ANNEX C

RESPONSES TO SUPPLEMENTARY QUESTIONS POSED BY THE PANEL REGARDING SECTION III OF THE UNITED STATES SECOND ORAL STATEMENT

ANNEX C-1

**RESPONSE OF THE EUROPEAN COMMUNITIES
TO THE PANEL'S QUESTION NO. 172
REGARDING SECTION III OF THE UNITED STATES SECOND ORAL STATEMENT**

(14 December 2005)

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.

I. INTRODUCTION

1. In accordance with the Panel's ruling of 23 November 2005, as well as the amended time-table communicated to the parties on 25 November 2005, the present submission presents the EC's rebuttal to Section III of the US Opening Statement at the second meeting with the Panel (US Second Oral Statement). This submission at the same time constitutes the EC's response to the Panel's supplementary Question No. 172.

2. In this submission, the EC will first address some procedural objections regarding the US Second Oral Statement. Subsequently, the EC will respond in substance to the claims and arguments contained in Section III of the US Second Oral Statement.

II. PROCEDURAL OBJECTIONS

3. In the present section, the EC will raise two procedural issues regarding the US Second Oral Statement. First, the evidence presented by the United States with its Second Oral Statement is inadmissible due to its belated presentation. Second, certain of the matters raised in Section III of the US Second Oral Statement fall outside the Panel's terms of reference.

A. THE EVIDENCE PRESENTED BY THE UNITED STATES IN ITS SECOND ORAL STATEMENT IS INADMISSIBLE

4. At the hearing with the Panel on 22 November 2005, the EC has already orally objected to the late submission of a substantial amount of new evidence with the US Second Oral Statement. The EC acknowledges the Panel's ruling of 23 November 2005, and the decision to grant the EC additional time to respond to the matters raised and evidence submitted in Section III of the US Second Oral Statement.

5. However, the EC maintains its view that the litigation tactics employed by the United States raise serious issues of due process and procedural fairness, as well as the orderly conduct of DSU dispute settlement proceedings in general. These issues have only partially been addressed by the Panel's rulings. Moreover, the implications of the US conduct go beyond the present case. For this reason, the EC wishes to restate, in the present submission, its views on this matter.

6. According to Article 12.1 DSU, the Panel proceedings are in principle in accordance with the working procedures contained in Appendix 3 to the DSU. It is true that these working procedures do not establish specific time-limits for the presentation of evidence. Moreover, the Panel may, in consultation with the Parties to the dispute, adopt more specific procedures, and may also amend these procedures in consultation with the parties.

7. This notwithstanding, as the Appellate Body has remarked in *Argentina – Textiles and Apparel*, the working procedures contemplate two distinguishable stages in a proceeding before a Panel, namely the stage of the first hearing, which should serve the presentation of the facts, and the stage of the second hearing, which should serve the purpose of permitting rebuttals:[1]

> It is also true, however, that the Working Procedures in Appendix 3 do contemplate two distinguishable stages in a proceeding before a panel. Paragraphs 4 and 5 of the Working Procedures address the first stage in the following terms:
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> > 4. Before the first substantive meeting of the Panel with the parties, the parties to the dispute shall transmit to the Panel written submissions in which they present the facts of the case and their arguments.
> >
> > 5. At its first substantive meeting with the parties, the panel shall ask the party which has brought the complaint to present its case. Subsequently, and still at the same meeting, the party against which the complaint has been brought shall be asked to present its point of view.
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> The second stage of a panel proceeding is dealt with in paragraph 7 which states:
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> > 7. Formal rebuttals shall be made at a second substantive meeting of the panel. The party complained against shall have the right to take the floor first to be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the panel.
>
> Under the Working Procedures in Appendix 3, the complaining party should set out its case in chief, including a full presentation of the facts on the basis of submission of supporting evidence, during the first stage. The second stage is generally designed to permit "rebuttals" by each party of the arguments and evidence submitted by the other parties.

8. In line with these general principles of DSU dispute settlement, paragraph 12 of the Panel's working procedures contains the following rules on the submission of evidence:

> Parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttals, answers to questions or comments made for purposes of rebutting answers provided by others. Exceptions to this procedure will be granted upon a showing of good cause. In such cases, the other party shall be accorded a period of time for comment, as appropriate.

9. With its Second Oral Statement, the US submitted 22 exhibits containing new factual evidence. In large part, this evidence related to matters which had not previously been raised in the

[1] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 79.

submission of the parties.[2] The EC considers that this approach is not in accordance with the requirements of due process and procedural fairness, as reflected in paragraph 12 of the Panel's working procedures.

10. The evidence referred to in Section III of the US Second Oral Statement refers to alleged instances of non-uniform application which have not before been raised by the United States, and therefore constitute entirely new evidence. As the EC will subsequently show, some of this evidence even relates to matters which are outside the Panel's terms of reference.

11. Even to the extent that the evidence presented relates to cases of application which have been previously discussed between the parties, notably the evidence referred to in Section V of the US Second Oral Statement, it is not clear why this evidence has not been presented in earlier submissions.[3] In this context, it must be noted that whether the late submission of evidence is "necessary for the purposes of rebuttal" does not just depend on whether it relates to a "rebuttal" of an argument made earlier, but also whether it could have been introduced earlier.

12. The EC sees no good cause for the late submission of this evidence by the US. The evidence contained in Section III refers to examples which in certain cases go several years back, and could have been introduced by the United States with its First Written Submission.[4] The United States did not even attempt to indicate why the above evidence was not accessible to it by the date of the first substantive meeting, nor did the United States otherwise try to show good cause for the late submission of the new evidence.[5]

13. The late submission of this new evidence is all the more unjustifiable given the strict refusal of the United States to submit evidence in its earlier submissions. Indeed, when requested by the Panel after the first hearing to provide evidence of further cases of non-uniform application, the US uniformly refused to submit such evidence.[6] More strikingly still, in its Second Written Submission, the US abstained completely from submitting any factual evidence whatsoever.

14. This conduct by the United States gives the strong impression that the United States has been deliberately withholding the evidence until the last possible stage, when the possibilities for the EC to respond to it would be minimal. Such litigation tactics are not conducive to a proper conduct of dispute settlement proceedings under the DSU.

15. The Panel's decision to grant the EC additional time to comment on Section III of the US Second Oral Statement does not address these concerns. First, due to the late submission of this new evidence by the US, the EC has to present a third submission in parallel to the answers of the Panel and the comments on the US responses. Second, the Panel's ruling only addresses Section III of the Second Oral Statement, but not the additional evidence referred to in other parts of the US Second

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[2] The EC notes that in its ruling of 23 November, the Panel left open whether the evidence in question constituted "new evidence" or "evidence that is necessary for the purposes of rebuttals".

[3] As regards the affidavit produced by the US in Exhibit US-79, the EC has already explained that this evidence is deprived of all useful evidentiary value.

[4] On camcorders, cf. US Second Oral Statement, para. 26 et seq.; Sony Playstation, US Second Oral Statement, para. 32 et seq. As regards the "DeBaere-Presentation" (Exhibit US-59), as the EC will explain below, this presentation has no evidentiary value whatsoever.

[5] In *Canada – Wheat Exports and Grain Imports*, para 6.140, the Panel rejected a scholarly article submitted by the United States in an untimely manner, noting that the US did not even try indicating why the above evidence was not accessible to it by the date of the first substantive meeting, nor did the United States otherwise try to show good cause for the late submission of the new evidence. In particular, it rejected the US argument that this article served only as rebuttal.

[6] Cf. US Replies to Panel Question Nos. 14, 24, and 33; cf. also EC Second Written Submission, para. 45.

Oral Statement. Finally, the US approach has already had implications for the Panel's overall timetable, and may have further implications.

16. The US approach is of general concern for the WTO dispute settlement system. Panels have to work within very narrow timeframes, which imposes a considerable burden on the parties, the Panel and the Secretariat. Because of these constraints, it is important that the parties act in such a way that assists the Panel in respecting its timetable, rather than obstructing it.

17. The US approach is particularly disturbing in the context of the present case. The US is asking the Panel to make extremely sweeping findings, notably that the entire system of EC customs administration is incompatible with Article X:3(a) GATT. It could have been expected that the substance of the evidence, as well as the way in which it is presented, would measure up to the gravity of the US claims and their implications. However, the opposite has been the case. Whereas the EC has participated constructively in the process, and already with its First Written Submission presented a comprehensive description of its system of customs administration and judicial review in order to provide the Panel with a solid factual basis, the US has approached this case as a game of litigation tactics. The EC submits that such an approach is not conducive to allowing the Panel to proceed to an objective evaluation of the facts as required by Article 11 DSU.

18. For these reasons, the EC maintains its view that the evidence submitted by the US with its Second Oral Statement is inadmissible.

B. CERTAIN MATTERS RAISED BY THE UNITED STATES IN PART III OF ITS SECOND ORAL STATEMENT ARE OUTSIDE THE PANEL'S TERMS OF REFERENCE

19. In Section III of its Second Oral Statement, the US also raises an issue regarding the alleged non-uniform application of Article 221(3) CCC, which concerns the period during which the customs debt may be communicated to the debtor.[7] The EC submits that this matter is not within the Panel's terms of reference.

1. The Panel may only examine the matters identified in the US Panel request

20. The present Panel has been established by the DSB with standard terms of reference in accordance with Article 7.1 DSU.[8] Accordingly, the mandate of the Panel is to examine the matter referred to it as identified in the Panel request of the United States.[9]

21. As the Appellate Body has confirmed in *US – Carbon Steel*, the Panel request forms the basis of the Panel's terms of reference under Article 7.1 of the DSU:[10]

> There are, therefore, two distinct requirements, namely identification of *the specific measures at issue*, and the provision of a *brief summary of the legal basis of the complaint* (or the *claims*). Together, they comprise the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.

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[7] US Second Oral Statement, para. 27, para. 31. The US inaccurately refers to Article 221(3) CCC as a provision "prescribing the period following importation during which a customs debt may be collected". As the EC will show in the following section, this is not accurate.

[8] WT/DS315/9, para. 2.

[9] WT/DS315/8.

[10] Appellate Body Report, *US – Carbon Steel*, para. 125. Similarly, Appellate Body Report, *Guatemala – Cement I*, para. 72.

22. Article 6.2 DSU sets out the following minimum requirements with which all Panel requests must comply:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

23. In *Korea – Dairy*, the Appellate Body held that Article 6.2 of the DSU imposes four separate requirements:[11]

> When parsed into its constituent parts, Article 6.2 may be seen to impose the following requirements. The request must: (i) be in writing; (ii) indicate whether consultations were held; (iii) identify the specific measures at issue; and (iv) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In its fourth requirement, Article 6.2 demands only a summary – and it may be a brief one – of the legal basis of the complaint; but the summary must, in any event, be one that is "sufficient to present the problem clearly". It is not enough, in other words, that "the legal basis of the complaint" is summarily identified; the identification must "present the problem clearly".

24. The objective and purpose of Article 6.2 of the DSU is to guarantee a minimum measure of procedural fairness throughout the proceedings. This is of particular importance to the defendant, who must rely on the Panel request in order to begin preparing its defence. Similarly, WTO Members who intend to participate as third parties must be informed of the subject-matter of the dispute. This underlying rationale of Article 6.2 DSU has been explained by the Appellate Body in *Thailand – H-Beams*:[12]

> Article 6.2 of the DSU calls for sufficient clarity with respect to the legal basis of the complaint, that is, with respect to the "claims" that are being asserted by the complaining party. A defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence. Likewise, those Members of the WTO who intend to participate as third parties in panel proceedings must be informed of the legal basis of the complaint. This requirement of due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings.

25. In *EC – Bananas III*, the Appellate Body has clarified that the claims which are set out in the Panel request must be distinguished from the subsequent arguments of the parties in support of their claim. Consequently, the Appellate Body has held that a faulty Panel request cannot be subsequently "cured" by the written submission of the parties:[13]

> We do not agree with the Panel that "even if there was some uncertainty whether the panel request had met the requirements of Article 6.2, the first written submissions of the Complainants 'cured'

[11] Appellate Body Report, *Korea –Dairy*, para. 120.

[12] Appellate Body Report, *Thailand – H-Beams*, para. 88 (emphasis added). Similarly Appellate Body Report, *US – Carbon Steel*, para. 126.

[13] Appellate Body Report, *EC – Bananas III*, para. 143.

> that uncertainty because their submissions were sufficiently detailed to present all the factual and legal issues clearly". Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint. If a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently "cured" by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding.

26. As a consequence, the only basis on which to establish whether a Panel request is in conformity with the requirements of Article 6.2 is the text of the request itself. This has been confirmed by the Appellate Body in *US – Carbon Steel*:[14]

> As we have said previously, compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be "cured" in the subsequent submissions of the parties during the panel proceedings.[15] Nevertheless, in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced.[16] Moreover, compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances.

2. The US claim regarding the non-uniform application of Article 221(3) CCC is not within the Panel's terms of reference

27. According to the third paragraph of the US Panel request, the US claims that there exists a lack of uniformity of administration of EC customs law with respect to the following areas of EC customs law:

- classification and valuation of goods;
- procedures for the classification and valuation of goods, including the provision of binding classification and valuation information to importers;
- procedures for the entry and release of goods, including different certificate of origin requirements, different criteria among member States for the physical inspection of goods, different licensing requirements for importation of food

[14] Appellate Body Report, *US – Carbon Steel*, para. 127 (emphasis added).
[15] *Ibid*., para. 143.
[16] See, for example, Appellate Body Report, *Korea – Dairy*, para. 127; Appellate Body Report, *Thailand – H-Beams*, para.95.

products, and different procedures for processing express delivery shipments;

- procedures for auditing entry statements after goods are released into the stream of commerce in the European Communities;

- penalties and procedures regarding the imposition of penalties for violation of customs rules; and

- record-keeping requirements.

28. The issue raised by the United States regarding the alleged non-uniform application of Article 221(3) CCC does not concern any of these areas. Article 221 CCC is a provision which concerns the communication of the customs debt to the debtor. Article 221 CCC is drafted as follows:

> 1. As soon as it has been entered in the accounts, the amount of duty shall be communicated to the debtor in accordance with appropriate procedures.
>
> 2. Where the amount of duty payable has been entered, for guidance, in the customs declaration, the customs authorities may specify that it shall not be communicated in accordance with paragraph 1 unless the amount of duty indicated does not correspond to the amount determined by the authorities.
>
> Without prejudice to the application of the second subparagraph of Article 218(1), where use is made of the possibility provided for in the preceding subparagraph, release of the goods by the customs authorities shall be equivalent to communication to the debtor of the amount of duty entered in the accounts.
>
> 3. Communication to the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred. This period shall be suspended from the time an appeal within the meaning of Article 243 is lodged, for the duration of the appeal proceedings.
>
> 4. Where the customs debt is the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings, the amount may, under the conditions set out in the provisions in force, be communicated to the debtor after the expiry of the three-year period referred to in paragraph 3.

29. Article 221 is contained in Title VII of the CCC, entitled "Customs Debt", and more specifically in Chapter 3 thereof, dealing with the recovery of the amount of the customs debt. In this context, Article 221 CCC establishes that the amount of duty must be communicated to the debtor. Article 221(3) sets out a time limit of three years within which this communication of the debt may occur, but provides that this period is suspended for the period of appeal proceedings. Article 221(4) provides that where the customs debt is the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings, the amount may, under the conditions set out in the provisions in force, be communicated to the debtor after the expiry of the three-year period referred to in paragraph 3.

30. The question of the post-clearance recovery of customs duties, and more specifically during which period a customs duty may be communicated to the debtor, does not fall within any of the issues raised in the US Panel request. It does not concern the classification or valuation of goods; it is not a procedure for the entry and release of goods; it is not a procedure for auditing entry statements; nor does it concern the imposition of penalties or record-keeping requirements.

31. The United States has submitted that the issues referred to in paragraph 3 of its Panel request are merely "illustrations", and that its claim is related to the lack of uniform administration of "EC customs law as a whole".[17] As the EC has already remarked in its Second Written Submission,[18] such an interpretation of the US Panel request is not in accordance with the requirements of Article 6(2) DSU. EC customs law is a vast body of law. It is therefore not sufficient for the description of the "specific measure at issue" to simply refer to the "administration of EC customs law" as a whole.

32. The US has implicitly acknowledged this in the third paragraph of its Panel request by referring, to the specific issues where it claims a lack of uniform administration exists. This listing must have a useful purpose. In particular, it should allow the Panel to know which issues are precisely within its terms of reference. Similarly, it should allow the EC, as the defendant in the present proceedings, to adequately prepare its defence. Laying down a list of measures and then vaguely refer to "including but not limited to" should be considered a failed attempt to have an "open ended" case. In the reading of the United States, it would be possible for a complainant to keep a Panel request extremely vague, raise a few issues as "illustrations", and then bring a case regarding completely different issues. Moreover, the US seems to believe that such issues can even be introduced at the very last stage of the proceedings. Such "surprise tactics" are not compatible with the due process requirements of Article 6(2) DSU.

33. The EC's interpretation finds further confirmation in the attendant circumstances of the present case, and notably in the subsequent submissions of the US. Until its Second Oral Statement, the US never referred to a problem of non-uniform application of Article 221 CCC. More specifically, when asked by the Panel after the first hearing to provide an exhaustive list of all customs procedures[19] challenged under Article X:3(a) GATT, the US declined to do so.[20] If the US believed that non-uniform application of Article 221(3) CCC was part of its claims, it should have raised this issue then.

34. The EC finds further confirmation of this in the US reply to the Panel's Question No. 124, where the US lists a number of provisions in respect of which it claims to have established a lack of uniform administration.[21] Significantly, this list does not include Article 221 CCC, nor any other provision from Title VIII of the CCC. This implies that the United States either does not believe it has established any claim regarding the non-uniform administration of Article 221 CCC, or it concedes that this claim does not fall within the Panel's terms of reference.

35. For these reasons, the EC submits to the Panel that the US claim regarding non-uniform application of Article 221 (3) CCC does not fall within the Panel's terms of reference.

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[17] Most recently, US Reply to Panel Question No. 124, para. 1-2. Cf. also US Reply to Panel Question No. 3, para. 7.

[18] EC Second Written Submission, paras. 13-14.

[19] It is noted that post-clearance recovery of customs debt is not a "customs procedure" within the meaning of Article 4 (16) CCC. However, the EC understands the Panel to have used the term in a wider sense.

[20] US Reply to Panel Question No. 6, para. 31.

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

III. THE EXAMPLES OF NON-UNIFORM ADMINISTRATION IN SECTION III OF THE US SECOND ORAL STATEMENT

36. In this section, the EC will proceed to rebut the substantive examples of alleged non-uniform administration submitted by the United States in Section III of its Second Oral Statement, i.e. the Camcorder case, the Sony Playstation case, and the Judgment of the ECJ in Intermodal Transports.[22] On this basis, the EC will add an overall conclusion regarding the evidence presented by the US in support of its claims under Article X:3(a) GATT.

A. CAMCORDERS

37. With respect to the classification of camcorders, the United States alleges that there is a problem regarding the non-uniform administration of EC customs law in respect of the "retrospective effect" of EC explanatory notes.[23] These allegations are unfounded. Moreover, the US allegations seem to be primarily related to the issue of the post-clearance recovery of the customs debt, which, as the EC has already shown,[24] is not within the Panel's terms of reference.

38. The US has presented its reference to the camcorders case as a rebuttal to the EC's reference to EC explanatory notes as a tool for securing uniform administration of EC classification rules.[25] However, it subsequently discusses the question as to whether member States, subsequent to the adoption of an EC explanatory note, may reach back to collect additional duty on importations made prior to the issuance of the explanatory note.[26]

39. This issue has nothing to do with the value of explanatory notes as tools for securing the uniform administration of tariff classification rules. It goes without saying that an explanatory note can be effective for the purposes of securing uniform tariff classification only once it has been adopted. The question of what effect it may have for the collection of customs duties which relate to importations which took place before the adoption of the explanatory note is a question which relates to the post-clearance recovery of customs debt, which is an issue distinct from tariff classification.

40. The US has not shown that there has been any lack of uniformity as regards tariff classification in the EC following the issuance of the explanatory note submitted as Exhibit US-61. The BTI issued by the Spanish authorities submitted as Exhibit US-65 are all in full accordance with EC classification rules. The US has not provided any evidence of any other member States having classified Camcorders contrary to EC classification rules. It has simply stated, without any further supporting evidence or documentation, that "the French authority informed the company that it intended to collect additional duty retroactively on certain camcorders, including cameras, that is, models covered by the Spanish BTI".[27] It thus appears that the question addressed by the French authorities was one of post-clearance recovery of customs duties, and not one of tariff classification.

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[22] The EC notes that two out of the three examples are drawn from a presentation made by Mr. Philippe de Baere, whom the US describes as a "seasoned customs law practitioner" (US Second Oral Statement, para. 24 and Exhibit US-59). Mr. de Baere is Member of a Brussels law firm with an extensive practice in the field of customs law, who frequently represents industry and traders against the EC customs authorities and institutions. Mr. de Baere has also been involved personally in the two cases referred by the United States. The EC would remark that it is not surprising that a practising trade lawyer would defend a position that serves the interests of his clients. The EC considers, however, that a presentation by an interested attorney cannot be regarded as an objective statement on the facts. The evidential value of the de Baere presentation for the purposes of the present dispute is therefore *nil*.

[23] US Second Oral Statement, para. 26 et seq.

[24] Above, Section II.B.

[25] US Second Oral Statement, para. 26.

[26] US Second Oral Statement, para. 29, 31.

[27] US Second Oral Statement, para. 30.

Moreover, the US does not provide any evidence as to when the importation in question took place, and whether indeed they related to products corresponding to those referred described in the BTI issued by the Spanish authorities.

41. Since the question is therefore not one regarding the uniform administration of tariff classification rules, but rather of the post-clearance recovery of customs debts, the EC considers that the issue is outside the Panel's terms of reference. The EC will therefore not respond to these allegations in detail. The EC would note, however, that the substance of the US presentation of the facts is so confused and incomplete that a meaningful rebuttal at this stage anyways would be very difficult, if not impossible. Moreover, the US has not provided any information as to the concrete circumstances of the cases in which recovery of the customs duty was sought. For this reason, the EC will limit itself hereafter to some general remarks.

42. First, the US has referred to a problem regarding the uniform administration of Article 221(3) CCC, which it describes as a provision "prescribing the period following importation during which a customs debt may be collected".[28] However, this is not accurate. Article 221(3) CCC covers the question of the post-clearance recovery of customs duties, including the issue of the effect of the post-importation adoption of explanatory notes, only very partially. In fact, Article 221(3) addresses only the period during which a customs debt may be communicated to the debtor. In contrast, the question of the substantive conditions under which the customs debt may be retroactively recovered is addressed in Article 220 CCC, and in particular in Article 220(2)(a) thereof.

43. This confusion on the part of the US is further illustrated by the reference the US makes to an administrative guideline issued by Germany which it claims illustrates its allegation of non-uniform administration of Article 221 (3) CCC.[29] However, this administrative guideline does not refer to Article 221 CCC, but to Articles 220 and 236 CCC. Moreover, contrary to what the US suggests, this guideline is not a German invention, but is the transposition of a letter that had been addressed by the European Commission in 1996 to the customs authorities of all member States, including Germany.[30] There also exists an information paper elaborated by the services of the European Commission on the application of Articles 220 (2) (b) CCC and 239 CCC, which provides further guidance to the member States authorities.[31]

44. Second, the US claims that the only permitted exception to Article 221(3) CCC is the lodging of an appeal, which suspends the three-year period for communicating the customs debt.[32] This is equally incorrect. Another relevant exception is Article 221(4) CCC, according to which, where the customs debt is the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings, the amount may, under the conditions set out in the provisions in force, be communicated to the debtor after the expiry of the three-year period. As the Court of Justice has clarified, the question as to whether an act may give raise to criminal proceedings is a question of member States law, not of Community law.[33] Moreover, the length of the period during which the debt can be communicated in the case envisaged in Article 221(4) CCC must equally be laid down in member States' law. Any resulting differences are thus differences between legislation, not examples of non-uniform administration.

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[28] US Second Oral Statement, para. 27.

[29] US Second Oral Statement, para. 29 and Exhibit US-63.

[30] As Exhibit EC-153, the EC attaches the letters addressed to Germany and the UK. But for the addresses, both letters are identical.

[31] Exhibit EC-154. The Paper is also available on the website of DG TAXUD (http://europa.eu.int/comm/taxation_customs/resources/documents/customs/procedural_aspects/general/debt/guidelines_en.pdf)

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

[33] Case C-273/90, *Meico-Fell*, [1991] ECR I-5569, para 13 (Exhibit EC-155).

45. In conclusion, the camcorders case does not show any lack of uniformity in the EC's classification practice. As regards the issue of post-clearance recovery of customs debt, this question is outside the Panel's terms of reference.

B. SONY PLAYSTATION2

46. In its Second Oral Statement, the US raises an alleged problem of non-uniform administration relating to the classification of the Sony PlayStation2 (PS2).[34] However, the US presentation of the facts is incomplete and misleading. While the US states that the UK proceedings demonstrate how the ECJ's decision in *Timmermans* "can detract from rather than promote uniform administration",[35] the reliance on the case by the UK High Court of Justice to uphold an interpretation advanced by the Court of First Instance (CFI) and other key Community institutions actually shows how *Timmermans* can operate to promote uniformity.

47. Ultimately, a more detailed examination of the facts in that case is necessary to demonstrate how the rule in *Timmermans* actually contributed to, rather than detracted from, a uniform interpretation and application of Community law. That case involved an application by Sony Europe Ltd. to the UK authorities for a BTI classifying its PS2. On its first application, the UK customs authority classified it pursuant to CN 9504 1000, which covers "video games of a kind used with a television receiver",[36] because it concluded that the PS2 was not freely programmable.[37] This classification was confirmed on departmental review.[38]

48. Subsequently, the issue reached the EC Customs Code Committee (Nomenclature Section).[39] The Committee unanimously considered that PS2 indeed fell under the CN 9504 1000, but for different reasons. In particular, while it considered that the PS2 was properly classified under CN 9504 1000, it concluded that the device was freely programmable. Subsequently, the Commission adopted, on 10 July 2001, a classification regulation classifying the PS2 under heading 9504.[40] Relying on general rule 3(b), the regulation gave as a reason that "playing video games gives the apparatus its essential character".

49. On appeal, the UK Tribunal annulled the decision of the UK authorities in light of the fact that the legal basis underlying the denial of the requested BTI classification was incorrect.[41] Therefore, pending publication of the Commission regulation, Sony requested a new BTI and the UK Commissioners issued a BTI classifying the PS2 under CN 8471 49 00 (covering automatic data processing machines and parts thereof),[42] but making it clear that its classification would have to be revoked when the classification regulation would enter into force.[43] Following the entry into force of the Regulation, on 25 July 2001, the UK authority revoked the BTI and, in conformity with Community law, the PS2 was classified under CN 9504 1000, the same classification as the original BTI.[44]

[34] US Second Oral Statement, paras. 32-34.
[35] US Second Oral Statement, para. 32.
[36] Exhibit EC-156.
[37] Exhibit US-70, para. 4.
[38] Exhibit US-70, para.4.
[39] Case T-243/01, *Sony* (Exhibit EC-24).
[40] Regulation 1400/2001, Exhibit EC-157.
[41] Exhibit US-70, para. 4.
[42] Exhibit EC-156.
[43] Exhibit US-70, paras. 5, 50-51.
[44] Exhibit US-70, para. 6.

50. Following the revocation of the BTI classifying the PS2 in 8471 49 90 00 , Sony challenged the validity of the Regulation at the Court of First Instance.[45] In its judgment of 30 September 2003, the CFI invalidated the Regulation. However, as regards the substantive classification, the CFI explicitly confirmed that the article could be classified under heading 9504 1000.[46] Rather, it determined that the reasons given for the classification, namely reliance on General Interpretative Rule 3(b), had been erroneous.[47] It also specifically noted that classification of the PS2 under CN 9504 1000 could be properly based on the objective characteristics of the product.[48] In particular, the Court found that: [49]

> Such reasoning can also be applied to a case such as this one. Thus, in the absence of a definition of "video games" for the purposes of subheading 9504 10, it is appropriate to consider as video games any products which are intended to be used, exclusively or mainly, for playing video games, even though they might be used for other purposes.
>
> It is, moreover, undeniable that, both by the manner in which the PlayStation2 is imported, sold and presented to the public and by the way it is configured, it is intended to be used mainly for playing video games, even though, as is apparent from the contested regulation, it may also be used for other purposes, such as playing video DVDs and audio CDs, in addition to automatic data processing.

51. Following this judgment, the UK customs authorities in a letter dated 21 October 2003, requested the advice of the European Commission on the classification of the Sony PS2. In response, the Commission sent a letter to all EC customs authorities (including the customs authorities of the new member States) on 8 January 2004 which confirmed that on the basis of the judgment of the CFI, the PS2 cannot be classified in heading 8471, but must be classified in heading 9504.[50]

52. Following the CFI decision, Sony sought to have the BTI issued under CN 8471 49 90 00 by the UK authorities before the entry into force of the new classification regulation "revived". It is worth noting that Sony did not apply for a new BTI, but merely attempted to "revive" the old BTI. Accordingly, before the UK VAT and Duties Tribunal, Sony concentrated its arguments exclusively on the revival of the revoked BTI, and did not address the substantive classification issue.[51] The UK Tribunal rejected Sony's appeal, and maintained the revocation of the BTI in force.[52]

53. On appeal, the UK High Court equally declined to revive the BTI for CN 8471 49 90 00. Its reasons were based on Community objectives and principles.[53] In particular, on a more detailed examination of the issue and taking account of, *inter alia*, the CFI decision, a Commission letter advocating the CFI interpretation, the unanimous conclusions of the Customs Code Committee, and other international organization interpretations following the decision – all of which classified it under heading 9504 1000[54] – it was obvious to the UK High Court that the BTI classifying the PS2 under

[45] Exhibit US-70, para. 6.
[46] Exhibit EC-24, para. 119.
[47] Exhibit EC 24, para. 133.
[48] Exhibit EC-24, para. 110.
[49] Exhibit EC-24, paras. 111-112.
[50] Exhibit EC-158.
[51] Exhibit EC-159.
[52] Exhibit EC-159.
[53] *See* Exhibit US-70, para. 118.
[54] *See* Exhibit US-70, paras. 141-46.

CN 8471 49 90 00 was wrong and therefore, the applicant was not entitled to revive that BTI.[55] With respect to the original revocation of the BTI classifying PS2 in CN 8471 49 90 00, the Court concluded, based on *Timmermans*, that the national authorities were entitled to revoke the classification as a separate action from the Regulation and therefore the revocation of the BTI for 8471 49 90 00 stood in light of the fact that the rationale for revoking it remained applicable.[56]

54. Ultimately, the US statement alluding to the fact that the High Court of Justice revoked the BTI based on its "own re-evaluation of the classification rules"[57] is highly misleading. The revocation, on 25 July 2001, took place on account of the entry into force of an EC classification regulation. Accordingly, rather than following its "own interpretation of classification rules", the UK authority in fact duly applied Community law. The UK High Court upheld the validity of the revocation with explicit reliance on the *Timmermans* judgment of the Court of Justice and on the basis of clear evidence supporting the reasoning behind that revocation.[58] This is yet another illustration of the fact that the *Timmermans* case law, rather than detract from uniformity, actually promotes it.

55. In addition, the US has also criticised the UK High Court for not having referred the question to the ECJ.[59] This criticism is entirely unjustified. First of all, the High Court is not a court of last instance, and therefore not obliged to refer questions to the ECJ. Second, as regards the substantive classification issue, the issue had sufficiently been clarified through the judgment of the Court of First Instance. Moreover, the supporting elements, such as the Commission's letter, the Committee's opinion, and WCO opinions, all pointed in that same direction.[60] Presumably recognising this, Sony had not even tried to directly argue the classification question. Accordingly, the UK court was not wrong to consider that the issue was sufficiently clear, and that it could decide the issue on its own.

56. In conclusion, the Sony PlayStation2 case is not a case of lack of uniformity in the EC's system of tariff classification. Rather, it is a case where a "seasoned customs law practitioner",[61] through unprecedented legal contortions, has unsuccessfully tried to revive a BTI which would have been contrary to the uniform classification practice in the EC. It speaks for the efficiency of the EC's system that this attempt failed. In contrast, it is ironic that the US makes itself the advocate for behaviour which would manifestly detract from the uniform application of EC law.

C. INTERMODAL TRANSPORT

57. The US presents the ECJ judgement in *Intermodal Transports* as leaving "broad discretion" to the member States' courts whether or not they refer a question to the ECJ.[62] According to the US, this discretion would reinforce divergences in Members States' administration of customs law.[63]

58. However, these two arguments rest on an incomplete and incorrect reading of the judgement.

59. Concerning the first argument (about discretion), the EC has already explained in its First Written Submission, the different positions of national courts or tribunals depending on whether there is or is not a judicial remedy under national law. [64]

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[55] Exhibit US-70, paras. 97 and 147.
[56] Exhibit US-70, paras. 132-33.
[57] US Second Oral Statement, para. 33.
[58] Exhibit US-70, para. 118.
[59] US Second Oral Statement, para. 34.
[60] Exhibit US-70, paras. 143-144.
[61] Cf. US Second Oral Statement, para. 24.
[62] US Second Oral Statement, para. 37, *in fine*.
[63] Also in US Second Oral Statement, para. 37, *in fine*.
[64] EC First Written Submission, para. 180.

60. With respect to national courts or tribunals against whose decisions there is a judicial remedy under national law, they are entitled, but in principle not required, to refer a question to the Court of Justice for a preliminary ruling on interpretation.[65] The rationale behind this rule is obviously that, in case the court or tribunal decides not to refer the question, the decision of the court or tribunal can still be appealed and that the obligation to refer will be upon the court or tribunal against whose decisions there is not a judicial remedy under national law.

61. Indeed, in respect of national courts or tribunals against whose decisions there is no judicial remedy under national law, the Court affirms again in *Intermodal Transports* that "the third paragraph of Article 234 EC must, following settled case-law, be interpreted as meaning that such courts or tribunals are required, where a question of Community law is raised before them, to comply with their obligation to make a reference".[66]

62. *Intermodal Transport* is precisely a case showing that this obligation is respected by the highest national courts of tribunals. The "Hoge Raad" is the last instance in the Netherlands for classification in customs matters and, when confronted with the classification of a vehicle, it referred to the ECJ asking about the correct classification of the good in question.[67] The US makes no reference to this issue in its Second Oral Statement.

63. Although there are exceptions to the obligation to refer, these exceptions are subject to strict conditions, which were laid down by the ECJ in the *Cilfit* case.[68] These exceptions are: [69]

- the question raised is irrelevant; or,
- the Community provision in question has already been interpreted by the Court; or,
- the correct application of Community law is so obvious as to leave no scope for any reasonable doubt.

64. In relation to the latter criterion (no scope for any reasonable doubt), which has attracted the US attention, the ECJ has repeated in *Intermodal Transport* that: [70]

> […] before the national court or tribunal comes to the conclusion that the correct application of a provision of Community law is so obvious that there is no scope for any reasonable doubt as to the manner in which the question raised is to be resolved and therefore refrains from submitting a question to the Court for a preliminary ruling, it must in particular be convinced that the matter is equally obvious to the courts of the other member States and to the Court of Justice (*Cilfit and Others*, paragraph 16).

65. However, as already stated, the exceptions are subject to strict conditions. Generally speaking, they "must be assessed in the light of the specific characteristics of Community law, the

[65] The statement made by Mr. Vermulst in the article quoted by the US at para. 38 of its Second Oral Statement refers particularly to the position of first instance national courts (Exhibit US-72). This article, therefore, does not support the overall and exaggerated argument employed by the US in its Second Oral Statement that there is a "broad discretion" open to the member States' courts whether or not they refer a question to the ECJ.

[66] At para. 33.

[67] At paras. 3 and 46-64.

[68] Case 283/81, *Cilfit*, [1982], ECR p. 3415 (Exhibit EC-160).

[69] At para. 33 in *Intermodal Transport* and, more in detail, at paras. 10-16 in *Cilfit*.

[70] Exhibit US-71, para. 39.

particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community".[71]

66. The two first general conditions have already been developed by the ECJ in *Cilfit*:[72]

> […] it must be borne in mind that Community legislation is drafted in several languages and that the different languages versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.
>
> It must also be borne in mind that, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. […].
>
> Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.

67. Moreover, *Intermodal Transport* adds that the exceptions to the obligation to refer must be applied very strictly in tariff classification cases where a BTI has been issued to a third party by another member State. The Court notes that: [73]

> The fact that the customs authorities of another member State have issued to a person not party to the dispute before such a court a BTI for specific goods, which seems to reflect a different interpretation of the CN headings from that which that court considers it must adopt in respect of similar goods in question in that dispute, most certainly must cause that court to take particular care in its assessment of whether there is no reasonable doubt as to the correct application of the CN, taking into account, in particular, of the three criteria cited in the preceding paragraph" (emphasis added).

68. It is therefore, misleading to assert, as the US does, that *Intermodal Transports* "shows […] the broad discretion that member State courts have to refer or not refer questions to the ECJ".[74] This level of discretion is limited to national courts or tribunals against whose decisions there is a judicial remedy under national law. In the case of national courts or tribunals against whose decisions there is no judicial remedy under national law, the general rule is that there is an obligation on them to refer, with some very specific and limited exceptions, to the ECJ. These exceptions have been rendered even stricter in the customs classification sector by *Intermodal Transports*.

69. Finally, with respect to the second argument presented by the US in its Second Oral Statement, it is worth noting that, contrary to what the US claims, the *Intermodal Transport* case does not demonstrate any absence of uniformity in the EC's tariff classification practice, but on the contrary perfectly shows how preliminary rulings contribute to the EC uniform administration of its laws.

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[71] Exhibit US-71, para. 33.
[72] Exhibit EC-160, paras. 18-20.
[73] Exhibit US-71, para. 34 (emphasis added).
[74] US Second Oral Statement, para. 37, *in fine*.

70. Indeed, the ECJ has clarified in the judgment that heading 8709 of the Combined Nomenclature must be interpreted as not covering the vehicle in question. This means that, according to the *Timmermans* case law, any BTI issued for that vehicle at that heading by any national customs authority must be revoked.[75] Moreover, due to the binding effects of preliminary rulings[76] and in the absence of a change in the relevant classification rules, national customs authorities are not entitled to classify that good under heading 8709 any longer.

71. In the actual case, the BTI issued by Finland on 14 May 1996 had expired, in accordance with Article 12 (4) CCC, in May 2002, and had not been renewed. Accordingly, there was no issue of non-uniform administration to be resolved. In contrast, had the Finnish BTI still been valid, or had it been renewed, the Finnish authorities would then have revoked it in accordance with the *Timmermans* case law.

72. In conclusion, contrary to the US submissions, the *Intermodal* case illustrates that the preliminary reference procedure provides an effective tool for ensuring uniform tariff classification. [77]

D. OVERALL CONCLUSION REGARDING THE EVIDENCE PRESENTED BY THE UNITED STATES UNDER ARTICLE X:3(A) GATT

73. Already in its closing remarks at the second hearing of the Panel, the EC has pointed to the lack of factual evidence supporting the US claims of non-uniform administration.[78] In the area of tariff classification,[79] the US initially referred to two cases, in neither of which it succeeded in establishing a lack of uniformity. In its second oral statement, the US has made a belated effort to provide three further examples of alleged non-uniformity. However, as the EC has shown, none of these examples is an example of non-uniformity, and one of the cases is not even within the panel's terms of reference. More ironically still, in certain cases and most notably the Sony PlayStation2 case, the US makes itself the advocate of behaviour that would actually detract, rather than promote, uniformity.

74. Throughout its submissions, the EC has stressed that it falls on the United States to prove that the EC system entails a lack of uniform administration. In response to the Panel's Question No. 173, the EC has also commented on the evidential requirements to be fulfilled in order for it to be established that the EC's system "as such" leads to a lack of uniform administration.

75. A useful point of reference for the present case remains the report of the Appellate Body in *US – Oil Country Tubular Goods from Mexico*.[80] In this case, the Appellate Body reversed the Panel's findings that the US Sunset Policy Bulletin as such violated the Anti-Dumping Agreement because it considered that a sample of more than 20 cases of application taken out of over 200 cases submitted by Mexico was not sufficient for an objective establishment of the facts.

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[75] EC First Written Submission, para. 326 et seq. and EC Second Written Submission, para. 99.

[76] EC Reply to Question No. 73, paras. 131 and 132, and Question No. 163, para. 67.

[77] It is worth noting that this is also supported by the article by Mr. Vermulst only very selectively quoted by the US in para. 38 of its Second Oral Statement. Right after the passage quoted by the US, Mr. Vermulst states as follows: "Evidently, the ECJ is therefore prepared to thoroughly delve into this area of EC trade law. [...] An explanation for this difference might be that a correct uniform customs classification is one of the pillars of a successful customs union." (Exhibit US-72, p. 21).

[78] EC Closing Statement, paras. 19-20.

[79] In the area of customs valuation, the evidentiary basis of the US claim is completely missing, since the US claims seem to be almost entirely based on suppositions and extrapolations from the 2000 Report of the EC Court of Auditors.

[80] EC Reply to Panel Question No. 173, para. 98.

76. In the present case, the US asks the Panel to come to a finding that the EC's entire system of customs administration is incompatible with Article X:3(a) GATT. It asks the Panel to come to this result on the basis of less than a handful of cases which the US has itself selected. It is submitted that such a small and highly selective sample is not a sufficient basis for evaluating whether the EC's system, or individual components thereof, are compatible with Article X:3(a) GATT. This result is even more compelling when it is noted that out of the handful of cases selected by the US, not a single one actually shows a lack of uniformity in the EC's system of customs administration.

77. Overall, the EC therefore submits that the US has failed to establish that there is a lack of uniformity in the administration of EC customs law in the areas referred to in its Panel request.

IV. CONCLUSION

78. For the above reasons, the EC reiterates the conclusion stated in its First Written Submission.

ANNEX C-2

RESPONSES OF THE UNITED STATES TO SUPPLEMENTARY QUESTIONS POSED BY THE PANEL REGARDING SECTION III OF THE US SECOND ORAL STATEMENT

QUESTIONS FOR THE UNITED STATES

177. Please explain why the United States did not refer to evidence contained in Section III of its Oral Statement at the second substantive meeting, prior to the second substantive meeting?

The United States became aware of the illustrative cases referred to in Section III of its Oral Statement at the second substantive meeting through the presentation by Mr. Philippe De Baere at an 27 October 2005, American Bar Association symposium.[1] The United States called attention to those illustrative cases because they helped to rebut specific arguments the EC had made in prior submissions, and because, more generally, they refuted the EC's contention that the United States was basing its claims on "theoretical" scenarios.[2]

As the United States became aware of instances of non-uniform administration, it identified particular cases that highlighted issues that had been developed at earlier stages in the dispute and that would aid the Panel in examining those issues. Not surprisingly, in identifying examples of the non-uniform administration of EC customs law, the United States focused, in particular, on information from businesses and their representatives who actually have had direct experience with the EC's customs administration system. Obtaining information from such sources has not always been easy, as persons who have to deal with the Commission and with the EC's 25 independent, geographically limited customs offices on a routine basis often (and understandably) are reluctant to openly criticize the EC system. As the EC's pointed critique of Mr. De Baere's presentation in its response to the Panel's Question No. 172 shows, those concerns are not unfounded.[3]

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[1] *See* US Second Oral Statement, para. 24 *et seq.*; Philippe De Baere, *Coping with customs in the EU: The uniformity challenge: Judicial review of customs decisions and implementing legislation*, Presentation at ABA International Law Section (27 October 2005) (Exh. US-59). As points of reference, it should be recalled that the US First Written Submission was filed on 12 July 2005, and the US Oral Statement at the first Panel meeting was delivered on 14 September 2005.

[2] *See* EC First Written Submission, para. 314; *see also id.*, paras. 244-46; EC First Oral Statement, paras. 28-29; EC Second Written Submission, paras. 45, 54.

[3] Additional Submission of the European Communities in Rebuttal of Section III of the US Second Oral Statement, para. 36 n.22 (14 December 2005) ("EC Additional Submission"). Paradoxically, the EC asserts that statements by the very persons who are harmed by the non-uniform administration of EC customs law (or their representatives) are not credible because they are supposedly self-interested. *See id.*; EC Closing Statement at Second Panel Meeting, para. 16 (asserting that affidavit by Chairman of Rockland Industries has "no probative value whatsoever"). The United States finds this assertion puzzling. The persons whose statements are at issue have absolutely nothing to gain from openly recounting their direct experiences with the non-uniform administration of EC customs law. If anything, critical statements by persons with direct knowledge of non-uniform administration of EC customs law are *contrary* to their self-interest, as such statements might be perceived as prejudicial to their ongoing relations with EC institutions and with the EC's 25 independent, geographically limited customs offices. The only self-interest that companies and lawyers have in coming forward is their interest in improving the EC system of customs administration so as to avoid future problems. Finally, the United States notes a glaring inconsistency between the EC's critique of the statements of persons with direct knowledge of the non-uniform administration of EC customs law as not credible, on the one hand, and its (erroneous) assertion that there is an absence of evidence of nullification and impairment, on the other, (*see* EC Second Oral Statement, para. 54), given that some of the strongest evidence of nullification and impairment are statements of persons who have been harmed by the EC's non-uniform administration of its customs laws.

The illustrative cases discussed in Section III of the US Oral Statement at the second substantive meeting all involve relatively recent events. This helps to explain the timing of the discussion of those cases in this dispute and contradicts the EC's groundless accusation that "the United States has been deliberately withholding the evidence until the last possible stage."[4] For example, in the camcorders case, it was only in November 2005 that the customs authority in France informed the French importer that it intended to collect additional duties on past imports of certain camcorder models, notwithstanding BTI issued to the French company's Spanish affiliate classifying those models under heading 8525.40.91.[5] In the Sony PlayStation2 case, it was only at the end of July 2005 that the UK High Court of Justice issued its decision declining to refer to the ECJ a question concerning the extent of a customs authority's power and (following the ECJ's *Timmermans* decision) affirming the power of that authority to keep BTI revoked notwithstanding the annulment of the EC regulation that had led to its revocation in the first place.[6] Finally, the ECJ's decision in *Intermodal Transports* (Exhibit US-71) was not issued until mid-September 2005 (in fact, at the same time the first substantive meeting in the present dispute was taking place).

Moreover, the illustrative cases that the United States discussed all rebut particular arguments the EC had made in previous submissions. The EC has asserted that explanatory notes, BTI, and ECJ decisions issued under the preliminary reference procedure all serve as important instruments to ensure the uniform administration of EC customs law.[7] The illustrative cases the United States discussed at the second Panel meeting help to rebut the EC's argument with respect to each of those instruments.

The camcorders case, for example, showed the non-uniformity of administration resulting from issuance of an explanatory note, with some member States revisiting the classification of past imports in light of the note (and, accordingly, collecting additional duty) and others giving the note prospective effect only.[8] The case also showed an important limitation of BTI as a supposed tool of ensuring uniform administration. Thus, in an audit of a company in France, the customs authority was able to disregard the classification of goods set forth in BTI issued to an affiliated company by the customs authority in Spain.[9] Finally, the case showed an important limitation on ECJ decisions as tools that allegedly could ensure uniform administration. Thus, France's highest court simply declined to refer a question to the ECJ (concerning the circumstances under which the three-year period for communication of the customs debt to the debtor provided for in the Community Customs Code may be suspended), notwithstanding divergence in administration among different customs authorities in the EC.[10]

The Sony PlayStation2 case is another illustrative case that serves to rebut two arguments advanced by the EC. The EC has tried to argue that the ECJ's *Timmermans* decision of January 2004,

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[4] EC Additional Submission, para. 14.

[5] *See* US Second Oral Statement, para. 30.

[6] *See* US Second Oral Statement, paras. 33-34.

[7] *See, e.g.*, EC Second Written Submission, paras. 93-104, 244; EC Replies to 1st Panel Questions, paras. 55, 71, 175.

[8] *See* US Second Oral Statement, paras. 27-29. The EC attempts to dismiss the relevance of the camcorder case by arguing that it does not relate to "explanatory notes as tools for securing the uniform administration of tariff classification rules." EC Additional Submission, para. 39. Rather, in its view, the illustration relates to the effect of explanatory notes on the post-clearance recovery of customs debt. What the EC obscures by parsing the illustration in this way is the basic point that different customs authorities in the EC give different effect to these instruments, which undermines the suggestion that they "secure" uniform administration.

[9] *See* US Second Oral Statement, para. 30.

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

promotes rather than detracts from uniform administration.[11] *Timmermans* is the decision that permits each of the EC's 25 independent, geographically limited customs offices to revoke or amend BTI on its own initiative and regardless of the effect that other customs offices in the EC have given to that BTI. The United States rebutted the EC's characterization of *Timmermans* as a uniformity-promoting decision by, among other things, calling attention to the Sony PlayStation2 case.[12] The Sony PlayStation2 case also helps rebut the EC's portrayal of the preliminary reference mechanism as a tool that allegedly could ensure uniform administration, given the adherence of member State courts (such as the UK court in this case) to the EC Advocate-General's call for self-restraint in use of that mechanism in the customs area, as set forth in his opinion in *Wiener*.[13]

Finally, the *Intermodal Transports* decision also helps to rebut the EC's portrayal of the utility of the preliminary reference mechanism as a tool to ensure uniform administration. If the preliminary reference mechanism truly served as a tool to ensure uniform administration, an obvious case for use of that tool would be one in which a member State court was made aware of divergent classification of the product at issue by the customs authority in another member State. Indeed, the EC Commission itself evidently made that argument (unsuccessfully) to the ECJ.[14] Nevertheless, the ECJ found that even this circumstance does not compel use of the mechanism, if the member State court believes the correct classification to be "so obvious as to leave no scope for any reasonable doubt".[15]

In sum, each of the illustrative cases discussed in Section III of the US Oral Statement at the second Panel meeting helped to rebut arguments the EC had made in its prior submissions. Far from engaging in "a game of litigation tactics",[16] the United States used the illustrative cases in Section III of its oral statement precisely as contemplated by paragraph 12 of the Panel's working procedures – i.e. "for purposes of rebuttals". Its introduction of rebuttal evidence at this stage in the proceeding is not at all remarkable in WTO dispute settlement. Indeed, in this very proceeding, the EC introduced six new exhibits in connection with its comments on the US answers to the Panel's questions following the second Panel meeting. Given that two of those exhibits (Exhibits. EC-161 and EC-162) relate to US customs administration, which is not even at issue in this dispute, it is difficult to see how they meet the standard of being "necessary for the purposes of rebuttal". In other disputes, as well, the EC commonly has introduced evidence (ostensibly for rebuttal purposes) at the second Panel meeting or later.[17]

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[11] *See, e.g.*, EC Second Written Submission, para. 99; EC Replies to 1st Panel Questions, para. 30.

[12] The issue in that case was what an individual customs authority has the power to do, in light of *Timmermans*, following the annulment of a classification regulation with EC-wide effect. Specifically, the question was the status of BTI that the authority had revoked on the basis of the now-annulled regulation. Must the authority restore the BTI (an action that, in theory, might promote uniform classification of the good at issue, albeit under a heading different from that in the now-annulled regulation)? Or, may the authority keep the BTI revoked, relying on new, independent reasons for doing so, rather than on the existence of the now-annulled regulation? Citing *Timmermans*, the UK High Court found that the customs authority in the UK could keep the BTI revoked, relying on new, independent reasons. The United States submits that the PlayStation2 case demonstrates that even where an EC customs office has issued BTI, supposedly bringing a limited degree of uniformity to the classification of the good concerned (at least for the holder of the BTI), *Timmermans* empowers the customs office to modify or revoke the BTI for its own, independent reasons, in a way that completely undermines uniform administration.

[13] *See* US Second Oral Statement, paras. 33-34.

[14] *See Intermodal Transports BV* v. *Staatssecretaris van Financiën*, Case C-495/03, para. 35 (15 September 2005) (referring to argument by the Commission) (Exhibit US-71) ("*Intermodal Transports*").

[15] *Intermodal Transports*, paras. 33, 45 (Exhibit US-71).

[16] EC Additional Submission, para. 17.

[17] In the dispute *EC – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (DS174 and DS290), the EC introduced 31 new exhibits, totaling 108 pages, in connection with its answers to questions following the second substantive meeting with the panel. In that same dispute, the EC filed an additional five exhibits, totaling 93 pages, in connection with its comments on the complainants' answers to questions. Although that dispute concerned EC measures, some of the exhibits the EC

178. In paragraph 19 et seq of the European Communities' reply to Panel Question No. 172, the European Communities submits that Article 221(3) of the Community Customs Code does not concern any of the areas of customs administration referred to in the United States' request for establishment of panel. Please comment.

The EC's assertion that Article 221(3) of the Community Customs Code ("CCC") does not concern any of the areas of customs administration referred to in the US panel request appears to confuse the *claims* made by the United States with *arguments* advanced in support of those claims. It is well established that, under Article 6.2 of the DSU, a panel request must set forth the claims of the complaining party, but need not set forth its arguments.[18]

The claims of the United States with respect to GATT 1994 Article X:3(a) are set forth clearly and with specificity in the first paragraph of its panel request (WT/DS315/8). There, the United States claims that "the manner in which the European Communities ("EC") administers its laws, regulations, decisions and rulings of the kind described in Article X:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") is not uniform, impartial and reasonable, and therefore is inconsistent with Article X:3(a) of the GATT 1994". The panel request then goes on to identify precisely the laws, regulation, decisions, and rulings of the kind described in Article X:1 of the GATT 1994 that the EC fails to administer in the manner required by Article X:3(a). The very first measure identified is the CCC, of which Article 221(3) plainly forms a part.

The third paragraph of the panel request lists examples of some important ways in which the lack of uniform administration of EC customs law manifests itself. That this is not an exhaustive list is plain from the introductory phrase "including but not limited to". In its reply to the Panel's Question No. 172, the EC argues that this phrase should not be read to encompass the area of customs administration related to CCC Article 221(3) (i.e. communication of the customs debt).[19]

In making this argument, the EC is treating the illustrations set forth in the third paragraph of the panel request as if they were the US claims, as opposed to examples that demonstrate the US claim that the EC is breaching GATT 1994 Article X:3(a) by failing to administer its customs laws uniformly. While the phrase "including but not limited to" may be inadequate to include in a dispute measures or agreement provisions not expressly listed in the panel request[20], its use in connection with a summary of *arguments* in support of a claim does not affect the right of the complaining party to make other arguments throughout a dispute.[21]

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submitted at that stage of the proceeding concerned agreements to which the EC is not party (i.e. the North American Free Trade Agreement) and municipal law of the complaining parties. In the dispute *EC – Trade Description of Sardines*, the EC even attempted to introduce new evidence at the interim review stage of the panel proceeding. *See* Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, para. 301 (adopted 23 October 2002). The Appellate Body concluded that the interim review stage was not an appropriate time to submit further (alleged) rebuttal evidence.

[18] *See, e.g.*, Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, para. 125 (adopted 12 January 2000); Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, para. 141 (adopted 25 September 1997); Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/*DS22*/AB/R, p. 22 (adopted 20 March 1997).

[19] EC Additional Submission, para. 32.

[20] *Cf.* Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, para. 90 (adopted 16 January 1998).

[21] *See, e.g.*, Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, para. 141 (adopted 25 September 1997) ("[T]here is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set

The United States discussed CCC Article 221(3) – a provision of a measure identified in the US panel request as not being administered by the EC in a uniform manner – in its Oral Statement at the second Panel meeting as part of a rebuttal of the EC assertion that certain instruments – i.e. explanatory notes, BTI, and ECJ judgments – ensure uniform administration. As noted in response to Question No. 177, above, the divergent administration of Article 221(3) in the camcorders case highlights that these tools do *not* ensure uniform administration. Thus, for example, although different EC customs offices take different approaches to circumstances warranting suspension of the three-year period for communication of the customs debt provided for in Article 221(3) – a clear example that the EC fails to administer its customs laws uniformly – at least one member State court of last resort has consistently declined to refer to the ECJ a question that might lead to resolution of that divergence.[22] Under the EC system of customs law administration, the existence of such a divergence within the EC does not itself compel a member State court to refer a question to the ECJ.

The United States was not required to refer to this argument in its panel request. All that it was required to do (as relevant here) was to "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly"[23], which is what it did, and more.

179. In paragraph 34 of the European Communities' reply to Panel Question No. 172, the European Communities notes that the list of instances of non-uniform administration contained in the United States' reply to Panel Question No. 124 does not refer to Article 221 of the Community Customs Code. Please comment, indicating the significance, if any, that should be attached to the European Communities' observation.

No significance should be attached to the lack of a reference to CCC Article 221 in the US answer to Question No. 124. In particular, contrary to what the EC asserts, it does not reflect an acknowledgment either that the United States has failed to show non-uniform administration by the EC of Article 221 or that non-uniform administration of Article 221 falls outside the Panel's terms of reference.

Question No. 124 did not ask the United States to list every illustration supporting its claim that the EC's failure to administer its customs laws uniformly breaches the EC's obligation under GATT 1994 Article X:3(a). Rather, the United States understood Question No. 124 to seek confirmation that the principal finding requested by the United States is a finding that the EC is in breach of its obligation under Article X:3(a) as a result of the absence of uniformity in the administration of EC customs laws as a whole. The United States confirmed that this is the principal finding that it seeks with respect to its Article X:3(a) claim. In its response to Question No. 124 and in its responses to other questions (notably, Question No. 126), the United States showed that un-rebutted evidence of the design and structure of the EC's system of customs administration supports that finding. The United States then added (in its response to Question 124) that evidence of non-uniform administration in specific areas corroborates the finding that non-uniform administration necessarily results from the design and structure of the EC's system. As noted, the United States listed areas of non-uniform administration demonstrated by the evidence.

Article 221 is a further example to those in the list. Like the other examples set forth in the list, the evidence plainly shows that Article 221 is administered in a non-uniform manner, contrary to

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out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the *parties*.").

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

[23] DSU, Article 6.2.

Article X:3(a). As discussed in the US Oral Statement at the second Panel meeting, CCC Article 221(3) prescribes a three-year period following the incurrence of a customs debt during which liability for the debt may be communicated to the debtor.[24] It also provides for suspension of the three-year period during the pendency of an appeal. It does not provide any other circumstance under which the three-year period may be suspended. Nevertheless, the EC customs office in France has taken the position (since confirmed by an amendment to the French customs code) that the three-year period may be suspended by the institution of any administrative proceeding (procès-verbal) investigating a possible customs infraction, even if that proceeding does not result in the imposition of any penalty against the debtor.[25] Customs authorities in other parts of the EC do not take the same position. That is, they do not administer CCC Article 221(3) in the same manner as the customs authority in France.

In fact, the EC effectively concedes that Article 221 is administered in a non-uniform manner (albeit for reasons different from those discussed by the United States) and, therefore, would have been an appropriate illustration to include in the US response to Question No. 124. The EC points out that under paragraph 4 of Article 221, liability for a customs debt may be communicated to the debtor after the three-year period set out in paragraph 3, "[w]here the customs debt is the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings." It explains that each member State may decide for itself what constitutes an act liable to give rise to criminal court proceedings, as well as "the length of the period during which the debt can be communicated" where the customs debt is the result of such an act.[26] Thus, if a given act resulting in a customs debt (for example, negligent mis-classification of merchandise) is subject only to administrative penalties in one member State, but is subject to criminal penalties in another, the customs authority in the first member State is subject to the three-year limitation on communication of the customs debt, while the customs authority in the second member State is subject only to the limitation (if any) set forth in its national law.[27] This is a clear example of how the EC, through its customs offices in the different member States, fails to administer its customs law uniformly.

180. In paragraph 42 of the European Communities' reply to Panel Question No. 172, the European Communities submits that the United States uses the Camcorders example to illustrate alleged non-uniform administration with respect to the period following importation during which a customs debt may be collected. Is this characterization of the United States' allegations correct? If not, please specifically explain how the United States' arguments in this regard should be characterized

The EC's characterization of the purpose for which the United States used the camcorders example is not correct. The United States used the camcorders example to illustrate four distinct

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

[25] *See, e.g.*, Judgment of the Cour de Cassation, Case No. 143, June 13, 2001, pp. 439-40 (Exhibit US-67) (upholding suspension of 3-year period for the Saga Méditerranée company, even though the company had been discharged of liability under penal law); Judgment of the Cour de Cassation, Case No. 144, 13 June 2001, p. 448 (Exhibit US-68) (upholding suspension of 3-year period for the Saupiquet company and its customs agents, even though they had been discharged of liability under penal law).

[26] EC Additional Submission, para. 44.

[27] It should be noted that this is yet another way in which the different penalties available in each of the EC member States evidence non-uniform administration of EC customs law. It is not necessary that a penalty actually be imposed for this non-uniform administration to manifest itself. The only predicate for avoiding the three-year limitation in CCC Article 221(3) is that the act resulting in the customs debt "was liable to give rise to criminal court proceedings", not that it actually did give rise to criminal court proceedings. Thus, even in the hypothetical case in which customs authorities in two different member States treated an identical infraction in the same way and declined to impose any penalty at all, the fact that the authority in one member State *could have* treated the infraction as a criminal matter while the other could not means that the first is expressly permitted to enlarge the period for communication of the customs debt while the second is not.

points. First, the example illustrates that, contrary to the EC's argument, explanatory notes are not effective tools for ensuring the uniform administration of EC customs law. This is demonstrated by the fact that customs authorities in at least two member States (France and Spain) decided to give retrospective effect to the camcorders explanatory note (Exhibit US-61). That is, in view of the explanatory note, they revised the classification of merchandise that had already been imported, and they collected additional customs duties accordingly. By contrast, customs authorities in other member States refrained from giving retrospective effect to the explanatory note because the note effectively established a new substantive rule (i.e. it made susceptibility of camcorders to modification of use following importation a criterion for their classification). This was evidenced, for example, by the announcement of the explanatory note by the customs authority in the United Kingdom, in which it indicated that the note "does involve a change in practice for [the] United Kingdom".[28] Thus, different EC customs offices took the same explanatory note and applied it to the same situation differently, demonstrating that the EC fails to administer its customs law uniformly.

Second, the camcorders example illustrates that, contrary to the EC's argument, BTI is not an effective tool of ensuring uniform administration of classification rules. In this case, one EC customs office (in Spain) had issued BTI classifying 19 camcorder models (Exhibit US-65). The French affiliate of the holder of the BTI informed another EC customs office (in France) of the BTI's existence during the course of an audit by that office. Nevertheless, the EC customs office in France informed the company that it intended not to follow the classification set forth in the BTI, but instead, to collect duty based on its own determination of the correct classification of the camcorder models at issue. The EC incorrectly characterizes this as a "question . . . of post-clearance recovery of customs duties, and not one of tariff classification".[29] It is true that the context in which this matter emerged involved the post-clearance recovery of duties. However, determining the amount of duties to be recovered requires a determination of classification. The EC readily acknowledges that "[t]he BTI issued by the Spanish authorities submitted as Exhibit US-65 are all in full accordance with EC classification rules."[30] It is, therefore, all the more surprising that a second EC customs office has

[28]HM Customs & Excise, Tariff Notice 19/01 (July 2001) (Exh. US-63); *see also* Vorschriftensammlung Bundesfinanzverwaltung, VSF-Nachrichten N 46 2003, sec. I(3) (5 August 2003) (German customs notice on application of the EC provisions on reimbursement/remission and recovery of import duties, together with unofficial English translation) (Exhibit US-64) (noting that where an explanatory note effectuates a change in substance it will not be applied retroactively). In its reply to the Panel's Question No. 172, the EC misstates the purpose for which the United States referred to the administrative guideline issued by Germany and set forth in Exhibit US-64. Contrary to the EC's assertion (*see* EC Additional Submission, para. 43), the United States cited this guideline not to illustrate a point regarding CCC Article 221, but rather, to underscore the divergence in the treatment of explanatory notes between certain customs offices (notably, in France and Spain), on the one hand, and other customs offices (notably, in Germany and the United Kingdom), on the other.

Moreover, the United States calls the Panel's attention to the exhibit (EC-153) that the EC introduced to show that the German guideline was in fact "the transposition of a letter that had been addressed by the European Commission in 1996 to the customs authorities of all Member States". EC Additional Submission, para. 43. First, the letter set forth in Exhibit EC-153 says nothing about the effects of explanatory notes. It is addressed, instead, to the impact of tariff classification regulations on the recovery of customs duties. Second, the letter does discuss the situation in which, prior to issuance of a tariff classification regulation, some importers had paid duty on the merchandise at issue equal to the amount they would have had to pay under the new regulation, while others paid less. It states that "[t]he principles of legal certainty and legitimate expectations cannot be invoked by traders who, in the case of disparities in application by different customs offices in the Community, have paid the same amount of duties as they would under the new regulation". Letter from James Currie to Mrs. V.P.M. Strachan CB, p. 2 (Exhibit EC-153). In other words, where classification rules have been administered in a non-uniform way, such that importers into some member States have paid higher duties than importers of materially identical goods into other member States, the EC acknowledges that a new classification regulation will not cure that non-uniformity.

[29] EC Additional Submission, para. 40.

[30] EC Additional Submission, para. 40.

indicated its intent not to follow the classification set forth in that BTI. Its decision not to do so illustrates that BTI does not ensure uniform administration of EC customs law by the EC's 25 independent, geographically limited customs offices.

Third, the camcorders example illustrates the non-uniform administration of CCC Article 221(3), as discussed in response to Question No. 179, above. Not only does the EC customs office in France take the position (unlike customs offices in other parts of the EC) that the camcorders explanatory note can be applied to imports pre-dating the note but, additionally, it takes the position (also unlike customs offices in other parts of the EC) that the note can be applied to imports even if the customs debt attributable to those imports arose more than three years in the past. Thus, the camcorders importer in France remains vulnerable for additional duty collections on imports made in 1999, even though customs offices in other parts of the EC would consider such additional collection to be time-barred.[31]

Finally, the camcorders example illustrates that, contrary to the EC's argument, the mechanism for the preliminary reference of questions to the ECJ does not effectively ensure uniform administration of EC customs law. This aspect of the camcorders example is linked to the non-uniform administration of CCC Article 221(3). If the preliminary reference mechanism were an effective tool for curing situations in which the EC is not administering its customs laws uniformly, then one would expect that tool to be used precisely where a member State court is confronted with stark evidence of non-uniform administration – e.g., where the EC customs office in France treats the institution of an administrative investigation as suspending the three-year period set forth in Article 221(3), while other EC customs offices do not. Yet, as the United States has shown, even France's highest court has consistently refused to refer this question to the ECJ, notwithstanding the clear divergence in administration in different regions of the EC.[32]

181. With respect to the arguments made by the United States in paragraph 31 of its Oral Statement at the second substantive meeting, please clearly identify the type(s) of non-uniform administration being alleged.

In paragraph 31 of its Oral Statement at the second substantive meeting, the United States alleges that the EC fails to administer Article 221(3) of the CCC in a uniform manner. That article states that "[c]ommunication to the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred". It identifies only one circumstance under which the three-year period may be suspended: the lodging of an appeal. Nevertheless, one EC customs office (in France) administers Article 221(3) by suspending the three-year period upon the institution of any administrative proceeding (procès-verbal) investigating a possible customs infraction, regardless of whether a customs penalty ever is imposed against a party being investigated. Other EC customs offices do not administer Article 221(3) in this manner. That is, they do not treat the three-year period provided for in Article 221(3) as suspended upon the initiation of any administrative proceeding (procès-verbal) investigating a possible customs infraction. Thus, as the

[31]In its Oral Statement at the second Panel meeting, the United States described this aspect of the camcorders example as non-uniform administration with respect to "the period following importation during which a customs debt may be collected." In its response to Question No. 172, the EC clarifies that Article 221(3) concerns "the period during which a customs debt may be communicated to the debtor". The United States agrees with this statement of the subject of Article 221(3). However, the United States disagrees with the implication that this has nothing to do with collection of the customs debt. The period during which the customs debt may be communicated to the debtor is obviously essential to collection of the debt. For, if the period for such communication has expired, then so has the possibility of collecting any debt not previously communicated.

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

camcorders example shows, a camcorders importer in one part of the EC (France) remains vulnerable in 2005 for additional duty collections on imports made in 1999, even though EC customs offices in other parts of the EC would consider such additional collection to be time-barred. Therefore, the administration of Article 221(3) is a glaring example of non-uniform administration of EC customs law in breach of GATT 1994 Article X:3(a).[33]

Separately, also in paragraph 31 of its Oral Statement at the second substantive meeting, the United States called attention to the refusal of France's highest court to refer to the ECJ the question of whether an administrative investigation may suspend the three-year period under Article 221(3). The United States submitted that where the highest court of a member State can decline to refer a question to the ECJ, even in the face of clear evidence that the EC customs office in that member State is administering EC customs law differently than the EC customs offices in other member States, this rebuts the EC's assertion that the preliminary reference mechanism ensures uniform administration.

QUESTION FOR BOTH PARTIES

184. With respect to paragraph 49 of the European Communities' reply to Panel Question No. 172, could the act of issuance of binding tariff information that is not, at the time of issuance, inconsistent with EC customs law but which, to the knowledge of the issuing authority, will certainly become inconsistent with such law (e.g., once an inconsistent regulation comes into effect) be evidence supporting an allegation of non-uniform administration within the meaning of Article X:3(a)? If so, please explain making reference to the terms of Article X:3(a).

In answering Question No. 184, it is important to distinguish between the hypothetical situation the question posits, the known facts of the Sony PlayStation2 ("PS2") case, and the broader significance of the PS2 case. First, as to the hypothetical the question posits, it is indeed possible that BTI issued by one EC customs office classifying a good one way, where the customs office knows that an EC-wide regulation classifying the good differently is forthcoming, could be evidence supporting an allegation of non-uniform administration within the meaning of GATT 1994 Article X:3(a). Article X:3(a) requires a Member to "administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article". It is undisputed that EC classification rules (the subject of BTI) are laws or regulations of the kind described in paragraph 1 of Article X. Further, the ordinary meaning of "administer", as relevant here, is, "carry on or execute (an office, affairs, etc.)".[34] The ordinary meaning of "uniform", as relevant here, is, "[o]f one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times".[35] By issuing BTI, an EC customs office "administers" the EC's classification rules within the ordinary meaning of that term. That is, through BTI, an EC customs office determines the Common Customs Tariff heading under which a particular good is to be classified by applying general rules on interpretation of the Tariff.

The question then is whether administration of the classification rules through BTI stays the same in different places under the scenario posited. If the classification set forth in BTI issued by one

[33] As noted in response to Question No. 179, above, the EC's response to Question No. 172 highlights an additional way in which CCC Article 221 is administered in a non-uniform manner. Specifically, with respect to paragraph 4 of Article 221, the length of the period during which the customs debt may be communicated to the debtor may vary from customs office to customs office within the EC in the circumstance where a customs office determines (according to its own, national criteria) that an act resulting in a customs debt is an act that "*may* give rise to criminal proceedings" (regardless of whether it actually *does* give rise to criminal proceedings). EC Additional Submission, para. 44 (emphasis added).

[34] *The New Shorter Oxford English Dictionary*, Vol. I at 28 (1993) (Exhibit US-3).

[35] *The New Shorter Oxford English Dictionary*, Vol. II at 3488 (1993) (Exhibit US-4).

EC customs office "will certainly become inconsistent with [EC customs] law (e.g., once an inconsistent regulation comes into effect)," one must consider what has prompted adoption of the forthcoming inconsistent regulation. Notably, it is quite possible that other EC customs offices have been classifying the good at issue in the manner set forth in the anticipated regulation, and that these EC customs offices urged adoption of an EC-wide regulation in view of the inconsistent action by the EC customs office whose BTI is in question. This possibility is supported by the critical role that the Customs Code Committee plays in the process of adopting classification regulations[36], and the fact that the Committee consists of representatives of all 25 EC member States. Put another way, if the anticipated regulation classified the good at issue in a manner contrary to the classification applied in several member States, it would seem difficult to generate Committee support for the regulation, which would necessitate referral of the regulation to the Council of the European Union (which ultimately could reject the regulation).[37] If, in fact, development of the EC regulation reflects the emergence of a plurality view among EC customs offices on how the good at issue should be classified, then the issuance of inconsistent BTI by a single EC customs office would demonstrate administration of the classification rules through BTI that is *different* in different places – i.e. that is not "uniform" within the ordinary meaning of that term as used in Article X:3(a).

Having said this, it is not clear from the facts of the PS2 case as laid out in the judgments of the EC Court of First Instance (Exhibit US-12) and the UK High Court of Justice (Exhibit US-70) whether EC customs offices other than the EC customs office in the United Kingdom had had occasion to classify the PS2 prior to issuance of the Commission regulation.[38]

Finally, and most fundamentally, the foregoing response should not be confused with the broader significance of the PS2 case and the rationale for discussing it in the US Oral Statement at the second Panel meeting. The main point to be gleaned from the PS2 case does *not* concern the correct classification of the PS2. Contrary to the EC's assertion, the United States is not making itself "the advocate for behaviour which would manifestly detract from the uniform application of EC law."[39] It

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[36] *See* EC First Written Submission, para. 92; EC Replies to 2nd Panel Questions, para. 61 (adoption of classification regulations requires consultation of the Committee).

[37] *See* Council Decision 1999/468/EC, laying down the procedures for the exercise of implementing powers conferred on the Commission, Article 4 (setting forth the "management procedure," which is the procedure applicable to adoption of classification regulations) (Exhibit US-10).

[38] The judgment of the Court of First Instance does observe, however, that "[i]t [was] common ground amongst the parties that, at the time the contested regulation was adopted, that BTI [i.e. the BTI issued by the customs office in the United Kingdom] was the only one classifying the PlayStationR2 under heading 8471." *Sony Computer Entertainment Europe Ltd.* v. *Commission of the European Communities*, Case T-243/01, para. 68 (Court of First Instance of the European Communities, 30 September 2003) (Exhibit US-12).

It also is not clear that the classification set forth in the UK BTI was consistent with EC law even before issuance of the Commission regulation. The decision by the EC customs office in the United Kingdom to classify the PS2 under Tariff heading 8471.49.00 was based on the view that the determinative issue in its classification was whether it was freely programmable. While the Customs Code Committee found that it was freely programmable, it supported a regulation specifying a different classification, based on the view that this characteristic was not determinative. *See Sony Computer Entertainment Europe Ltd.* v. *Commission of the European Communities*, Case T-243/01, paras. 23-24 (Court of First Instance of the European Communities, 30 September 2003) (Exhibit US-12) (indicating that basis for classification in 12 June 2001 was that PS2 was capable of being freely programmed); *Sony Computer Entertainment Europe Ltd.* v. *Commissioners of Customs and Excise*, Judgment of the High Court of Justice, Chancery Division, [2005] EWHC 1644 (Ch), para. 99 (27 July 2005) (Exhibit US-70) (summarizing argument of customs authority, in which it is noted that "a unanimous [EC] Nomenclature Committee recognised at its meetings in April and May 2001" that classification of the PS2 under heading 8471 "was incorrect").

The United States calls attention to the foregoing aspects of the PlayStation2 case in the interest of clarity. However, these aspects do not affect the answer to the Panel's Question, as discussed above.

[39] EC Additional Submission, para. 56.

is not arguing that the June 2001 BTI issued by the customs office in the United Kingdom should have been restored upon annulment of the EC classification regulation because the BTI classified the PS2 correctly.

Rather, the broader significance of the PS2 case, and hence the reason for discussing it at the second Panel meeting, is that it demonstrates the power of each of the EC's 25 independent, geographically limited customs offices to depart from a course of uniform administration on its own initiative. The issuance of BTI in June 2001 classifying the PS2 under Tariff heading 8471 was an act that, at least under the EC's view of BTI, should have led to uniform administration of the classification rules with respect to that product. The issuance of an EC regulation in July 2001 was an act that should have continued uniform administration of the classification rules with respect to the PS2, albeit under a different Tariff heading (9504, instead of 8471). Consistent with continuity of uniform administration, the June 2001 BTI was revoked as a result of the regulation's entering into force.

When the EC regulation was annulled by the September 2003 Court of First Instance judgment, one might have expected the June 2001 BTI to be restored, which (again, under the EC's view of BTI) would have continued the uniformity of administration of the classification rules with respect to the PS2. In fact, prior to the ECJ's January 2004 judgment in *Timmermans*, the customs authority in the United Kingdom evidently believed that it was required to restore the BTI, and that, in view of the Advocate-General's September 2003 opinion in *Timmermans*, it could not amend the BTI based on its own, independent reinterpretation of the applicable classification rules.[40]

However, following the *Timmermans* judgment, the customs authority in the United Kingdom was free to keep the BTI revoked, not on the basis of the EC regulation (which, of course, had been annulled), but now on the basis of its own reinterpretation of the applicable classification rules. It was thus able to interrupt the series of actions that, in theory, had provided for uniform classification of the PS2 since June 2001. Whether or not the BTI correctly classified the PS2, this case stands for the broader proposition that, under *Timmermans*, each of the EC's 25 independent, geographically limited customs offices has the power to depart from a path of theoretically uniform administration of the classification rules based on its own reconsideration of those rules.

That proposition has a significance that is not limited to the facts of the PS2 case. It demonstrates that, contrary to the EC's argument, BTI does not ensure uniform administration of EC classification rules. It was for this reason that the United States discussed the PS2 case at the second Panel meeting. The United States emphasizes this point to avoid any confusion between the first part of its response to the Panel's question, which concerns one aspect of the PS2 case, and the more general significance of the PS2 case.

In short, the PS2 example (like the other examples discussed in part III of the US Oral Statement at the second Panel meeting) confirms the main point of the U.S. claim with respect to GATT 1994 Article X:3(a): 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

[40] *Sony Computer Entertainment Europe Ltd.* v. *Commissioners of Customs and Excise*, Judgment of the High Court of Justice, Chancery Division, [2005] EWHC 1644 (Ch), paras. 68-69 (27 July 2005) (Exhibit US-70); *see also* US First Written Submission, paras. 63-64 (discussing Advocate-General's opinion in *Timmermans*).

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). Neither BTI, nor explanatory notes, nor the ECJ preliminary reference procedure alters this conclusion.

ANNEX C-3

**RESPONSES OF THE EUROPEAN COMMUNITIES
TO SUPPLEMENTARY QUESTIONS POSED BY THE PANEL
REGARDING SECTION III OF THE US SECOND ORAL STATEMENT**

QUESTIONS FOR THE EUROPEAN COMMUNITIES

182. With reference to paragraph 15 of the European Communities' reply to Panel Question No. 172, please clearly identify the "additional evidence referred to in other parts of the US Second Oral Statement" which the European Communities categorises as "new evidence".

The EC refers to Exhibits US-73 to US-80.

183. With respect to paragraphs 47 and 48 of the European Communities' reply to Panel Question No. 172, please clarify where the criterion of "freely programmable" (which was referred to by both the UK authorities when Sony first requested classification of the product in question as well as subsequently by the Customs Code Committee) comes from?

The criterion is based on Note 5 (A) to CN Chapter 84, which defines, for the purposes of heading 8471, an "automatic data processing machine" as follows (Exhibit US-46, emphasis added):

> For the purposes of heading 84.71, the expression " automatic data processing machines " means :
>
> (a) Digital machines, capable of
>
> (1) storing the processing program or programs and at least the data immediately necessary for the execution of the program;
>
> (2) being <u>freely programmed</u> in accordance with the requirements of the user;
>
> (3) performing arithmetical computations specified by the user; and,
>
> (4) executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run;
>
> (b) Analogue machines capable of simulating mathematical models and comprising at least : analogue elements, control elements and programming elements;
>
> (c) Hybrid machines consisting of either a digital machine with analogue elements or an analogue machine with digital elements.

QUESTION FOR BOTH PARTIES:

184. With respect to paragraph 49 of the European Communities' reply to Panel Question No. 172, could the act of issuance of binding tariff information that is not, at the time of issuance, inconsistent with EC customs law but which, to the knowledge of the issuing authority, will certainly become inconsistent with such law (e.g. once an inconsistent regulation comes into effect) be evidence supporting an allegation of non-uniform administration within the meaning of Article X:3(a)? If so, please explain making reference to the terms of Article X:3(a).

No. The fact that BTI is issued and later revoked as such does not constitute evidence of non-uniform administration. The fact that at the time the BTI was issued, it may have been foreseeable that the BTI would later have to be revoked does not alter this assessment.

As regards the specific instance referred to in paragraph 49 of the EC's Additional Submission, it should be noted that the UK authorities issued the BTI under heading 8471 49 00 in reaction to a judgment which had annulled an earlier BTI issued under heading 9504 1000.

In addition, it should be noted that the BTI thus issued applied only for a short time, and did not lead to any non-uniform administration. Moreover, it was promptly revoked when the Commission classification regulation entered into force. Accordingly, the BTI in question cannot be regarded as evidence of a lack of uniformity.

Moreover, even though the BTI in question should not have been issued, this was a unique case due to the very specific circumstances of the case. An isolated and temporary problem cannot be regarded as evidence of a pattern of non-uniformity in the EC's system of customs administration. In contrast, what is worrying is that the United States is now supporting a party which is seeking to revive the effects of the BTI in question, and is thus advocating a situation which could effectively lead to a situation of non-uniform administration.[1]

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[1] Cf. EC Additional Submission, para. 56.