asserts that CCCIR Article 502(3) "has to be considered as an abbreviated reference to the requirements laid down in Article 133(e) CCC."[56] The EC gives no basis for this assertion, which seems unusual given that, in general, the 680-page CCCIR gives a more detailed elaboration of the provisions in the 77-page CCC and not a shorter paraphrase of the latter provisions. In any event, the internal ambiguity within the substantive law itself evidently has given rise to non-uniformity of administration. Thus, one EC customs authority (in the United Kingdom) tells applicants for authorization to engage in processing under customs control: "There are therefore two aspects to the economic test and you must provide evidence to show *both* the impact upon your business *and* the impact upon any other community producers of the imported goods."[57] This customs authority then goes on to specify different types of evidence that applicants should provide to substantiate both prongs of this economic test.

By contrast, another EC customs authority (in France) tells applicants for authorization to engage in processing under customs control: "With regard to processing under customs control, block 10 of the model request must be completed with information showing that use of this customs regime will create or maintain a processing activity in the Community. . . ."[58] It does not tell applicants that the information they provide also must show that the proposed processing activity will not adversely affect the essential interests of Community producers of similar goods. Nor does it indicate types of evidence that applicants should provide to satisfy such a second prong to the economic test.

The foregoing material difference between the evidence that one EC customs authority tells applicants they must provide and the evidence that a different EC customs authority tells applicants they must provide amounts to a non-uniformity in administration of the EC law providing for processing under customs control. Not only has no EC institution (such as the Commission) stepped in to reconcile this glaring divergence, but the EC denies that there is a divergence at all, despite clear documentary evidence to the contrary. The EC asserts that even though the instructions one EC customs authority gives to traders are materially different from the instructions that another EC customs authority gives to traders, the difference should not be accorded any significance. The United States fails to see how this difference can *not* be accorded significance. It is this divergence that is inconsistent with the EC's obligation of uniform administration under GATT Article X:3(a), with respect to processing under customs control.

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[56] EC First Written Submission, para. 413.

[57] HM Customs & Excise, Notice 237, "Processing Under Customs Control (PCC)," para. 15 (June 2003) (emphasis added) (Exhibit US-34).

[58] Bulletin officiel des douanes no. 6527 at para. 83 (31 August 2001, as modified by BOD no. 6609, Nov. 4, 2004) ("En ce qui concerne la transformation sous douane, la rubrique 10 du modèle de demande doit être complétée des informations démontrant que le recours à ce régime douanier crée ou maintient une activité de transformation dans la communauté. . . .") (Exhibit US-35).

141. In paragraph 215 of its Second Written Submission, the European Communities argues that, with respect to its claim under Article X:3(b) of the GATT 1994, the United States does not make any allegations regarding the scope of review demanded under Article X:3(b). Please comment.

The EC's assertion that the United States does not make any allegations regarding the scope of review demanded under Article X:3(b) is based on an analytical framework that the EC has proposed for examining that provision. Under that framework, the EC suggests that Article X:3(b) can be examined in terms of four issues: "the material scope of the control, its nature, its purpose and the time requirement."[59] The United States has not used this same framework for examining the EC's obligation under Article X:3(b). Therefore, the comments the United States makes on the EC's assertion with respect to scope of review are without prejudice to the US view of the appropriate analytical framework under which to consider Article X:3(b).

Article X:3(b) requires the EC as a WTO Member to have in place certain "judicial, arbitral or administrative tribunals or procedures." It then defines certain qualities that these tribunals or procedures must have, as follows:

(1) They must provide for the "review and correction of administrative action relating to customs matters";

(2) Such review and correction must be "prompt";

(3) The tribunals or procedures must be "independent of the agencies entrusted with administrative enforcement"; and

(4) The decisions of the tribunals or procedures must be

(a) "implemented by" and
(b) "govern the practice of"

the agencies entrusted with administrative enforcement "unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers."

The US Article X:3(b) allegations in this dispute relate to the fourth of the above-enumerated qualities that tribunals or procedures must have – in particular, the "govern the practice" requirement. The tribunals or procedures for review and correction of administrative action relating to customs matters that the EC provides – in particular, the courts in each of the EC's 25 member States – do not have the fourth quality set out in Article X:3(b) because the decisions that they render do not govern the practice of "*the* agencies entrusted with administrative enforcement." The decisions of any given court govern the practice of only a subset of the agencies entrusted with administrative enforcement. Therefore, the EC does not provide tribunals or procedures that satisfy all of the requirements of Article X:3(b). Not only is this inconsistent with the ordinary meaning of the text of Article X:3(b), this conclusion is reinforced when that provision is read in its context as set forth in Article X:3(a). To the extent that the decisions of review courts govern the practice of only *certain* agencies entrusted with administrative enforcement, the EC's system of review undermines rather than complements the uniform administration required by Article X:3(a). Since Article X:3(b) should be read in this context, this is an additional reason to find that the review courts provided by the EC fail to meet the EC's obligation under Article X:3(b).[60]

[59] EC Second Written Submission, para. 215.

[60] *See generally* US First Written Submission, paras. 134-139; US Second Written Submission, paras. 102-109.

142. In light of the United States' argument in its reply to Panel Question No. 121 that the obligation of prompt review and correction under Article X:3(b) of the GATT 1994 applies to the first tribunal or procedure that a Member provides following the taking of an administrative decision, if the Panel were to assume for the sake of argument that the European Communities is not obliged to establish a central review body(ies) with authority to make decisions with EC-wide effect under Article X:3(b), please respond to the following:

(a) Does the United States consider that the review by bodies in each of the EC member States responsible for undertaking first instance review of customs decisions taken by member States authorities is in violation of Article X:3(b)?

(b) If so, please explain which aspect(s) of review by these bodies are in violation of Article X:3(b), making reference to the relevant requirements of Article X:3(b) and providing all relevant evidence in support.

(c) With regard to paragraph 86 of the European Communities' Oral Statement at the second substantive meeting, does the United States consider that review is not "prompt" in violation of Article X:3(b) of the GATT 1994 with respect to the following:

(i) first instance review by national courts of EC member States where there has been no reference to the ECJ for a preliminary ruling; and/or

(ii) first instance review by national courts of EC member States where there has been reference to the ECJ for a preliminary ruling.

The US complaint in this dispute is not about the review bodies provided by each of the EC's member States. The United States has not argued, for example, that review at the member State level breaches member States' obligations under GATT Article X:3(b). The thrust of the US claim is that existing review at the member State level *alone* lacks features that would enable it to satisfy the *EC's* Article X:3(b) obligation. In particular, a member State court issues decisions whose effects are confined to the territory of that member State. No court within the territory of the EC that provides prompt review and correction of customs administrative actions issues decisions that govern the practice of *the* agencies (as opposed to a subset of the agencies) entrusted with administrative enforcement of EC customs law.

The EC asserts that the customs authorities located in each of its 25 member States are EC customs authorities. The EC concedes that the decisions of the courts in one member State do not bind the authorities in other member States. Therefore, the decisions of the courts in one member State do not govern the practice of the EC agencies in the other 24 member States. This is a clear breach of the plain language of Article X:3(b).

In discussing parts (a) and (b) of the Panel's question at the second substantive meeting with the parties, the Panel explained that it was interested in knowing how the United States understands the word "decisions" as used in Article X:3(b). In particular, the Panel asked whether the decisions that must both be implemented by and govern the practice of the agencies entrusted with administrative enforcement are simply the ultimate mandates or orders issued by the review courts, or whether they encompass the courts' reasoning as well. Since, based on the discussion at the second Panel meeting, the United States understands Question No. 142 to be addressed to this issue too, the United States offers the following observations.

Article X:3(b) must be interpreted according to the ordinary meaning of its terms, in context, and in light of the object and purpose of the GATT 1994. The terms of Article X:3(b) plainly provide

that the decisions rendered by review tribunals or procedures must meet two independent requirements: They must be implemented by the agencies entrusted with administrative enforcement, and they must govern the practice of those agencies. These two independent requirements cannot simply be merged into one, which is what the EC does in arguing that "govern the practice of" simply means "implement in fair terms."[61] For decisions to govern the practice of the agencies entrusted with administrative enforcement, they must be given effect beyond simple implementation of the order in the case at hand.[62] This is consistent with the context of Article X:3(b) – in particular, the uniform administration requirement – as discussed above.

This then leads to the question of what "decisions" means. In other words: Which statements by a review court must govern the practice of the agencies entrusted with administrative enforcement – simply the final mandate or order, or the mandate or order coupled with the court's reasons? At the second Panel meeting, it was pointed out that in some legal systems the term "decision" might be understood as limited to the final mandate or order, while in others it might also encompass the court's reasons. The United States submits that whether "decisions" is understood to have a narrower or broader meaning does not affect the "govern the practice" requirement. That is, even in a legal system in which a decision is understood as pertaining only to the court's mandate or order and not to its reasons, Article X:3(b) still requires that the decision both be implemented by *and* govern the practice of the agencies entrusted with administrative enforcement. In fact, a Member need not have a legal system that looks generally to judicial precedent as a source of law in order to satisfy this requirement.

A simple example will illustrate this point. Consider a case in which a review court has overruled a Member's customs authority on a question of classification. The court finds that the customs authority erred in classifying a good under heading "X" and that it should have classified the good under heading "Y." Implementation of the court's decision entails the customs authority revising the classification of the particular merchandise in the administrative action that gave rise to the court review. It may be that in reaching its decision, the court explained its reasons in a way that may have broad applicability to other classification questions (or even to other areas of law). In some legal systems, the court's reasons might be accorded a certain weight, such that they should be deferred to as precedent. However, the court's reasoning need not be treated as precedent in this sense in order for its decision to govern the practice of the agencies entrusted with administrative enforcement. In between the extremes of simple implementation in the case at hand and treatment as general precedent is the possibility that the court's decision – its conclusion with respect to the correct classification of the good at issue – will be applied to other cases involving identical goods. This is what the United States understands by the concept of a decision governing the practice of the agencies entrusted with administrative enforcement, as that concept is described in Article X:3(b).

Thus, in the foregoing illustration, if the court found that the customs authority had erred in classifying the good at issue under heading "X" and that it should have classified it under heading "Y," the "govern the practice" aspect of Article X:3(b) would require that in other cases the authority follow the court's decision and classify identical goods under heading "Y," even if those goods are imported by a party other than a party to the original court proceeding. It would not, however, require that the court's decision be given a broader precedential effect, applicable not only to identical goods but also to other goods and perhaps even to other areas of law. In the view of the United States, under this understanding of the "govern the practice" aspect of Article X:3(b), it does not make a difference whether a given Member's legal system treats a "decision" as consisting of only the court's order or mandate, or including the court's reasons.

In sum, even if a Member's legal system treats a court's decision as consisting only of the court's final mandate or order, GATT Article X:3(b) still requires that the decision govern the practice

[61] EC Second Written Submission, para. 230.
[62] *See* US Second Written Submission, paras. 104-106.

of the agencies entrusted with administrative enforcement and that this effect mean something distinct from simple implementation of the decision. As discussed above, the decisions issued by review courts in the EC fail to satisfy this requirement, as they govern the practice of only some of the agencies entrusted with administrative enforcement in the EC.

With respect to part (c) of the Panel's question, the United States does not take a position in this dispute as to whether review is "prompt" within the meaning of Article X:3(b) in the case of first instance review by member State courts where there is no reference to the ECJ for a preliminary ruling. This is not to say that the United States concedes that such review is prompt. In this regard, the United States recalls the observation of the EC's advisor, Mr. Vermulst, that "judicial review in classification matters and, more in general, all customs issues is not only expensive and time-consuming for affected parties, it also may lead to inconsistent judgments by national courts, at least in first instance."[63]

The United States has referred to the time it takes for a question to be referred to and decided by the ECJ in cases in which courts choose to exercise their discretion to refer to the ECJ.[64] The United States has done so on the supposition that the ECJ is the one tribunal that the EC provides that appears to meet the other requirements of Article X:3(b). In particular, unlike the courts of the EC member States, the ECJ issues decisions that govern the practice of the agencies entrusted with administrative enforcement of the EC's customs laws. Thus, if the ECJ were the tribunal maintained by the EC to satisfy its Article X:3(b) obligation (a proposition that the EC rejects[65]), then it would be important to examine whether the review provided by that tribunal is prompt. In fact, it is not prompt. Just to get a preliminary question put before the ECJ a trader may have to go through an administrative appeals process (at which stage referral to the ECJ is not even possible),[66] followed by multiple layers of court review, which itself may take years. Even then, the trader has no assurance that a question will get referred to the ECJ, even where it concerns a clear divergence among different authorities' administration of the law.[67] If the question should happen to get referred to the ECJ, it will take 19 to 20 months on average for the question to be decided.[68] The United States submits that the time it takes for a question to get decided by the ECJ following referral, coupled with the time it takes for a question to reach the ECJ in the first place, would fail to satisfy the requirement of promptness if the EC were contending that review by the ECJ satisfies its obligation under Article X:3(b).[69]

143. In light of the United States' argument in its reply to Panel Question No. 121 that the obligation of prompt review and correction under Article X:3(b) of the GATT 1994 applies to the first tribunal or procedure that a Member provides following the taking of an

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[63] *See* US Second Oral Statement, para. 38 (quoting Vermulst, *EC Customs Classification Rules*, p. 21 (Exhibit US-72)).

[64] *See, e.g.*, US Second Written Submission, para. 109.

[65] *See, e.g.*, EC Second Oral Statement, para. 85.

[66] *See* EC Replies to First Panel Questions, paras. 117 ("Most of the EC member States require the trader to lodge a request for an administrative review before appealing to the relevant court."), 122 ("Decisions to refer for a preliminary ruling are taken by the member States *courts*. . . .) (emphasis added).

[67] *See* US Second Oral Statement, paras. 35-38.

[68] *See* EC Replies to First Panel Questions, para. 124.

[69] *See generally* US Replies to First Panel Questions, paras. 152-154. As part (c) of the Panel's question refers to paragraph 86 of the EC's Oral Statement at the second substantive meeting, the United States makes an additional observation about that part of the EC's statement. There, the EC compares the time it takes for an appeal to make its way through member State court and ECJ review to the time it takes for an appeal in the United States to be decided by the US Court of International Trade ("CIT"). The EC provides an entirely misleading description of the time it takes for a request for review to be decided in the United States. The United States refers the Panel to paragraph 142 of the US Replies to the First Set of Panel Questions. Most significantly, the EC simply ignores the extent to which the timing of review by the CIT is largely in the hands of the party seeking review. *See* US Replies to First Panel Questions, paras. 150-151.

administrative decision and with respect to its claim under Article X:3(b) of the GATT 1994, does the United States challenge review by the ECJ pursuant to Article 230 of the EC Treaty of decisions taken by EC institutions? If so, please explain which aspect(s) of review by the ECJ under Article 230 of the EC Treaty is in violation of Article X:3(b), making reference to the relevant requirements of Article X:3(b) and providing all relevant evidence in support.

Article 230 of the EC Treaty pertains to review by the ECJ of the legality of acts adopted by EC institutions, including the Commission and Council. In this dispute, the United States has not raised any issue with respect to ECJ review pursuant to Article 230. The US discussion of the role of the ECJ has focused on the possibility of review pursuant to Article 234 of the EC Treaty – the preliminary ruling mechanism. The EC asserts that through the preliminary ruling process, the ECJ plays an important role in ensuring uniform administration of EC customs law.[70] The United States has demonstrated that this is not the case. In particular, in its Oral Statement at the second Panel meeting, the United States showed that the courts in the various member States are under no obligation to refer a question to the ECJ, even when they are confronted with evidence of an undeniable divergence in the administration of EC customs laws.[71]

In its statement at the second Panel meeting, the EC stated that "if . . . a court in a[n] EC member State does not share the interpretation of the EC legislation given by a court of another member State, it will take the initiatives that are proper to its respective position in the system: . . . the court in another member State will or shall refer to the EC Court of Justice."[72] These statements as to what "will" or "shall" happen are without basis. And, as the illustrations the United States discussed at the second Panel meeting make clear, the use of the preliminary ruling mechanism to which the EC alludes does *not* happen, even in cases posing a stark divergence of administration among customs authorities.

144. In its reply to Panel Question No. 74, the European Communities submits that, although the Community Customs Code does not contain any provisions requiring that review by national courts be prompt, there are a number of Community-wide measures (such as the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union), which have the effect of requiring member States' tribunals to provide prompt review. Please comment.

The United States notes that the EC's reply to Panel Question No. 74 is yet another example of the EC making reference to a due-process type obligation of a very general nature, which it admits is not operationalized in the customs context, as the source of fulfillment of its Article X:3 obligation. The United States fails to see how such a general provision, not operationalized in the customs context, can ensure that the tribunals the EC provides for review of customs administrative actions in fact provide prompt review. That said, in this dispute, the United States does not argue that the review provided by particular member State tribunals is not prompt. Rather, these tribunals are not tribunals that satisfy the requirements of Article X:3(b).

145. In its reply to Panel Question No. 36, the United States submits that first instance review is undertaken by the Office of Regulations and Rulings, which is part of US Customs and Border Protection. Please indicate whether or not all review decisions issued by the Office of Regulations and Rulings have effect throughout the United States.

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.

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[70] *See, e.g.*, EC First Written Submission, para. 185.
[71] US Second Oral Statement, paras. 31, 35-38.
[72] EC Second Oral Statement, para. 99.

The first instance review by the Office of Regulations and Rulings referred to in the US reply to Panel Question No. 36 is known in the United States as "further review" of determinations on protests. Decisions issued under the further review procedure have the same force and effect as advance ruling decisions. That is, they are binding as to the transactions described and cannot be modified or revoked without going through the same modification process as is applicable to rulings. The recipient of the further review decision would be able to employ it at any port throughout the United States. Other persons whose goods are identical in all material respects would be able to invoke the decision as authority for the disposition of their goods.

QUESTIONS FOR BOTH PARTIES

173. Making reference to the relevant terms of Article X:3(a) of the GATT 1994 and any other supporting material, please explain whether or not the design and structure of a customs administration system as a whole, or relevant components thereof, can be considered as such in determining whether or not Article X:3(a) has been violated for want of uniform administration. Additionally or alternatively, is it necessary to have regard to specific instances of non-uniform administration in order to demonstrate a violation of Article X:3(a)?

Article X:3(a) has some unusual aspects that need to be considered when looking at it under the traditional "as such/as applied" framework. It is true that Article X:3(a) is concerned with administration. However, one can conceive of a Member establishing a system of customs administration that as such necessarily results in non-uniform administration in breach of Article X:3(a) (as is the case in the EC). By way of analogy, in the *Canada – Wheat Exports and Grain Imports* dispute, the Panel found the United States to have made "a *per se* challenge to the [Canadian Wheat Board] Export Regime viewed in its entirety."[73] Canada did not object to the US claim (concerning a breach of GATT Article XVII) on this ground, and the Panel agreed to entertain the US claim.[74] In fact, the EC as third party in that dispute argued that the GATT article at issue could be breached by virtue of "structural shortcomings" affecting the way the state trading enterprise under consideration acts.[75] Analogously, in the present dispute the United States contends that structural shortcomings in the EC's system of customs administration result in non-uniform administration of EC customs law, in breach of Article X:3(a).

What is essential to an "as such" claim is the obligation alleged to have been breached and whether the object of the challenge necessarily results in a breach of that obligation. For the reasons described in the US response to Question No. 126, the design and structure of the EC system of customs administration necessarily result in non-uniform administration in breach of GATT Article X:3(a).

Moreover, as also explained in response to Question No. 126, the US argument under Article X:3(a) has not relied exclusively on demonstrating that the design and structure of the EC system of customs administration necessarily results in non-uniform administration. The United States also has supported its argument with evidence that the EC and senior EC officials have recognized an absence of uniform administration; examples of non-uniform administration; and evidence practitioners who actually must work within the system understand administration to be non-uniform.[76] The Panel asks whether it is necessary to have regard to specific instances of non-uniform

[73] Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.28.
[74] Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.28.
[75] Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 4.601; *see also id.*, para. 4.603 ("The European Communities also considers that Canada's explanation of the CWB's institutional structure does not provide for sufficient assurances that the CWB actually acts in accordance with the obligations under Article XVII:1(a) and (b) GATT.").
[76] *See* Reply to Question No. 126, *supra*.

administration in order to demonstrate a violation of Article X:3(a). While it is difficult to answer that question in the abstract, it need not be answered in the context of the present dispute, as the support for the US claim under Article X:3(a) includes evidence of *both* the design and structure of the EC system of customs administration *and* specific instances of non-uniform administration.

174. Please comment on the practical relevance, if any, of the following comment made by the Panel in *Argentina – Hides and Leather* at paragraph 11.77 of its report: "Article X:3(a) [of the GATT 1994] requires an examination of the real effect that a measure might have on traders operating in the commercial world" (emphasis added).

In the context of *Argentina – Hides and Leather*, the reference to "the real effect on traders" was in contradistinction to the suggestion that the obligation of uniform administration under Article X:3(a) is breached only when a Member treats exports to one Member differently from exports to another.[77] In determining whether Article X:3(a) has been breached, a panel should ask not whether one WTO Member has been treated differently from other WTO Members. It should ask whether traders have been treated differently based, for example, on the part of the Member's territory through which they import their goods. If the manner in which a Member administers its customs law might encourage a trader to prefer importation through one region rather than another, this would be probative of non-uniform administration, in breach of Article X:3(a).

Significantly, in the last sentence of paragraph 11.77 of its report, the *Argentina – Hides and Leather* Panel noted that an examination of the real effect that a measure might have on traders "can involve an examination of whether there is a possible impact on the competitive situation. . . ." In other words, an examination of the real effect that a measure might have on traders is not confined to an examination of whether traders in similar situations are required to pay different customs duties. The concept of "a possible impact on the competitive situation" encompasses more than just liability for customs duties. Notably, it includes the effect that non-uniform administration has of causing traders to divert shipments from one region of a Member's territory to another region due, for example, to relative certainty as to favourable classification or valuation, less risk of liability for penalties, or likelihood of receiving authorization to engage in a specialized activity (e.g., processing under customs control).[78]

175. In paragraph 11.77 of the report in *Argentina – Hides and Leather*, the Panel stated that "trade damage" need not be demonstrated in order to prove a violation of Article X:3(a). Please comment.

To prove a violation of Article X:3(a), all the United States is required to show is that the EC administers its customs law in a non-uniform manner. The United States does not need to show harm to the United States or to particular traders to support its Article X:3(a) claim. In particular, the United States is under no obligation to show that particular instances of non-uniform administration caused importers to pay higher tariffs than they would have paid under a system of uniform administration. It may well be that non-uniform administration causes traders to divert their trade in ways that would make no sense where uniform administration prevailed, precisely to avoid having to pay higher tariffs. As the United States discussed in its opening statement at the second Panel meeting, this has been the case with respect to imports of LCD monitors into the EC.[79] Despite the EC's protestations to the contrary,[80] whether such response to non-uniform administration yielded a

[77] Panel Report, *Argentina – Hides and Leather*, para. 11.76.

[78] *See* Replies to Questions 135, 137(b), and 137(d), *supra*.

[79] *See* US Second Opening Statement, para. 52 (discussing EICTA September 2005 Letter, p. 1 (Exhibit US-75)).

[80] *See, e.g.*, EC Second Oral Statement, para. 54 ("the EC also wonders wherein precisely would lie the nullification or impairment of benefits to the US"); EC Second Written Submission, para. 35 ("it is for the US,

particular measure of trade damage is not relevant to establishing an Article X:3(a) breach.

176. In paragraph 15 of its Oral Statement at the second substantive meeting, the European Communities notes that it invokes Article XXIV:12 of the GATT 1994 to support the view that GATT commitments, including Article X:3(a) of the GATT, were undertaken by Contracting Parties in full respect of their constitutional systems. What significance, if any, should be attached to the fact that a customs union akin to the European Communities did not exist at the time the text of the GATT was concluded in 1947?

The EC's statement at paragraph 15 of its Second Oral Statement, and similar statements elsewhere,[81] wrongly suggest that Article X:3(a) of the GATT 1994 ought to be interpreted in light of the constitutional structures of individual Members, including the EC. By the EC's logic, the Panel should start with the EC's constitutional structure as a fixed point and interpret Article X:3(a) around that fixed point. Any interpretation that might result in the EC having to change its system of customs administration and review, according to this argument, must be rejected.

As the United States explained in its Closing Statement at the second Panel meeting, the EC has it exactly backwards.[82] It is not the EC's constitutional structure that should inform the meaning of Article X:3(a); rather, it is the ordinary meaning of the terms of Article X:3(a) in context and in light of the object and purpose of the GATT 1994 that should inform the EC's obligation under that article.[83] Article XXIV:12 does not change this. Paragraph 13 of the *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994* makes it clear that Article XXIV:12 does not excuse or alter a Member's obligations. Thus, it provides that "[e]ach Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994."[84]

Whether or not a customs union "akin to" the EC existed when the GATT was concluded in 1947 is therefore not relevant to the analysis of the EC's obligations under Article X.[85] What is important is that Article X:3(a) is drafted in a way that makes no special accommodation for a Contracting Party with multiple, independent, regionally limited customs authorities and no procedures or institutions to ensure that those various authorities administer the Contracting Party's customs laws uniformly. Nor does Article XXIV:12 make any such accommodation. As the United States has explained, Article XXIV:12 is not a general excuse from or limitation on the applicability of Article X:3(a).[86]

When the EC joined the WTO in 1994 it accepted the text of, and the obligations under, the GATT. There is nothing in the GATT 1994 or the WTO Agreement that suggests that the EC has different rights or obligations from any other Member, nor is there anything in the WTO Agreement that suggests that the fact of the EC's having become a Member affects the meaning of any provision of the GATT 1994. Indeed, if the logic of the EC's argument were accepted here, there is a very serious question as to where it would end. That is, what other GATT obligations would have to be specially interpreted in light of the EC's (or any other Member's) constitutional structure?

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as the complaining party, to show that variations of administrative practice, even where they existed, have a significant impact on traders").

[81] *See, e.g.*, EC Second Oral Statement, para. 12; EC Second Closing Statement, para. 3; EC First Written Submission, para. 220; EC Replies to First Panel Questions, para. 113.

[82] *See* US Second Closing Statement, paras. 12-16.

[83] Where the negotiators of the WTO agreements wanted to take Members' constitutional structures into account, they knew how to do so. *See, e.g., General Agreement on Trade in Services*, Art. VI:2(b); *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, Art. 4.2; *see also* US Second Written Submission, para. 16 (discussing GATS, Art. VI:2(b)).

[84] *See* US Second Written Submission, paras. 12-17.

[85] The United States notes that it is not certain what precisely the Panel means by a customs union "akin to" to the EC.

[86] *See* US Replies to First Panel Questions, para. 188.

There is no basis for arguing that an interpretation of Article X:3(a) that gives its terms their ordinary meaning in context and in light of the GATT's object and purpose should be rejected because that interpretation might require the EC to make changes to its system of customs administration and review of customs decisions. The text of Article X did not change in 1994 when the EC became a WTO Member. Rather than assume that the Contracting Parties' acceptance of the EC as a WTO Member constituted acceptance that the EC's system of customs administration conformed with Article X:3(a), the Panel should assume that the EC chose to become a Member of the WTO aware of the obligations it would have under GATT Article X:3(a) and committed to conform its system of customs administration accordingly.

ANNEX B-2

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

(7 December 2005)

QUESTIONS FOR THE EUROPEAN COMMUNITIES

146. In its reply to Panel Question No. 42, the European Communities argues that, as a matter of EC law, both the institutions of the European Communities and the authorities of the member States, each of them acting within their respective spheres of competence, are 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; and (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, please identify whether and the extent to which the European Communities and/or the member States are responsible for the enactment[1] and the administration of, inter alia, laws and regulations in the following areas of customs administration:

(a) Tariff classification;

(b) Customs valuation; and

(c) Customs procedures (particularly, audit following release for circulation[2]; penalties for infringements of EC customs legislation; processing under customs control; and local clearance procedures).

If the European Communities shares competence with the member States in any one or more of the above areas of customs administration, please clearly explain the delineation between their respective competences in the relevant areas.

In the EC, customs law is to a very large extent regulated by EC law, and notably the Common Customs Tariff, the Customs Code, and the Implementing Regulation. As the EC has explained in response to the Panel's Question No. 78, member States may act to supplement EC law only if the matter is not dealt with in the relevant EC legislation, or if they are authorized by EC legislation to do so.[3]

In the area of customs, there are therefore only limited areas in which member States can still legislate. member States legislation covers in particular organizational matters, such as the establishment and designation of the member States' authorities competent for the administration of customs laws. Members States' law also determines the penalties applicable for violations of EC customs law. Finally, member States' law may be relevant where EC law does not address a specific question, e.g. the rules for the service of documents. Another example would be document retention requirements, where Article 16 (1) CCC provides that documents shall be retained for a

[1] By "enactment", we mean the enactment of laws and regulations *in addition to and/or supplementing* the Community Customs Code, the Implementing Regulation and the Taric.

[2] Assuming, for the sake of argument, that such audits can be classified as a customs procedure for the purposes of this dispute.

[3] EC Reply to Panel Question No. 78, para. 145.

minimum period of three years, but leaves member States the possibility to stipulate longer periods.[4]

As the EC has already explained, as in most other areas of EC law, the administration of EC customs law is primarily the responsibility of the EC member States.[5] The European institutions, and notably the European Commission, administer EC customs law only in a limited number of cases. However, the European Commission, as the guardian of the EC treaty, supervises the correct implementation of EC customs law.[6] A specific forum to ensure coordination between the member States and the Commission is provided by the Customs Code Committee.[7]

These general principles also apply with respect to the specific areas mentioned in the Panel's question.[8] The administration of tariff classification rules is in principle the responsibility of the member States. However, the EC Commission disposes of a number of tools[9] to ensure a uniform administration, including classification regulations, explanatory notes, but also decisions requiring the revocation of BTI. The Commission is also in charge of the running of the EBTI data base. Moreover, the Customs Code Committee may examine any question of tariff classification, and adopt conclusions on such issues.

As regards customs valuation, the administration of valuation rules is equally the responsibility of the member States' authorities. However, the European Commission monitors the correct application of customs valuation rules, and the Customs Code Committee equally may adopt guidelines and conclusions on questions of customs valuation wherever necessary.[10]

The conduct of customs audits and the administration of penalty provisions are equally the responsibility of the member States authorities. As regards audits, the EC notes, however, that the European Commission may also, on the basis of Regulation 1150/2000 (Exhibit EC-45) require member States to carry out inspections, with which the Commission shall be associated upon request, or itself carry out inspection measures.

Finally, as regards processing under customs control and the local clearance procedure, the administration of these procedures is in principle the responsibility of the member States. As regards the application of the economic conditions for processing under customs control, the EC has, however, already explained that in certain cases, the examination of these conditions takes place at the Community level.[11]

147. Please explain in practical terms how Article 10 of the EC Treaty is enforced and by whom in the following areas of customs administration:

(a) Tariff classification;

(b) Customs valuation; and

[4] EC First Written Submission, para. 426.
[5] EC First Written Submission, para. 78-79.
[6] EC First Written Submission, para. 79. For the tools available to the European Commission in this regard, the EC refers to the description in EC First Written Submission, part. III A and B.
[7] EC First Written Submission, para. 80 et seq.
[8] Cf. EC First Written Submission, para. 88 et seq.
[9] The EC notes that certain of these tools, notably classification regulations, are themselves measures of general application, and do not therefore constitute "administration".
[10] EC First Written Submission, para. 125 et seq.
[11] Cf. EC First Written Submission, para. 137 – 138.

(c) Customs procedures (particularly, audit following release for circulation[12]; penalties for infringements of EC customs legislation; processing under customs control; and local clearance procedures).

Please provide evidence of enforcement of Article 10 of the EC Treaty in the abovementioned areas of customs administration, such as ECJ judgements in which Article 10 EC Treaty has been invoked

As the EC has explained, the duty of cooperation laid down in Article 10 EC is legally binding and directly applicable in all member States. Accordingly, it must be respected by member States' authorities in the administration of Community customs law.

The duty of cooperation inspires the interpretation of Community law by EC Courts, and may be invoked in disputes before member States tribunals. If a question arises regarding the application of Community law, including the duty of cooperation, this question can – or, in the case of a tribunal of last instance, must – be referred to the Court of Justice. Finally, where a member States infringes the duty of cooperation, this constitutes an infringement of the EC Treaty, against which the European Commission can bring infringement proceedings pursuant to Article 226 EC.

In the area of classification, the ECJ relied on Article 10 in two recent cases following references for a preliminary ruling. In *Commissioners of Customs & Excise v. SmithKline Beecham*[13], Article 10 formed the central justification in the ECJ's decision that a domestic United Kingdom court was obliged to undo the unlawful consequences of a breach of Community law. In that case, the customs authority had classified nicotine patches. On appeal, the High Court of Justice of England and Wales, Chancery division, disagreed with the classification and referred the question to the European Court of Justice. Examining principles of law and the factual characteristics of the product, the ECJ agreed that the product was incorrectly classified. In light of this incorrect classification, the Court found that the national court was obliged to remedy the non-compliance with Community law. In particular, it found: [14]

> Established case-law makes it clear that, in keeping with the principle of the duty to cooperate in good faith laid down in Article 10 EC, the member States are obliged to nullify the unlawful consequences of a breach of Community law. The obligation is incumbent on all the authorities of the member States concerned within the sphere of their competence. It is thus for the competent authorities and the courts of a member State to take, within the sphere of their competence, all the measures, general or particular, necessary to remedy the non-compliance of incorrect binding tariff information. Such particular measures include, more particularly, the annulment of the incorrect binding tariff information and the adoption of new information in keeping with Community law.

Kühne & Heitz v. Productschap voor Pluimvee en Eieren[15] involved a case where a trader had been required to reimburse certain export refunds following a determination by the national court that its product did not fall within the goods subject to the refunds. Later, the European

[12] Assuming, for the sake of argument, that such audits can be classified as a customs procedure for the purposes of this dispute.

[13] Case C-206/03, *SmithKline Beecham*, Order of the Court of 19 January 2005 (not yet reported) (Exhibit EC-142).

[14] *Id.*, para. 51 (citations omitted).

[15] Case C-453/00, *Kühne & Heitz*, [2004] ECR I-837 (Exhibit EC-61).

Court of Justice made a contrary preliminary ruling determination on the same issue. Following this decision, the trader sought to obtain a sum equivalent to the amount of refunds it would have obtained if its product would have been classified in accordance with the ECJ judgment. The Dutch court sought a preliminary ruling on the issue of whether, in light of the concept of legal certainty, the court was indeed obliged to reopen the case. In answering the preliminary reference question, the ECJ that in the light of the circumstances of the particular case, the principle of cooperation arising from Article 10 EC obliged the administrative body concerned "to review the decision in order to take account of the interpretation of the relevant provision of Community law given in the meantime by the Court."[16]

Article 10 EC has also been the basis of the case law of the Court of Justice on penalties for violations of Community law, including customs laws.[17] *José Teodoro de Andrade v. Director da Alfândega de Leixoes*[18] addressed Portuguese penalties for failure to clear goods through customs within the statutory time limit. In that case, Mr. de Andrade brought an action before the Tribunal Fiscal Aduaneiro do Porto claiming *inter alia* that Portuguese law, which provided for either sale of the goods or subjecting them to an *ad valorem* surcharge for failure to comply was customs clearance procedures within the statutory time limit, was contrary to the concept of proportionality. In coming to its decision that the provisions for sale or ad valorem penalty did not infringe the principle, the Court noted that Community legislation required the customs authorities to take any measures necessary, including sale, in order to regularize the situation of goods. With this in mind, the Court stated:

> It is settled case-law, confirmed in paragraph 20 of Case C-36/94 Siesse v Director da Alfândega de Alcântara [1995] ECR I-3573, that where Community legislation does not specifically provide for any penalty for an infringement or refers for that purpose to national legislation, Article 5 of the EC Treaty (now Article 10 EC) requires the member States to take all the measures necessary to guarantee the application and effectiveness of Community law. For that purpose, while the choice of penalty remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive. As regards customs offences, the Court has pointed out that in the absence of harmonization of the Community legislation in that field, the member States are empowered to choose the penalties which seem appropriate to them. They must, however, exercise that power in accordance with Community law and its general principles, and consequently with the principle of proportionality (*see* Siesse, paragraph 21).[19]

Several other cases also address penalties in light of Article 10 similarly. These cases include *Hannle + Hofstetter Internationale Spedition* v. *Finanzlandesdirektion für Wien, Niederosterreich und Burgenland*[20] and *Siesse v. Director da Alfândega de Alcântara.*[21]

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[16] *Id.*, Para. 27.

[17] Cf. already EC First Written Submission, para. 144 et seq. It is understood that this case law concerns legislative measures of the member States.

[18] Case C-213/99, *de Andrade*, [2000] ECR I-11083 (Exhibit US-31).

[19] *Id.*, paras. 19-20.

[20] Case C-91/02, *Hannl + Hofstetter*, Judgment of 16 October 2003 (not yet reported) (Exhibit EC-143).

[21] Case C-36/94, *Siesse*, [1995] ECR I-3573, para. 20 (Exhibit EC-40).

In *Commission v. Greece*,[22] two consignments of maize exported from Greece to Belgium in May 1986 in fact comprised maize imported from Yugoslavia, although they had been officially declared by the Greek authorities as comprising Greek maize. For that reason the agricultural levy payable to Community own resources had not been collected. According to the Commission that fraud had been committed with the complicity of certain Greek civil servants. The Commission brought infringement proceedings, arguing *inter alia* that Greece was, under Article 5 (now 10) EC, obliged to bring proceedings against the perpetrators of the fraud and those who abetted it. The Court upheld the Commission's submission:[23]

> It should be observed that where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the member States to take all measures necessary to guarantee the application and effectiveness of Community law.
>
> For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive .
>
> Moreover, the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws.

This overview of case law from the field of customs law[24] shows that Article 10 EC is fully operational and can be applied by the ECJ and national tribunals. As the EC has already explained, that there are not hundreds of court cases related to Article 10 EC in the area of customs does not mean that the duty of cooperation is not enforced, but rather that it is generally respected.[25]

148. In its reply to Panel Question No. 58, the European Communities submits that, under the Rules of Procedure of the Customs Code Committee, there is no specific provision bestowing the Commission with the power to ask member States to provide specific information. The European Communities argues that, however, member States are bound by the duty of cooperation under Article 10 of the EC Treaty, which 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. Please provide evidence of instances when Article 10 of the EC Treaty has been invoked to require member States to provide information in the area of customs administration.

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[22] Case 68/88, *Commission v. Greece*, 1989 [ECR] 2965 (Exhibit EC-38).

[23] *Id*., para. 23 – 24.

[24] In accordance with the Panel's Question, the examples given in the present question are limited to the field of customs law. Outside the area of customs law, there are numerous other cases in which the ECJ has applied Article 10 EC.

[25] EC Second Oral Statement, para. 51.

As the EC has explained in its reply to Question No. No. 58, member States are under a duty to facilitate the Commission's tasks as guardian of the treaty, which includes also the provision of all information which might be requested by the Commission.[26]

However, as the EC has explained,[27] there is no problem of transmission of information by the customs authorities of the member States to the Commission. Where a subject matter is dealt with in the Customs Code Committee, it is frequently the member States of their own initiative which have raised the matter and which will provide information. Of course, the Commission also frequently requests information from the member States' customs authorities, either bilaterally or through the Customs Code Committee. member States' authorities provide this information as a matter of course. Since there have been so far no failures to provide information when requested, the European Commission has not had a reason to specifically invoke Article 10 of the EC Treaty in this respect.

149. In its reply to Panel Question No. 79, the European Communities submits that obligations of mutual consultation between customs authorities of member States may arise in specific situations. Please provide details of all such obligations and the circumstances when they apply in the following areas of customs administration:

(a) Tariff classification;

(b) Customs valuation; and

(c) Customs procedures (particularly, audit following release for circulation[28]; penalties for infringements of EC customs legislation; processing under customs control; and local clearance procedures).

In replying to this question, the scope of the phrase "obligations of mutual consultation between customs authorities of the member States" is taken to also cover practices such as the provision or exchange of information, as well as consultation for the purposes of prior agreement in relation to issuance of an authorization.

The EC would like to recall that, at the highest level of EC law,[29] there is a duty of cooperation between EC member States. More concretely, mutual consultation between member States may also follow from specific provisions of EC customs law. In the EC reply to the Panel's Question No. 79, five such examples have already been provided in that response.

As regards tariff classification, the EC refers its replies to the Panel's Questions No. 55 and 56, in which it has explained the duty of cooperation of member States in the context of the issuance of BTI.

In the area of valuation, in certain situations the valuation declared and accepted in one member State has to be communicated to any and all other member States involved in the transactions. This applies in certain cases of goods held under customs warehousing, inward processing, outward processing or goods imported for processing within the EC. Similarly, the customs value of goods imported for temporary importation or end-use has to be notified to other administrations.[30] There is also a best practice guide which deals with the exchange of information

[26] EC Reply to Panel Question No. 58, para. 79.

[27] EC Reply to Panel Question No. 58, para. 80.

[28] Assuming, for the sake of argument, that such audits can be classified as a customs procedure for the purposes of this dispute.

[29] Member States are bound by the duty of cooperation (Article 10 EC), which includes an obligation to further contribute to the uniform application of Community law.

[30] Articles 296 and 523, respectively, of the Implementing Regulation.

(i.e. consultation) between member States in relation to valuation advice, rulings and audit (Exhibit EC-144).

As regards post-import audit, the obligation to consult other member States depends on the specific issue involved, because post import audit can give rise to questions on any issue or aspect of customs rules and customs controls.

With respect to the local clearance procedure and processing under customs control, where such a procedure involves more than one member State, exchange of information is practiced. Furthermore, Article 250 of the Customs Code provides that where a customs procedure is used in several member States, the decisions, identification measures and documents issued by one member State shall have the same legal effects in other member States as such decisions, measures taken and documents issued by each of those member States. Having provided for the legal effects in other member States of measures taken, findings made, etc. by one member State, this provision is therefore relevant to further illustrate that mutual consultation between member States can arise in the context of many aspects of customs management.

Finally, a general framework for mutual cooperation and assistance between member States' customs authorities is provided by Regulation 515/97 (Exhibit EC-42).[31] Under this Regulation, member States have the general right to request relevant information from other member States, on either persons or transactions involving imports of goods, from other administrations. member States also have the obligation to provide assistance (including communication of all information in their possession) where they consider it useful for ensuring compliance with customs legislation, or where breaches (actual or potential) of customs legislation arise. These general obligations, of course, can cover all areas of customs work.

150. Please explain what the Customs Information System is and how it works in practice (established pursuant to Council Regulation (EC) 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters (Exhibit EC-42)).

Customs authorities can face situations requiring immediate action in another EC member State. For this reason, national authorities need to have a mechanism for communication and co-operation already in place. The Customs Information System (CIS) has been put in place in order to create such a fast communication interface.

The CIS consists of two databases: 1) "*CIS 1st pillar*", which deals with infringements of the Community law on customs and agricultural matters and 2*) "CIS 3rd pillar", which* deals with serious contraventions related to customs matters (criminal law).

In each database, the main categories of information collected relate to:

- commodities
- means of transport
- businesses
- persons
- fraud trends
- availability expertise
- retained, seized, confiscated consignments.

Two search engines are available to search the database:

[31] EC First Written Submission, para. 150 et seq.

- the standard search tool gives access to the whole data related to a case;
- a simplified search tool (Border Query Tool) provides, on the basis of predetermined criteria, a quick access to useful elements on control purpose.

The CIS is managed by the European Anti-Fraud Office (OLAF). In practice, the above information is delivered through the AFIS (Anti-Fraud Information System) terminals in the member States and direct access to data is reserved exclusively for the national authorities designated by each member State such as the customs administrations. After having been checked by the competent authority of each member State, the information uploaded in the database is sent to the Commission for storage purposes.

151. What is the European Communities' definition of the term "uniform" in Article X:3(a)?

The EC agrees with the definition referred to by the Panel in *Argentina – Hides*, according to which "uniform" can be defined as "of one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times".[32]

The EC would recall, however, that whether "administration" can be regarded as uniform cannot be evaluated on the basis of individual instances of administration, but requires demonstration of a pattern of non-uniform administration.[33] Moreover, identical standards must apply to the requirement of uniformity over time, across territory, or as between individuals.[34]

152. In its reply to Panel Question No. 110, the European Communities submits that the granting of discretion in a particular legislative provision may be necessary where complex factual aspects have to be taken into account or where conflicting interests need to be weighed and balanced. The European Communities further submits that, typically, the exercise of such discretion will be limited by law and will be governed by certain principles, such as the principle of non-discrimination.

(a) Please explain the legal basis for the application of the principle of "non-discrimination" in the context of the application of discretionary provisions in the area of customs administration by member State customs authorities.

The main general reference in the EC Treaty to the principle of non-discrimination is contained in Article 12 prohibiting discrimination on grounds of nationality. However, the Court of Justice has declared it to be a fundamental principle of law, whereby comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified.[35]

(b) Which principles other than the principle of "non-discrimination" apply in the context of the application of discretionary provisions in the area of customs administration by member State customs authorities?

Generally speaking, EC customs law is very detailed, and does not leave a large measure of discretion to member States' customs authorities. To the extent that discretion exists, general

[32] Panel Report, *Argentina – Hides and Leather*, para. 11.80.
[33] EC First Written Submission, para. 63 et seq.
[34] Cf. Panel Report, *Argentina – Hides and Leather*, para. 11.83.
[35] See, *inter alia*, Case C-150/94, *United Kingdom/Council*, [1998] ECR I-7235, para. 97-101 (Exhibit EC-145), and case T-13/99, *Pfizer Animal Health*, [2002] ECR II-3305, para. 271-272 (Exhibit EC-146).

principles of law most likely to be applied in customs administration by member State authorities are proportionality, protection of legitimate expectations and effectiveness.

The principle of proportionality requires that measures adopted do not exceed the limits of what is appropriate and necessary in order to attain the objective legitimately pursued by the measure in question and that, when there is a choice between several appropriate measures, recourse must be had to the least onerous.[36]

The principle of protection of legitimate expectations, which is linked to the principles of good faith and legal security, extends to any individual who is in a situation in which it is apparent that the administration has led him to entertain reasonable expectations by giving him precise assurances.[37]

The principle of effectiveness prohibits member States from taking measures which would inhibit the implementation of EC law and requires them to give adequate effect to EC law in cases arising before them (see, above, *Commissioners of Customs & Excise v. SmithKline Beecham*, para. 53).[38]

153. In its reply to Panel Question No. 94, the European Communities submits that Article X:3(a) of the GATT 1994 is primarily concerned with the administrative outcomes affecting traders. Can this statement be reconciled with the submission made by the European Communities in its replies to Panel Question Nos. 47 and 49 that individual decisions cannot be challenged as such under Article X:3(a)? If so, please explain how.

The two statements are fully compatible. In its response to the Panel's Question No. 9, the EC intended to clarify that Article X:3 (a) GATT does not concern laws, regulations, and procedures as such, but only their administration. In response to the Panel's Question No. 47 and 49, the EC clarified that whether administration is in conformity with Article X:3 (a) GATT can be evaluated only on the basis of a pattern of administration, not on the basis of individual instances of administration.

154. In its reply to Panel Question No. 90, the European Communities argues that, in essence, the Panel in *Argentina – Hides and Leather* said that, if a particular law or regulation mandates administrative behaviour that is, inter alia, non-uniform, the law itself constitutes a violation of Article X:3(a) of the GATT 1994. Does this reasoning mean that, in the context of this case, Article X:3(a) of the GATT 1994 will have been violated if EC law on customs administration can be read, in essence, to mandate non-uniform administration? If not, please explain the relevance, if any, of the abovementioned comments by the Panel in *Argentina – Hides and Leather* to the present case.

Article X:3 (a) GATT is concerned with the administration of laws and regulations, not with those laws and regulations themselves. However, the EC agrees that where a law or regulation "mandates" a form of administration that is not uniform, reasonable, or partial, such law or regulation could be regarded per se as a violation of Article X:3 (a) GATT. A law or regulation will be mandatory in this sense if it does not leave the authorities any possibility to administer the laws or regulations in question in a uniform, impartial, or reasonable manner.[39]

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[36] See, *inter alia*, *Pfizer Animal Health*, referred to in the previous footnote, paras. 411-412, and Case C-192/01, *Commission/Denmark*, [2003] ECR I-9693, para. 45 (Exhibit EC-147).

[37] See, *inter alia*, Case T-65/98, *Van den Bergh Foods Ltd*, [2003], not yet in the official reports, para. 192, (Exhibit EC-148).

[38] Para. 10 above.

[39] This was the case in *Argentina – Hides and Leather*; cf. EC Second Oral Statement, para. 30.

In the EC, no law mandates a non-uniform administration of EC customs law. On the contrary, EC laws ensure the uniform administration of EC customs law. The burden of proof for establishing the contrary rests on the US. For the question whether the EC system of customs administration can be considered "as such" in determining whether Article X:3 (a) GATT has been violated, the EC refers to its reply to the Panel's Question No. 173.

155. In paragraph 432 of its first written submission, the European Communities submits that penalty laws are governed by fundamental rules of due process to which the disciplines of Article X:3(a) of the GATT 1994 are ill-adapted. Can this argument be reconciled with the submission made by the European Communities in paragraph 231 of its first written submission to the effect that Article X:3(a) only lays down minimum standards of transparency and procedural fairness? If so, please explain how.

The EC believes that the two statements are fully compatible. The first statement concerns the scope of Article X:1 GATT, whereas the second statement concerns the interpretation of the substantive requirements of Article X:3 (a) GATT. The fact that Article X:3 (a) GATT contains minimum standards of transparency and fairness does not mean that this provision must apply to penalties. Rather, this depends on whether penalty provisions are among the laws referred to in Article X:1 GATT, which, as the EC has shown, is not the case.[40]

Moreover, the EC maintains that the substantive standards of Article X:3 (a) GATT are ill adapted to the application of penalties. This is particularly obvious with regard to the issue of uniformity. Sanctions, and in particular criminal sanctions, involve an assessment of individual guilt and conduct, including predictions regarding rehabilitation and integration. A further important consideration is proportionality. These considerations are entirely different from those regarding the uniform application of laws concerning classification or valuation of goods.

This finds further confirmation in the fact that sanctions are specifically addressed in Article VIII:3 GATT, which imposes certain standards of proportionality with respects to the imposition of penalties. If Article X:1 GATT was intended to apply to penalties, then it would have been natural to include a specific reference to them in this provision.

156. In its reply to Panel Question No. 48, the European Communities submits that the obligation of uniform administration under Article X:3(a) of the GATT 1994 means that the trader should have "reasonable assurance" as to the way in which the WTO Member in question will administer its laws and regulations. Please elaborate in practical terms what is meant by the reference to "reasonable assurance".

Reasonable assurance means that the treatment a trader can expect from the authorities of such member should be reasonably predictable. This is in line with the requirements of the Panel in *Argentina – Hides*, where the Panel held that uniform administration requires that Members ensure that their laws are applied consistently and predictably.[41] As the EC has also remarked, whether the treatment to be expected from the customs authorities is predictable in this sense must be evaluated not on the basis of individual instances of administration, but taking into account the overall pattern of administration.

157. In its reply to Panel Question No. 78, the European Communities submits that a member State may only 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 by Community legislation. Does this mean that member States are prohibited from taking any action –

[40] EC Second Written Submission, para. 190 et seq. ; Second Oral Statement, para. 66 et seq.
[41] Panel Report, *Argentina – Hides and Leather*, para. 11.83.

whether binding or non-binding – in cases where a Community regulation does not explicitly authorize the member State to do so or if a specific issue is covered by Community legislation? If not, please explain what action member States are authorized to take.

As regards binding legislation, the EC can confirm that member States can only act to supplement provisions contained in a Community regulation if they are authorized to do[42] so or if a specific issue is not covered by Community legislation.

As regards non-binding measures, member States' authorities are not prevented from issuing administrative guidelines or other non-binding documents for administrative purposes. However, as the EC has already explained, and as the Court of Justice has confirmed on several occasions, such measures cannot derogate in any way from the application of Community law by the customs authorities and the courts.[43]

158. In paragraph 68 of its Second Written Submission, the European Communities submits that it doubts that Article X:3(a) of the GATT 1994 requires the establishment of a central customs agency because this could not be regarded as a "reasonable measure" within the meaning of Article XXIV:12 of the GATT 1994. Does this mean that the European Communities considers that one of the effects of Article XXIV:12 when read with Article X:3(a) is that Members are only required to take "reasonable measures" to fulfil their obligations under the latter provision? If so, please provide support for such a view, making reference to the terms of Articles X:3(a) and XXIV:12 respectively.

As the Panel in *Canada – Gold Coins* has explained, the purpose of Article XXIV:12 GATT is to "qualify the basic obligation to ensure the observance of the General Agreement by regional and local government authorities in the case of contracting parties with a federal structure".[44] As the Panel further explained, Article XXIV:12 GATT does not limit the applicability of the provisions of the General Agreement, but "limits the obligations of federal States to secure their implementation" within their domestic legal order.[45]

Accordingly, it is clear that a WTO Member with a federal structure, while fully bound by the obligations under the covered agreement, is obliged to take "reasonable measures" to secure their implementation by sub-federal entities. "Reasonable" measures cannot mean any and all measures. Such a reading, as proposed by the US,[46] would fail to give any useful meaning to Article XXIV:12 GATT.

In order to determine what is a "reasonable measure", the Panel in *Canada – Gold Coins* has held that "the consequences of [...] non-observance [*of the provisions of the GATT*] by the local government for trade relations with other contracting parties are to be weighed against the domestic difficulties of securing observance".[47] This is also the standard which would have to be applied in the present case.

As the EC has remarked, it is fully committed to ensuring uniform application of customs law throughout the EC, and it has the necessary measures in place for this purpose. This is why the EC has not invoked Article XXIV:12 GATT as a primary defence in the present case.

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[42] The EC would clarify that the authorization does not necessarily have to be "explicit"; it is sufficient if it follows from the text of the Community legislation.

[43] EC First Written Submission, para. 344; EC Reply to the Panel's Question No. 78, para. 146.

[44] GATT Panel Report, *Canada – Gold Coins*, para. 53.

[45] GATT Panel Report, *Canada – Gold Coins*, para. 64.

[46] US Second Written Submission, para. 13 – 15.

[47] GATT Panel Report, *Canada – Gold Coins*, para. 69.

However, the US claims go far beyond what is required for securing uniform application of customs law by the authorities of the EC member States; rather, they are aimed at depriving the EC member States of their competence for the administration of EC customs law by requiring the creation of an EC customs agency, and EC customs court, and the harmonization of member States law notably in the area of penalties. This would entail a radical shift in the federal balance within the EC. The EC does not believe that this can be described as a "reasonable measure" within the meaning of Article XXIV:12 GATT.

This point is also illustrated by the conclusions of the Panel in *Canada – Gold Coins*, where the Panel did not take a position on whether the referral of the measure of the Province of Ontario to the Canadian Supreme Court by the Government of Canada could be regarded as a "reasonable measure" within the context of the Canadian legal order.[48] The EC submits therefore that the creation of a customs agency, a customs court, or the harmonization of member States law, could not be regarded as "reasonable measures" within the meaning of Article XXIV:12 GATT.

159. With respect to the Customs Code Committee:

(a) Are there any limits on the time for which a matter can remain unresolved on the agenda of the Customs Code Committee? If so, please specifically identify the provisions that impose such time-limits.

There are no specific time limits for how long a matter can remain on the agenda of the Customs Code Committee, nor of any other similar committee. The prescription of such time limits would not be practical, since certain matters may take more time to address than others. Moreover, it is not entirely clear how "matter" should be defined. The matter may relate to the adoption of a single measure, but may also be a series of related measures, or an ongoing policy discussion. Similarly, the fact that the Committee returns to a particular matter does not mean that the issue has not been resolved, but may also be a reflection of ongoing monitoring and review. Generally, all matters before the Customs Code Committee are dealt with as expeditiously as possible, in accordance with requirements of good administrative practice.

(b) In its reply to Panel Question No. 58, the European Communities submits that opinions of the Customs Code Committee typically reflect a common approach agreed by all member States, which is normally observed by the member States. Please provide proof to support this assertion.

Conclusions of the Customs Code Committee typically reflect a common approach of the member States because they are adopted by consensus. It is not for the EC, but for the US as the complainant in the present case, to provide evidence to the contrary. One interesting example for the observance of Customs Code Committee conclusions, however, is provided by the judgment of the UK High Court concerning the classification of the Sony Playstation2 submitted by the US as Exhibit US-70, in which the UK Court referred to the unanimous conclusions of the Nomenclature Committee in support of its findings.

(c) How many cases of divergences of 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?

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

[48] GATT Panel Report, *Canada – Gold Coins*, para. 71.

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.

(d) In paragraph 266 of its first written submission, the European Communities submits that it is incorrect to refer to the Customs Code Committee as an institution of the European Communities. How does/should this characterization of the Customs Code Committee affect the Panel's consideration of the institutions, instruments and mechanisms in place in the European Communities to fulfil the requirements of Article X:3(a) of the GATT 1994?

The EC's comment was a correction of the incorrect characterization of the Customs Code Committee in the US First Written Submission.[49]

Under EC law, EC institutions are only those listed in Article 7 (1) EC Treaty, namely the European Parliament, the Council, the Commission, the Court of Justice, and the Court of Auditors.[50] The Customs Code Committee is a committee established by the Customs Code in order to assist the Commission in the exercise of certain powers delegated to it by the Council, in accordance with Article 202 EC Treaty and the Comitology decision.[51] In addition, and independently of the adoption of measures under the comitology procedure, under Article 249 CCC and Article 8 of Regulation 2658/87, the Customs Code Committee also has competence to consider any question of Community custom law, and thus functions as a forum for coordination and mutual information between the member States and the Commission.

The EC notes that in response to a question during the second substantive meeting with the Panel (now Question No. 134), the US confirmed that it was not challenging the manner in which the Customs Code Committee operates. To this extent, the EC is not sure how the characterization of the Customs Code Committee will affect the Panel's analysis. However, the EC believes that a correct understanding of the role and functions of the Customs Code Committee is important for the overall understanding of the EC's system of customs administration.

160. In cases where divergences are detected between the member States with respect to the administration of EC customs laws (including but not limited to cases involving divergent BTI), does the EC Commission have the authority to bypass the Customs Code Committee to resolve such divergences? If so, please explain the circumstances in which this is possible and the frequency with which the Commission takes action independently of the Customs Code Committee in cases of divergence.

A consultation of the Customs Code Committee is required wherever this consultation is prescribed in the relevant Community legislation, i.e. wherever the Commission acts in the exercise of powers which have been delegated to it by the Council. Measures which require the consultation of the Committee include, for instance, amendments to the implementing regulation,

[49] US First Written Submission, para. 29.
[50] Cf. EC First Written Submission, para. 19.
[51] Cf. EC First Written Submission, para. 24 et seq. and Exhibit US-10.

the adoption of classification regulations or explanatory notes, or of decisions requiring the revocation of BTI.[52] In such cases, consultation is a necessary element of the procedure leading to the adoption of the act.

Where the Commission does not act on the basis of powers delegated to it by the Council, it is not required to have recourse to the Customs Code Committee. As the guardian of the EC Treaty, it may directly approach member States on any question relating to the administration of customs law by the member States' authorities. Moreover, where there exists an infringement of Community law, the Commission may bring infringement proceedings in accordance with Article 226 EC. The Commission may of course equally chose to bring the matter before the Customs Code Committee in accordance with Article 249 CCC and Article 8 of Regulation 2658/87; it is likely do so in particular where a matter does not relate only to one member State, but is of interest to all member States.

161. Regarding the tariff classification of network cards for personal computers and drip irrigation products in the European Communities, does the European Communities accept that, at one point in time, one or more EC member States did not treat as binding BTI issued by the other EC member States?

The EC is not aware of any such instance regarding these two products. In this context, the EC would like to recall that BTI is binding only against the holder of the BTI, which is a specific natural or legal person.[53] BTI is not binding against other persons. This has also been confirmed by the ECJ in the recent judgment in *Intermodal Transports*.[54]

162. With respect to the operation of the ECJ preliminary rulings system during the period 1995 - 2005:

(a) What is the total number of preliminary rulings requested by member State courts?

The total number of preliminary rulings requested by member State courts during the period 1995 – 2005 is 2,314.

(b) Of the total number of requests for preliminary rulings made during the relevant period, how many concern the area of customs administration? Please break down this figure for the following specific areas of customs administration:

(i) Tariff classification;

(ii) Customs valuation; and

(iii) Customs procedures (particularly, audit following release for circulation[55]; penalties for infringements of EC customs legislation; processing under customs control; and local clearance procedures).

[52] Cf. EC First Written Submission, para. 75, 92, 99, 117.
[53] EC First Written Submission, para. 112.
[54] Case C-495/03, *Intermodal Transports*, not yet reported, para. 27 (Exhibit US-71).
[55] Assuming, for the sake of argument, that such audits can be classified as a customs procedure for the purposes of this dispute.

Out of the total number of requests for preliminary rulings (2,314) during the period 1995 - 2005, 249 concern the area of customs administration. The breakdown is the following:

Tariff classification	55
Customs valuation	9
Customs procedures	162
Other	23

(c) Of the total number of requests for preliminary rulings made in the customs administration area, how many of those requests resulted in preliminary rulings by the ECJ. Please break down this figure for the following specific areas of customs administration:

(i) Tariff classification;

(ii) Customs valuation; and

(iii) Customs procedures (particularly, audit following release for circulation[56]; penalties for infringements of EC customs legislation; processing under customs control; and local clearance procedures).

The outcome of the 249 requests for preliminary rulings concerning the area of customs administration, broken down for the specific areas of customs administration, is the following:

	Judgements	Orders	Removed	Pending	*Total*
Classification	45	-	2	8	55
Valuation	7	-	-	2	9
Procedures	114	9	22	17	162
Others	17	1	1	4	23
Total	183	10	31	25	249

163. In paragraph 61 of its Oral Statement at the second substantive meeting, the European Communities submits that ECJ judgements following a request by the national court of an EC member State "guide" all courts of EC member States. Please clarify whether or not the ECJ judgements in question are binding on courts of EC member States.

The EC confirms its reply to Question No. 73,[57] where it has explained that the ECJ judgements given in preliminary references are binding on all courts of the EC member States. However, in relation to interpretation of Community law, a member State's court may always refer

[56] Assuming, for the sake of argument, that such audits can be classified as a customs procedure for the purposes of this dispute.

[57] EC Reply to Panel Question No. 73, paras. 131 and 132.

to the ECJ seeking confirmation, clarification or a change in the ECJ case law. It is in this sense that ECJ judgements guide the member State courts.

164. With respect to the 83 infringement proceedings commenced by the EC Commission against member States concerning the administration of customs law during 1995 – 2005:

(a) Please break down this figure for the following particular areas of customs administration:

(i) Tariff classification;

(ii) Customs valuation; and

(iii) Customs procedures (particularly, audit following release for circulation[58]; penalties for infringements of EC customs legislation; processing under customs control; and local clearance procedures).

Out of the 83 cases, 2 cases relate to tariff classification, 1 case to customs valuation, 44 cases to customs procedures, and 36 cases to general questions of EC customs law, notably Articles 23 to 27 EC and 133 EC Treaty.

(b) What measures exist to ensure that the results of an infringement proceeding by the EC Commission against a member State are binding on the other member States?

No such measures exist, nor could they exist. An infringement procedure under Article 226 always relates to a specific act or omission committed by a particular member State. In accordance with Article 228 EC, it is that member State which, it if is found to have fulfilled its obligations, is required to take the necessary measures to comply with the judgment.

It is noted that whereas a judgment under Article 228 EC is binding only on the Member against which the proceedings were brought, the findings of the court of Justice have the effect of clarifying EC law, and to this extent will guide other member States as regards their own obligations under the Treaty. Moreover, in later infringement proceedings in which the same or similar questions arise, the Commission can refer to the earlier case law of the Court as relevant precedent.

165. In paragraph 167 of its Second Written Submission, the European Communities submits that the European Ombudsman is a mechanism that contributes to the "proper" administration of EC law. Please identify the number of instances the European Ombudsman's advice has been sought in the area of customs administration and the action taken by the Ombudsman in each of those instances.

In the period since 1999, the Ombudsman issued four decisions on matters of customs administration. In one case, the Ombudsman made a critical remark. In two cases, the Ombudsman found no maladministration. In a further case, the complaint was withdrawn, so that the Ombudsman did not take a decision on the substance of the complaint.[59]

[58] Assuming, for the sake of argument, that such audits can be classified as a customs procedure for the purposes of this dispute.

[59] The Reebok case (Exhibit US-52).

166. In paragraph 275 of its first written submission, the European Communities submits that any individual with a concern regarding the administration of customs matters can bring the issue to the attention of the EC Commission, which will consider the matter and respond in accordance with the Commission's Code of Conduct. During the period 1995 – 2005:

(a) What is the total number of cases where individuals approached the EC Commission with concerns regarding the administration of customs matters? Please break down this figure for the following particular areas of customs administration:

(i) Tariff classification;

(ii) Customs valuation; and

(iii) Customs procedures (particularly, audit following release for circulation[60]; penalties for infringements of EC customs legislation; processing under customs control; and local clearance procedures).

(b) Providing all necessary evidence, please explain the reaction and/or action taken by the Commission in each of these cases and the time taken by the Commission to respond.

On the basis of a search of the central archives of DG TAXUD, in the period 1996[61] to 2004, over 17000 letters were received from private bodies and operators on customs matters. Per year, the total numbers are as follows:

Period	Letters coming from private bodies and operators in customs matters
1996	2769
1997	3018
1998	2490
1999	3105
2000	1425
2001	1198
2002	1049
2003	918
2004	1334

It has not been possible for the archives to subdivide these numbers by sector concerned for the entire period (classification, valuation, customs procedures). Moreover, the Panel will appreciate that it is not feasible for the EC, within the time-frame imposed by the present proceedings, to explain the reaction and/or action taken by the Commission in each of these cases and the time taken by the Commission to respond.

However, in order to give the Panel an overview, the EC attaches representative tables for the period 2002 to 2005 prepared by the most relevant units of the Commission's DG TAXUD (Exhibit EC-149).

[60] Assuming, for the sake of argument, that such audits can be classified as a customs procedure for the purposes of this dispute.

[61] Due to technical reasons, it has not been possible to provide data for the year 1995.

167. Please provide a list of any best working practice guidelines that have been issued in the following areas of customs administration:

(a) Tariff classification;

(b) Customs valuation; and

(c) Customs procedures (particularly, audit following release for circulation[62]; penalties for infringements of EC customs legislation; processing under customs control; and local clearance procedures).

For the area of tariff classification, the EC can refer to the EBTI guidelines (Exhibit EC-32).

For the area of customs valuation, the EC refers to the compendium of customs valuation texts (Exhibit EC-37), which is regularly updated, and into which all relevant conclusion and commentaries are integrated. Moreover, there is also a standard form for information exchange on valuation matters which has been adopted in the form of conclusions of a project group under the Customs 2002 programme (Exhibit EC-144).

As regards the issues referred to as "customs procedures" in the Panel's question, i.e. audit following release for circulation; penalties for infringements of EC customs legislation; processing under customs control; and local clearance procedures, the EC can refer to the following guidelines:

- A Risk Analysis Guide issued to member States in 1998 (Exhibit EC-150).
- A Standard Risk Management Framework issued in 2002 (Exhibit EC-151).
- The Customs Audit Guide (Exhibit EC-90).
- 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 (Exhibit EC-41).

168. Please comment on and respond to the following submissions by the United States:

(a) In paragraph 50 of its Second Written Submission, the United States argues that the European Communities does not refer to any measures making Article 10 of the EC Treaty operational in the area of customs administration nor to any rules giving effect to this general obligation vis-à-vis member States in particular situations.

The EC does not agree with the US statement. As the EC has already explained in its Second Oral Statement,[63] the duty of cooperation is legally binding and directly applicable on all member States. It can and has been enforced through recourse to the European Court of Justice; in this respect, the EC can refer to its answer to the Panel's Question No. 147. That such cases are not extremely numerous does not mean that the duty of cooperation does not have practical effect, but rather that it is generally respected.

(b) In paragraph 86 of its Second Written Submission, referring to the Panel's Report, *Argentina – Hides and Leather*, the United States submits that, while

[62] Assuming, for the sake of argument, that such audits can be classified as a customs procedure for the purposes of this dispute.

[63] EC Second Oral Statement, para. 51.

> **a law providing for penalties or audit procedures may be considered as something to be administered, that does not exclude the possibility of considering the same law as a tool for administering other laws, for example, by putting those laws into effect through verification and enforcement. The United States submits that the European Communities itself recognized this point in *Argentina – Hides and Leather*, where it challenged the same Argentinean measure from the perspective of its substance and from the perspective of its character as a tool for administering other laws.**

The EC disagrees with the US statement. As the EC has explained in its Second Oral Statement,[64] *Argentina – Hides* concerned a particular Argentinean resolution which authorized the participation of industry representatives in the administrative process. The Panel held that the resolution constituted a violation of Article X:3 (a) GATT because it made it impossible for Argentina to administer its customs laws in a manner that was reasonable and impartial.[65] Nowhere does the Panel Report in *Argentina – Hides* indicate that the Argentinean measure administered some other measure. Accordingly, *Argentina – Hides* provides no support for the US interpretation in the present case.

(c) In its reply to Panel Question No. 93, the United States submits that matters described in Article X:1 of the GATT 1994 other than customs matters – such as measures of general application affecting the sale, distribution, transportation, and insurance of imports – can be distinguished from penalty provisions and audit procedures inasmuch as they are objects of administration rather than measures that serve an administrative function.

The EC fails to see the basis for such a distinction. The relevant distinction in Article X GATT is the one between the measures of general application referred to in Article X:1, and their administration, which is referred to in Article X:3 (a) GATT. As the EC has already explained previously,[66] Article X GATT does not distinguish between "laws" which are of "substantive" character and others which are of "administrative" character, or laws which "serve an administrative function" and others which do not.

All of the laws referred to in Article X:1 GATT need to be administered. Accordingly, they all serve an administrative function in the sense that they guide the behaviour of the authorities which are responsible for their administration. If the US interpretation was correct, all laws within the scope of Article X:1 GATT would simultaneously also have to be regarded as "administration" within the meaning of Article X:3 (a) GATT. Such an interpretation would wreak havoc with the logic of Article X GATT, and simply has no basis in the wording of this provision. It would also overturn the clear distinction between "administration" and the measures to be administered upheld by the Appellate Body in *EC – Bananas III*.[67]

As regards specifically penalty provisions, the EC has already explained that such provisions are themselves laws to be administered, rather than administration. In this respect, the EC can refer to its earlier submissions.[68]

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[64] EC Second Oral Statement, para. 74; cf. also EC Second Oral Statement, para. 30.

[65] Cf. Panel Report, *Argentina – Hides and Leather*, para. 11.58, where the EC is quoted as arguing that the resolution made the impartial application of the relevant customs rules *impossible.* This refutes at the same time the US claim that the Panel report "made absolutely no reference" to the character of the measures as mandatory or permissive (US Second Written Submission, para. 91).

[66] Cf. EC First Written Submission, para. 216 et seq.; EC Second Writen Submission, para. 18 et seq.

[67] Appellate Body Report, *EC – Bananas III*, para. 200. Confirmed in Appellate Body Report, *EC – Poultry*, para. 115 ; Panel Report, *US – Corrosion Resistant Steel Sunset Reviews*, para. 7.289.

[68] EC Second Written Submission, para. 200 et seq. ; EC Second Oral Statement, para. 69 et seq.

As regards "audit procedures", the EC is not sure what "procedures" the US is referring to, nor what is the parallel with the question of sanctions. As the EC has explained,[69] Article 78 (2) CCC gives customs authorities the power to conduct post-clearance inspections and audits. As the EC has also remarked all member States have the necessary audit capacities, and are guided by the Community Customs Audit Guide (Exhibit EC-90). The EC does not believe that audit provisions as such are among the laws which are enumerated in Article X:1 GATT. In any event, the basic provisions exist at Community level, not at member States level, and a uniform audit practice is ensured throughout the EC.

(d) In paragraph 25 of its Second Written Submission, the United States argues that it is unclear how the European Communities' characterization of Article X:3(a) of the GATT 1994 as a "minimum standards provision" translates into a legal standard that may be applied by the Panel.

As the EC has explained in its Second Oral Statement,[70] the purpose of the qualification of Article X:3 (a) GATT as a "minimum standard" is not to define the substantive standard of Article X:3 (a) GATT, but to clarify the object and purpose of the provision. As the EC has also explained, Article X:3 (a) GATT is not a provision which prescribes in detail how WTO Members should administer their customs laws. There are other provisions in the GATT, and in other covered agreements, which contain the detailed substantive disciplines with which Members must comply. Article X:3 (a) GATT complements these disciplines of the GATT and its annexes in order to ensure that the enjoyment of the benefits of the GATT by other Members is not frustrated through measures of administration which are unreasonable, partial, or non-uniform. In accordance with customary rules of treaty interpretation,[71] this limited object and purpose of Article X:3 (a) GATT must guide the interpretation of the provision by the Panel.

(e) In paragraph 42 of its Oral Statement at the first substantive meeting, the United States submits that the European Communities' contention that appeals of customs decisions to national courts, coupled with the possibility of national courts making preliminary references to the ECJ, constitutes a critical instrument of ensuring uniform administration of customs law is at odds with its contention that the obligation of uniform administration under Article X:3(a) of the GATT 1994 and the obligation to provide remedies in respect of administrative action under Article X:3(b) of the GATT 1994 are discrete obligations without any inherent link

Should paragraph 42 of the US first Oral Statement be interpreted in this way, it would constitute an incorrect understanding of the EC's position. The EC's submissions do not limit the role played by preliminary references to the ECJ to those made by national courts of first instance, which are the courts covered by Article X:3(b) GATT, as it has been acknowledged by the US.[72] References to the ECJ are also made by national courts of higher instances, which are tools for securing uniform administration under Article X:3 (a) GATT. Furthermore, the EC considers that the case-law constituted by ECJ preliminary rulings is an important tool to ensure uniform administration for the purposes of Article X:3(b) GATT. Indeed, this role is not limited to the case before the referring national court but it is also played in relation to future cases where a reference to the ECJ will not take place and to the implementation of Community law by member States' administrative authorities. The EC, therefore, insists that preliminary references to the ECJ are to be considered as one of the instruments aiming to ensure uniform administration as required by Article X:3 (a) GATT.

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[69] EC Second Written Submission, para. 157-158. In the EC Second Written Submission, reference was erroneously made to Article 76 (2) CCC; this should be corrected to read Article 78 (2) CCC.

[70] EC Second Oral Statement, para. 23 et seq.

[71] As evidenced by Article 31 (1) of the Vienna Convention on the Law of Treaties.

[72] US Reply to Panel Question No. 121, para 189.

169. What is the specific legal basis under EC law according to which the following bodies are considered as organs of the European Communities:

(a) the bodies established in the member States to review at the first instance customs decisions taken by member State customs authorities; and

(b) national courts of the member States which are charged to review at the first instance customs decisions taken by member State customs authorities?

In paragraph 70 of its First Oral Statement, the EC referred to the tribunals of the member States as organs of the EC in order to explain that, within the meaning of International law, the EC is entitled to comply with its international obligations through those tribunals.

Under EC constitutional law, the role of the member States courts as bodies entrusted with the ordinary application of Community law is based on the preliminary reference procedure to the ECJ and on the basic principles of primacy of Community law and direct effect, which have already been explained in our First Written Submission. [73] The two principles also explain the position of any administrative review body in relation to Community law.

Finally, a specific legal basis is found in the customs legislation, where Article 243 of the CCC provides that the right of appeal may be exercised before the customs authorities designated for that purpose by the member States and, subsequently, before an independent body, which may be a judicial authority or an equivalent specialized body, according to the provisions in force in the member States.

170. In its reply to Panel Question No. 74, the European Communities submits that, although the Community Customs Code does not contain any provision requiring that review by national courts be prompt, there are a number of measures that have effect throughout the European Communities (such as the European Convention on Human Rights and Fundamental Freedoms), which it argues have the effect of requiring member States' tribunals to provide prompt review.

(a) Please explain in practical terms how the cited Community-wide measures are enforced and by whom in the context of deadlines for review of administrative decisions by member State tribunals.

Article 6 of the European Convention of Human Rights and Fundamental Freedoms (Exhibit EC-49), on which Article 47 of the Charter of Fundamental Rights is based (Exhibit EC-48), is a provision applied in the EC member States, which are all parties to the Convention. This provision can be invoked before any EC member State court. Courts and tribunals of second or higher instance have a particular role in enforcing the obligation to provide prompt review in customs matters upon first instance tribunals. Once the domestic remedies have been exhausted, the case may be brought before the European Court of Human Rights (Article 35 of the European Convention).

(b) Do these Community-wide measures apply to the review by first instance bodies in each of the EC member States?

Article 6 (1) of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union only apply to judicial proceedings. However, review of customs decisions by independent administrative bodies under Article X:3(b) GATT is subject to principles related to good administration, like the observance of a reasonable time-limit

[73] EC First Written Submission, paras 179-190 and 36- 40, respectively.

in administrative procedures.[74] The principle of good administration has been enshrined in Article 41 (1) of the Charter of Fundamental Rights of the European Union as the right of every person "to have his or her affairs handled impartially, fairly and within a reasonable time". It should be underlined that the Charter, as indicated in its Preamble, "reaffirms […] the rights as they result, in particular, from the constitutional traditions and international obligations common to the member States".

171. In what circumstances and pursuant to which provision(s) can/must the ECJ review decisions issued by national courts of the member States?

Actions before the European Court of Justice and the Court of First Instance are limited to those laid down by the EC Treaty, which have been listed in paragraph 171 and footnote 53 of the EC First Written Submission. The EC Treaty does not establish an appeal to the Court of Justice or to the Court of First Instance against decisions of the national courts of the member States.

Question No. 172 (reply due on 14 December 2005). Please comment on section III of the United States' Oral Statement at the second substantive meeting, including any exhibits referred to in that section.

A reply to this question will be provided in a separate submission by 14 December 2005.

QUESTIONS FOR BOTH PARTIES:

173. Making reference to the relevant terms of Article X:3(a) of the GATT 1994 and any other supporting material, please explain whether or not the design and structure of a customs administration system as a whole, or relevant components thereof, can be considered as such in determining whether or not Article X:3(a) has been violated for want of uniform administration. Additionally or alternatively, is it necessary to have regard to specific instances of non-uniform administration in order to demonstrate a violation of Article X:3(a)?

First of all, the EC would remark that the US panel request referred, as the measure at issue, only to the administration of customs law, not to measures of general application which constitute the EC's system of customs administration. As the EC has already explained, these general measures are therefore not within the Panel's terms of reference.[75]

As the EC has also already remarked,[76] Article X:3 (a) GATT is concerned with the administration of laws and regulations, not with those laws and regulations themselves. The design and structure of the EC's system of customs administration, or individual components thereof, could be regarded as constituting a violation of Article X:3 (a) GATT only if they necessarily and inevitably lead to an administration that is contrary to the requirements of Article X:3 (a) GATT.

Whether the EC's system of customs administration "as such" leads to non-uniform administration is therefore a question of fact regarding the interpretation and application of a large body of the EC municipal law. The burden of proof to establish that the municipal law is in violation of WTO obligations rest with the US as the complainant. The requirements for

[74] Joint Cases T-44/01, T-119/01 and T-126/01, *Vieira*, [2003] ECR II-1209, para. 167 (Exhibit EC-152).

[75] CF EC Second Written Submission, para. 18 et seq.

[76] Cf. above Reply to the Panel's Question No. 154.

discharging this burden of proof have been described by the Appellate Body in *US – Carbon Steel* as follows:[77]

> Thus, a responding Member's law will be treated as WTO-*consistent* until proven otherwise. The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case.

Accordingly, it cannot be assumed lightly that a measure of municipal law, let alone an entire system of customs administration, as such leads to a violation of WTO obligations. Rather, as the Appellate Body confirmed in *US – Oil Country Tubular Goods Sunset Reviews* with specific reference to Article X:3 (a) GATT,[78] solid evidence is required to establish such a proposition. Such evidence must include in particular evidence regarding the consistent application of the law, in other words, in the current case, of a consistent lack of uniformity in the EC's system of customs administration.

A recent illustration for the requirements for establishing an as such challenge is provided by the Appellate Body report in *US – Oil Country Tubular Goods from Mexico*. In this case, the Panel had come to the conclusion that a US administrative guidance, the Sunset Policy Bulletin, as such violated the Anti-Dumping Agreement after having considered a "sampling" out of more than 200 cases of application of the Bulletin. The United States appealed this finding, referring explicitly to "the serious nature of an 'as such' challenge" and the "particular rigour required in assessing such a challenge".[79] The Appellate Body considered that the Panel's reliance on a limited sample did not constitute an objective assessment of the facts as required by Article 11 DSU, and therefore reversed the Panel's findings. [80]

The contrast between *US – Oil Country Tubular Goods from Mexico* and the US submissions in the present case could not be starker. In *US – Oil Country Tubular Goods from Mexico*, a sample taken out of over 200 cases of application was held to be insufficient for establishing that the Sunset Policy Bulletin as such violated WTO obligations. In the present case, the US asks the Panel to come to the conclusion that the EC's system of customs administration violates Article X:3 (a) GATT on the basis of less than a handful of cases of application, some of which it introduced at a very late stage in the proceedings, and non of which establish a lack of uniformity.[81] In addition, the US has consistently denied the relevance of factual information for establishing the consistency of the EC's system of customs administration with Article X:3 (a) GATT. It appears that whereas the US preaches rigour in the establishment of the facts when it is the defendant, it does not wish to see the same approach applied when it is the complainant.

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[77] Appellate Body Report, *US – Carbon Steel*, para. 157.
[78] Appellate Body Report, US – *Oil Country Tubular Goods Sunset Reviews*, para. 217.
[79] Appellate Body Report, *US – Oil Country Tubular Goods from Mexico*, para. 64.
[80] Appellate Body Report, *US – Oil Country Tubular Goods from Mexico*, para. 210.
[81] In this context, it is interesting to note that in *US – Oil Country Tubular Goods from Mexico*, para. 64, the US also complained about not having had a meaningful opportunity to rebut the evidence created and presented by the Panel until the interim review stage.

Overall, the EC submits that the evidence presented by the US is insufficient for establishing, in accordance with Article 11 DSU, that the EC's system of customs administration, or particular components thereof, as such violates Article X:3 (a) GATT.

174. Please comment on the practical relevance, if any, of the following comment made by the Panel in *Argentina – Hides and Leather* at paragraph 11.77 of its report: "Article X:3(a) [of the GATT 1994] requires an examination of the real effect that a measure might have on traders operating in the commercial world" (emphasis added).

The EC agrees that the effect of administration on traders is a relevant consideration in the interpretation of Article X:3 (a) GATT. As the EC has said, this means that the treatment which a trader can expect to receive from the customs authorities of a WTO Member should be reasonably predictable.[82] As the EC has also explained,[83] this does not mean that individual instances of administrative error, which can be corrected through administrative and judicial mechanisms provided by a WTO Member's system, can be regarded as constituting a violation of Article X:3 (a) GATT.

The requirement to examine the effects of the measure is also linked to the evidence required for discharging the burden of proof. If the effects on traders are a relevant consideration for Article X:3 (a) GATT, then the effect on traders should be demonstrable through adequate evidence. The United States has submitted almost no evidence regarding the concrete application of EC customs law to individual traders. Moreover, when it requested input for its case from the trading community, it received almost no contributions.[84] Since the effect on traders is a relevant consideration for the interpretation and application of Article X:3 (a) GATT, the evidence adduced by the US is insufficient for establishing a violation of Article X:3 (a) GATT.

Finally, since the effect on traders is a relevant consideration in the application of Article X:3 (a) GATT, measures which entail no relevant difference in treatment between traders whatsoever cannot be held to constitute a violation of Article X:3 (a) GATT. A case in point is Regulation 493/2005, which the US has unjustifiably criticized even though this regulation ensures entirely uniform tariff treatment by suspending the tariff duties on the covered products.[85]

175. In paragraph 11.77 of the report in *Argentina – Hides and Leather*, the Panel stated that "trade damage" need not be demonstrated in order to prove a violation of Article X:3(a). Please comment.

The EC agrees that there is no requirement to show "trade damage" in order to prove a violation of Article X:3 (a) GATT. Rather than trade damage, the question is whether the complainant has suffered nullification and impairment within the meaning of Article XXIII GATT. It follows from Article 3.8 DSU that where there is an infringement of the obligations under the covered agreements, this is normally presumed to constitute a case of nullification and impairment. However, this presumption can be rebutted by the Member complained against.

As the EC has remarked, even if Regulation 493/2005 were held to constitute a violation of Article X:3 (a) GATT, this clearly would be a case where there is no nullification and impairment, since the duties applicable for all covered goods are zero.[86] More broadly speaking, some of the explanations given by the US as to why it has not provided evidence of non-uniform

[82] Cf. above, Reply to Panel Question No. 156.
[83] EC Second Oral Statement, para. 32.
[84] EC First Written Submission, para. 10, and Exhibit EC-1.
[85] EC First Written Submission, para. 356 et seq.
[86] EC Second Written Submission, para. 124.

administration equally raise the question of what is the nullification and impairment from which the US has suffered.[87]

176. In paragraph 15 of its Oral Statement at the second substantive meeting, the European Communities notes that it invokes Article XXIV:12 of the GATT 1994 to support the view that GATT commitments, including Article X:3(a) of the GATT, were undertaken by Contracting Parties in full respect of their constitutional systems. What significance, if any, should be attached to the fact that a customs union akin to the European Communities did not exist at the time the text of the GATT was concluded in 1947?

The fact that the EC or any similar customs union did not exist at the time the GATT 1947 was concluded is of no significance.

Article XXIV:12 GATT is a general provision which applies to all contracting parties in which provisions of the GATT are implemented by regional or local governments. This is clearly the case for the EC. In accordance with explanatory note 2 (a) to the GATT 1994, the references to a "contracting party" in the GATT 1994 shall be deemed to read "Member". According to Article XI:1 of the WTO Agreement, the EC is an original Member of the WTO. It is thus clear that upon concluding the WTO agreements, all WTO Members agreed that the provisions of the GATT, including Article XXIV:12 GATT, should apply to the EC.

Moreover, in accordance with Article II:1 of the WTO Agreements, the GATT 1994 is an integral part of the WTO Agreement, which was accepted by the WTO Members as a "single undertaking". It is true that the GATT 1994 incorporates, with modifications, the GATT 1947. However, as the Appellate Body has clarified in *Brazil – Desiccated Coconut*, the GATT 1947 by itself no longer constitutes the basis for the rights and obligations of WTO Members.[88]

An interpretation of the GATT 1947 in isolation would therefore not be an adequate way of interpreting the GATT 1994 as an integral part of the WTO Agreements. For this reason, the question whether the contracting parties to the GATT 1947 might have considered that Article XXIV:12 GATT could or could not apply to a WTO Member such as the EC is of no relevance for the interpretation of Article XXIV:12 of the GATT 1994.

This finds further confirmation in para. 13 of the Understanding on Article XXIV GATT, which simply restates the obligations flowing from Article XXIV:12 GATT for WTO Members. If WTO Members, at the time of conclusion of the Marrakech Agreement, had wished to subject the EC to any special standards, it would have been natural to include such provision in the understanding on Article XXIV:12 GATT. Since this was not done, it must be assumed that Article XXIV:12 GATT applies to the EC as it does to any other WTO Member with regional or local governments or authorities.

Finally, there is nothing in the text of Article XXIV:12 GATT which gives rise to the assumption that this provision should not have applied to a contracting party "akin to the EC". As the EC has remarked, it does not claim to be subject to standards any different from those applicable to other WTO Members. On the other hand, the EC also does not accept that the EC's system of executive federalism and judicial review is fundamentally different from the systems of other WTO Members which have a federal system. Accordingly, there is no reason for considering that Article XXIV:12 GATT does not apply to the EC.

[87] EC Second Oral Statement, para. 54.
[88] Appellate Body Report, *Brazil – Desiccated Coconut*, p. 14.

ANNEX B-3

COMMENTS OF THE UNITED STATES ON THE EUROPEAN COMMUNITIES' RESPONSES TO QUESTIONS POSED BY THE PANEL AFTER THE SECOND SUBSTANTIVE MEETING

(14 December 2005)

QUESTIONS POSED TO THE EUROPEAN COMMUNITIES

The United States appreciates this opportunity to comment on the EC's replies to the questions posed by the Panel following the second substantive meeting with the parties. Many of the points the EC raises already have been addressed by the United States in prior written and oral submissions or are not relevant to the resolution of this dispute. In the comments below, the United States will focus primarily on new points that the EC raises that are pertinent to the resolution of this dispute and/or that have not been addressed in prior US submissions. The United States does not comment on the reply to every question that the Panel posed to the EC following the second substantive meeting with the parties. The US decision not to comment on the EC's reply to any particular question should not be understood as agreement with the EC's reply.

Question 146

In its reply to Question No. 146, the EC delineated a number of areas in which the administration of EC customs law is the responsibility of the independent authorities in each of the 25 EC member States.[1] An additional area that has been discussed in this dispute and that should be added to that delineation is the customs procedure concerning the recovery of customs debts. As discussed in the US oral statement at the second Panel meeting,[2] Article 221(3) of the Community Customs Code (Exh. US-5) establishes a period of three years following importation during which a customs debt may be collected. The EC's 25 independent, geographically limited customs offices are each responsible for administering that rule and, as the United States showed, different customs offices administer it differently. France, for example, has enacted a law whereby the three-year period is suspended by any administrative proceeding (procès-verbal) investigating a possible customs infraction.[3] Despite divergence with other customs authorities in other parts of the EC, France's highest court (the Cour de Cassation) has declined to refer to the ECJ the question of this rule's consistency with EC law.[4]

Question 147

In its reply to Question No. 147, the EC states that "Article 10 EC is legally binding and directly applicable in all member States."[5] It adds that Article 10 "inspires the interpretation of Community law by EC courts."[6] It then gives an overview of cases in which Article 10 has been

[1]Replies of the European Communities to the Questions of the Panel After the Second Substantive Meeting, paras. 3-7 (7 December 2005) ("EC Replies to 2nd Panel Questions").

[2]US Second Oral Statement, para. 31.

[3]Loi de finances rectificative pour 2002 (No. 2002-1576 du 30 décembre 2002), J.O. No. 304 du 31 décembre 2002, p. 22070 texte No. 2, Art. 44 (amendment to customs code, Art. 354) ("La prescription est interrompue par la notification d'un procès-verbal de douane.") (Exh. US-69).

[4]*See* Judgment of the Cour de Cassation, Case No. 143, 13 June 2001, pp. 439-40 (Exh. US-67); Judgment of the Cour de Cassation, Case No. 144, 13 June 2001, p. 448 (Exh. US-68).

[5]EC Replies to 2nd Panel Questions, para. 8.

[6]EC Replies to 2nd Panel Questions, para. 9.

invoked and concludes that "Article 10 EC is fully operational and can be applied by the ECJ and national tribunals."[7]

Whether Article 10 is "legally binding and directly applicable" is beside the point. The relevant question is whether the very broad, overarching obligation set forth in Article 10 translates into specific rules in the customs area that would ensure uniform administration by the EC's 25 independent, geographically limited customs offices. The answer is that it does not. Article 10 simply states:

> member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
>
> They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.

Neither the EC Treaty nor other EC legislation states with particularity what "appropriate measures" member States must take in the area of customs law to achieve uniform administration.

From the point of view of GATT 1994 Article X:3(a) it matters little that EC Treaty Article 10 is "legally binding" if (as is the case) it is not made operational in the customs area through particular rules or regulations. The United States has demonstrated this point in its prior submissions. For example, where the customs authority in one part of the EC has classified a good in a particular way, the "legally binding" nature of EC Treaty Article 10 does not compel the customs authority in another part of the EC to classify a materially identical good in the same way.[8] A very concrete illustration of the inability of EC Treaty Article 10 to secure uniform administration of the customs laws is the case of LCD monitors. As the United States explained at the second Panel meeting,[9] even though the Customs Code Committee issued a non-binding conclusion regarding classification of these goods in July 2004, the administration of the classification rules with respect to LCD monitors is in a state of disarray. Thus, the authority in one member State (the United Kingdom) follows that conclusion; another authority (in Germany) evidently rejects it, having recently issued BTI classifying a monitor under heading 8471 based on its *principal* use, even though the conclusion called for such classification based only on *sole* use; and a third authority (in the Netherlands) has promulgated its own set of classification criteria out of concern that the practices of other authorities were resulting in "a diverted flow of business, which is harmful to the competitiveness of Dutch industry in the logistics and services sector."[10]

Moreover, the cases cited by the EC in its reply to Question No. 147 do nothing to affect the conclusion that EC Treaty Article 10 does not secure the uniform administration of EC customs law by the EC's 25 independent, geographically limited customs offices. For example, the EC discusses the ECJ judgment in *Commissioners of Customs & Excise v. SmithKline Beecham* (Exh. EC-142). The question in that case was what a member State court should do upon finding that the classification of a good (nicotine patches) set forth in BTI, which had been consistent with a World Customs Organization ("WCO") opinion, was not in fact the correct

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[7]EC Replies to 2nd Panel Questions, para. 15.

[8]The one narrow exception is the case in which the classification by the first authority is set forth in binding tariff information ("BTI") which is then invoked before the second authority by the very same person to whom the BTI was issued, and only that person (i.e. "the holder").

[9]US Second Oral Statement, paras. 53-56.

[10]Douanerechten. Indeling van bepaalde LCD monitoren in de gecombineerde nomenclatuur, No. CPP2005/1372M (8 July 2005) (original and unofficial English translation) (Exh. US-77).

classification under the EC Tariff. Not surprisingly, the ECJ found that the member State court was "obliged to nullify the unlawful consequences" of the breach of EC law brought about by the issuance of incorrect BTI.[11] However, the Court went on to say (in a portion of its decision not cited by the EC in its reply to Question No. 147) that how an authority goes about remedying a case of non-compliance with EC customs law is a matter "within the ambit of domestic law."[12] The only limitation is that member States follow the very general "principles of equivalence and effectiveness."[13] Thus, different authorities confronted with the same issue confronted by the UK court are free to address the problem in different ways "within the ambit of domestic law."

Another case that the EC discusses in its reply to Question No. 147 is the case of *Kühne & Heitz v. Productschap voor Pluimvee en Eieren* (Exh. EC-61). This was a case in which an administrative proceeding concerning an exporter's entitlement to certain refunds had closed. The exporter had lost, due to a finding regarding classification of the exported goods. Subsequently, in an unrelated proceeding, the ECJ rendered a decision regarding the classification of materially identical goods. Had that decision been available sooner, the result of the Kühne & Heitz refund request would have been different (i.e. favourable to the exporter). Following the ECJ decision, the exporter started a new proceeding, which eventually led to referral to the ECJ of the question whether the original Kühne & Heitz administrative proceeding should be reopened in light of the ECJ classification decision. The ECJ found that *in the circumstances of that case*, the Dutch customs authority was required "to review the decision in order to take account of the interpretation of the relevant provision of Community law given in the meantime by the Court."[14]

Notably, the circumstances of that case included the fact that "under national law, [the customs authority] ha[d] the power to reopen [its original] decision."[15] In fact, the ECJ recognized that "Community law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which becomes final [due to expiry of reasonable time-limits or exhaustion of remedies]."[16] Thus, while the Dutch administrative authority in the *Kühne & Heitz* case itself was required to reopen an administrative decision in light of a subsequent ECJ decision, Article 10 of the EC Treaty did not compel other EC administrative authorities to do so if the laws in their respective member States contained stricter rules on the finality of administrative decisions. As a result, EC customs authorities in the 25 different parts of the EC's customs territory may take different approaches to the effects of an ECJ customs classification judgment on prior administrative proceedings. This is yet another example of a lack of uniform administration by the EC of its customs law.

The EC also discusses the *de Andrade* case (which the United States has discussed in prior submissions),[17] as well as other cases involving EC Treaty Article 10 in the context of customs penalties. As the United States has previously explained, these cases confirm that penalty provisions may vary significantly from customs authority to customs authority in different parts of the EC. As the ECJ explained in *de Andrade*, EC Treaty Article 10 simply requires customs authorities to "take all the measures necessary to guarantee the application and effectiveness of Community law."[18] It imposes no requirement that different customs authorities "guarantee the application and effectiveness of Community law" in a uniform manner.

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[11]Case C-206/03, *SmithKline Beecham*, Order of the Court of Jan. 19, 2005 (not yet reported), para. 51 (Exhibit EC-142) ("*SmithKline*")

[12]Case C-206/03, *SmithKline*, para. 57 (Exhibit EC-142); *see also id.*, para. 53.

[13]Case C-206/03, *SmithKline*, para. 57 (Exhibit EC-142).

[14]Case C-453/00, *Kühne & Heitz*, [2004] ECR I-837, para. 27 (Exh. EC-61).

[15]Case C-453/00, *Kühne & Heitz*, para. 28 (Exh. EC-61).

[16]Case C-453/00, *Kühne & Heitz*, para. 24 (Exh. EC-61).

[17]*See, e.g.*, US First Written Submission, para. 100; US First Oral Statement, para. 51; US Replies to 1st Panel Questions, paras. 111-12.

[18]Case C-213/99, *de Andrade*, [2000] ECR I-11083, paras. 19-20 (Exh. US-31).

Further, these decisions on customs penalties confirm that penalties are tools for administering the rules of EC customs law with respect to classification, valuation, and customs procedures, as the United States has argued. Thus, as just noted, the *de Andrade* decision refers to penalties as measures "to guarantee the application and effectiveness of Community law." That characterization by the ECJ is consistent with the ordinary meaning of the term "administer"[19] and contradicts the EC's argument that penalty provisions are not tools used to administer EC customs laws.

A similar characterization is articulated in the *Hannle + Hofstetter* case (Exh. EC-143). That case concerned an Austrian law that imposed as a penalty an increase in duty to be paid in certain situations involving delay in the payment of a customs debt. The ECJ found that "member States are empowered to choose the penalties which seem appropriate to them" as long as they are within the very general bounds of proportionality and effectiveness.[20] The Court went on to observe that "[t]he objective of the measure is to prevent disadvantage to traders who respect Community legislation and whose conduct ensures that the customs debt can be entered into the accounts and settled rapidly."[21] Again, the ECJ portrays a penalty measure as a tool for giving effect to EC customs law (in this case, in the area of customs procedures) by enforcing compliance with that law. This confirms that penalty provisions "administer" EC customs law within the ordinary meaning of that term.[22]

One final comment concerning the EC's reply to Question No. 147 concerns its assertion that a tribunal of last instance must refer to the ECJ a question regarding the application of Community law that arises in a proceeding before it.[23] As has been shown, that obligation on the part of tribunals of last instance is not absolute. Thus, the ECJ explained in *Intermodal Transports* that a court of last instance is not required to refer a question to the ECJ if, for example, it finds the correct classification of the goods in question to be "so obvious as to leave no scope for any reasonable doubt."[24] Moreover, it is the court of last instance itself that has "sole responsibility" for determining whether the correct classification of goods is "so obvious as to leave no scope for any reasonable doubt."[25] Indeed, as noted above, the question of whether the three-year period for recovery of customs debts may be suspended by the initiation of an administrative proceeding is a question that a court of last instance (in France) has declined to refer to the ECJ, presumably believing the answer to be obvious, even though initiation of an administrative proceeding does not suspend the three-year period in other parts of the EC.[26]

Question 149

The EC's reply to Question No. 149 is notable for at least two reasons. First, the EC persists in referring to "obligations" of cooperation among customs authorities that are extremely general and/or non-binding in nature. Second, the examples of specific obligations of mutual consultation that the EC provides all pertain to situations in which some specific administrative action must be taken by two or more customs authorities, usually because a good or conveyance is necessarily moving between two or more EC member States during a time when the authorities continue to have a regulatory interest in the good or conveyance. In effect, these are the exceptions that prove the rule. That is, as the only examples of *binding* provisions on mutual

[19]*See* US First Written Submission, para. 34; *see also* US Replies to 1st Panel Questions, para. 158.

[20]Case C-91/02, *Hannl + Hofstetter*, Judgment of Oct. 16, 2003 (not yet reported), para. 18 (Exh. EC-143).

[21]Case C-91/02, *Hannl + Hofstetter*, para. 21 (Exh. EC-143).

[22]*See* US Replies to 1st Panel Questions, paras. 156-60; US Second Written Submission, paras. 85-98.

[23]EC Replies to 2nd Panel Questions, para. 9.

[24]*Intermodal Transports*, paras. 33 & 45 (Exh. US-71).

[25]*Intermodal Transports*, para. 37 (Exh. US-71).

[26]*See* US Second Oral Statement, para. 31.

consultation the EC can provide are examples involving situations that necessarily involve regulatory action by two or more customs authorities, the logical inference to be drawn is that in other situations there are no specific, binding provisions on mutual consultation. Surely the EC would have cited such provisions if they existed for other situations. Thus, in the routine case of a good being imported into the territory of the EC, clearing customs, and entering the stream of commerce in the EC (i.e. attaining the status of a Community good), there are no specific, binding provisions on mutual consultation.

The EC begins its reply by alluding again to Article 10 of the EC Treaty.[27] On this point, the United States refers to its comment on the EC's reply to Question No. 147. Later in its reply, the EC refers to its replies to the Panel's Question No. 55 and 56.[28] Those replies discussed the Administrative Guidelines on the European Binding Tariff Information (EBTI) System and its Operation. At the outset, the EC confirmed that those guidelines "are not legally binding."[29] The EC then went on to state that, taken in conjunction with EC Treaty Article 10, customs authorities must take "due account of the administrative guidelines" and must "use all tools available to ensure the proper and uniform administration of EC customs law."[30] However, what this entails and who decides whether "due account" has been taken of the non-binding administrative guidelines, the EC never explains.

In its reply to the Panel's Question No. 56, the EC stated that where two or more member States disagree on the correct classification of a good they "*should* consult with one another."[31] Nowhere does the EC explain which customs authority should initiate such consultations or within what time period. Nor does the EC explain what happens if a customs authority in a given member State declines to consult. Nor does it explain what happens if a member State believes that there is no actual disagreement on classification because (despite an importer's assertions) it believes that the goods that it is considering are materially different from the goods that other member States are considering.

The EC went on to state that "[i]f the disagreement persists, the matter must be raised to the Customs Code Committee." It asserted that "[i]n practice, the responsible official in the member State concerned will submit the issue to the Commission."[32] Again, the EC gave no explanation as to the time period within which such submission "will" be made. Nor did it explain which of the member States is "the member State concerned" that "will submit the issue to the Commission" when there is a disagreement among two or more member States.

Further in its reply to Question No. 149, the EC refers to "a best practice guide which deals with the exchange of information (i.e. consultation) between member States in relation to valuation advice, rulings and audit (Exhibit EC-144)."[33] However, the document to which the EC refers appears to be simply a report on "possible working tools to assist information exchange in customs valuation matters." It is not evident from the report that the ideas discussed therein actually acquired the status of a "best practice guide," let alone that they became binding in any sense.

Additionally, the EC refers to a regulation that sets out "a general framework for mutual cooperation and assistance" under which customs authorities have "the general right to request relevant information" from one another.[34] As the EC's own description of that regulation makes

[27]EC Replies to 2nd Panel Questions, para. 19.
[28]EC Replies to 2nd Panel Questions, para. 20.
[29]EC Replies to 1st Panel Questions, para. 44.
[30]EC Replies to 1st Panel Questions, para. 45.
[31]EC Replies to 1st Panel Questions, para. 47.
[32]EC Replies to 1st Panel Questions, para. 58.
[33]EC Replies to 2nd Panel Questions, para. 21.
[34]EC Replies to 2nd Panel Questions, para. 24 (referring to Regulation 515/97 (Exh. EC-42)).

clear, it is not a specific operationalization of a duty to administer EC customs law uniformly. It is simply, in the EC's words, "a general framework."

The EC's reply to Question No. 149 does refer to some specific obligations of mutual consultation among customs authorities. However, as noted above, these all involve situations in which two or more customs authorities necessarily have a regulatory interest in a good or conveyance. For example, the EC refers to its reply to the Panel's Question No. 79.[35] There, the EC cited six instances in which the CCCIR requires mutual consultation between customs authorities.[36] The first instance it cited was Article 292(2) of the CCCIR. That article concerns the situation in which a good is accorded preferential tariff treatment on entering the EC "subject to end-use customs supervisions." In other words, the preferential tariff treatment is dependent on the good's end use, which is subject to customs authority verification. Because the end use may occur in the territory of a member State other than the member State into which the good was imported, according the treatment at issue may require coordination between customs authorities.

Another instance cited by the EC in which the CCCIR requires consultation between customs authorities is Articles 313a-313b. Those provisions concern the status of a "regular shipping service." A service may acquire that status if it "carries goods in vessels that ply only between ports situated in the customs territory of the Community."[37] Verifying compliance with that requirement necessarily requires coordination among customs authorities in different parts of the territory of the EC. In this respect, the requirement of mutual consultation associated with the regular shipping service provision is like the requirement of mutual consultation associated with the provision on preferential treatment subject to end-use customs supervision. The other provisions cited in the EC's reply to Question No. 79 are to similar effect.

Likewise, the examples of specific mutual consultation requirements that the EC provides in the areas of valuation and customs procedures all involve situations in which multiple customs authorities are involved in a given transaction.[38]

The EC's reply to Question No. 149 makes clear that customs authorities in the EC may not even be aware of how other customs authorities in other parts of the EC are administering EC customs laws. Traders are under no obligation to inform one authority of decisions made by another authority, except in the narrowest of circumstances. In the absence of such information, it is almost impossible to imagine how the 25 independent, regionally limited customs authorities in the EC could administer EC customs laws in a uniform manner.

In sum, the EC's reply to Question No. 149 shows that, with certain very narrow exceptions, there are no binding provisions specifically requiring mutual consultation between authorities in the customs context. There are very general requirements (such as that set forth in EC Treaty Article 10) and non-binding guidelines (such as the administrative guidelines on the EBTI system). But, these general requirements and non-binding guidelines are not given operational effect through specific requirements applicable in the customs context. Therefore, as has been seen, where a customs authority in one member State classifies a good in a particular way, for example, and that classification is brought to the attention of another authority in a different member State, there is no rule requiring the latter authority to take any particular action in light of that information on what the former authority has previously done.

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[35]EC Replies to 2nd Panel Questions, para. 19.

[36]EC Replies to 1st Panel Questions, para. 148.

[37]CCCIR, Art. 313a(1) (Exh. US-6).

[38]*See* EC Replies to 2nd Panel Questions, paras. 21, 23. With respect to local clearance procedures and processing under customs control, the EC notably states that "where such a procedure involves more than one member State, exchange of information *is practiced*." *Id.*, para. 23 (emphasis added). The EC identifies no specific requirement for such information exchange; it simply asserts that such exchange "is practiced."

Question 151

In its reply to Question No. 151, the EC refers once again to the supposed requirement that to establish a breach of GATT 1994 Article X:3(a) a party must show not only that there is an absence of uniform administration, but also that the non-uniform administration exhibits a "pattern."[39] As the United States has shown in previous submissions, Article X:3(a) contains no such "pattern" requirement.[40]

Question 152 (b)

In responding to Question No. 152(b), the EC asserts that EC customs law "does not leave a large measure of discretion to member States' customs authorities."[41] The EC thus appears to be using the term "discretion" in a very narrow sense, which fails to appreciate that when a customs authority decides how to classify a good or how to value a transaction it necessarily exercises discretion in the sense that it must use judgment.[42] As detailed as the EC's customs rules may be, they are not so detailed as to exclude the possibility of differences of view as to how they should be applied in particular cases. While in theory there may well be a single "right answer" as to how a given good should be classified or valued, it is not the case that every customs authority will necessarily and automatically always reach that theoretically right answer. Administering the EC's customs laws requires the EC customs authorities to exercise judgment. Within the EC's customs territory, there are 25 independent, geographically limited authorities, with different legal traditions, applying such judgment, and there is an absence of institutions or procedures that ensure that these authorities exercise their judgment in the same way. The combination of these features necessarily results in non-uniform administration by the EC of its customs laws, in breach of GATT 1994 Article X:3(a).

Question 155

In its reply to Question No. 155, the EC asserts that the applicability of GATT 1994 Article X:3(a) to penalty provisions "depends on whether penalty provisions are among the laws referred to in Article X:1 GATT."[43] As the United States has explained in prior submissions, this argument confuses the distinction between a measure that is being administered and a measure that is doing the administering, in the sense that the latter gives effect to the former. For a measure to be within the scope of Article X:3(a), the measure being administered must be within the scope of Article X:1, and it is not relevant whether the administering measure is also within the scope of Article X:1. What is relevant is whether such administering measures (i.e. the tools of administration) differ from customs authority to customs authority within the territory of a WTO Member. To the extent that they do (as is the case in the EC), they demonstrate non-uniform administration of the Member's customs laws.

Moreover, the EC's contention that "the substantive standards of Article X:3(a) GATT are ill adapted to the application of penalties"[44] misses the relevance of Article X:3(a) to the issue of penalties. The EC explains that the application of penalties requires that the relevant authority have flexibility to take account of degree of guilt and other factors. However, the question of flexibility in the application of penalties is not at issue in this dispute. What is at issue is the

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[39]EC Replies to 2nd Panel Questions, para. 31; *see also id.*, para. 37 (reply to Question No. 153).

[40]*See* US First Oral Statement, paras. 17-19; US Replies to 1st Panel Questions, paras. 36-41; US Second Written Submission, paras. 26-38.

[41]EC Replies to 2nd Panel Questions, para. 33.

[42]*See New Shorter Oxford English Dictionary*, Vol. I, pp. 688-89 (1993) (defining "discretion," as relevant here, to mean "[t]he action of discerning or judging; judgment; decision, discrimination"); *see also* US Second Written Submission, paras. 59-61.

[43]EC Replies to 2nd Panel Questions, para. 40.

[44]EC Replies to 2nd Panel Questions, para. 41.

disparity in the tools available to different authorities within the Member's territory to respond to identical infractions. It is that disparity that demonstrates non-uniformity of administration of the customs laws, regardless of how penalty provisions are applied in any particular case.

Finally, the EC continues to seek support from the contrast between the explicit reference to penalties in Article VIII:3 of the GATT 1994 and the absence of such a reference in Article X. However, as the United States explained in its second written submission, the fact that Article VIII:3 sets substantive parameters for penalties for certain types of breaches of customs regulations or procedural requirements – i.e. "minor breaches" – has nothing to do with whether penalties may be considered to be tools for administering a Member's customs laws. There, the United States explained that the EC's argument would lead to absurd results as, for example, justifying discrimination among WTO Members in the application of penalties in view of the absence of any reference to penalties in GATT 1994 Article I.[45] Similarly, the logic of the EC's argument would seem to preclude Article X claims regarding the imposition of antidumping duties or of fees or other charges commensurate with the cost of services rendered, since both of those types of charges are explicitly addressed in other GATT Articles (Articles VI and II:2(c), respectively) but not in Article X. As these outcomes plainly would be absurd, the EC's argument that penalties are not covered by Article X because they are addressed in other GATT articles should be rejected.

Question 156

In its reply to Question No. 156, the EC states that "[r]easonable assurance means that the treatment a trader can expect from the authorities of such member should be reasonably predictable."[46] At the outset, the Panel should note that there is no "reasonable assurance" test in GATT 1994 Article X:3(a). A Member could administer its customs laws in a non-uniform manner in breach of Article X:3(a), regardless of whether it gives traders "reasonable assurances" as to how it will administer its laws and regulations.

Having asserted without support a "reasonable assurances" test that it equates to a test of whether the treatment a trader can expect is "reasonably predictable," the EC then goes on to state that predictability should be examined in terms of "the overall pattern of administration."[47]

The United States does not see how the existence of a "pattern" relates to the question of reasonable predictability of treatment. The treatment that authorities will accord traders may lack reasonable predictability whether or not the authorities' administration of the customs laws exhibits a pattern.

The United States agrees that, as a factual matter, where a Member administers its customs laws in a uniform manner, the treatment the Member accords traders should be reasonably predictable. It should be emphasized that the reasonable predictability that a trader should expect under a system of uniform administration is reasonable predictability as to how the *Member* will administer its laws. It is irrelevant that the customs authority in one region within a Member's territory may administer the Member's laws in a reasonably predictable manner. There would be little point in an obligation to administer customs laws uniformly if it could be satisfied simply by the customs authority in one region within a Member's territory according reasonably predictable treatment, regardless of the actions of authorities outside that region. For example, if a customs authority in one region predictably behaves in one way, and a customs authority in another region predictably behaves in another way, that predictability changes nothing about the fact that the overall behaviour is not uniform. If a Member is satisfying its obligations under GATT 1994 Article X:3(a), a trader will have its reasonable expectations met that it will be accorded the same

[45]US Second Written Submission, paras. 96-97.
[46]EC Replies to 2nd Panel Questions, para. 43.
[47]EC Replies to 2nd Panel Questions, para. 43.

treatment for the same situation across the Member's territory, not just in one or another part of it. The EC's system of customs administration does not satisfy that altogether reasonable expectation.

Question 157

In its reply to Question No. 157, the EC notes that "member States' authorities are not prevented from issuing administrative guidelines or other non-binding documents for administrative purposes."[48] While the EC goes on to state that such guidelines and administrative documents cannot derogate from the application of EC customs law, this does not change the fact that the guidelines and administrative documents are particular to the member State issuing them, as is the interpretation of EC customs law that the member State is applying.

An illustration of this point is the guidance issued by the customs authority in the United Kingdom and the customs authority in France, respectively, regarding administration of the EC law on processing under customs control. As the United States has demonstrated, these two sets of guidance, on their face, take different approaches to the administration of that law.[49] Whether or not that guidance is characterized as binding or non-binding, and whether or not the guidance can be said to derogate from EC customs law, an applicant for authorization to engage in processing under customs control reasonably would understand that the customs authority in the United Kingdom will follow the steps identified in the UK guidance and the customs authority in France will follow the steps in the French guidance. It is for this reason that the United States maintains that the differences in the guidance are evidence of non-uniform administration.

Question 158

The EC's reply to Question No. 158 begins by recalling the statement by the Panel in *Canada – Gold Coins* that "the purpose of Article XXIV:12 GATT is to 'qualify the basic obligation to ensure the observance of the General Agreement by regional and local government authorities in the case of contracting parties with a federal structure.'"[50] That statement is important, because it highlights why Article XXIV:12 of the GATT 1994 is *not* relevant to the present dispute. Article XXIV:12 is relevant to "the observance of the General Agreement by regional and local government authorities." This dispute, by contrast, does not concern the observance of an obligation under the GATT 1994 by regional and local government authorities but, rather, by the EC itself.[51] It is the EC that has an affirmative obligation under GATT 1994 Article X:3(a) to administer EC customs law in a uniform manner. For that reason, this dispute is distinguishable from *Canada – Gold Coins*, which involved a provincial government adopting a measure for the raising of provincial revenue – a power that Canada's constitution vested exclusively in the provincial legislature[52] – in a manner that put Canada in breach of its obligation under GATT 1994 Article III. In that dispute, South Africa complained that Canada had breached its GATT 1994 Article III obligation by virtue of the provincial legislation. Here, by contrast, the United States is not arguing that the action of any single member State itself brings about a breach by the EC of its obligation under GATT 1994 Article X:3(a). Rather, the United States is arguing that the EC has breached its obligation under GATT 1994 Article X:3(a) by virtue of its failure to administer its customs law – "federal" law, to use the EC's term – in a uniform manner.

Second, even if Article XXIV:12 were relevant to this dispute, it would not excuse the EC from its obligation under Article X:3(a) or in any way affect its obligation under that Article. As

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[48]EC Replies to 2nd Panel Questions, para. 45.

[49]*See* US Replies to 2nd Panel Questions, paras. 71-72, 73-78.

[50]EC Replies to 2nd Panel Questions, para. 46 (quoting GATT Panel Report, *Canada – Gold Coins*, para. 53). The Panel should note that the GATT Panel report in *Canada – Gold Coins* was never adopted.

[51]*See* US Second Written Submission, paras. 13-17.

[52]*See* GATT Panel Report, *Canada – Measures Affecting the Sale of Gold Coins*, L/5863, para. 8 (17 September 1985, unadopted) ("*Canada – Gold Coins*").

paragraph 13 of the *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994* ("Understanding on Article XXIV") makes clear, "Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994. . . ." That is, Article XXIV:12 imposes an *obligation* on Members with federal structures to take "reasonable measures" to "ensure observance" by local or regional governments of a Member's obligations, but Article XXIV:12 does not purport to alter the content of any GATT 1994 obligation for such Members. Additionally, even where observance of WTO obligations by regional or local governments is at issue, paragraph 14 of the Understanding on Article XXIV and Article 22.9 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") provide that "[t]he provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the [DSU]" and "[t]he provisions of the covered agreements and [the DSU]," respectively, "relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance." Therefore, even if, pursuant to Article XXIV:12, the EC's only obligation under Article X:3(a) were to take "reasonable measures" to secure uniform administration of EC customs law, its failure to actually administer its customs law in a uniform manner would not excuse it from relevant provisions on compensation and suspension of concessions.[53]

Third, the United States notes that the EC states that it "has not invoked Article XXIV:12 GATT *as a primary defence* in the present case."[54] That statement is important, because it implies that the EC in fact has invoked Article XXIV:12 as a defense, just not a "primary" defense. Previously, the EC had not actually "invoked Article XXIV:12 GATT as a . . . defence," but merely referred to it as "support" for its proposed interpretation of GATT 1994 Article X:3(a).[55] This distinction is significant, because actually invoking Article XXIV:12 as a defense would carry with it a burden to demonstrate that lapses in the uniform administration of EC customs law concern matters "which the central government cannot control under the constitutional distribution of powers."[56] If the EC is now arguing that it is not able to control the administration of customs law by the customs authorities in the member States under its constitutional distribution of powers, this only reinforces the point that the EC is not meeting its obligation to administer its customs law uniformly under Article X:3(a).

Finally, the EC's reply to Question No. 158 assumes that the US claims demand "creation of an EC customs agency, and [sic] EC customs court, and the harmonization of member States law notably in the area of penalties," and proceeds to argue that these are not reasonable measures.[57] In fact, the EC mischaracterizes the US claims and thus responds to an argument the United States does not make. The United States has never insisted that the EC must create an EC customs agency and an EC customs court and harmonize member States' laws. The United States simply argues that the EC, like other WTO Members, must administer its customs laws in a manner consistent with GATT 1994 Article X:3(a) and provide tribunals or procedures for the prompt review and correction of administrative action relating to customs matters that comply with Article X:3(b).

Question 159(b)

In its reply to Question No. 159(b), the EC states that "[i]t is not for the EC, but for the US as the complainant in the present case, to provide evidence" that conclusions of the Customs Code

[53]*See* GATT Panel Report, *Canada – Gold Coins*, paras. 61-65 (discussing Canada's obligation to compensate South Africa until efforts pursuant to Article XXIV:12 bring Canada into compliance with Canada's obligation under Article III).

[54]EC Replies to 2nd Panel Questions, para. 49 (emphasis added).

[55]EC Replies to 1st Panel Questions, para. 113.

[56]GATT Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, BISD 39S/206, para. 5.79 (adopted 19 June 1992); *see also* US Second Written Submission, para. 17 & n.17.

[57]EC Replies to 2nd Panel Questions, para. 50.

Committee do *not* typically reflect a common approach of the member States or that they are *not* adopted by consensus.[58] The EC's characterization of the burden of proof is wrong. It is "the party who asserts a fact, whether the claimant or the respondent, [that] is responsible for providing proof thereof."[59] In this case, it is the EC in rebuttal that has asserted that issuance of conclusions of the Customs Code Committee is a procedure for ensuring uniform administration because the conclusions are adopted by consensus. Therefore, it is the EC that has the burden to substantiate that proposition. Indeed, the EC is uniquely positioned to demonstrate whether opinions of the Customs Code Committee typically reflect a common approach agreed by all member States since it alone has access to the full documentation evidencing the deliberations of the Committee.

In any event, to the extent the evidence in this dispute has addressed the relationship between opinions of the Customs Code Committee and the approach of member States, the evidence has shown a prominent example of the two *not* being in accord. Specifically, in the LCD monitors case, the customs authorities in at least two member States have taken approaches to classification of the goods at issue that are at odds with the corresponding Customs Code Committee conclusion.[60]

Question 159(d)

In its reply to Question No. 159(d), the EC states that it "is not sure how the characterization of the Customs Code Committee will affect the Panel's analysis" since the United States "[is] not challenging the manner in which the Customs Code Committee operates."[61] As the United States explained in its answer to Question No. 134, the way in which the Customs Code Committee operates is relevant to the US Article X:3(a) claim because the Committee is one of the institutions that the EC holds out as ensuring that the EC administers its customs laws uniformly. The United States refers the Panel to its answer to that question for a fuller discussion of this issue.[62]

Question 161

In reply to Question No. 161, the EC states that it is not aware of customs authorities in certain member States declining to treat as binding BTI issued by other customs authorities for network cards and for drip irrigation products. The Panel should note, however, that the EC's reply focuses narrowly on whether BTI issued to a particular "holder" for the products at issue were ever not honored by customs authorities other than the issuing authority. More relevant is the undeniable fact that these products were subject to divergent classification by different customs offices within the EC, and these divergences were not resolved promptly and as a matter of right. Thus, in the *Peacock* case, the Advocate General observed that "customs authorities of various Community member States issued conflicting BTIs classifying items of LAN equipment variously under headings 8471, 8473 and 8517."[63] Likewise, with respect to drip irrigation products, the EC does not deny that there was a divergence of classification between different customs authorities. Rather, it simply characterizes the divergence as "a case of temporarily diverging BTI."[64] "Temporarily diverging BTI" means that customs authorities in different member States classified materially identical products differently, such that the EC was undeniably not administering EC customs law uniformly.

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[58]EC Replies to 2nd Panel Questions, para. 53.

[59]Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, p. 14 (adopted 23 May 1997).

[60]*See* US Second Oral Statement, paras. 54-56.

[61]EC Replies to 2nd Panel Questions, para. 60.

[62]US Replies to 2nd Panel Questions, paras. 42-44.

[63]*Peacock AG* v. *Hauptzollamt Paderborn*, Case C-339/98, Opinion of the Advocate-General, 2000 ECR I-08947, para. 15 (28 October 1999) (Exh. US-17).

[64]EC Second Written Submission, para. 141.

Question 165

The EC's reply to Question No. 165 concerning the role of the European Ombudsman in the area of customs administration should be understood in the context of the Ombudsman's mandate. In particular, as the guide entitled "The European Ombudsman at a Glance" explains, "The Ombudsman cannot investigate complaints against national, regional or local authorities in the member States, even when the complaints are about European Union matters."[65] This point is confirmed in a recent Ombudsman decision (presumably one of the four to which the EC referred in its reply to Question No. 165).[66] The decision involved the purchase by a company in the Netherlands of shoes from a seller in Finland which were accompanied by certificates of origin issued by the Finnish authority that read "Hong Kong, China." The customs authority in the Netherlands was unsure whether this meant that the shoes originated in Hong Kong or in China (a significant difference, as shoes originating in China would be liable for antidumping duties). The authority in the Netherlands began an investigation into the origin of the goods. Subsequently, the authority in Finland issued revised certificates of origin that read "Hong Kong." However, rather than simply accept those certificates, the authority in the Netherlands continued its investigation, ultimately concluding that the shoes were of Chinese origin. This led to an assessment of antidumping duties and then to a series of transactions between the Dutch company, the Dutch customs authority and the EC Commission. The Commission's actions ultimately led the company to file a complaint with the Ombudsman. In its decision, the Ombudsman made clear that the company's inquiry "does not concern the decision taken by the Dutch customs authorities or the allegedly erroneous certificates of origin delivered by the Finnish Chamber of Commerce. Regarding these matters, the complainant has the possibility to lodge complaints with the respective national ombudsmen in the Netherlands and in Finland."[67]

Question 168(a)

In reply to Question No. 168(a), the EC states that "the duty of cooperation is legally binding and directly applicable on all member States. It can and has been enforced."[68] As the United States explained in its comment on the EC's reply to Question No. 147, the relevant question is not whether EC Treaty Article 10 is "legally binding and directly applicable." The relevant question is whether the very broad, overarching obligation set forth in Article 10 is made operational in the customs area through specific rules that would ensure uniform administration. The answer is that it is not. For a full discussion of this issue, the United States refers the Panel to its comment on the EC's reply to Question No. 147.

Question 168(b)

In its reply to Question No. 168(b), the EC purports to describe what the Panel "held" in *Argentina – Hides*. Specifically, it asserts that "[t]he Panel held that [Argentina's Resolution 2235] constituted a violation of Article X:3(a) GATT because it made it impossible for Argentina to administer its customs laws in a manner that was reasonable and impartial."[69] Notably, the portion of the *Argentina – Hides* report that the EC cites in support of this proposition is not the Panel's finding, but rather, the Panel's summary of the EC's argument.[70] It was the EC as complainant, not

[65]The European Ombudsman at a Glance, p. 2 (Exh. US-82).

[66]Decision of the European Ombudsman on complaint 1817/2004/OV against the European Commission (7 November 2005) (Exh. US-83).

[67]Decision of the European Ombudsman on complaint 1817/2004/OV against the European Commission, The Decision, para. 1.2 (7 November 2005) (Exh. US-83).

[68]EC Replies to 2nd Panel Questions, para. 78.

[69]EC Replies to 2nd Panel Questions, para. 79.

[70]Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1, para. 11.58 (adopted 16 February 2001) ("*Argentina – Hides*").

the Panel, that contended that the Argentinian measure at issue made the "impartial application of the relevant customs rules impossible." Indeed, the very fact that the Panel did *not* adopt the EC's characterization that the Argentinian measure made it "impossible" for Argentina to meet its Article X:3(a) obligation suggests that the Panel did not rely on that characterization. This point is supported by the fact that, although the Panel ultimately concluded that Argentina's administration of its customs law was not impartial, it did so for reasons other than that urged by the EC. Significantly, it did not accept the EC's argument that the mere presence of representatives of the domestic tanning industry at the port upon the exportation of raw hides necessarily resulted in a breach of the obligation of impartial administration.[71]

Second, the EC's reply to Question No. 168(b) indicates that the EC disagrees with the US statement that in *Argentina – Hides*, the EC challenged the same Argentinean measure from the perspective of its substance and from the perspective of its character as a tool for administering other laws. On this point, the United States refers the Panel to paragraph 4.203 of the Panel report in *Argentina – Hides*, which substantiates the US statement.[72]

Finally, with respect to the EC's statement that "[n]owhere does the Panel Report in *Argentina – Hides* indicate that the Argentinean measure administered some other measure,"[73] the United States refers the Panel to paragraph 11.72 of the *Argentina – Hides* report. There, the Panel concludes that the measure at issue "merely provides for a certain manner of applying those substantive rules i.e. Argentina's customs laws]. This measure clearly is administrative in nature."

Question 168(c)

In its reply to Question No. 168(c), the EC states that "Article X GATT does not distinguish between 'laws' which are of 'substantive' character and others which are of 'administrative' character."[74] However, Article X:3(a) plainly does refer to certain "laws, regulations, decisions and rulings" and to the manner in which a Member must administer such "laws, regulations, decisions and rulings." A relevant question, therefore, is how the manner of administration of those laws, regulations, decisions and rulings is evidenced. As the Panel in *Argentina – Hides* recognized, the manner of administration may be evidenced by other measures that prescribe the way in which the laws, regulations, decisions and rulings are given effect. Such other measures may appropriately be described as being administrative in character. From this perspective, the laws, regulations, decisions and rulings that are being administered may be described as being substantive in character. To the extent that a measure that is administrative in character is evidence of the non-uniform administration of laws, regulations, decisions and rulings that are substantive in character, the administrative measure can be considered as part of a challenge to a Member's failure to administer its laws uniformly under Article X:3(a).[75]

The EC next proceeds to introduce a new argument in which it contends that all of the laws in Article X:1 could be considered administrative in character in the sense that they "need to be administered."[76] The EC thus attempts to make a *reductio ad absurdum* type argument. However, its premise that what makes a law "administrative" is the "need to be administered" is incorrect. In fact, what makes a law administrative is that it provides for a certain manner of

[71]*See* Panel Report, *Argentina – Hides*, para. 11.99 ("Much as we are concerned in general about the presence of private parties with conflicting commercial interests in the Customs process, in our view the requirement of impartial administration in this dispute is not a matter of mere presence of ADICMA representatives in such processes.").

[72]*See also* US Second Written Submission, para. 86.

[73]EC Replies to 2nd Panel Questions, para. 79.

[74]EC Replies to 2nd Panel Questions, para. 80.

[75]*See* US Second Written Submission, paras. 85-95; US Replies to 2d Panel Questions, paras. 25-28, 35-41.

[76]EC Replies to 2nd Panel Questions, para. 81.

applying substantive rules. For further discussion on this point, the United States refers the Panel to its answer to Question No. 130.[77]

The EC goes on to argue that penalty provisions cannot be administrative in nature because they are "themselves laws to be administered."[78] In this regard, the EC makes the error of assuming that a law that is administrative in character cannot itself be administered. That simply is not true.[79]

Finally, the EC professes confusion with regard to the US discussion of audit procedures as tools, like penalty provisions, that administer EC customs laws in a non-uniform manner. The EC states that it fails to see "the parallel" between audit procedures and penalty provisions.[80] In fact, the United States has been quite clear in articulating the parallel. Like penalty provisions, audit procedures do not prescribe substantive customs rules, but rather, they are tools for verifying and enforcing compliance with substantive rules, which are set forth elsewhere. To the extent that different customs authorities in the EC use very different audit procedures, they administer substantive EC customs rules differently, just as is the case with different penalty provisions.[81] Indeed, the EC does not even assert that its 25 independent, geographically limited customs authorities administer EC customs law uniformly through the use of audit procedures. It merely states quite vaguely that they "have the necessary audit capacities, and are guided by the Community Customs Audit Guide."[82]

Question 168(d)

In its reply to Question No. 168(d), the EC states that it has referred to Article X:3(a) as a "minimum standard" provision to clarify "the object and purpose of the provision."[83] The United States disagrees with the EC's suggestion that an object and purpose can or need be attributed to an individual treaty provision. Article 31(1) of the Vienna Convention on the Law of Treaties ("VCLT") provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." It is apparent that the "its" before "object and purpose" refers to the singular "treaty," rather than to the plural "terms of the treaty." This view has been confirmed, for example, by the Panel in *US – Corrosion-Resistant Steel Sunset Review*, which refers explicitly to the "object and purpose of the *treaty*,"[84] and the Appellate Body in *EC – Hormones*, which discusses "the *treaty's* object and purpose."[85]

Having purported to identify what it calls the "object and purpose" of Article X:3(a), the EC goes on to state that "[i]n accordance with customary rules of treaty interpretation, this limited object and purpose of Article X:3(a) GATT must guide the interpretation of the provision by the Panel."[86] However, as already noted, the EC's approach is not in accordance with customary rules of treaty interpretation, which provide for interpretation of a treaty in light of the *treaty's* object and purpose. The EC's approach, in fact, turns customary rules of interpretation on their head.

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[77]US Replies to 2nd Panel Questions, paras. 25-28.
[78]EC Replies to 2nd Panel Questions, para. 82.
[79]*See* US Second Oral Statement, paras. 76-77; US Replies to 2nd Panel Questions, para. 26 n.22.
[80]EC Replies to 2nd Panel Questions, para. 83.
[81]*See* US First Written Submission, paras. 97-99.
[82]EC Replies to 2nd Panel Questions, para. 83.
[83]EC Replies to 2nd Panel Questions, para. 84.
[84]Panel Report, *United States – Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, para. 7.44 (adopted 9 Janaury 2004, as modified by Appellate Body report) (emphasis added) ("*US – Corrosion-Resistant Steel Sunset Review*").
[85]Appellate Body Report, *EC – Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R, para. 104 (adopted 13 February 1998) (emphasis added) ("*EC – Hormones*").
[86]EC Replies to 2nd Panel Questions, para. 84 (citing Article 31(1) of the Vienna Convention on the Law of Treaties).

Rather than ascertaining the meaning or "purpose" of an individual treaty provision by examining the ordinary meaning to be given to the terms of the treaty in their context and in the light of treaty's object and purpose, the EC attempts *first* to identify *a priori* what it calls "the object and purpose" of Article X:3(a) and *then* urges that this supposed "object and purpose" "guide the interpretation of the provision."

The EC's approach also is troubling in that it invites the possibility of adding to or diminishing rights and obligations under the covered agreement at issue. It should not be left to parties to a dispute to divine "purposes," since a party may simply use this as an opportunity to re-write the provision – which is precisely what the EC is doing in characterizing Article X:3(a) as a "minimum standard" provision.

Nowhere does Article X:3(a) or any other provision of the GATT 1994 articulate an "object and purpose" that supports a characterization of Article X:3(a) as a "minimum standard" provision. In construing WTO agreements, the Appellate Body has consistently looked to the text of the relevant agreement to identify its object and purpose.[87] Here, however, the EC purports to derive an "object and purpose" not from agreement text, but from a passing reference in an Appellate Body report in a context unrelated to that of the present dispute, and in which the phrase "minimum standard" was not in fact used to describe any supposed "object and purpose" of Article X:3(a). This is a perfect example of the danger of pursuing treaty interpretation in the manner the EC has proposed. The EC has selected an isolated statement about Article X:3(a) from outside the text of the GATT 1994, labeled that statement as the "object and purpose" of Article X:3(a), and then attempted to leverage that statement to an entirely self-serving end. Because it is contrary to customary rules of treaty interpretation, the EC's characterization of this "object and purpose" should be rejected.

Question 168(e)

The EC's reply to Question No. 168(e) repeats the EC's position that preliminary references to the ECJ are an instrument of ensuring uniform administration, but it does not show how that position can be reconciled with the EC's view that Articles X:3(a) and X:3(b) set forth discrete obligations without any inherent link. In fact, in prior submissions, the EC has portrayed the ECJ as an entity that has a "cooperative relationship" with and "helps" the review courts in the member States, working with them to ensure that they interpret and apply EC law correctly.[88] The ECJ thus would appear to play an integral role in the review process. At the same time, the EC describes the decisions of the ECJ as important instruments for ensuring uniform administration. In this sense, the EC appears to acknowledge a clear link between the function of uniform administration and the function of review of administrative action. As the EC's own characterizations support the existence of a link between uniform administration and the review

[87]*See, e.g.*, Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, para. 92 (adopted 20 April 2004) (object and purpose identified through examination of preamble of WTO Agreement and text of Enabling Clause); Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, para. 311 (adopted 27 January 2003) (overall object and purpose of DSU expressed in Article 3.3 of that agreement); Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, paras. 140-42 (adopted 23 October 2002) (referring to Articles 3.4 and 3.7 of DSU to describe its object and purpose); Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, para. 95 (adopted 12 January, 2000) (referring to preamble of Safeguards Agreement to identify its object and purpose).

[88]EC Replies to 1st Panel Questions, para. 174 ("[preliminary reference] procedure is based on a cooperative relationship between the Court of Justice and national courts"); EC Second Written Submission, para. 244 ("ECJ does not review national customs administration decisions, but it helps the national courts in such a review."); EC First Written Submission, para. 470 (same).

and correction of administrative action, its contention that Article X:3(a) does not provide context for Article X:3(b) should be rejected.

Question 169

In its reply to Question No. 169, the EC explains that tribunals in the EC member States are "organs of the EC" by virtue of "the preliminary reference procedure to the ECJ and . . . the basic principles of primacy of Community law and direct effect."[89] It follows, according to the EC's argument, that these features qualify member State tribunals as the tribunals for prompt review and correction that the EC provides to fulfil its obligation under GATT 1994 Article X:3(b).

What is notable about this line of reasoning is that it implies that the actions that the EC takes to fulfil its Article X:3(b) obligation are indistinguishable from the actions that the EC's member States take to fulfill their Article X:3(b) obligations. The very same tribunals that the EC member States maintain for the prompt review and correction of administrative action relating to customs matters are the tribunals that the EC maintains for that same purpose, according to the EC. Thus, the EC appears to reason that if the individual member States are complying with their obligations under Article X:3(b) then the EC necessarily is complying with its obligation under Article X:3(b).

However, the fact that the same tribunal may be considered, as a matter of internal EC law, as both a member State tribunal and an EC tribunal does not mean that it meets the requirements of GATT 1994 Article X:3(b) with respect to both the EC and the member State's obligations. As the United States has discussed in prior submissions, one of characteristics that a tribunal must have to satisfy a WTO Member's obligation under Article X:3(b) is that its decisions must "govern the practice of" "the agencies entrusted with administrative enforcement."[90] Plainly, "the agencies entrusted with administrative enforcement" means something different from the point of view of an EC member State than it does from the point of view of the EC.

With respect to France, for example, "the agencies entrusted with administrative enforcement" are the French customs authorities. With respect to the EC, "the agencies entrusted with administrative enforcement" are the 25 independent, geographically limited customs offices of the EC. It may well be that the decisions of a French review tribunal govern the practice of the agencies entrusted with administrative enforcement in France. However, they indisputably do *not* govern the practice of the agencies entrusted with administrative enforcement of EC customs law throughout the EC. In this sense, the fact that the French tribunal may satisfy France's obligation under Article X:3(b) does not mean that it also satisfies the EC's obligation. In sum, although as a matter of EC law a tribunal may serve a dual function as both a member State tribunal and an EC tribunal, this does not mean that it also satisfies both the member State's obligation under Article X:3(b) and the EC's obligation under Article X:3(b).

Question 173

In its reply to Question No. 173, the EC starts by drawing a distinction between "the administration of customs law" and "measures of general application which constitute the EC's system of customs administration," as if these two things were entirely unrelated.[91] In fact, they are not unrelated at all. To the extent that measures of general application which constitute the EC's system of customs administration (or the absence of certain measures) result in non-uniform administration, they establish that the EC administers its customs laws in a manner inconsistent

[89]EC Replies to 2nd Panel Questions, para. 87.

[90]*See* US Replies to 2nd Panel Questions, para. 81; US Second Oral Statement, paras. 83-85; US Second Written Submission, paras. 102-09; US Replies to 1st Panel Questions, paras. 135-40.

[91]EC Replies to 2nd Panel Questions, para. 93.

with GATT 1994 Article X:3(a). As discussed in the US response to Question No. 126, the design and structure of the EC's system of customs administration establish that very conclusion.[92]

The EC proceeds to assert that to establish that the EC's system of customs administration "as such" leads to non-uniform administration, the United States must provide "evidence regarding the consistent application of the law,"[93] citing the Appellate Body reports in *US – Carbon Steel*, *US – Oil Country Tubular Goods Sunset Reviews*, and *US – Oil Country Tubular Goods from Mexico*.[94] However, that is not what the reasoning in these reports demonstrates. Even in the quotation from *US – Carbon Steel* which the EC cites, it is clear that, in looking at the meaning of a municipal law, it is *not* required to produce evidence of the law's application; rather, evidence from the text of the law itself "may be supported, *as appropriate*, by evidence of the consistent application of such law[]."[95] The fact that in the disputes cited by the EC the complaining parties introduced such evidence (because other, more direct, evidence did not support their position), and that the quality of that evidence therefore had to be examined, does not mean that such evidence is required (given, in particular, the Appellate Body statement in *US – Carbon Steel*).

In contrast to disputes in which other types of evidence may have been "appropriate," in the present dispute, the United States has demonstrated that the design and structure of the EC's system of customs administration necessarily results in the non-uniform administration of EC customs law, in breach of Article X:3(a). In particular, the fact that the EC administers its customs laws through 25 independent, regionally limited offices, without any institution or procedure that ensures that divergences of administration do not occur or that promptly reconciles them as a matter of course when they do occur, necessarily results in non-uniform administration in breach of GATT 1994 Article X:3(a).

Further, the United States notes that the EC's discussion of *US – Oil Country Tubular Goods from Mexico* relates not to Article X:3(a) of the GATT 1994, but rather, to Mexico's claim under Article 11.3 of the *Antidumping Agreement*. In fact, Mexico had asserted a GATT 1994 Article X:3(a) claim in addition to its *Antidumping Agreement* claim. In addressing that claim, the Appellate Body stated,

> In our view, an assessment of the USDOC's determinations for the purpose of determining whether the USDOC administers United States laws and regulations on sunset reviews in a uniform, impartial, and reasonable manner in accordance with Article X:3(a) of the GATT 1994 *entails an inquiry much different from that involved in determining whether the SPB instructs the USDOC to treat certain scenarios as conclusive or determinative contrary to Article 11.3 of the Anti-Dumping Agreement*. Therefore, in the absence of any consideration by the Panel of this claim, we are not in a position to rule on it.[96]

For this reason as well, the report in *US – Oil Country Tubular Goods from Mexico* fails to support the EC's characterization of what is required to support a claim under GATT 1994 Article X:3(a).

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[92]US Replies to 2nd Panel Questions, paras. 9-16.

[93]EC Replies to 2nd Panel Questions, para. 96.

[94]EC Replies to 2nd Panel Questions, paras. 95-98.

[95]Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, para. 157 (adopted 19 December 2002) (emphasis added) ("*US – Carbon Steel*").

[96]Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, para. 218 (adopted 28 November 2005) ("*US – Oil Country Tubular Goods from Mexico*").

Question 174

In its reply to Question No. 174, the EC acknowledges that "the effect of administration on traders is a relevant consideration in the interpretation of Article X:3(a) GATT," but then states that "this does not mean that individual instances of administrative error, which can be corrected through administrative and judicial mechanisms provided by a WTO Member's system, can be regarded as constituting a violation of Article X:3(a) GATT."[97] However, a central issue in this dispute is *not* whether "individual instances of administrative error . . . can be regarded as constituting a violation of Article X:3(a) GATT." The United States has not made any such allegation. Rather, with respect to errors, the issue is *who decides* what is error.[98] In the EC, each of 25 independent, geographically limited customs authorities, with different legal traditions, decides for itself what is the correct interpretation of EC customs law and what is error. That is, there is no EC institution or procedure that makes the EC's customs offices take these decisions uniformly across all of its 25 member States. If, in a given case, an affected person believes that one of these 25 authorities has erred, he may appeal to a tribunal which, again, is geographically limited. Only if a Commission or member State representative exercises his discretion to refer a matter to the Customs Code Committee, or if a member State court exercises its discretion to refer a question to the ECJ, might an entity with EC-wide authority say definitively what is correct and what is error. This aspect of the EC system of customs administration – the EC does not administer its customs law uniformly across its customs territory in the first instance – is inconsistent with GATT 1994 Article X:3(a).

Additionally, the EC asserts that effects on traders are relevant to burden of proof and then states that the United States has failed to show effects on traders and therefore failed to discharge its burden of proof.[99] This charge is wrong for at least two reasons. First and foremost, as the EC acknowledges in its reply to Question No. 175, the United States has no obligation to prove damages in order to prevail on its Article X:3(a) claim.[100] Second, the EC's discussion of trade effects mis-reads the Panel report in *Argentina – Hides*. As relevant here, that report noted that consideration of an Article X:3(a) claim requires "an examination of the real effect that a measure *might* have on traders operating in the commercial world."[101] The Panel was referring not necessarily to measurable effects, such as increased customs duties, but to a qualitative impact on the competitive environment. This is evident from the next two sentences in the Panel report. The Panel acknowledged that there is no requirement to show trade damage. But, it said, determining whether there has been of breach of Article X:3(a) "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."[102]

In *Argentina – Hides* itself, it was not evident from the Panel report that the right of domestic industry representatives to be present during the completion of customs formalities prior to the export of raw hides increased costs to exporters or to foreign purchasers of those hides. Nevertheless, this right did alter the competitive environment, inasmuch as domestic industry representatives were able to see exporters' confidential business information. Similarly, the non-uniformity of administration of EC customs laws alters the competitive environment without necessarily affecting traders' liability for customs duties in a given case. For example, a trader may effectively be compelled to modify its shipping patterns to account for the non-uniform

[97]EC Replies to 2nd Panel Questions, para. 100.
[98]*See generally* US Second Written Submission, para. 60.
[99]EC Replies to 2nd Panel Questions, para. 101.
[100]EC Replies to 2nd Panel Questions, para. 103.
[101]Panel Report, *Argentina – Hides*, para. 11.77 (emphasis added).
[102]Panel Report, *Argentina – Hides*, para. 11.77 (emphasis added).

administration. This has been the case, notably, with respect to imports into the EC of LCD monitors.[103]

In fact, the EC's reply to Question No. 174 refers to the case of LCD monitors, offering this as an example of the absence of any effect on traders, in view of the temporary duty suspension regulation. However, as the United States pointed out in its answer to Question No. 137(b), to view the LCD monitors case as a case involving no effects on traders requires an observer to take an exceedingly narrow view of what constitutes effects on traders.[104]

Question 175

The EC's reply to Question No. 175 begins with the observation that "there is no requirement to show 'trade damage' in order to prove a violation of Article X:3(a) GATT,"[105] a point with which the United States agrees.[106] The EC then turns to the question of "whether the complainant has suffered nullification and impairment within the meaning of Article XXIII GATT."[107] The EC then wrongly describes nullification and impairment as being limited to effects on traders' duty liability.[108] In fact, there are other ways in which benefits accruing to the United States under the GATT 1994 may be nullified or impaired as a result of the EC's non-uniform administration of its customs laws. For example, benefits accruing to the United States are nullified or impaired if traders effectively are compelled to alter shipping patterns or incur additional costs as a result of the EC's non-uniform administration.

Further, the EC's reply makes reference to paragraph 54 from the EC's oral statement at the second Panel meeting.[109] There, the EC asserted that if traders "achieve optimal classification of their goods" under the EC's system of non-uniform administration, then there is no nullification or impairment to speak of. However, the EC has provided no reason to believe that traders do, in fact, "achieve optimal classification of their goods" under the EC's system of non-uniform administration. Therefore, the EC has failed to rebut the presumption that its infringement of its obligations under GATT 1994 Article X:3(a) constitute a case of nullification or impairment.[110]

Moreover, the EC's line of reasoning concerning traders achieving "optimal classification of their goods" leads to absurd results. Under a system of non-uniform administration of customs laws, as in the EC, there may be a theoretically optimal way to take advantage of the system. For a trader with time and resources, it may be possible to identify the region that offers the ideal approach to classification and valuation, with the lowest risk of imposition of penalties or other costs. Of course, for small exporters or exporters that ship on an infrequent basis, the costs of identifying how best to take advantage of the non-uniform system may be excessive. In short, just

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[103]*See* US First Written Submission, para. 74 n.70; US Second Oral Statement, para. 52; *see also id.*, para. 21 (divergence in classification of drip irrigation products effectively compelled exporter to modify shipping practices).

[104]US Replies to 2nd Panel Questions, paras. 56-60; *see also* US Second Oral Statement, paras. 52-59. In its reply to Question No. 174 (para. 101) the EC suggests (as it has in prior submissions) that the number of responses that the United States received to its invitation for public comment on the issues in this dispute is a relevant consideration for the Panel. In fact, it is entirely irrelevant, which is why the United States has refrained from answering such statements. The United States simply would remark that there are multiple ways in which traders communicate with US government agencies. Written submissions in response to formal calls for comment are only one such way. Not surprisingly, given the public nature of such comments and the fact that stakeholders must deal with EC customs authorities on a day-to-day basis, some stakeholders prefer to convey their views through other channels.

[105]EC Replies to 2nd Panel Questions, para. 103.

[106]*See* US Replies to 2nd Panel Questions, para. 102.

[107]EC Replies to 2nd Panel Questions, para. 103.

[108]EC Replies to 2nd Panel Questions, para. 104.

[109]EC Replies to 2nd Panel Questions, para. 104 n.87.

[110]*See* DSU, Art. 3.8.

because it may be theoretically possible to identify optimal treatment under a system of non-uniform administration does not mean that there is a lack of nullification or impairment. Nor, of course, does it mean that there is no breach of the GATT 1994 Article X:3(a) obligation of uniform administration.

Question 176

The EC's reply to Question No. 176 focuses on the relevance of GATT 1994 Article XXIV:12 to the EC's obligation under GATT 1994 Article X:3(a). The same issue is addressed in the EC's reply to Question No. 158. Accordingly, the United States refers the Panel to its comments on the EC's reply to that question, above. The only further comment that the United States adds is to note that in its reply to Question No. 176, the EC frames the relevant issue as whether "WTO Members, at the time of conclusion of the Marrakech Agreement, had wished to subject the EC to any special standards."[111] The United States agrees that in concluding the Marrakesh Agreement the WTO Members did not subject the EC to "special standards." The implications of that fact are not only that the EC is subject to the same rights as other WTO Members but also that it is subject to the same obligations as other WTO Members. That is precisely why it would be inappropriate to construe GATT 1994 Article X:3(a) through the lens of the EC's unique constitutional structure.

[111]EC Replies to 2nd Panel Questions, para. 109.

ANNEX B-4

COMMENTS OF THE EUROPEAN COMMUNITIES ON THE UNITED STATES' RESPONSES TO QUESTIONS POSED BY THE PANEL AFTER THE SECOND SUBSTANTIVE MEETING

(14 December 2005)

QUESTIONS POSED TO THE UNITED STATES

In its present submission, the EC provides its comments on the replies of the US to the Questions of the Panel after the second substantive meeting. Given the advanced stage of the proceedings, the EC will, in the present submission, focus on arguments which are made for the first time in the US replies. The fact that the EC does not comment on a particular reply or argument does not imply that the EC agrees with the reply or argument. To the extent that the US reiterates arguments to which the EC has already responded in earlier submissions, the EC refers to its earlier submissions.

Question 124

In its response to the Panel's question, the US repeats its statement, which it already made in earlier submissions, that it is challenging the administration of EC customs law "as a whole".[1] In addition, the US now adds that it would also "welcome" findings on the specific areas of EC customs administration identified in its Panel request, even though it also states that it considers such findings as "not strictly necessary".[2] It then provides a list of provisions in respect of which it claims to have established an absence of uniform administration.[3]

The EC is perplexed by these responses of the United States, which seem designed to maintain, even in this late state of the proceedings, a maximum of ambiguity as to what precisely the United States is challenging.

As regards the US claim that it is challenging the "administration of EC customs law as a whole", the EC has already commented that such a wide interpretation of the US Panel request is not in accordance with the requirements of Article 6.2 DSU, which requires a sufficient identification of the specific measure at issue.[4] It has further elaborated on this point in its additional submission on Part III of the US Second Oral Statement, to which it hereby refers.[5]

As regards the individual areas of customs administration identified in the US Panel request, and notably the third paragraph thereof, the EC remarks that it is not clear what the US means when it states that it would "welcome" such findings. It should be recalled that a Panel's function is not to make findings of violations of its own initiative, but rather to resolve a dispute between the parties. The US should therefore have clearly stated whether it requests such findings or not.

Furthermore, the EC would recall the terms of reference of the Panel include the question of non-uniform administration of EC customs law only in the areas enumerated in paragraph 3 of the US panel request. As the EC has set out in its additional submission regarding Part III of the

[1] US Reply to Panel Question No. 124, para. 2 – 3.
[2] US Reply to Panel Question No. 124, para. 3, 5.
[3] US Reply to Panel Question No. 124, para. 4.
[4] EC Second Written Submission, para. 13-14.
[5] EC Additional Submission, Section II.B.

US Second Oral Statement,[6] this means notably that the claim regarding an alleged absence of uniformity in the administration of Article 221 CCC is not within the Panel's terms of reference. The EC notes that the US reply does not indeed mention Article 221 CCC as one of the provisions with respect to which the US claims to have presented evidence supporting subsidiary findings of violation.[7]

Finally, it is appropriate to recall that the Panel's terms of reference include, in accordance with Article 7 DSU, only measures which were in existence at the time the matter was referred to it by the DSB. This means that the Panel can not make findings on measures which no longer existed at the time it was established.[8] Similarly, the Panel can also not address measures which were not yet in existence at that time it was established.[9]

This reminder is necessary since the United States has, throughout its submissions, repeatedly referred to alleged examples of non-uniform administration which it itself acknowledges no longer exist. Examples for this are the US references to the classification of network cards or drip irrigation products.[10] Another example are the persistent references by the US to the issues raised in the report of the Court of Auditors on customs valuation.[11] On the other hand, the US has also referred to certain events, notably regarding the classification of LCD monitors, which are subsequent to the establishment of the Panel, and for that reason also are outside the Panel's terms of reference.[12]

In conclusion, with respect to the US claim under Article X:3 (a) GATT, the EC understands the Panel's terms of reference to include the administration of EC customs law, at the time of the establishment of the Panel, in the specific areas of EC customs law enumerated in paragraph 3 of the US Panel request.

Question 126

The EC contests the US' statement, made in reply to this question, that the EC does not have "a procedure or institution that ensures that divergences of administration among the 25 different customs authorities do not occur or that promptly reconciles them as a matter of course when they occur".[13] The EC has already explained the numerous mechanisms of EC law which ensure a uniform administration of EC customs law. For the sake of avoiding repetition, the EC will refer to its earlier submissions.[14]

What is noteworthy about the US reply is, however, the US statement that this alleged absence of procedures or institutions applies "with respect to *all* areas of customs administration for the same reason", including to the administration classification rules, valuation rules, and customs procedures.[15] In other words, the United States criticisms of particular aspects of the EC's

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[6] EC Additional Submission, Section II.B.

[7] US Reply to Panel Question No. 124, para. 4.

[8] Cf. Panel Report, *Japan – Film*, para. 10.58; Panel Report, *US – Gasoline*, para. 6.19.

[9] Panel Report, *US – Upland Cotton*, para. 7.158 – 7.160.

[10] Cf. US Second Oral Statement, para. 21.

[11] US Second Oral Statement, para. 21, where the US refers to the issue of warranties. This is also reflected in the references to various valuation provisions in paragraph 4 to the US Reply, all of which seem to relate to issues which were raised in the report of the Court of Auditors, but which have subsequently been followed up and, to the extent necessary, resolved (cf. already EC Second Written Submission, para. 384 et seq.).

[12] US Second Oral Statement, para. 55 – 57 and Exhibits US-76 to US-78.

[13] US Reply to Panel Question No. 126, para. 12.

[14] Cf. in particular EC First Written Submission, para. III.

[15] US Reply to Panel Question No. 126, para. 14 (emphasis in the original). It is noted that in its judgment in *Intermodal Transports*, to which the US has referred in its Second Oral Statement, the ECJ

system in specific areas, such as for instance the EBTI system, do not seem to be essential to the US claims. Accordingly, despite the US protestations to the contrary, what the US appears to be seeking is nothing less than a fundamental overhaul of the EC's system of customs administration, and the only feasible tool for this purpose the US has suggested so far appears to be the creation of an EC customs agency.

Question 127

In its Reply to the Panel's Question, the US first gives a list of the EC procedures and institutions which, in the EC's submission, ensure uniform administration of EC customs law, but then proceeds to complain that "*not one* of the foregoing procedures or institutions provides for prompt reconciliation of divergences as a matter of right".[16]

In response, the EC would first recall that whether the EC system ensures uniform administration must be evaluated on the basis of the EC's system as a whole, and not by looking at individual measures in isolation.[17] The question is therefore not whether one or the other instrument by itself ensures uniform administration, but whether the available instruments together ensure uniform administration.

Second, the US seems to complain that, possibly with the exception of judicial review before member States courts, none of the instruments provide for a reconciliation "as of right". In this respect, the EC would like to remark that Article X:3 (a) GATT merely requires WTO Members to ensure uniform administration, but does not prescribe as to how they must achieve this goal. Accordingly, no WTO Member is obliged to grant traders any particular "rights" with respect to the provision of uniform administration. Therefore, the question to which extent a WTO Member ensures uniform administration through measures which can be activated by traders "as of right" or through measures which are at the discretion of the authorities is a question regarding the design of each Member's system which is not prejudged by Article X:3 (a) GATT.

Question 128

The EC finds it noteworthy that in response to the Panel's question, the US states that "because of their specificity and the diverse range of issues covered, it would be impossible to identify all measures" which supplement the measures referred to in the Panel's question.[18] This is in stark contrast to the US statement that it is challenging the "administration of EC customs law as a whole", which is an even wider body of law. The US response therefore supports the EC's view that the reference to the "administration of EC customs law as a whole" is not a sufficient description of the specific measure at issue.[19]

Question 129

According to the United States' reply, besides penalty provisions, "binding tariff administration, member States audit provisions, member State guidelines on applying the economic test for deciding whether to allow processing under customs control, and guidelines issued by the EC institutions" are "administrative provisions". In contrast, the rules of the Tariff regulation, the CCC, and the Implementing Regulation are supposed not to be "administrative", because they contain "substantive customs rules". [20]

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equally noted that various mechanisms exist to ensure a uniform classification practice in the EC (Exhibit US-71, para. 41-44.)

[16] US Reply to Panel Question No. 127, para. 19 (emphasis original).
[17] EC Second Oral Statement, para. 45; EC First Oral Statement, para. 31.
[18] US Reply to Panel Question No. 128, para. 22.
[19] Supra, Comments on US Reply to the Panel's Question No. 124.
[20] US Reply to Panel Question No. 129, para. 23.

The EC fails to see what is the basis for these distinctions, which are entirely artificial. The relevant distinction is not between "administrative provisions" and "substantive provisions", but between the laws, regulations, judicial decisions and administrative rulings referred to in Article X:1 GATT, and their administration referred to in Article X:3 (a) GATT.[21] Despite the contortions to which the US has gone to show the opposite,[22] a law is not "administration" of another law.

It is noted that the classification into "administrative" and "substantive" matters proposed by the US is entirely haphazard. On the one hand, it is not clear what BTI, which clearly is administration since it relates only to one specific holder, has to do with the guidelines to which the US refers subsequently.[23] On the other hand, it is not true that the Tariff regulation, the CCC and the Implementing Regulation contain only rules which are "substantive in nature". Rather, many of the provisions contained in these acts are of procedural character, and thus, according to the United States, would have to be regarded as "administration" rather than as measures to be administered. The US interpretation thus leads to manifestly absurd results.

Question 130

As the EC has already explained, the term "administrative" was used by the Panel in *Argentina – Hides* in a different context, and is of no direct relevance to the interpretation of Article X:3 (a) GATT in the present case.[24]

In its reply, the US has commented on the ordinary meaning of the term "administrative", which it defines as "executive", i.e. as something that has "the function of putting something into effect".[25] However, as the EC has already said, a law of general application cannot be said to be "putting into effect" another law of general application. Moreover, all provisions of "administrative law", which in many WTO member States is the term used for characterising the laws governing the conduct of public authorities, would otherwise have to be regarded as "administration". Accordingly, quite apart from the fact that the distinction between "administrative" and "substantive" measures has no basis in Article X GATT, the US interpretation does not respect the ordinary meaning of the term "administrative", and would lead to patently absurd results.

Question 132

In its reply to the Panel's question, the US states the following: "Under a system that provides for uniform administration, any differences that may emerge in administration from one region to another should be resolved promptly and as a matter of right. If that happens, there will be no inconsistencies to be tolerated".[26]

The EC is not sure it understands the relationship between the first and the second sentence of the US response. On the one hand, the US seems to acknowledge that "differences" may emerge. On the other hand, the US states that "there will be no inconsistencies to be tolerated". It is not clear to the EC whether there is, for the US, a difference between "differences" and "inconsistencies". If there is, the EC wonders what it is. If there is not, then the second sentence would appear to contradict the first.

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[21] EC Second Written Submission, para 18 et seq.

[22] Cf. for instance the highly artificial reference to a "provision doing the administering" in the US Reply to the Panel's Question No. 129, para. 24.

[23] As for "member States' audit provisions", the US has not specified what provisions it is referring to. To the extent, however, that such provisions exist at member States level, they clearly would have to be regarded as laws and not as administration.

[24] EC Second Oral Statement, para. 30, 74.

[25] US Reply to Panel Question No. 130, para. 26.

[26] US Reply to Panel Question No. 132, para. 31.

The only way to reconcile the two sentences would then be to adopt a meaning of "prompt" which is equivalent to "instantaneous". However, the EC considers that such a definition would not be reasonable even in the most centralized of systems of customs administration. Indeed, in any administration, administrative action is rarely ever "instantaneous". Accordingly, it must be sufficient for Article X:3 (a) GATT if differences are reconciled within a reasonable time-frame, given also the circumstances of the specific case in issue. The EC notes that this is in accordance with the US' own submissions on Article X:3 (b) GATT, where the US has argued that what is "prompt" is a "function, for example, of the complexity of the case".[27]

The United States itself illustrates this point by conceding that even in a centralized system, there may be "momentary inconsistencies between regions", for instance due to lapses of communication. As one example, the US mentions that officials in one port of the Member's territory may not be immediately aware of a classification ruling issued by the customs authority at a different port. [28] However, the US does not explain why it can be assumed that in a centralized system of customs administration, such inconsistencies would necessarily remain "momentary", and in particular how and why they would be instantaneously detected when they occur.

The US also once again requires that the reconciliation of differences should take place as "a matter of right".[29] In this regard, the EC would repeat that Article X:3 (a) GATT requires only that administration be uniform, but not that the reconciliation of divergences necessarily take place as "a matter of right".[30]

Finally, the US also criticizes that the reconciliation in the EC takes place in what it calls a "haphazard" manner and that there is no "clearly identified path" for resolving the differences.[31] The US is of course right that in the EC, there are various tools available all of which contribute to uniform administration, and therefore there may be various paths through which a particular case can be resolved. This is arguably a difference from the US system, where, due to the existence of US customs as a centralized agency, there may be a smaller number of tools and procedural avenues. However, this structural difference between the EC and the US system has nothing to do with the EC's compliance with Article X:3 (a) GATT, nor does it make the EC's system "haphazard". Article X:3 (a) GATT does not require that all differences always be resolved through "one single path". Rather, it leaves the WTO Members the choice as to what tools they may wish to employ in order to ensure uniform administration, and these tools may differ depending on the circumstances of the particular case.

Question 133

The EC can refer to its comments on the US replies to the Panel's Question Nos. 129 and 130.

Question 134

The EC takes note that the United States is not challenging the way in which the customs code committee operates as such.[32] Nonetheless, the US repeats its criticism that traders cannot bring their cases before the Customs Code Committee "as a matter of right" and have them resolved there.[33] In this respect, the EC can only repeat that first of all, Article X:3 (a) GATT does not require that traders are given any specific rights, whether before the Customs Code Committee

[27] US Reply to Panel Question No. 40, para. 152.
[28] US Reply to Panel Question No. 132, para. 32.
[29] US Reply to Panel Question No. 132, para. 31.
[30] Above, third paragraph of the Comments on US Reply to Panel Question No. 127.
[31] US Reply to Panel Question No. 132, para. 34.
[32] US Reply to Panel Question No. 134, para. 42.
[33] US Reply to Panel Question No. 134, para. 44.

nor elsewhere.[34] Accordingly, whether EC legislation grants traders or industry a right to be heard prior to the adoption of a measure such as a classification regulation or not is a question of the internal design of the EC's system of no relevance for Article X:3 (a) GATT.[35]

The EC also notes that the US claims, with reference to Exhibit EC-103, that the "section of the Customs Code Committee dealing with BTI" meets only two to three times a year.[36] This statement is based on a misunderstanding. The US is referring to the meetings of the "BTI" subsection of the Tariff and Statistical Nomenclature section of the Customs Code Committee. However, this section deals only with the technical and general aspects regarding the operation of the BTI system. Cases of divergent BTI are dealt with in the three sectoral subsections of the Tariff and Statistical Nomenclature section (Agriculture and chemicals, mechanical appliances, textiles). As can be seen from Exhibit EC-103, in 2002 – 2004, these three subsections have held a total of 13-14 meetings per year.

Question 135

In its reply to the Panel's question, the US states that the "treatment" that exporters and importers expect to be of the same kind does not only relate to the duty assessed on a particular goods, but includes also penalties they may face in different places.[37] On the basis of this reply, it appears that the US is understanding Article X:3 (a) GATT to be a general provision guaranteeing equal treatment to traders in all aspects relating to their operations.

The EC would recall that that Article X:3 (a) GATT is not a general rule stipulating the equal treatment of traders, but a more limited provision requiring the uniform administration of a specified set of laws. The US interpretation overlooks that Article X:3 (a) GATT is therefore limited in two ways: first, because it applies only the laws which are enumerated in Article X:1 GATT, and which, for instance, do not include penalty provisions; and second, because Article X:3 (a) GATT concerns only the administration of law, but not substantive differences which may exist between laws applicable in different parts of the territory of a WTO Member.

Question 136

In its response to the Panel's Question, the United States responds that other persons than those to whom the ruling letter is addressed "have the right to cite an existing ruling as authority for the principle enunciated therein", and therefore "can enjoy the benefits of the ruling".[38] It appears that this response does not correctly describe the legal effect of advance rulings in the US legal order.

First of all, it is important to note that advance rulings of US customs are not legally binding. As the US Supreme Court has held in *US vs. Mead Corporation*, advance rulings are not entitled to *Chevron deference*, i.e. are not legally binding on courts in proceedings before them.[39] Rather, the Supreme Court held that advance rulings are merely entitled to "*Skidmore deference*", i.e. are entitled to deference "proportional to their 'power to persuade'".[40] In other words, the US Supreme Court accords only a very limited degree of deference to advance rulings of US Customs.

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[34] Cf. above, third paragraph of the comment on US Reply to Panel Question No. 127.

[35] Cf. EC First Written Submission, para. 272. In addition, as the EC has already noted, the Customs Code Committee does occasionally hear traders and industry representatives in accordance with Article 9 of its Rules of Procedure (EC First Written Submission, para. 87).

[36] US Reply to Panel Question No. 134, footnote 32.

[37] US Reply to Panel Question No. 135, para. 49.

[38] US Reply to Panel Question No. 136, para. 52.

[39] EC Second Written Submission, para. 103, and Exhibit EC-130.

[40] Exhibit EC-130.

Moreover, it must be noted that in accordance with 19 CFR 177 (9) (c), no other person than the one to whom the ruling letter is addressed should rely on a ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letters. This provision has been relied on repeatedly by US courts and US authorities in order to prevent traders from relying on ruling letters that were not addressed to them.

For example, *Fujitsu Compound Semiconductor, Inc. v. United States*[41] concerned the import of laser diode modules. In that case, Fujitsu imported the laser diode modules that were classified under tariff subheading 8541.40.95 dutiable at 4.2 per cent *ad valorem.* The laser diodes were liquidated and Fujitsu did not protest the rulings. Following the liquidations, Toshiba imported the same product. Later, two Headquarter customs rulings determined the correct classification for the laser diode modules to be under tariff 8541.40.20 at a dutiable rate of 2 per cent *ad valorem*. As a result of the contrary rulings, Fujitsu sought to *inter alia* reverse the final liquidation decision. In coming to its conclusion that the Headquarter classification rulings could not be applied to the uncontested liquidation, the Court noted: [42]

> [T]he mere existence of a HQ letter does not mean it is automatically applicable to entries other than those covered by the letter. The letter ruling in this case was issued to Toshiba on a like-product, not to Fujitsu. Customs regulations provide that other than the party to whom the ruling is addressed, "no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter".

The same point is also illustrated by US Customs Ruling HQ 954622.[43] There, a trader sought to retroactively apply a Headquarters Ruling Letter to goods it imported based on the fact that a customs ruling it previously obtained classified like goods differently. Although the ruling expressly noted that 19 CFR § 177 (9) (c) generally does not apply to any transaction other than the one described in the letter, in that case the Headquarters ruling could be retroactively applied to a third party transaction based on the specific wording of the ruling relied upon. In particular, it stated that "any previously issued rulings which clearly conflict with the analysis and result herein set forth are likewise revoked." Therefore, while a ruling can be written to have broader effect, 19 CFR § 177 (9) (c) normally precludes binding application of the ruling to third parties and transactions not addressed therein.

Accordingly, the United States overstates greatly the difference between advance rulings and BTI in the EC. Moreover, the US ignores that unlike advance rulings in the US system, BTI is not the only tool available for ensuring a uniform administration of classification rules. For instance, as the EC has already explained, the EC can adopt classification regulations or EC explanatory notes.[44] Classification regulations are legally binding throughout the Community in accordance with Article 249 EC.[45] Moreover, while they must respect the CN, any question regarding their validity would have to be referred to the European Court of Justice for a preliminary ruling, which will examine whether the Commission has committed a "manifest error of assessment".[46] As long as the Court of Justice has not declared a classification regulation to be invalid, it must be applied by all customs authorities, and can be invoked by individuals.

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[41] Slip Op. 2003-6 (Ct. Int'l Trade 2003) (Exhibit EC-161).

[42] Exhibit EC-161, at 7-8. Although the language quoted refers to "like-product", an earlier part of the opinion states that the products were actually identical (p. 2)

[43] Exhibit EC-162.

[44] EC First Written Submission, para. 92 et seq.

[45] EC First Written Submission, para. 93.

[46] EC First Written Submission, para. 95.

Accordingly, it seems fair to say that the legal authority of EC classification regulations is considerably stronger than that of rulings of US customs.

Overall, however, the question of the legal effect of BTI or advance rulings is irrelevant under Article X:3 (a) GATT. It must be recalled that Article X:3 (a) GATT does not contain any obligation whatsoever to have a system of advance rulings. Even less does Article X:3 (a) GATT prescribe precisely how such a system of advance rulings should be designed in terms of the effects that such advance rulings will have. If it were desired to create such specific obligations, this should be done through the Doha Negotiations on Trade Facilitation, not through the process of dispute settlement.[47] Accordingly, whereas the US was perfectly entitled to opt for a system of advance rulings designed as it is, the EC is equally entitled to design its BTI system differently.

Question 137 (a)

First of all, the EC notes that the US reply to the Panel's Question provides no answer to the remarks made by the EC in paragraphs 108 to 109 of its SWS, namely that the letter to the Ornata GmbH in Exhibit US-50 seemed to have no relation to the administrative protest decided by the Main Customs Office Bremen in its letter in Exhibit US-23.

In contrast, the EC had not contested that both letters may concern importations of the same type of product. However, since there is no substantive inconsistency between the two decisions of the German authorities, both of which excluded classification of the products because of the absence of a layer of textile flock visible to the naked eye,[48] it is still not clear to the EC what point the US tried to make by introducing the second case. As regards the BTI issued by the Dutch, Irish and UK customs authorities, the EC has already explained that the goods examined by the German authorities did not correspond to the ones described in the BTI, which uniformly described the products as visibly flocked.[49]

In this regard, the US reply also refers again to the affidavit by Mark J. Berman, President of Rockland Industries, which it presented with its second oral statement as Exhibit US-79. However, as the EC has already remarked, [50] this affidavit has no evidentiary value whatsoever.

First, the affidavit (point 5) states that "that the product addressed in the ZPLA letter was produced by Rockland and sold to Ornata GmbH. However, the EC never contested this point. In contrast, the affidavit provides no answer as to whether the products for which the BTI were issued by the Dutch, Irish and UK authorities also were products of Rockland.

Second, the question for the correct classification of the product is not whether the product "incorporates textile flocking as part of the coating process", but whether there is a layer of textile flocking visible to the naked eye. This is hardly a question which can be answered through the presentation of an affidavit sworn by the President of the producer of the good. This is also illustrated by the fact that US Customs itself had difficulty classifying the good, and had to have recourse to repeated laboratory examinations.[51]

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[47] It is recalled that advance rulings are a subject matter of the Doha Negotiations on Trade Facilitation, and that the US has made a number of proposals in this regard (EC First Written Submission, para. 227).

[48] In its Reply to Panel Question No. 137 (a), para. 55, the US claims that the Main Customs Office Bremen excluded Rockland's product "on the ground that the product had plastic in its coating, regardless of whether textile flocking or other elements were mixed into that coating". This is yet another new interpretation of the decision by the US, which however has no basis in the text of the decision (cf. EC First Written Submission, para. 333 et seq.).

[49] EC First Written Submission, para. 335 et seq.

[50] EC Closing Statement, para. 16.

[51] Cf. EC First Written Submission, para. 345.

Third, Mr Berman cannot be regarded as a credible witness for the purposes of the present case. The US has contested any doubts as to the credibility of Mr Berman by arguing that Mr Berman has no interest in the outcome of this WTO dispute.[52] While it may be true that Mr Berman has no direct interest in the outcome of this WTO dispute, it is equally true that Mr Berman has a clear interest in a favourable classification of BDL. It is therefore hardly conceivable that Mr Berman would swear an affidavit which would have negative implications for the tariff classification of Rockland's products.

Accordingly, the affidavit produced by the United States has no evidentiary value whatsoever. The United States has failed to show that there is any lack of uniformity regarding the classification of BDL in the EC.

Question 137 (b)

As regards Regulation 493/2005, which suspends the duty rates on certain types of LCD monitors, the US maintains that this regulation is not satisfactory because it is merely a temporary solution which does not resolve the underlying classification issue.[53] In response to the EC explanations that the EC will, at the latest before the expiration of Regulation 493/2005, take the necessary measures to ensure the continuation of uniform administration, the US simply states that it is "aware of no provision that compels this outcome". Moreover, the US argues that "traders organize their business affairs with a long-term view", and may therefore be making their shipping decisions already in anticipation of the situation which might exist after the expiration of Regulation 493/2005.

In the view of the EC, these criticisms are unfounded. A WTO complaint cannot be based on speculation about future actions or omission of a WTO Member. It is therefore entirely irrelevant whether any provision "compels" the EC to take the necessary measures after the expiration of Regulation 493/2005. What matters is whether the EC will actually do so, and only if it fails to ensure uniform administration could the US possibly formulate a claim, but not in anticipation of a possible failure to do so.

The reference to the long-term planning on the part of traders is equally irrelevant for the purposes of Article X:3 (a) GATT. The EC of course appreciates that traders have an interest in a stable trading environment. However, Article X:3 (a) GATT is a provision which requires uniform administration. It is not a provision which prohibits legislative changes, or which protects expectations of traders as regards the continuation of certain measures. Accordingly, the question as to what measures the EC will adopt after the expiration of Regulation 493/2005 in order to ensure uniform administration is not prejudged by Article X:3 (a) GATT.

Subsequently, the US turns to the issue of monitors not covered above the size threshold of Regulation 493/2005, and in this context refers to its Second Oral Statement and to Exhibits US-75 to US-78.[54]

In this respect, the EC would note that certain of the measures referred to by the US date from July 2005, and are thus outside the Panel's terms of reference.[55] Moreover, as the EC has said previously, the classification of LCD monitors is a recent and ongoing issue which is kept under close review by the EC institutions.[56] On the basis of ongoing consultations with the customs authorities of the member States as well as with concerned industry, the services of the

[52] US Reply to Panel Question No. 137 (a), footnote 39.
[53] US Reply to Panel Question No. 137 (b), para. 56.
[54] US Reply to Panel Question No. 137 (b), paras. 56, 58-60.
[55] Exhibit US-77 and US-78. Cf. already above, seventh para. of the Comments on US Reply to Panel Question No. 124.
[56] EC First Written Submission, para. 361; EC Closing Statement, para. 15.

European Commission have prepared a draft classification regulation.[57] This measure will be submitted for the opinion of the Customs Code Committee at its meeting of December 16, 2005.[58]

The US now also submits a very recent letter of 6 December 2005 from the European industry association (EICTA) to the European Commission in which that association is protesting envisaged adoption of a classification regulation for the monitors concerned, expressing disagreement with the envisaged classification.[59] The EC fails to see how this letter supports the US submission. In fact, in its letter, EICTA specifically calls on the Commission to **postpone** the discussion of the classification regulation. This may be understandable from the point of view of EICTA, which is in disagreement with the Commission on the question of the substantive classification. What is not understandable is why the United States believes that this letter from the relevant industry association, which calls for the postponement of a measure which will contribute to uniform administration, supports its own submission that the EC is not doing to ensure uniform administration.

With reference to EICTA's letter, the US has also criticized that the Commission has not consulted with industry over the draft regulation.[60] In this respect, the EC would remark that whether, how and when a WTO Member consults with industry prior to the adoption of a regulatory measure has nothing to do with the requirement of uniform administration under Article X:3 (a) GATT. In addition, it is not correct to state that the Commission has not consulted with industry. The Commission services have variously consulted with industry, and EICTA has also had the occasion to present its views regarding the classification of LCD Monitors with DVI before the Customs Code Committee.[61] For the information of the Panel, the EC also attaches the response of the European Commission to the letter of EICTA (Exhibit EC-165).

Question 137 (c)

While in paragraph 61 of its replies, the US repeats selective quotations previously made relating to control standards and working practices, and the treatment of traders with operators in several member States, it is not evident that these references are appropriate in responding to the Panel's question; in any event the EC has already addressed in its First Written Submission the issue of the treatment of traders. The EC would also like to mention again that it is in the field of audit that most practical issues relating to common control standards and working practices arise, and the EC developments in relation to audit have already been described.

With regard to the third assertion by the US in paragraph 61, the EC would like to emphasize that although EC law does not at present provide for Community-wide valuation decisions, this current situation does not in itself cause a lack of uniform administration, nor could it by itself demonstrate a lack of uniform administration in the context of GATT Article X;3(a).

Question 137 (d)

In its reply to the Panel's question, the US refers to a "requirement of prior approval" applied "in practice.[62] In this regard, it should be pointed out that the reference to such a requirement comes from an ambiguously worded passage in the Report of the Court of Auditors from 2000.[63] The EC would like to inform the Panel that on the basis of a survey of the practices

[57] Exhibit EC-163.
[58] Exhibit EC-164.
[59] US Reply to Panel Question No. 137 (b), para. 59, and Exhibit US-81.
[60] US Reply to Panel Question No. 137 (b), para. 59.
[61] Cf. Exhibit EC-84, in which EICTA acknowledges the possibility to present its views at the Nomenclature Committee meeting of 8 November 2004.
[62] US Reply to Panel Question No. 137 (d), para. 62.
[63] Cf. EC First Written Submission, para. 395.

of the customs authorities of all member States, it can confirm that no member State applies, neither in law nor in practice, a requirement of prior approval with respect to the conditions under which a sale other than the last sale may be used as the basis for establishing the transaction value for customs valuation purposes. The United States has not provided any evidence to the contrary. Accordingly, the United States claim is unfounded.

Question 137 (e)

The US does not explain the meaning of the terms "outer parameters" on which it bases its short answer to this question. However, the EC would like to point out that the US First Written Submission has not proven that the EC customs authorities administer the local clearance procedure in a non-uniform manner. The US First Written Submission only shows that the US has relied upon confusing information from unknown sources. Moreover, all along the proceedings, the US has neither rebutted the arguments advanced by the EC in its First Written Submission[64] nor attached any evidence to that purpose, though these deficiencies were already highlighted by the EC in its First Oral Statement.[65] In its answer to this Panel's Question, the US fails again to react.

Question 138

In respect of this question, the EC would clarify that it has never contented that "audit procedures" are part of valuation rules. Audit procedures may in principle serve to verify the correct application of numerous customs rules, including, but not only, valuation rules. The EC has responded to the US arguments on audits in the context of the discussion of customs valuation because this is the context in which the question was raised by the US, namely with reference to the Report of the Court of Auditors on customs valuation.[66] Similarly, as the Panel has remarked, in its Second Oral Statement, the US once again dealt with the issue of audits in the section dealing with valuation rules.[67]

However, the EC does contest that rules regarding auditing for customs purposes fall under Article X:1 GATT. Article X:1 GATT covers only those laws and regulations which pertain to the matters referred to in this provision. Moreover, the US has not in any way demonstrated that there is any lack of uniformity as regards auditing for customs purposes in the EC. The US has repeatedly referred to "different audit provisions" in the member States, but has never made clear what it understands by these provisions, nor in which they would differ. The US has also not provided any proof that the conduct of customs audits in practice is non-uniform in the EC. [68]

Question 139

As a matter of clarification, the EC would like to underline that the French and UK documents referred to in the US arguments do not constitute "law". Their nature is simply that of guidance, which must be always interpreted in line with Community legislation, as constituted in this case by the CCC and the Implementing Regulation.

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[64] EC First Written Submission, paras. 419 to 427.
[65] EC First Oral Statement, para. 49.
[66] Cf. EC First Written Submission, footnote 197.
[67] US Second Oral Statement, para. 67.
[68] As regards the EC Customs Audit Guide, the US has criticised that this guide was only "recently finalised" and is "merely intended as an aid to member States" (US Second Oral Statement, para. 67). However, the EC does not see why the fact that the Guide is recent and non-binding should mean that it is irrelevant. Moreover, as the EC has explained in Reply to Panel Question No. 167, there are also other best practice guidelines concerning relevant questions of risk analysis and risk management (EC Reply to Panel Question No. 167, para. 62).

The United States challenges what it considers to be a divergence between the French and the UK guidance concerning processing under customs control. The EC has already explained in its submissions that there is no divergence between both documents and gives some further arguments in its comments to Question No. 140. Moreover, as the EC has equally explained,[69] it would be for the US to prove that there is any divergent application of the conditions for processing under customs control. The US has brought no such proof.

Question 140

Contrary to what the US claims,[70] the EC finds no internal ambiguity within EC law on the economic conditions. Article 133 CCC sets up the economic conditions to grant an authorization for processing under customs control by requiring, in one sentence, the fulfilment of "the necessary conditions for the procedure to help create or maintain a processing activity in the Community without adversely affecting the essential interests of Community producers of similar goods (economic conditions)". Article 502 (3) of the Implementing Regulation repeats those economic conditions by using the first part of the sentence. The fact, as alleged by the US, that the Implementing Regulation generally gives a more detailed elaboration of the provisions of the CCC is irrelevant, because what counts is the way in which the specific regulatory framework concerning processing under customs control is distributed between both pieces of legislation. Thus, the full list of conditions to grant an authorization is laid down in the CCC, not in the Implementing Regulation, and it is clear that the former text prevails because of its higher hierarchal status.

Finally, the US is wrong in claiming that the French guidance only requires the "creating or maintaining a processing activity in the Community".[71] The EC refers to its Second Written Submission for that purpose.[72] Further to those arguments, the EC would like to add that the second subparagraph in paragraph 78 and paragraph 79 of the French guidance underline the obligation upon the requesting party to provide information on the lack of adverse effects on the essential interests of Community producers of similar goods.[73]

Question 141

Without prejudice to the analytical framework used by the US for examining the EC's obligation under Article X:3 (b) GATT, the EC notes that the US makes no allegations regarding the scope of review required under that provision.

The US confirms that its allegations regarding Article X:3 (b) relate to the requirement that tribunals or procedures must govern the practice of the agencies entrusted with administrative enforcement.[74] The EC's supplementary arguments on this issue will be developed in its comments related to Question No. 142.

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[69] EC Second Written Submission, para. 181 et seq.

[70] US Reply to Panel Question 140, paras. 74 to 76.

[71] US Reply to Panel Question 140, para. 77.

[72] EC Second Written Submission, paras. 178 to 180.

[73] Paragraph 78, second subparagraph, provides that "[p]ar conséquent [a reference to the essential interests requirement as set up in the first subparagraph] le demandeur doit, **dans tous les cas**, préciser dans sa demande la raison économique pour laquelle il a recours à l'un de ces régimes [processing under customs control included] ".

Paragraph 79 provides that "[d]ans la rubrique n° 10 de la demande, le demandeur doit mentionner la raison économique du recours au régime sollicité". It is important to underline that the economic reason includes the essential interests requirement, as it derives from the second subparagraph in paragraph 78 of the French guidance.

[74] US Reply to Panel Question No. 141, para. 81.

Question 142 (a) and (b)

The US claim that review at the member State level does not comply with the requirement in Article X:3 (b) GATT that decisions taken by first instance courts shall govern the practice of the agencies entrusted is based on a very restrictive literal and contextual interpretation of that provision.

In the EC's view the US position is based on a radical interpretation of Article X:3 (b) GATT, with the only objective of attacking the EC judicial system. This conduct is in direct contradiction with the obligation, under Article 31 (1) of the Vienna Convention, to interpret treaties in good faith. Furthermore, the Panel Report on *US-Gambling* noted that "the principle of good faith in the process of interpretation underlies the concept that interpretation should not lead to a result which is manifest absurd or unreasonable".[75] The EC has already explained that the US interpretation does not correspond to the legal traditions of most, if not all, of the WTO Members.[76] Therefore, the US interpretation of the requirement "govern the practice" in Article X:3 (b) GATT should be rejected as unreasonable.

The EC insists, first, that in developing the literal interpretation of the term "govern", the US makes a selection that is not acceptable.[77] That term covers not only binding instruments or relations (control, regulate, determine, constitute a law, rule or standard), but also some others that are not binding, like "influence" or "serve to decide".[78] The EC considers that these two meanings are more in accordance with the position that first instance courts play in most legal orders of the WTO Members, and, in any case, in those Members not having centralized courts for first instance review of administrative decisions in customs matters, including the EC.[79] The US has not rebutted these arguments.

Second, the contextual interpretation of Article X:3 (b) GATT applied by the US (i.e.: its pretended link with subparagraph (a) in Article X:3)[80] is also wrong. The EC has already given several reasons backing that assertion.[81] Moreover, the relevant context for the interpretation of Article X:3 (a) is not the following subparagraph (b), but paragraph 1 in Article X, to which Article X:3 (a) makes a specific reference. Paragraph 1 includes "judicial decisions of general application" among the instruments to be administered uniformly in accordance to paragraph 3 (a). This evidences that Article X GATT covers two types of judicial decisions: those of general application, whose uniform administration is required under paragraph 3 (a), and those adopted by first instance review courts, where uniform administration through all the WTO Member is not required. This contextual interpretation explains why there is no link between subparagraphs (a) and (b) in Article X:3 GATT. Moreover, as the EC has underlined in the previous argument, the

[75] Panel Report, *US – Gambling*, para. 6.49.

[76] EC Second Oral Statement, para 98, and EC Closing Statement, para. 30.

[77] EC Second Oral Statement, paras. 94 and 95.

[78] The US has not attached the pages of *The New Shorter Oxford Dictionary* to which it refers in its Second Written Submission, para. 104. For ease of reference, the EC provides the relevant pages (Exhibit EC-166).

[79] See some examples in EC Second Oral Statement, para. 96.

[80] The link made by the US between subparagraphs (a) and (b) in Article X:3 GATT is much more astonishing if we consider that in *Canada – Wheat*, Appellate Body Report, paras. 79 et seq, the US sustained the view that subparagraph (a) and subparagraph (b) of Article XVII:1 GATT contained separate, independent obligations. The Appellate Body, and before the Panel, rejected this interpretation on the basis of the text and the context of these provisions, mainly because of the specific reference that the latter makes to the former. In the current case, the situation is just the opposite, because, as the EC has already explained in its Second Written Submission, para. 223, Article X:3 (b) GATT does not make any reference to subparagraph (a), unlike subparagraph (c), which contains an explicit link to subparagraph (b).

[81] EC First Written Submission, para. 461, EC First Oral Statement, paras. 60 and 69, EC Reply to Panel Question No 87, para. 172, EC Second Oral Statement, para. 100, and EC Second Written Submission, paras. 222 et seq.

limited effect thus acknowledged to decisions given by first instance courts is more in accordance with their position in most of the legal orders of the WTO Members.

The arguments developed by the US in relation to the notion of "decision" show also its unilateral interpretation of other legal systems. Contrary to what the US claims, in most of the WTO Members a review court is not entitled to decide under what heading a good should be classified. Due to historic reasons, the powers of the courts are limited to the annulment of administrative decisions.[82] This clearly limits the possibility to enforce judicial decisions on those agencies that are outside the geographical scope, which could not meaningfully apply those decisions as binding. The use of the plural form all through Article X:3 (b) GATT is precisely a recognition of this equilibrium between the executive and judicial branches of government.

Question 142 (c)

The United States does not take a position in this dispute as to whether review is "prompt" in the case of first instance review by member State courts where there is no reference to the ECJ for a preliminary ruling. Though the US underlines that "this is not to say that the United States concedes that such review is prompt",[83] the fact is that this *caveat* is irrelevant for the purposes of this dispute. In the absence of a US claim concerning these reviews, the Panel should not make a determination on the matter.

The claim is, therefore, limited to first instance reviews by EC member States courts where there is reference to the ECJ. It should be recalled that, on questions of interpretation, first instance member States courts are not required to refer to the ECJ.

The US considers that national reviews in such cases are not prompt because "just to get a preliminary question put before the ECJ a trader may have to go through an administrative appeals process […], followed by multiple layers of court review, which itself may take years" and "[i]f the question should happen to get referred to the ECJ, it will take 19 to 20 months on average for the question to be decided".[84]

The EC cannot agree with these two arguments.

First, the EC considers that the time it takes to go through non-independent administrative appeals cannot be taken into account for the purpose of assessing "promptness" in the review under Article X:3 (b) GATT. The reason is that this kind of administrative appeal (those decided by bodies that are not independent of the agencies entrusted with administrative enforcement) are covered not by Article X:3 (b) GATT but by Article X:3 (c), which allows the WTO Members to keep them, if they in fact provide for an objective and impartial review of administrative action.

Second, with respect to the time that preliminary references to the ECJ take, the US claims that it "would fail to satisfy the requirement of promptness if the EC were contending that review by the ECJ satisfies its obligation under Article X:3 (b)". As this is not the case, the EC considers that the claim is inexistent.

However, as a subsidiary argument, the EC would like to point out that the US considers that "prompt" means "without delay", that "what it means for action to be taken without delay

[82] See, for example, the explanations of the EC system and its member States given in the EC First Written Submission, para. 176, and EC Reply to Panel Question No. 71, para. 127.

[83] US Reply to Panel Question No 142, para. 90. The US reference to Mr. Vermulst's publication is out of context, because the author did not make an analysis in the context of Article X:3 (b) GATT.

[84] US Reply to Panel Question No 142, para. 91.

necessarily will depend on context", and that "the word 'prompt' does not, by itself, connote a particular passage of time that will be relevant in all contexts".[85]

The application of those criteria to those cases where a EC member State first instance court refers to the ECJ must necessarily lead to the conclusion that the review is prompt, because there are no delays: preliminary reference proceedings before the ECJ are integrated in the proceedings before the national court in order to cooperate in the resolution of a dispute by the national court.

Question 143

The EC takes note that the United States is not challenging the ECJ review pursuant to Article 230 of the EC Treaty.

The observations of the US on preliminary references to the ECJ are outside the scope of the Panel's question and the EC refers to its additional submission to Part III of the US Second Oral Statement.[86]

Question 144

The EC firmly rejects the United States' consideration of the European Convention on Human Rights as "a due-process type obligation of a very general nature".[87] The US observation reflects its lack of familiarity with the European system for the protection of Human Rights, whose respect is ensured by the European Court of Human Rights, as the EC has explained in an answer to a Panel's question.[88]

Moreover, the EC rejects the US assertion that it has admitted that the European Convention on Human Rights is not "operationalized" in the customs context. Article 6 (1) of the Convention, which lays down the right to a fair trial by an independent and impartial tribunal established by law, encompass the right to prompt judicial protection in all sectors,[89] with the only exception of civil service cases.

Anyhow, the EC would like to insist that, to its knowledge, no WTO Member (not, in any case, the United States[90]) has inscribed in its legislation a precise provision requiring first instance independent review to be prompt.

Question 145

The EC has already explained that, contrary to the requirement in Article X:3 (b) GATT, administrative review in the US undertaken by the Office of Regulations and Rulings is not independent, because the Office is part of US Customs and Border Protection, which is the agency in the US entrusted with administrative enforcement in customs matters.[91]

In any case, assuming, for the sake of argument, that such review decisions come under Article X:3 (b), their effect do not comply with the US interpretation of the provision as used by the US to challenge the EC system. The US criticizes that first instance national decisions in the EC do not bind the other member States agencies. However, further review decisions by the Office are described by the US as being only an "authority" for the disposition of identical goods

[85] US Reply to Panel Question No. 40, para. 152.
[86] EC Additional Submission, Section III C .
[87] US Reply to Panel Question No. 144, para. 94.
[88] EC Reply to Panel Question No. 170, para. 89.
[89] EC Reply to Panel Question No. 74, paras. 134 to 136, and to Panel Question No 70, para. 89.
[90] EC Reply to Panel Question No. 74, para. 138.
[91] EC Second Written Submission, para. 218.

by other persons.[92] This term reflects that "further review" decisions in the US do not produce binding effects, which is a situation equivalent to the one existing between the different national courts and agencies in the EC.[93]

As the US claims that "decisions issued under the further review procedure have the same force and effect as advance ruling decisions",[94] the EC refer, for further arguments, to its comments on the US answer to Question No. 136.

QUESTIONS POSED TO BOTH PARTIES

Question 173

The EC considers that the US response to the Panel's question is entirely insufficient, and manifests a fundamental weakness in the US case.

Instead of providing the Panel with an answer as to how the Panel should establish whether, as the US claims, the EC system "necessarily" leads to a lack of uniformity contrary to Article X:3 (a) GATT, the US vaguely refers to "some unusual aspects" of Article X:3 (a) GATT.[95] As regards the question whether it is necessary to have regard to specific instances of non-uniform administration, the US answers that "while it is difficult to answer that question in the abstract, it need not be answered in the present case".

The EC fundamentally disagrees. There is nothing so unusual about Article X:3 (a) GATT that the normal rules regarding an objective assessment of the facts pursuant to Article 11 DSU should not longer apply. Accordingly, the normal evidentiary requirements for establishing that a Member's law as such violates WTO obligations, as set out by the Appellate Body in *US – Carbon Steel*, also apply in the present case.[96] This means in particular that the US is required to support its claim of an as-such incompatibility of the EC's system of customs administration with solid evidence of an actual pattern of non-uniform administration. For the details, the EC would refer to its own reply to the Panel's Question No. 173.

The only case law to which the US refers is the Panel Report in *Canada – Wheat Exports and Grain Imports.* [97] However, contrary to the US statement, what is remarkable about this report is not that the Panel "entertained" the US claim against the Wheat Board regime, but rather that it rejected it because the United States had failed to prove that the Wheat Board in fact necessarily would act in a way contrary to Article XVII GATT.[98] Accordingly, *Canada – Wheat Exports and Grain Imports* is another illustration that as-such claims about another Member's laws cannot simply be based on speculation about the possible effects of another WTO Member's system, but need to be supported by hard evidence based on their actual application.

Question 176

In response to the Panel's question, the US is claiming that the EC is proposing that Article X:3 (a) GATT should be interpreted "in light of the constitutional structures of the

[92] US Reply to Panel Question No. 145, para. 96, *in fine*.
[93] EC Second Oral Statement, paras. 98 and 99, and EC Closing Statement, para. 30.
[94] US Reply to Panel Question No. 145, para. 96.
[95] US Reply to Panel Question No. 173, para. 97.
[96] Appellate Body Report, *US – Carbon Steel*, para. 157.
[97] US Reply to Panel Question No. 173, para. 97.
[98] Panel Report, *Canada – Wheat Imports and Grain Exports*, para. 6.148. As confirmed by the Appellate Body, *Canada – Wheat Imports and Grain Exports*, para. 196.

Members, including the EC".[99] As the EC has remarked, it is not arguing in any way it is subject to different standards than other WTO Members [100]

However, the Panel's question did not concern Article X:3 (a) GATT, but Article XXIV:12 GATT. As the EC has explained in its own reply to the Panel's Question, this provision is clearly applicable to the EC. Moreover, as the EC has explained in response to the Panel's Question No. 158, the provision must have a useful meaning. In the context of Article XXIV:12 GATT, it is inevitable that it must be considered whether the WTO Member in question has regional or local governments and authorities within its territories which have responsibilities for implementing the provisions of the GATT. If it does, then the Member in question must take "reasonable measures" to ensure compliance. What is a reasonable measure must be determined by weighing the internal difficulties of ensuring compliance against the consequences of non-observance of WTO obligations for trading partners.[101]

The United States, by simply denying that Article XXIV:12 GATT could have any relevance for the present dispute, in essence fails to give Article XXIV:12 GATT any useful meaning. This being said, the EC does not advocate any reading of Article XXIV:12 GATT which would amount to a special standard for the EC, or which would jeopardize the compliance by WTO Members with a federal structure with their WTO obligations. It merely emphasizes that measures which would require a radical change in the federal balance of a WTO Member, such as the creation of a centralized customs agency, a customs court, and the harmonization of laws within that WTO Member, cannot be regarded as "reasonable measures" within the meaning of Article XXIV:12 GATT.

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[99] US Reply to Panel Question No. 174, para. 103.
[100] EC Second Oral Statement, para. 9.
[101] Cf. EC Reply to Panel Question No. 158, para. 48.