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EUROPEAN COMMUNITIES – SELECTED CUSTOMS MATTERS

Report of the Panel

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Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002
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EC – Computer Equipment	Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R; WT/DS68/AB/R, adopted 5 February 1998
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002
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Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998

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US – Corrosion-Resistant Steel Sunset Review	Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, adopted 9 January 2004, as modified by the Appellate Body Report, WT/DS244/AB/R
US – Gambling	Panel Report,*United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, as modified by the Appellate Body Report, WT/DS285/AB/R
US – Gasoline	Appellate Body Report, *United Sttates – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
US – Gasoline	Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by the Appellate Body Report, WT/DS2/AB/R
US – Hot-Rolled Steel	Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001 as modified by the Appellate Body Report, WT/DS184/AB/R
US – Malt Beverages	GATT Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, adopted 19 June 1992, BISD 39S/206
US – Offset Act (Byrd Amendment)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003
US – Oil Country Tubular Goods from Mexico	Appellate Body Report, *Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, adopted 28 November 2005
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004

US – Section 301 Trade Act	Panel Report, *United States – Sections 301-310 of the Trade Act 1974*, WT/DS152/R, adopted 27 January 2000
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998
US – Stainless Steel	Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted 1 February 2001
US – Underwear	Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997
US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, adopted 21 March 2005 as modified by the Appellate Body Report, WT/DS267/AB/R
US – Wool Shirts and Blouses	Apellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997

LIST OF ABBREVIATIONS

BDL	Blackout drapery lining
BTI	Binding Tariff Information
CCC, the Code	Community Customs Code, Council Regulation (EEC) 2913/92
CFI	European Court of First Instance
CIS	Customs Information System
CN	European Communities Combined Nomenclature
Comitology Decision	Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission
Commission, EC Commission	Commission of the European Communities
Council, EC Council	Council of the European Union
Court of Justice, European Court of Justice	Court of Justice of the European Communities
Customs Code Committee, the Committee	Committee established by Articles 247a (1) and 248a (1) of the CCC
Customs Valuation Agreement	Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EBTI	European Binding Tariff Information
EC	European Communities
ECJ	European Court of Justice
ECR	European Court of Justice, Reports of Cases before the Court
EC Treaty	Treaty establishing the European Community

EU Treaty	Treaty on European Union
GATT	General Agreement on Tariffs and Trade 1994
HS	Harmonized Commodity and Coding System
HS Convention	International Convention on the Harmonized Commodity and Coding Sysdtem
Implementing Regulation**,** CCCIR	Commission Regulation (EEC) 2454 of 2 July 1993 laying down provisions for the Implementation of the CCC
Kyoto Convention	International Convention on the Simplification and Harmonization of Customs Procedures
LCD monitors with DVI	Liquid crystal display flat monitors with digital video interface
LCP	Local clearance procedures
Member States, EC member States	Member States of the European Union
Official Journal	Official Journal of the European Union
PCC	Processing under customs control procedure
RIL	Reebok International Limited
Taric	Integrated Tariff of the European Communities
Tariff, the	Community Customs Tariff, Council Regulation (EEC) 2658/87
US	United States
USCIT	United States Court of International Trade
USTR	United States Trade Representative
WCO	World Customs Organization
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

I. INTRODUCTION

1.1 On 21 September 2004, the United States requested consultations with the European Communities (EC) pursuant to Articles 1 and 4 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) (WT/DS315/1).

1.2 The request referred to the alleged non-uniform manner in which the European Communities administers its laws, regulations, decisions and rulings of the kind described in Article X:1 of GATT 1994 pertaining to the classification and valuation of products for customs purposes and to requirements, restrictions or prohibitions on imports.

1.3 The request identified the following measures: Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code, including all annexes thereto, as amended (the "Code"); Commission Regulation (EEC) No. 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code, including all annexes thereto, as amended (the "Commission Regulation"); Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, including all annexes thereto, as amended (the "Tariff Regulation"); the Integrated Tariff of the European Communities established by virtue of Article 2 of Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, including all annexes thereto, as amended (the "TARIC"); and for each of the above laws and regulations, all amendments, implementing measures and other related measures.

1.4 The request also referred to the alleged failure of the European Communities to institute judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters.

1.5 The United States and the European Communities held consultations on 16 November 2004 but failed to reach a mutually satisfactory resolution of the matter. Consequently, in a communication dated 13 January 2005[1], the United States requested the Dispute Settlement Body (DSB) to establish a panel. Accordingly, at its meeting of 21 March 2005, the DSB established the Panel with standard terms of reference. The terms of reference for the Panel are, therefore, the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS315/8, the matter referred to the DSB by the United States in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.6 On 17 May 2005, the United States requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. That paragraph provides:

> If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties

[1] WT/DS315/8 contained in Annex C.

to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

1.7 On 27 May 2005, the Director-General accordingly composed the Panel as follows:

Chairman: Mr. Nacer Benjelloun-Touimi

Members: Mr. Mateo Diego-Fernández
Mr. Hanspeter Tschäni

1.8 Argentina; Australia; Brazil; China; Hong Kong, China; India; Japan; Korea; and Chinese Taipei reserved their third party rights to participate in the Panel's proceedings.

1.9 The Panel held the first substantive meeting with the parties on 14-16 September 2005. The session with the third parties took place on 15 September 2005. The Panel's second substantive meeting with the parties was held on 22-23 November 2005.

1.10 On 10 January 2005, the Panel issued the Descriptive Part of its Panel Report. The Interim Report was issued to the parties on 10 February 2006 and the Final Report was issued to the parties on 31 March 2006.

II. FACTUAL ASPECTS

2.1 This dispute concerns, *inter alia*, the question of whether the manner in which the European Communities administers its laws, regulations, decisions and rulings of the kind described in Article X:1 of GATT 1994, pertaining to the classification and valuation of products for customs purposes and to requirements, restrictions or prohibitions on imports, complies with the obligation of uniform administration contained in Article X:3(a) of the GATT 1994. In particular, the United States argues that the following measures are not being administered in a uniform way by the European Communities in violation of Article X:3(a): (a) the "Community Customs Code" contained in Council Regulation (EEC) No. 2913/92 of 12 October 1992; (b) the "Implementing Regulation" implementing the Community Customs Code contained in Commission Regulation (EEC) No. 2454/93 of 2 July 1993; (c) the "Common Customs Tariff", which was originally promulgated in Council Regulation (EEC) No. 2658/87 but which is updated annually in the EC Official Journal; (d) the "Taric", which is the Integrated Tariff of the European Communities established by virtue of Article 2 of the Council Regulation (EEC) No. 2658/87 of 23 July 1987 and (d) "related measures". The United States also challenges the alleged failure of the European Communities to provide for the review and correction of administrative action relating to customs matters in the manner prescribed by Article X:3(b) of the GATT 1994.

A. THE LEGISLATIVE FRAMEWORK FOR ADMINISTRATION OF EC CUSTOMS LAW

2.2 The EC Treaty establishes a common commercial policy. According to Article 133(1) of the EC Treaty, the common commercial policy is based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy, and measures to protect trade such as those to be taken in the event of dumping or subsidies. The ECJ has confirmed that the customs union and the common commercial policy, which includes administration of customs matters, fall within the exclusive competence of the European Communities.[2]

[2] Opinion 1/75, *Local Cost Standard*, [1975] ECR 1355 (Exhibit EC-13).

2.3 The three main instruments comprising the legislative framework for customs administration in the European Communities are: the Community Customs Tariff; the Community Customs Code; and the Implementing Regulation. Each of these instruments are EC regulations. Pursuant to Article 249(2) of the EC Treaty, they are binding in their entirety and directly applicable in all member States.

1. The Community Customs Tariff

2.4 The Community Customs Tariff was established by Council Regulation (EC) No. 2658/87 on 23 July 1987, which covers customs tariffs and the collection of international trade statistics. In turn, the Community Customs Tariff establishes the Combined Nomenclature (CN). Being a signatory to the HS Convention, the European Communities based the CN on the Harmonized System (HS). In particular, Article 1(2) of Regulation No. 2658/87 states that the CN is comprised of: (a) the harmonized system nomenclature; (b) EC subdivisions/headings to that nomenclature (where a corresponding duty rate is specified); and (c) preliminary provisions, additional sections or chapter notes and footnotes relating to subheadings. The preliminary provisions contain, *inter alia*, general rules for the interpretation of the CN.

2.5 The actual tariff nomenclature is contained in the Annex to Regulation No. 2658/87, which is updated on a periodic basis pursuant to Article 12 of the Regulation. The current version of the Annex was published on 7 September 2004 and came into force on 1 January 2005 as Commission Regulation (EC) No. 1810/2004.

2.6 The CN has eight-digit codes, with the first six digits representing the HS codes (as required by the HS Convention) and the last two digits identifying CN subheadings. Additionally, there may be a 9th digit reserved for the use of national statistical subdivisions and a 10th and 11th digit for the Integrated Tariff of the European Communities, known as the "Taric".[3] Similar to the HS, the CN consists of 21 sections, covering 99 chapters. Some sections and chapters of the CN are preceded by notes.

2. The Community Customs Code

2.7 Council Regulation (EEC) No. 2913/92 establishes the Community Customs Code.[4] The Community Customs Code comprises 253 articles and is divided into nine Titles, dealing with the following topics – Title I: Scope and basic definitions; Title II: Factors on the basis of which import duties or export duties and the other measures prescribed in respect of trade in goods are applied; Title III: Provisions applicable to goods brought into the customs territory of the Community until they are assigned a customs-approved treatment or use; Title IV: Customs-approved treatment or use; Title V: Goods leaving the customs territory of the Community; Title VI: Privileged operations; Title VII: Customs debt; Title VIII: Appeals; Title IX: Final provisions.

3. The Implementing Regulation

2.8 According to Article 247 of the Community Customs Code, the measures necessary for the implementation of the Community Customs Code are to be adopted by the Commission. On the basis of Article 247, the Commission adopted Regulation (EEC) No. 2454 of 2 July 1993 laying down provisions for the Implementation of the Community Customs Code (the "Implementing

[3] Article 2 of Regulation No. 2658/87 provides that the Taric shall be based on the CN. Section I of the TARIC explicitly states that it incorporates, *inter alia*, (a) the provisions of the HS; and (b) the provisions of the CN. The current version of the Taric is contained in Exhibit US-7.

[4] The current version of the Community Customs Code is contained in Exhibit US-5.

Regulation").[5] The Implementing Regulation sets out in detail the provisions necessary for the implementation of the Community Customs Code. Its structure broadly follows that of the Community Customs Code.

B. INSTITUTIONS AND MECHANISMS INVOLVED IN THE ADMINISTRATION OF THE EC CUSTOMS LAWS

1. The Commission

2.9 The Commission is not normally directly involved in the administration of EC customs law. Rather, Article 211 of the EC Treaty provides that the Commission shall "ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied". Generally, in the area of customs administration, the function of the European Commission as the guardian of the Treaty pursuant to Article 211 is to monitor the correct and uniform application of EC customs laws by the member States. Where the Commission considers that a member State has failed to fulfil an obligation under the Treaty, the Commission has the possibility, in accordance with the procedures of Article 226 of the EC Treaty, to bring the matter before the ECJ. Such "infringement proceedings" can be brought in response to any violation of Community law by a member State and can also concern the incorrect application of Community law by the administrations of the member States. In addition, there is a standardised procedure for complaints by individuals to be addressed to the European Commission regarding alleged infringements of Community law. Such complaints, which may also concern the application of Community law by national administrations, may lead to the institution of infringement proceedings by the Commission. In accordance with Article 228(1) of the EC Treaty, if the ECJ finds that a member State has failed to fulfil an obligation under the EC Treaty, the member State concerned is required to take the necessary measures to comply with the judgment of the ECJ. Where the member State concerned fails to comply with the judgment, the ECJ may impose a penalty payment on the member State pursuant to Article 228 (1) of the EC Treaty.

2.10 In the exercise of its duties under the EC Treaty, the public service of the European Commission is guided by a Code of Conduct which is part of the Commission's rules of procedure, and which sets out the principles of good administrative behaviour to be observed by all Commission staff.[6] In particular, Part 4 of the Code of Conduct provides that all enquiries must be dealt with as quickly as possible, and sets out time limits within which correspondence should be answered. Complaints regarding non-compliance with the Code of Conduct may be addressed to the Secretariat-General of the Commission. In addition, the Commission is politically responsible to the European Parliament. Moreover, in accordance with Article 194 of the EC Treaty, any citizen may direct a petition to the European Parliament on any matter which comes within the Community's fields of activity. Finally, in accordance with Article 195 of the EC Treaty, the European Parliament has appointed an Ombudsman empowered to receive complaints from individuals concerning instances of maladministration in the activities of the Community institutions or bodies.

2. The member States

(a) Legal effect of EC customs law on member States

2.11 Jurisprudence of the ECJ has established that the law of the European Community, including EC customs law, has primacy over the national law of the member States.[7] The principle of primacy applies to all provisions contained in the EC Treaty (primary Community law) and in acts of the EC

[5] The current version of the Implementing Regulation is contained in Exhibit US-6.
[6] Exhibit EC-12.
[7] Case 6/64, *Costa/E.N.E.L.*, [1964] ECR 1251, 1270 (Exhibit EC-4); Case 106/77, *Simmenthal II*, [1978] ECR 629, para. 17-18 (Exhibit EC-5).

institutions (secondary Community law). It also applies in respect of any provision of national law at any level, including member States' constitutions.[8] In practical terms, the principle means that, whenever a court of a member State encounters a conflict between a provision of Community law and a provision of its national law, it must set aside the provision of national law and only apply Community law.

2.12 Jurisprudence of the ECJ has also established that Community law is directly effective in member States. This means that Community law may create rights for individuals, which can be directly invoked by those individuals in proceedings before national courts and authorities.[9] The principle of "direct effect" may apply both to primary Community law as well as to secondary Community law.

(b) Administration of EC customs law

2.13 Community customs law is executed by the national authorities of the member States. This arrangement is referred to as "executive federalism".[10] The principle of executive federalism within the European Communities reflects the principle of subsidiarity, which is enshrined in Article 5(2) of the EC Treaty, according to which the Community should take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member States.

2.14 Article 10 of the EC Treaty imposes the following obligation on the member States regarding their administration, *inter alia* of EC customs law :

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

3. The Customs Code Committee

2.15 The Customs Code Committee is established by Articles 247a(1) and 248a(1) of the Community Customs Code. The Customs Code Committee has adopted its own Rules of Procedure[11], which are based – with some minor modifications – on the standard rules of procedure for comitology committees.[12]

2.16 In accordance with Article 1(1) of its Rules of Procedure, the Customs Code Committee comprises the following sections: Section for General Customs Rules; Origin Section; Duty-Free Arrangements Section; Customs Valuation Section; Section for Customs Warehouses and Free Zones; Section for Customs Procedures with Economic Impact; Transit Section; Single Administrative Document Section; Repayment Section; Tariff and Statistical Nomenclature Section; Section on the Movement of Air or Sea Passengers' Baggage; Economic Tariff Questions Section; Counterfeit Goods

[8] Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, para. 3 (Exhibit EC-6).
[9] Case 26/62, *Van Gend en Loos*, [1963] ECR 1, 25 (Exhibit EC-7).
[10] Koen Lenaerts/Piet van Nuffel, *Constitutional Law of the European Union*, 2nd ed, para. 14-047 (2005) (Exhibit EC-10).
[11] Exhibit US-9. The Rules of Procedure of the Committee are also available on the public website of the European Commission:
http://europa.eu.int/comm/taxation_customs/customs/procedural_aspects/general/community_code/index_en.htm
[12] These standard rules of procedure have been published in the Official Journal (Exhibit EC-2).

Section; Section for favourable treatment (end-use of goods). The Customs Code Committee is composed of representatives from each member State and chaired by a representative of the Commission.

2.17 Article 249 of the Community Customs Code states that the Customs Code Committee has the authority to examine any question concerning customs legislation which is raised by its chairman, either on his own initiative or at the request of a member State's representative. A similar provision is found in Article 8 of Regulation No. 2658/87 establishing the Common Customs Tariff, according to which the Committee may examine any matter referred to it by its chairman, either on his own initiative or at the request of a representative of a member State, concerning the CN or the Taric.

2.18 In practice, the Customs Code Committee undertakes the following tasks: gives opinions on amendments to the Community Customs Code or implementing measures proposed by the Commission; examines questions concerning the interpretation of customs provisions or definitions of terms used in customs legislation; exercises powers granted by virtue of specific customs legislation e.g., Article 9(1) of Regulation No. 2658/87 regarding: (a) amendment of the CN (including the creation of statistical Taric sub-headings); (b) consideration of classification regulations; (c) determination of the position of the European Communities in the Harmonized System Committee. The opinions of the Customs Code Committee are not legally binding.[13]

2.19 Articles 247a and 248a of the Community Customs Code provide that the Customs Code Committee shall act as a regulatory or management committee. Article 247 of the Community Customs Code foresees that the measures necessary for the implementation of the Community Customs Code are normally adopted according to the regulatory procedure. In certain cases, including those mentioned in Article 248 of the Community Customs Code, the management procedure applies instead.

2.20 According to Article 2 of the "Comitology Decision" contained in Decision 1999/468/EC,[14] the regulatory procedure should be applied for the adoption of "measures of general scope designed to apply essential provisions of basic instruments". Article 5 of the Comitology Decision provides that the Commission can adopt a proposed measure only if the Committee has agreed by qualified majority.[15] If no such majority has been reached or a qualified majority is against the proposal, the draft is submitted to the European Council. The European Council must then decide by qualified majority within 3 months, including to reject the measure in question. If no decision is taken within this time limit, the Commission adopts the proposed measure.

2.21 The "management procedure", which applies to "management measures",[16] is prescribed in Article 4 of Decision 1999/468/EC. That Article provides that, under this procedure, the Commission can adopt a proposed measure even when the Committee does not agree. However, if a negative opinion is rendered with a qualified majority by the Committee, the Commission must involve the European Council who can take a different decision with qualified majority within 3 months. The Commission can defer the application of the measure in such cases. In the event that the European Council takes no decision within three months, the suspended measure becomes applicable.

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[13] Joined Cases 69 and 70/76, *Dittmeyer*, [1977] ECR 231 (Exhibit EC-31).

[14] Exhibit US-10.

[15] A "qualified majority" decision involves a weighing of the votes of the member States pursuant to Article 205(2) of the Treaty Establishing the European Community, as amended by Article 3 of the Protocol on the Enlargement of the European Union.

[16] Article 2 of the Comitology Decision explains that "management measures" include measures relating to the application of the common agricultural and common fisheries policies, or to the implementation of programmes with substantial budgetary implications.

2.22 Community legal acts other than the Community Customs Code may also include references to the Customs Code Committee. In such cases, the applicable decision-making procedure is laid down in the provision attributing decision-making power to the Commission. One example is Article 10 of Regulation No. 2658/87 establishing the Common Customs Tariff, which provides that the Commission will be assisted by the Customs Code Committee in accordance with the management procedure.

4. EC courts

(a) Role and function of the courts of member States

2.23 The courts of the member States perform a dual role. When determining a dispute governed by national law, they form part of the national legal order. However, these national courts assume the status of Community courts when determining a case governed by Community law. The courts of the member States are competent to determine any dispute in cases where jurisdiction is not expressly conferred on the ECJ nor on the EC Court of First Instance. Pursuant to Article 234 of the EC Treaty, courts of member States may refer questions to the ECJ.

(b) Role and function of the ECJ

2.24 The ECJ and the Court of First Instance of the European Communities are constituted under the EC Treaty and the Protocol on the Statute of the ECJ annexed to it.[17] Both Courts are composed of one judge per member State and they normally decide in chambers of three or five judges. The ECJ is assisted by eight Advocates General, who provide opinions on cases.

2.25 According to Article 220 of the EC Treaty, the central task of the ECJ and the Court of First Instance is to ensure that, in the interpretation and application of the Treaty, the law is observed. Actions may be taken directly to the ECJ such as actions against member States for failure to fulfil an obligation under Community law (Articles 226-228 of the EC Treaty), actions for the annulment of a Community measure (Articles 230-231 of the EC Treaty), actions for failure by a Community institution to act (Article 232 of the EC Treaty), and actions for damages relating to the Community's non-contractual liability (Article 235 of the EC Treaty).

2.26 Proceedings before the ECJ may also originate from a national court under Article 234 of the EC Treaty. According to Article 234 EC, national courts may refer any question regarding the interpretation of Community law to the ECJ. With certain exceptions, member States' courts against whose decision there is no judicial remedy under national law are obliged to refer such questions to the ECJ.

2.27 Article 225(1) of the EC Treaty provides that the Court of First Instance shall have jurisdiction at the first instance in respect of actions for annulment, actions for failure to act, actions founded on non-contractual liability, staff cases and cases under arbitration clauses in Community contracts, with the exception of those reserved to the ECJ. According to Article 51 of the Statue of the Court of Justice, the ECJ shall hear actions brought by the Member States, the institutions of the Communities and by the European Central Bank. The ECJ may hear appeals on points of law from decisions of the Court of First Instance, where that Court has jurisdiction at first instance.

[17] Exhibit US-42.

5. Cooperation between the member States and between the member States and the Commission

(a) Council Regulation (EC) No. 515/97

2.28 Council Regulation (EC) No. 515/97 on mutual assistance between the administrative authorities of the member States and cooperation between the latter and the Commission seeks to ensure the correct application of, *inter alia*, the law on customs matters.[18]

2.29 Title I of Regulation No. 515/97 deals with the provision of assistance on request between member States customs authorities. Title II deals with spontaneous assistance between customs authorities. Title III deals with relations between member States' customs authorities and the Commission. Title V establishes the Customs Information System, which is an automated information system for the use of the administrative authorities of the member States and the Commission to assist EC customs authorities in preventing, investigating, and prosecuting operations that are in breach of customs law.

(b) Action programmes

2.30 The Community has adopted and implemented successive action programmes aimed at strengthening the effective implementation of the EC customs union. The current action program, "Customs 2007", applies for the period of 1 January 2003 to 31 December 2007. It is established by Decision 253/2003/EC of the European Parliament and the Council.[19] The objectives of Customs 2007 are set out in Article 3 (1) of Decision 253/2003. According to this Article, the objectives of the program are to ensure that the member States' customs administrations:

> (a) carry out coordinated action to ensure that customs activity matches the needs of the Community's internal market through implementing the strategy set out in the aforementioned Commission communication and Council resolution on a strategy for the customs union;
>
> (b) interact and perform their duties as efficiently as though they were one administration and achieve equivalent results at every point of the Community customs territory;
>
> (c) meet the demands placed on them by globalisation and increasing volumes of trade and contribute towards strengthening the competitive environment of the European Union;
>
> (d) provide the necessary protection of the financial interests of the European Union and provide a secure and safe environment for its citizens;
>
> (e) take the necessary steps to prepare for enlargement and to support the integration of new member States.

2.31 Customs 2007 foresees a number of programme actions, which include actions in the field of communication and information exchange systems, benchmarking, exchanges of officials, seminars, workshops and project groups, training activities, monitoring actions, and external actions in the form of technical assistance and training.

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[18] Exhibit EC-42.
[19] Exhibit EC-43.

6. Training

2.32 The training of customs officials of the member States takes place primarily at the national level. In addition, a "Common Customs Training Programme" was developed in the context of Customs 2007.

7. Budgetary and financial control

2.33 According to Article 2(1)(b) of the Council Decision 2000/597/EC, Euratom on the system of the European Communities' own resources[20], common customs tariff duties and other duties established in respect of trade with non-member countries shall constitute an "own resource" entered into the budget of the European Communities. Article 17(1) of Council Regulation (EC/Euratom) No. 1150/2000[21] provides that member States must take all requisite measures to ensure that the amounts corresponding to the Community's entitlement are made available to the Community as specified in that Regulation. In accordance with Article 18(2)(a) of Regulation No. 1150/2000, the member States must, at the request of the EC Commission, carry out additional inspections, with which the Commission shall be associated at its request. According to Article 18(3) of Regulation No. 1150/2000, the Commission may also itself carry out inspection measures on the spot.

C. SPECIFIC AREAS OF CUSTOMS ADMINISTRATION REFERRED TO BY THE UNITED STATES IN ITS SUBMISSIONS

1. Tariff Classification

2.34 The term "tariff classification" is defined in Article 20(6) of the Community Customs Code as the relevant subheading of: (a) the CN or any other nomenclature based on it, with or without further subdivisions, which is used for the application of Community tariff measures relating to trade in goods (e.g., tariff suspensions, tariff preferences, anti-dumping duties); or (b) any other Community nomenclature based on the CN, with or without further subdivisions, which is used for the application of non-tariff measures relating to trade in goods (e.g., import quotas for textile products, export refunds for agricultural goods).

2.35 The obligation to classify products under the Community Customs Code is borne by "customs authorities", which are defined in Article 4(3) of the Community Customs Code as the authorities responsible *inter alia* for applying customs rules. In the context of the European Communities, which is a customs union and which has a common customs tariff between EC member States and third countries, the member State administrations are responsible for all operations relating to the implementation on a day-to-day basis of the CN, including the making of classification decisions.

2.36 Jurisprudence of the ECJ establishes that tariff classification is carried out on the basis "of the objective characteristics and properties of products which can be ascertained when customs clearance is obtained".[22] Classification instruments that may be applicable throughout the European Communities include classification regulations, HS explanatory notes and opinions, EC explanatory notes, and opinions of the Customs Code Committee and binding tariff information.

[20] Exhibit EC-44.
[21] Exhibit EC-45.
[22] Case 38/76, *Luma*, [1976] ECR 2027, para. 7 (Exhibit EC-18); Case C-233/88, *van de Kolk*, [1990] ECR I-265, para. 12 (Exhibit EC-19).

(a) Classification Regulations

2.37 Pursuant to Article 9(1)(a) of Regulation No. 2658/87, the Commission may adopt regulations on the classification of goods. Such classification regulations are adopted by the Commission in accordance with the management procedure referred to in Article 10 of Regulation No. 2658/87. Classification regulations determine the tariff subheading to be applied to the specific good described in the Regulation but may also become relevant by analogy to products similar to those described in the regulation.[23] A classification regulation is binding throughout the Community in accordance with Article 249(2) of the EC Treaty but cannot amend the CN.[24]

(b) HS Explanatory Notes and WCO Opinions

2.38 According to Article 7(1)(b) of the HS Convention, the HS Committee can prepare Explanatory Notes, classification opinions and other advice as guidance to the interpretation of the HS. The ECJ has stated in its case law that, even though they are not normally binding in Community law, HS Explanatory Notes and classification opinions of the World Customs Organization (WCO) are important aids in the interpretation of the Common Customs Tariff.[25] Nevertheless, the ECJ has also judged that an interpretation of the HS approved by the WCO Council is binding on the Community when it reflects general practice followed by the member States, unless it is incompatible with the wording of the heading concerned or goes manifestly beyond the discretion conferred on the WCO.[26]

(c) Explanatory Notes of the Combined Nomenclature

2.39 According to Article 9(1)(a) of Regulation No. 2658/87, the Commission may issue explanatory notes to the CN. Such explanatory notes are adopted by the Commission in accordance with the management procedure foreseen in Article 10 of that Regulation. Explanatory notes may clarify particular issues of tariff classification arising under the CN but are distinct from the notes which introduce the chapters of the CN.[27] Explanatory notes to the CN are not legally binding, and cannot amend the CN. However, the ECJ has repeatedly acknowledged that explanatory notes are an important aid in the interpretation of the CN.[28]

(d) Opinions of the Customs Code Committee

2.40 On the basis of Article 8 of Regulation No. 2658/87, the Customs Code Committee may adopt opinions on questions relating to the application and interpretation of the CN. Such opinions are distinct from opinions which the Committee adopts in the context of a comitology procedure on measures proposed by the Commission. Opinions adopted by the Committee are not legally binding. However, the ECJ has held that that such opinions constitute an important means of ensuring the

[23] Case C-130/02, *Krings*, judgment of 4 March 2004 (not yet in the official reports), para. 35 (Exhibit EC-20).

[24] Case C-401/93, *GoldStar*, [1994] ECR I-5587, para. 19 (Exhibit EC-21); Case C-265/89, *Vismans*, [1990] ECR I-3411, para. 13 (Exhibit EC-22).

[25] Case C-396/02, *DFDS*, judgment of 16 September 2004 (not yet published), para. 28 (Exhibit EC-25); Case 14/70, *Deutsche Bakels*, [1970] ECR 1001, paras 9-10 (Exhibit EC-26).

[26] Cf. Case C-233/88, *van de Kolk*, [1990] ECR I-265, para. 9 (Exhibit EC-19).

[27] Case 183/73, *Osram*, [1974] ECR 477, para. 12 (Exhibit EC-27); Case 149/73, *Witt*, [1973] ECR 1587, para. 3 (Exhibit EC-28).

[28] Case C-396/02, *DFDS*, judgment of 16 September 2004 (not yet published), para. 28 (Exhibit EC-25); Case C-259/97, *Clees*, [1998] ECR I-8127, para. 12 (Exhibit EC-29).

uniform application of the common customs tariff by the authorities of the member States and, as such, can be considered as a valid aid to the interpretation of the Common Customs Tariff.[29]

(e) Binding tariff information

2.41 The basic provisions on binding tariff information ("BTI") are set out in Article 12 of the Community Customs Code. Further rules concerning binding information are contained in Title II of Part I of the Implementing Regulation (Articles 5-14). These additional provisions address, in particular, the procedures for obtaining binding information, measures to be taken in the event of binding information, the legal effect of binding information, and the expiry of binding information. In addition, the Commission has issued administrative guidelines on the European Binding Tariff Information (EBTI) System and its operation.[30]

2.42 The aim of binding information is to enable the trader to proceed with certainty where there are doubts as to the classification or origin of goods, thereby protecting the trader against any subsequent change in the position adopted by the customs authorities.

2.43 According to Article 6(1) of the Implementing Regulation, applications for binding information are to be made in writing, either to the customs authorities in the member State or member States in which the information is to be used, or to the competent customs authorities in the member State in which the applicant is established. In accordance with Article 6(5) of the Implementing Regulation, a list of the member States' authorities competent to issue BTI is regularly published in the Official Journal.[31]

2.44 The application must be made on a standard application form conforming to the specimen contained in Annex 1B to the Implementing Regulation. The details that an application for BTI must contain are set out in Article 6(3)(A) of the Implementing Regulation. According to Article 6(3)(A)(j), the application must contain the indication by the applicant whether, to his knowledge, BTI for identical or similar goods has already been applied for, or issued in the Community.

2.45 Article 8(1) of the Implementing Regulation provides that a copy of the application for BTI, a copy of BTI notified to the applicant, and the information contained in copy 4 of the BTI form shall be transmitted to the Commission. This transmission is done by electronic means. In accordance with Article 8(3) of the Implementing Regulation, this data is stored in a database of the Commission, called the EBTI data base. There are two versions of this database. One is available to the public for consultation; the other is exclusively available to the Commission and issuing customs authorities of the member States. The version available to the public allows searches of valid BTI by issuing country, start and end date of validity, BTI reference, CN code, keyword, or product description. The public version of the EBTI database is accessible on the website of the European Commission.[32] The version available to the Commission and customs authorities of the member States contains additional information of a confidential nature, which is not made available to the public (i.e. the name and address of the applicant, holder and agent, if one has been appointed, confidential commercial details concerning the goods for which the BTI has been issued, including trade names). The version available to the Commission and issuing customs authorities also contains all applications for BTI that have been submitted to member State customs administrations and BTI that has ceased to be valid.[33]

[29] Joined Cases 69 and 70/76, Dittmeyer, [1977] ECR 231, para. 4 (Exhibit EC-31).
[30] Exhibit EC-32.
[31] Exhibit EC-33.
[32] http://europa.eu.int/comm/taxation_customs/dds/en/ebticau.htm.
[33] A copy of the search interface of the database available to the Commission and issuing authorities of the member States are contained in Exhibit EC-34.

According to the administrative guidelines issued by the Commission on the EBTI system, the EBTI database should be consulted by customs authorities prior to the issuance of BTI in cases where there is a doubt regarding the correct classification, or where different headings merit consideration.[34]

2.46 As for who is responsible for issuing BTI, this is the task of member State customs authorities. In particular, Article 12 of the Community Customs Code provides that member State customs authorities must, upon written request, issue BTI. When the customs authorities have possession of all the elements necessary for them to determine the classification of the goods, BTI shall be notified to the applicant as soon as possible in accordance with Article 7(1) of the Implementing Regulation.

2.47 Article 10 of Implementing Regulation provides that BTI may only be invoked by the holder of the information or the holder's representative.[35] Articles 5 and 11 of the Implementing Regulation provide that BTI is binding on the administration of all member States. Further, according to Article 12(2) of the Community Customs Code, BTI will be binding on the customs authorities as against the holder of the BTI. Article 12(3) of the Community Customs Code clarifies that BTI will be binding only in respect of the tariff classification of goods that correspond in every respect to those described in the information. Article 12(4) of the Community Customs Code indicates that BTI will be valid for a period of six years but may be annulled where the customs authorities determine that the information is based on inaccurate or incomplete information from the applicant. Article 12(5) of the Community Customs Code identifies the circumstances in which BTI shall cease to be valid, including where BTI is revoked or amended in accordance with Article 9. Article 9 of the Community Customs Code, in turn, provides for revocation or amendment of BTI where "one or more of the conditions laid down for its issue were not or are no longer fulfilled." The ECJ has held that a member State customs authority is entitled to consider that one of the provisions laid down for the issuance of BTI is no longer fulfilled and to revoke that BTI where, on more detailed examination, it appears to that authority that its initial interpretation of the legal provisions applicable to the tariff classification of the goods concerned "is wrong, following an error of assessment or evolution in the thinking in relation to tariff classification"[36].

2.48 The procedure that will apply in the event of inconsistencies arising in BTI is set out in Article 9 of the Implementing Regulation. In particular, such inconsistencies may be considered by the Customs Code Committee if it has been placed on the agenda of the next meeting of the Committee by the Commission or at the request of a representative of a member State. Article 9 further provides that, in light of such inconsistencies, the Commission must adopt a measure to ensure the uniform application of the CN rules, as applicable, as soon as possible and within six months following the meeting at which the inconsistency is placed on the agenda of the Customs Code Committee. The measures foreseen in Article 9(1) of the Implementing Regulation may take the form of a classification regulation adopted by the Commission on the basis of Article 9(1)(a) of Regulation No. 2658/87. In accordance with Article 12(5)(a)(i) of the Community Customs Code, where such a regulation is adopted, BTI which is not in accordance with it will cease to be valid. Alternatively, the Commission may also, on the basis of Article 12(5)(a)(iii) of the Community Customs Code and Article 9(1) of the Implementing Regulation, adopt a decision obliging the member State who issued BTI to revoke it.

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[34] Exhibit EC-32, p. 7.

[35] Article 5(3) of the Implementing Regulation defines the "holder" of BTI to mean "the person in whose name the binding information is issued." The "holder" of BTI need not be the same as the "applicant" for BTI.

[36] *Timmermans Transport & Logistics BV v. Inspecteur der Belastingdienst – Douanendistrict Rososendaal and Hoogenboom Production Lts. v. Inspecteur der Belastingdienst – Douanendistrict Rotterdam*, Joined Cases C-133/02 and C-134/02, 2004 ECR I-01125, 22 January 2004, para. 25 (Exhibit US-2).

2. Customs valuation

2.49 Where customs duties are calculated on an *ad valorem* basis – that is, they are expressed as a percentage of the value of the good – the assessment of duties owed must include the valuation of the good.

2.50 The basic provisions on customs valuation are contained in Chapter 3 of Title II of the Community Customs Code (Articles 28-36). More detailed provisions are contained in Title V of the Implementing Regulation (Articles 141-181a). Title V is subdivided into seven chapters, concerning general provisions; royalties and licensing fees; the place of introduction into the Community; transport costs; rates of exchange; simplified procedures for perishable goods; and declarations of particulars and documents to be furnished. In addition, Annex 23 of the Implementing Regulation contains interpretative notes on customs valuation. Article 141(1) of the Implementing Regulation requires that, when applying the provisions of the Community Customs Code and the Implementing Regulation, member States shall comply with the interpretative notes.

2.51 Pursuant to Article 29 of the Community Customs Code, the primary basis for determination of customs value in the European Communities is the "transaction value" – that is, the price actually paid or payable for the imported goods. The transaction value may be used for imported goods provided that none of the restrictions or conditions leading to the rejection of the transaction value applies.

2.52 According to Article 32 of the Community Customs Code, the transaction value must be adjusted by *additions* to the price for: (a) commissions and brokerage; (b) the cost of containers and packing; (c) goods and services supplied by the buyer; (d) any royalties or licence fees related to the goods; (e) the proceeds to the seller of any subsequent resale, disposal or use of the imported merchandise; and (f) the costs of transport, insurance, loading and handling charges in the exporting country. Articles 157 - 159 of the Implementing Regulation provide further guidance concerning the meaning of "royalties" and the circumstances when they should be included in the transaction value. Article 33 of the Community Customs Code provides that the transaction cost must also be adjusted by *deductions* to the price for, for example: (a) costs for transportation within the European Communities; and (b) EC customs duties, antidumping duties and other charges payable in the European Communities by reason of the importation or sale of the goods.

2.53 The transaction value is the preferred and primary method of valuation and is used in most instances. However, pursuant to Article 29(1)(b) of the Community Customs Code, the transaction value may be rejected if, *inter alia*, the buyer and seller are "related" parties. Article 143 of the Implementing Regulation defines "related" parties to include cases such as: (a) where the parties are legally recognized partners in business; and (b) one of them directly or indirectly controls the other. Article 29(2) of the Community Customs Code makes it clear that the existence of a legal relationship between the buyer and seller does not necessarily mean that the transaction value will be rejected. This will only occur if the relationship influences the price. Annex 23 of the Implementing Regulation, which contains interpretative notes on custom value, explains in more detail when the transaction value should be disregarded in light of the relationship between buyer and seller.

2.54 Article 30 of the Community Customs Code provides that, if the transaction value cannot be used, alternative bases for valuation are to be used in the following sequential order: (a) the transaction value of identical goods; (b) the transaction value of similar goods; (c) the unit price at which the imported or identical or similar goods are sold in the greatest aggregate quantity to persons not related to the sellers; and (d) the computed value, which is the production cost including general expenses and the usual amount of profit. Annex 23 of the Implementing Regulations provides additional guidance regarding when these alternative methods can be used.

2.55 Article 147(1) of the Implementing Regulation provides that, for the purposes of Article 29 of the Community Customs Code, the fact that the goods which are the subject of a sale are declared for free circulation shall be regarded as adequate indication that they were sold for export to the customs territory of the Community. Article 147(1) of the Implementing Regulation further provides that, in the case of successive sales before valuation, only the last sale, which led to the introduction of the goods into the customs territory of the Community, or a sale taking place in the customs territory of the Community before entry for free circulation of the goods, shall constitute such indication.

2.56 Where a need for further detailed rules on valuation occurs, the Commission may, in accordance with the procedure referred to in Article 247 of the Community Customs Code, amend the valuation rules contained in the Implementing Regulation, which will be legally binding in all member States. In addition, in accordance with Article 249 of the Community Customs Code, the Customs Code Committee (through its Customs Valuation Section) may examine questions concerning the application of EC customs legislation in the field of valuation. The Commission has also issued a Compendium of Customs Valuation texts which contains commentaries prepared and conclusions reached by the Customs Code Committee on specific issues of customs valuation on the basis of Article 249 of the Community Customs Code. In addition, it contains excerpts from relevant judgments of the ECJ on valuation issues, as well as indices of other relevant texts.[37]

3. Audit following release for free circulation

2.57 Article 78 of the Community Customs Code authorizes customs authorities to inspect the commercial documents and data relating to any imports or exports or to subsequent commercial operations involving them. Such inspections help customs authorities to be in a position to satisfy themselves as to the accuracy of the particulars contained in the relevant customs declaration. Such inspections may be carried out at the premises of the declarant or of any person directly or indirectly involved in these operations. Customs authorities may also examine goods where it is still possible for them to be produced.

2.58 No provisions in the Community Customs Code nor in the Implementing Regulation oblige customs authorities to conduct audits following the release of goods for free circulation or impose any obligations on the manner in which such audits are to be conducted. However, the EC Commission in conjunction with the member States has prepared a Community Customs Audit Guide[38], which sets out a framework for post-clearance and audit-based controls.

4. Penalties for infringements of EC customs law

2.59 There are no provisions in the Community Customs Code nor in the Implementing Regulation that define the penalties applicable for violations of EC customs law. Therefore, as a general rule, the nature and level of such penalties, whether administrative or criminal in nature, are determined by the national laws of the member States. Nevertheless, in furtherance of Article 10 of the EC Treaty, member States must take all measures necessary for the proper implementation and application of EC law, including the provision of penalties for violations of EC law. In particular, they must ensure that particular infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.[39] This has been confirmed by Council resolution of 29 June 1995 on the effective uniform

[37] Exhibit EC-37.
[38] Exhibit EC-90.
[39] Case C-68/88, *Commission/Greece*, [1989] ECR 2965, para. 23-25 (Exhibit EC-38); similarly, Case C-326/88, *Hansen*, [1990] ECR I-2911, para. 17 (Exhibit EC-39); Case C-36/94, *Siesse*, [1995] ECR I-3573, para. 20 (Exhibit EC-40); Case C-213/99, *Andrade*, [2000] ECR I-11083, para. 19, 20 (Exhibit US-31).

application of Community law and on the penalties applicable for breaches of Community law in the internal market, which recalls the relevant case law of the ECJ and calls upon member States to ensure that "Community law is duly applied with the same effectiveness and thoroughness as national law and that, in any event, the penalty provisions adopted are effective, proportionate and dissuasive".[40] Where a member State fails to provide such effective, proportionate and dissuasive penalities, it fails to fulfil its obligations under the EC Treaty.[41]

5. Processing under customs control

2.60 Article 130 of the Community Customs Code states that the procedure for processing under customs control allows non-Community goods to be used in the customs territory of the Community in operations which alter their nature or state, without being subject to import duties or commercial policy measures, and thereafter allows the processed products to be released for free circulation at the rate of import duty applicable to the processed products.

2.61 Article 85 of the Community Customs Code provides that the use of the procedure for processing under customs control (which is defined as a customs procedure with economic impact) is conditional upon authorization being issued by the customs authorities at the request of the person who carries out the processing or arranges for it to be carried out. Authorization will only be granted if certain conditions are fulfilled. One such condition is contained in Article 133(e) of the Community Customs Code.

2.62 Article 133(e) of the Community Customs Code provides that, before granting authorization under Article 85, the customs authorities must examine the economic consequences of the use of the processing under customs control procedures to determine whether or not the procedure helps to create or maintain a processing activity in the European Communities without adversely affecting the essential interests of EC producers of similar goods. Article 502(3) of the Implementing Regulation provides that, in respect of processing under customs control arrangements, the examination shall establish whether the use of non-Community sources enables processing activities to be created or maintained in the Community.

2.63 Article 552 and Part A of Annex 76 of the Implementing Regulation set out the cases in which the economic conditions are deemed to be fulfilled so that, in those cases, an examination of the economic conditions is not necessary. For the types of goods and operations mentioned in Part B of Annex 76 of the Implementing Regulation and those not covered by Part A of that Annex, the examination of the economic conditions must take place at Community level, through the relevant Committee procedure. For the types of goods and operations not mentioned in Annex 76 of the Implementing Regulation, pursuant to Articles 502(1) and 552(1) of the Implementing Regulation, the examination of the economic conditions shall take place at national level. When examinations take place at the national level, member States must communicate to the Commission relevant information in accordance with Article 522 of the Implementing Regulation. Furthermore, pursuant to Articles 503 and 504 of the Implementing Regulation, if a member State objects to an authorization issued or if the customs authorities concerned wish to consult before or after issuing an authorization, an examination of the economic condition may take place at Community level.

6. Local clearance procedures

2.64 Pursuant to Article 263 of the Implementing Regulation, customs authorities of EC member States may allow, upon request, the use of the "local clearance procedure" to any applicant wishing to

[40] Exhibit EC-41.

[41] Case C-68/88, *Commission/Greece*, [1989] ECR 2965, para. 23-25 (Exhibit EC-38), where Greece was found to have violated its obligations under Article 10 of the EC Treaty.

have goods released for free circulation at the applicant's premises or at other designated places. In other words, an importer may have goods released for free circulation at its own premises or certain other designated locations without having to present the goods to customs.

2.65 The basic provision for the local clearance procedure is Article 76(1)(c) of the Community Customs Code. Additionally, where a data-processing technique is used, Article 77 of the Community Customs Code shall apply. More detailed provisions are laid down in Articles 263 – 267 of the Implementing Regulation.

2.66 Under Article 263 of the Implementing Regulation, authorisation to use the local clearance procedure shall be granted to any person wishing to have goods released for free circulation at his premises or at the other places designated or approved by the customs authorities in respect of goods subject to certain procedures (transit or customs procedures with economic impact) or which are brought into the customs territory of the Community with an exemption from the requirement that they be presented to customs. Article 264(1) of the Implementing Regulation provides that authorisation for local clearance will be granted provided that the applicant's records enable the customs authorities to carry out effective checks.

7. Recovery of customs debt

2.67 Revenue from import and export duties based on the Common Customs Tariff constitutes "own resources" pursuant to Article 2(1)(b) of the Council Decision 2000/597/EC, Euratom. Articles 217 – 220 of the Community Customs Code govern the entry into the accounts of the member States and, therefore, constitute the link between, on the one hand, the obligations of the debtor to pay import or export duty to the national customs administration and, on the other hand, the member States' obligation to make the "own resources" available to the European Communities. Pursuant to Article 221 of the Community Customs Code, as soon as the amount has been entered into the accounts, it must be communicated to the debtor in accordance with the appropriate procedures. Article 221(3) of the Community Customs Code stipulates the period of time within which the debt must be communicated to the debtor.

D. REVIEW OF CUSTOMS DECISIONS

1. Decisions the subject of judicial review

2.68 A "decision" is defined in Article 4(5) of the Community Customs Code as any "official act by the customs authorities pertaining to customs rules giving a ruling on a particular case, such act having legal effects on one or more specific or identifiable persons; this term covers, *inter alia*, binding information within the meaning of Article 12 [of the Community Customs Code]". In addition, Article 6(3) of Community Customs Code provides that "[d]ecisions adopted by the customs authorities in writing which either reject requests or are detrimental to the persons to whom they are addressed shall set out the grounds on which they are based. They shall refer to the right of appeal provided for in Article 243".

2.69 Article 243(1) of the Community Customs Code provides that any person directly and individually concerned by a *decision* of the customs authorities regarding the application of customs legislation has the right to lodge an appeal. An appeal is also possible where a requested decision has not been taken within the time period stipulated in Article 6(2) of the Community Customs Code.

2. Review by member States' customs authorities and courts

2.70 Article 243(1) of the Community Customs Code states that an appeal must be lodged in the member State where the relevant decision has been taken or applied for. In addition, Article 245 of

the Community Customs Code states that "provisions for the implementation of the appeals procedure shall be determined by the member States", meaning that appeals procedures are laid down in the national laws of the member States.

2.71 Article 243(2) indicates that the right of appeal may be exercised: (a) initially before the customs authorities designated for that purpose by the member States; and (b) subsequently, before an independent body, which may be a judicial authority or an equivalent specialised body, according to the provisions in force in the member States.

2.72 With respect to review by customs authorities designated in member States, this is required in most member States. However, in Belgium, Estonia, Greece, Cyprus, France, Malta and Portugal, administrative reviews are voluntary. Further, in Sweden, there is no administrative review and the administrative decision has to be appealed directly to the courts. Administrative authorities in the member States can repeal, revoke, alter or replace a disputed administrative decision.

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

3. Direct appeals to the ECJ

2.74 Article 230 of the EC Treaty vests individuals with the right to approach the Court of First Instance directly in certain cases. Article 230, which concerns actions for annulment, deals with the jurisdiction of the ECJ to review the legality of acts jointly adopted by the European Parliament and the Council, the European Commission and the ECB, or by the Council itself or the Parliament where the act is intended to produce legal effects vis-à-vis third parties. An action for annulment under Article 230 does not cover acts adopted by a national authority. Nor does it extend to the EC Treaty and its amendments.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. UNITED STATES[42]

3.1 The United States requests the Panel to:

(a) find that the European Communities is not in conformity with Article X:3(a) and Article X:3(b) of the GATT 1994;

(b) recommend that the European Communities bring itself into compliance with Article X:3(a) and Article X:3(b) of the GATT 1994 promptly.

B. EUROPEAN COMMUNITIES[43]

3.2 The European Communities requests the Panel to reject the claims raised by the United States.

[42] US First Written Submission, para. 155, and Second Written Submission, para. 117.
[43] EC First Written Submission, para. 477, and Second Written Submission, para. 246.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties' are set out in their written and oral submissions to the Panel, and in their answers to questions. The parties' arguments as presented in their submissions are summarized in this section. The summaries are based on the executive summaries submitted by the parties. The parties' written answers to questions from the Panel and from each other are set out in the Annexes to this Report (see list of Annexes at page xvi).

A. FIRST WRITTEN SUBMISSION OF THE UNITED STATES

1. Introduction

4.2 This dispute raises two questions: First, does the European Communities ("EC") administer its customs laws, regulations, judicial decisions and administrative rulings of general application in a uniform, impartial and reasonable manner, as required by Article X:3(a) of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994")? Second, does the EC have in place judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters, as required by Article X:3(b) of the GATT 1994? The answer to both questions is, no.

4.3 Instead of administering its basic customs law in a uniform way, the EC administers it in 25 different ways. As administration is the responsibility of each member State, questions of classification and valuation may be subject to as many as 25 different interpretations, and traders are subject to 25 different procedural regimes for bringing goods into free circulation in the EC. The net result is an administration that distorts rather than facilitates trade and that imposes transaction costs that should not exist where administration is uniform.

4.4 This problem is magnified by the absence of EC tribunals or procedures for the prompt review and correction of administrative action relating to customs matters. Like the administration of EC customs measures, appeals from customs decisions are a matter for each member State. As a result, there are 25 different appellate regimes in the EC, none of which can yield a decision with EC-wide effect, unless and until a question is referred to the Court of Justice of the European Communities ("the ECJ").

4.5 In the EC, the basic elements of the customs system are laid out in three pieces of legislation: the Community Customs Code ("CCC"), the CCC Implementing Regulation ("Implementing Regulation" or "CCCIR"), and the Common Customs Tariff ("the Tariff"). These measures (as well as related measures) are administered separately by the customs authorities in each of the 25 member States of the EC. There is a Customs Code Committee ("the Committee"), consisting of representatives of each of the member States and chaired by a representative of the Commission. Ostensibly, one of its functions is to reconcile divergences that emerge in member State administration of EC customs law. However, serious institutional constraints prevent it from fulfilling that function on a systematic basis.

4.6 Where a trader disputes a decision by a member State's customs authorities, its only recourse is to appeal that decision through the courts or other review tribunals of the member State. There is no EC forum to which a trader can promptly appeal a decision by a member State's customs authorities, including a decision that diverges from decisions of other member State authorities.

4.7 As a Member of the WTO in its own right, that is, separately from its constituent member States, the EC has an obligation to provide for administration of its customs laws and to provide for the prompt review and correction of administrative action relating to customs matters in the manner prescribed by GATT Articles X:3(a) and (b), respectively. The first question raised by this dispute is

whether the EC administers its customs law in a uniform manner, as required by Article X:3(a). Considering the ordinary meaning to be given to the terms of that article, the question is whether the EC manages, carries on, or executes its customs law in a manner that is the same in different places or circumstances, or at different times. Of particular relevance here is uniformity with respect to different places.

4.8 One of the few panels to probe Article X:3(a) in any detail was the panel in *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather* ("*Argentina – Hides and Leather*"). The panel report in that dispute supports the proposition that the requirement of uniform administration in Article X:3(a) includes administration that is uniform across the territory of a WTO Member. The EC does not administer its customs law in a manner that is uniform across different places in the EC, as Article X:3(a) requires. It administers its customs law in a manner that varies from member State to member State and fails to provide an EC mechanism for the systematic reconciliation of such variations.

2. The EC fails to administer its customs law in a uniform manner

(a) Customs classification

4.9 One area in which divergent administration of EC customs law is especially troubling is customs classification. Not surprisingly, when 25 different authorities are tasked with interpreting a complex nomenclature system, the possibilities for divergent interpretations are substantial. Indeed, the EC evidently was quite candid about this in its dispute with Thailand and Brazil over the classification of frozen boneless chicken cuts (*European Communities – Customs Classification of Frozen Boneless Chicken Cuts*). Neither the Code, nor any other provision of EC law of which the United States is aware, requires one member State to follow another member State's interpretation of the Tariff. If one member State classifies a product under a particular tariff subheading, there is no requirement that other member States classify it under the same subheading. *A fortiori*, there is no requirement that other member States follow the rationale of the first member State in classifying *similar* goods.

4.10 It is instructive to consider administration of the EC's provision for advance classification rulings, known as binding tariff information ("BTI"). Under the BTI system, an importer or other interested party applies to a member State's customs authorities for issuance of BTI confirming the classification that will be assigned to particular goods on importation into the territory of that member State. The application may be made by the "holder" of the BTI (i.e. the person in whose name it is issued), or by another "applicant" (defined as any person who applies for BTI). The holder or other applicant chooses the member State to which it will make the application.

4.11 Once issued, BTI is "binding on the customs authorities as against the holder of the information." Article 11 of the Implementing Regulation states that BTI issued by the authorities of one member State is "binding on the competent authorities of all the Member States under the same conditions." However, in reality member States do not always treat BTI issued by other member States as binding, and the BTI system does not ensure uniform administration of customs classifications. Moreover, pre-existing BTI issued by one member State does not prevent an applicant from trying to persuade a second member State that the classification in the original BTI was mistaken. In issuing the new BTI, nothing in the Code or Implementing Regulation requires the authorities to adhere to the findings contained in the previously issued BTI.

4.12 There are several ways in which the BTI system fails to achieve uniform administration with respect to classification. The first way is that it results in BTI shopping. In theory, the Commission should be able to control BTI shopping by exercising its authority to reconcile inconsistent BTI. However, there are several impediments to the Commission performing this function. First, it may be

difficult to detect whether, in fact, "different binding information exists." BTI is particular to the holder. Thus, it is possible for two different holders to possess conflicting BTI for identical merchandise. That "different binding information exists" would not be readily apparent in that case. Even where the same holder possesses conflicting BTI, the existence of the conflict may not be readily apparent to the Commission or the representative of a member State. The holder of the BTI may choose not to bring the conflict to the attention of the Committee. Other persons interested in having the difference reconciled (e.g., competitors) would not necessarily be aware of the conflict. Conversely, where a holder or other interested person is aware of conflicting BTI and wants to see the conflict resolved, it has no right to have the matter put before the Committee for resolution within a prescribed period of time.

4.13 Moreover, differences in classification of identical goods from member State to member State need not necessarily manifest themselves through conflicting BTI. It is possible for an applicant to receive unfavorable BTI from one member State and simply import the goods at issue through another member State (possibly incurring additional shipping, distribution, or other costs) without necessarily seeking BTI from that State. In that case, the existence of a difference would not necessarily be apparent to the Commission.

4.14 The EC does have in place an electronic database available to the public for searching BTI. In theory, one might be able to use the database to determine whether different member States had issued conflicting BTI for identical products. However, as a practical matter, such a search is extremely difficult, if not impossible.

4.15 Moreover, the inability to achieve uniform application of the Tariff through the BTI system is further demonstrated by the relative autonomy that each member State has with respect to revocation or amendment of BTI. In a recent decision, in a case known as *Timmermans*, the ECJ held that a member State customs authority can revoke BTI based on its own reconsideration of the Tariff (as opposed to the revelation of facts not before it when the BTI was issued). The Court reached this conclusion, even though the Advocate General had recommended the opposite conclusion, observing that "the possibility of revoking BTI in this way is not readily compatible either with the objective of the uniform application of the customs nomenclature or with the objective of legal certainty pursued by the introduction of BTI." Indeed, this is precisely the problem from the point of view of GATT Article X:3(a). Whatever limited potential the BTI system might have to provide for some degree of uniformity across the EC with respect to the particular goods and holder that are the subject of the BTI is further undermined by the fact that revisions to BTI are not even ostensibly "binding."

4.16 Finally, the problem of non-uniform administration of EC law on customs classification is illustrated by two recent (but by no means isolated) cases. In one case, German customs authorities have diverged from other member State authorities in the classification of a specialized textile product (blackout drapery lining) for five years, and EC institutions have not reconciled the divergence. In the second case, involving liquid crystal display flat monitors with digital video interface, the question of divergent classification (between the Netherlands, on the one hand, and other member States, on the other) was brought before the Committee in 2004 and, with respect to a major subset of the product concerned, remains unresolved today (and is subject to a temporary solution only with respect to the rest).

(b) Customs valuation

4.17 In some respects, the problems of non-uniform administration of customs law are even more pronounced in the area of valuation than they are in the area of classification. Unlike classification, EC customs law on valuation does not even provide a system comparable to BTI – that is, an information system that is ostensibly binding (albeit in a very limited way) and that (depending on how designed and administered) could at least be a step towards achieving uniform administration. In

general, the ability of EC institutions to step into the breach to impose uniformity is limited. The valuation section of the Committee does not have the authority to examine individual cases with a view to reconciling differences in administration from member State to member State.

4.18 The ways in which the valuation provisions of the Code and Implementing Regulation have been applied differently in different member States were catalogued in great detail in a December 2000 report by the EC Court of Auditors. One highlight of the Court's report is differential treatment of royalty payments. Under Article 32(1)(c) of the Code, royalties and license fees related to the goods being valued are supposed to be added to the price actually paid or payable, to the extent not already included. The Court found that in a number of cases, different member States apportioned royalties differently to the customs value of identical goods imported by the same company. Significantly, it found that in the cases identified, the member States involved either did not bring the disparate treatment to the attention of the Committee, or the matter was not examined by the Committee.

4.19 Another issue the Court examined was application of the rule that allows imported goods, in certain cases, to be valued on a basis other than the transaction of the last sale which led to the introduction of the goods into the customs territory of the EC. The Court found that authorities in some member States but not others required importers to obtain prior approval for valuation on a basis other than the transaction value of the last sale.

4.20 A third issue identified by the Court was differential treatment of vehicle repair costs covered under warranty. In at least one member State – Germany – the Court found that customs authorities reduced the customs value of imported vehicles by the value of repairs undertaken in the territory of the EC and reimbursed by the foreign seller. Other member States – in particular, Italy, the Netherlands, and the United Kingdom – declined requests for similar customs value reductions. Of particular note, the Court observed that the Commission had been aware of differential treatment among member States for at least ten years and had not taken any steps to reconcile the difference. In response, the Commission noted that since 1997 it had "attempted to align by means of implementing legislation diverging practices in the Community" but was unable to attain the necessary majorities in the Committee.

4.21 A recent case involving non-uniform administration of EC customs valuation law concerns divergent approaches to the determination of whether an importer has a control relationship with its off-shore suppliers. In that case, Spanish customs authorities found Reebok International Limited (RIL) to have a control relationship with suppliers outside the EC based on its contracts with those suppliers, while other member States (in particular, the Netherlands) found no such relationship. The different interpretation has significant consequences. Member State authorities that agreed with RIL that it did not have a control relationship with its suppliers allowed it to declare the customs value of its goods on the basis of the "sale for export" transaction value rule set out in Article 29 of the Code. On the other hand, the Spanish authorities required RIL to apply a different methodology. The net impact on RIL was an additional customs liability of 350,000 Euros per year (390,000 Euros when value-added tax and interest are included).

4.22 In sum, valuation, like classification, is an area in which the EC does not provide for uniform administration of its customs law. Each member State's authorities make their own interpretations of the Code and Implementing Regulation, and even where differences between member States are identified, the EC lacks the capacity systematically to reconcile them.

(c) Customs procedures

4.23 With respect to customs procedures, non-uniform administration is evident in various phases of the customs process. It comes up, for example, in the audits that different member State authorities

perform after goods have been released for free circulation. It is not uncommon for a member State's authorities to perform an audit to verify the value that an importer declared for goods that were released for free circulation. The December 2000 Court of Auditors Report found that different member State authorities take different approaches to such valuation audits, with important consequences for importers.

4.24 In the case of at least one member State, the Court found that the customs authorities lack the right to perform post-importation audits at all, except in cases of fraud. Even among States in which authorities are permitted to perform post-importation audits, the Court found differences among working practices, including the balance between reliance on examinations of goods at time of importation and post-release audits. Significantly, the Court found that differences in working procedures mean that "individual customs authorities are reluctant to accept each other's decisions." One audit procedure that the Court highlighted was the issuance of written valuation decisions. While some member States regularly issue written valuation decisions with binding effect going forward, others rarely issue such decisions.

4.25 Another area in which administration varies from member State to member State concerns penalties for violation of customs law. This area of divergence is one that has been noted by the ECJ on a number of occasions. The Commission itself has recognized (in its explanatory note accompanying a recent proposed revision to the Code) that "[e]conomic operators have complained for a long time about the lack of harmonization with regard to penalties against infringements of the customs rules. Specific offences may be considered in one Member State as a serious criminal act possibly leading to imprisonment, whilst in another Member State the same act may only lead to a small – or even no – fine."

4.26 Yet another area in which the administration of EC customs law differs among member States is the decision to permit what is known as "processing under customs control." Where this procedure is permitted, goods may be brought into the EC without being subject to duty and processed into downstream products in the EC, with those products then being released for free circulation at the applicable duty rate. Permission to engage in processing under customs control is subject to an economic conditions assessment, which different member States administer differently. Guidance issued by the United Kingdom customs authorities states that there are "two aspects to the economic test" and requires an applicant to provide evidence of the impact on its business of processing under customs control as well as evidence of "the impact upon any other community producers of the imported goods." In contrast, French regulations, for example, do not impose the additional test of demonstrating the absence of harm to competitors in the EC.

4.27 Another area in which non-uniform administration is evident is local clearance procedures ("LCP"). Under LCP, an importer may have goods released for free circulation at its own premises or certain other designated locations (as opposed to customs premises). While the general concept of how LCP is supposed to operate is set forth in the Implementing Regulation, the particular requirements vary from member State to member State. This is evident in the information that member States require LCP importers to transmit to customs authorities before goods are released. Some require only the electronic transmittal of manifest data. Others require that manifest data be translated or supplemented. Variations also are evident in the involvement of customs authorities prior to goods being released. Some member States rely on post-release audits, while others reserve the right to inspect goods prior to release. Member States typically require that supplementary information be transmitted to customs authorities following release under LCP, though here, too, the requirements vary. For example, some member States require transmittal of the EC's DV1 valuation form, whereas others do not. Some require the transmittal of invoices, certificates, and other supporting documentation, whereas others do not. Finally, requirements for retaining documents supporting LCP imports vary widely, ranging from four years in the United Kingdom to ten years in the Netherlands.

4.28 As the panel correctly observed in *Argentina – Hides and Leather*, "Article X:3(a) requires an examination of the real effect that a measure might have on traders operating in the commercial world" (para. 11.77). To that end, "[e]very exporter and importer should be able to expect treatment of the same kind, in the same manner both over time *and in different places*. . . " (para. 11.83; emphasis added). Article X:3(a) thus acts as a check against certain distortions to trade that may come about through administration that varies depending on factors such as point of entry within the territory of a Member.

4.29 A system that subjects traders to different procedures and different interpretations of classification and valuation law depending on the member State through which goods are imported into the territory of the EC is contrary to this basic principle. At a minimum, it makes it difficult for a trader to have a reasonable expectation of the treatment goods will receive when they are imported into the EC. It may also cause traders to make decisions about how to bring goods into the EC based on known differences among member States.

(d) The Commission, acting through the Customs Code Committee, does not provide uniformity to the administration of EC customs law

4.30 The mechanism provided in the Code for the Commission to address questions of administration of EC customs law is the Customs Code Committee. The Committee consists of representatives of each of the member States and is chaired by a representative of the Commission. Individual traders have no right to raise matters with the Committee. That right is reserved to the chairman of the Committee and member State representatives. A trader may petition a member State to bring a question before the Committee (though the Code does not require member States to have a petition process). However, the member State is under no obligation to respond favorably to such a petition.

4.31 For the most part, the Committee operates under the "regulatory procedure" laid down in the EC's so-called "comitology" decision. In matters relating to binding advance rulings that member States may issue on the classification or origin of goods, and in certain matters relating to preferential tariff treatment, the Committee operates under the comitology decision's "management procedure." Under both the regulatory procedure and the management procedure, a decision by the Committee requires the support of a majority of the member State representatives and at least 231 votes out of a total of 321 (based on weighting by member State as set out in the EC Treaty), and failure to reach a decision can lead to referral of the matter to the Council of the European Union, with different consequences depending on the applicable procedure. However, in practice, with respect to matters of customs administration, the Commission turns to the Council only on extremely rare occasions. Given institutional disincentives to refer matters to the Council, they may linger before the Committee indefinitely, as the Commission attempts to achieve the necessary majorities. This may mean that in controversial cases, no decision at all is taken.

4.32 The Code provides for adoption by the Committee of its own rules of procedure. Those rules are notable for purposes of the present dispute primarily for what they do *not* say. First, the rules do not contain any process for a trader affected by a member State's application of the Code to petition the Committee. Second, the rules contain no requirement that the Committee publish its agenda in advance of its meetings. Thus, a trader that may be affected by a question put before the Committee has no assurance that it will be made aware of the pendency of the matter. Third, while the rules contain an Article entitled "Admission of third parties," that Article does not establish a right for potentially affected parties to submit evidence and arguments to the Committee or even to be present at Committee meetings. It merely authorizes the Committee Chairman to invite experts to address the Committee and allows observers of certain third countries or organizations as specified in other EC instruments to be present at Committee meetings. Finally, there is no requirement that records of the Committee's proceedings be made public. In fact, Article 15 of the rules expressly provides that

decisions on public access to the Committee's documents are subject to the discretion of the Commission and that, in any event, "[t]he Committee's discussions shall be kept confidential."

4.33 Traders as well as EC institutions have acknowledged the limits of the Committee procedure's ability to reconcile differences in administration among member State customs authorities. For example, in the Court of Auditors Valuation Report, it was observed that in using the valuation section of the Committee, the Commission "has to rely on discussion, persuasion and encouragement as the means of achieving common treatment of identical problems in Member States." In reply, the Commission itself acknowledged that the Committee "can . . . only deal with a limited number of important cases that are brought before it."

4.34 In sum, the Committee process through which the Commission operates in matters of customs administration is not designed to systematically achieve uniform administration where divergences are shown to exist. From the point of view of "traders operating in the commercial world" (the relevant perspective for examining the Article X:3(a) obligation, as noted by the panel in *Argentina – Hides and Leather*), a WTO Member does not provide for uniform administration where there is doubt as to whether the mechanism ostensibly available for bringing about uniformity will or will not operate in the case of any given divergence. The mechanism theoretically available for bringing uniformity to the administration of customs law in the EC lacks a process for doing so on a systematic basis, and this absence of a process leads back to the conclusion that the EC simply does not provide for the uniform administration required by Article X:3(a).

3. The EC does not provide tribunals or procedures for the prompt review and correction of administrative action relating to customs matters

4.35 The second aspect of the US claim concerns the EC's failure to provide for an EC court or other forum to which a member State customs decision can be promptly appealed. Under the EC system, review of a member State customs decision is available in the courts of that member State. The only court with jurisdiction to issue decisions with EC-wide effect on matters of customs administration is the ECJ. However, the referral of questions to that court is not automatic, and even when a question does get referred to the ECJ, the time and steps necessary from the initial rendering of a customs decision by a member State's authorities to issuance of a decision by the ECJ makes review in that forum far from prompt.

4.36 The issue of reviewability of customs decisions is linked to the issue of uniform administration of customs law. To the extent that the administration of customs law is fragmented, the provision for review in the courts of each of 25 member States does not alleviate the fragmentation and may well compound it. In contrast, a single system of review could alleviate the different initial results that may occur in different ports from time to time.

4.37 The GATT 1994 provision pertinent to appellate review of customs decisions is Article X:3(b), which requires *each* WTO Member to "maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters." The EC is a WTO Member in its own right and is subject to Article X:3(b). Accordingly, the EC must have such tribunals or procedures.

4.38 Relevant context for interpreting Article X:3(b) includes the immediately preceding subparagraph in the paragraph in which the obligation at issue appears. That subparagraph calls for the "uniform, impartial, and reasonable" administration of customs laws. Thus, the decisions of the tribunals or procedures must provide for the review and correction of customs matters for the EC as a whole, not just within limited geographical regions within the EC. It is inconsistent with Article X:3(b) to require a trader who had received adverse customs decisions in three different

member States, each at odds with the prevailing interpretation of EC customs law in other member States, to pursue separate appeals in each of those States.

4.39 The Community Customs Code says little on the question of appeals. It merely establishes that there shall be a right to appeal from customs decisions; provides that, in the first instance, appeals may be exercised before a member State's customs authorities and subsequently before a court or other independent body; and provides that, except in certain specified circumstances, "the lodging of an appeal shall not cause implementation of the disputed decision to be suspended." Beyond that, the Code simply states that "[t]he provisions for the implementation of the appeals procedure shall be determined by the Member States."

4.40 Thus, the Code leaves wide discretion to the individual member States in establishing procedures for appeals from customs decisions, and that discretion is evidenced in the diversity of procedures in fact available in the different member States. Indeed, even if it could be argued (contrary to what the United States argues here) that the EC might fulfill its obligation under Article X:3(b) merely by requiring member States to have appellate procedures in place, it is notable that nothing in the Code requires that review by member State tribunals be prompt. The Code is silent on the question of timing.

4.41 In fact, appellate procedures vary from member State to member State with respect to factors such as the availability of first-level review by the customs authorities themselves, time-periods for first-level review by the customs authorities (where such review is mandatory before proceeding to court), requirements to post security in order to avoid immediate enforcement of the decision on appeal, and availability of review by courts of superior jurisdiction. For example, the time periods for first instance reviews conducted by member State customs authorities can vary widely (from 30 days in Ireland, to one year in the Netherlands). Moreover, differences among procedures are even more pronounced after the first stage of review.

4.42 At the top of the review structure is the ECJ. Unlike the decisions of the courts in individual member States, the decisions of the ECJ do have effect throughout the territory of the EC. It is only at this stage, after a trader has pursued its appeal through a member State's court system, that the trader reaches a forum for review and correction provided by the EC itself. However, given the time it necessarily takes to reach this forum, it can hardly be considered to meet the EC's Article X:3(b) obligation to provide "tribunals or procedures for the purpose . . . of the *prompt* review and correction of administrative action relating to customs matters."

4.43 In commenting on the request for the establishment of a panel in this dispute, the EC referred to the ECJ as the second institution (alongside the Commission) that enforces "harmonized customs rules and institutional and administrative measures . . . to prevent divergent practices." That the EC views the ECJ as serving this function is instructive and cause for examining the role actually filled by the ECJ. What that examination reveals is significant institutional limitations on the ability of the ECJ "to prevent divergent practices" and a failure of the ECJ to constitute a tribunal or procedure for prompt review and correction of administrative action relating to customs matters, as required by Article X:3(b). The principal manner in which a question of a member State's administration of EC customs law is likely to come before the ECJ is through a referral by the court of a member State, pursuant to Article 234 of the EC Treaty. However, with the exception of courts of last resort, referral of questions by member State courts is discretionary. Moreover, even when a question does get referred to the ECJ, the answer of the ECJ does not finally decide the matter. Rather the answer is sent back to the requesting court, which then decides the case before it in light of the ECJ's guidance.

4.44 In his opinion in the 1997 *Weiner* case before the ECJ, the EC's Advocate General urged member State courts to exercise self-restraint in referring questions of customs classification law to the ECJ. The Advocate General found it "clear that the Court's contribution to uniform application of

the Common Customs Tariff by deciding on the classification of particular products will always be minimal." The Advocate General's reasoning is easily transferrable to valuation and other areas in which member States' administration of EC law may diverge. A key lesson to be drawn from *Weiner* is that the ECJ is not suited to be the EC's tribunal or procedure for prompt review and correction of administrative action relating to customs matters required by Article X:3(b). Its place within the EC system – as the highest level adjudicator of questions of EC law – and the manner in which questions are put to it – typically, through discretionary referral by member State courts – make it incapable of serving that role.

4.45 As the ECJ is not set up to be an EC customs court – and, in any event, as the time it takes for a question raised in a member State's customs decision ultimately to get to ECJ review hardly qualifies such review as prompt – what is left is a patchwork of member State customs authorities whose work is reviewed by member State courts, with no EC tribunal or procedure providing prompt review and correction of customs decisions in a way that would bring about uniformity in the administration of EC customs law. In sum, the EC provides no tribunal or procedure for the prompt review and correction of administrative action relating to customs matters, as required by Article X:3(b) of the GATT 1994.

4. Conclusion

4.46 For the reasons set forth in the First Written Submission of the United States, the EC fails to comply with the obligations in Articles X:3(a) and X:3(b) of the GATT 1994. It does not administer its customs laws, regulations, decisions and rulings in a uniform, impartial, and reasonable manner. Nor does it maintain judicial, arbitral, or administrative tribunals or procedures for the purpose of the prompt review and correction of administrative action relating to customs matters. The United States asks that the Panel find the EC is not in conformity with Articles X:3(a) and X:3(b) of the GATT 1994 and recommend that it come into compliance promptly.

B. FIRST WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

1. Introduction

4.47 The United States alleges that the EC does not fulfil its obligations under Article X:3(a) of the GATT by failing to administer its customs laws in a uniform manner. Moreover, the United States alleges that the EC does not comply with its obligations under Article X:3(b) GATT by not providing judicial, arbitral or administrative tribunals or procedures for the prompt review and correction of administrative action relating to customs matters.

4.48 These claims of the United States are unfounded. The United States does not provide evidence that the EC fails to administer its customs laws in a manner contrary to Article X:3(a) GATT. Apart from a small number of isolated and misleading examples, the United States provides very little information about the actual administration of EC customs law. Since it does not provide any evidence to the effect that the EC administers its customs laws in a non-uniform manner, the United States fails to establish a *prima facie* case in support of its claims.

4.49 The focus of the United States case is not on the actual administration of EC customs laws, but on the EC system of customs administration. Put simply, the United States objects to the fact that the EC administers EC customs laws not through an EC customs agency, but through the national administrations of its member States. Similarly, the United States objects to the fact that judicial review of customs decisions in the EC is provided not through "EC-level tribunals", but through tribunals of the EC member States. With these claims, the United States is putting into question fundamental structural elements of the EC legal order, without providing a shred of proof that these structural elements are indeed incompatible with the requirements of Article X:3(a) and (b) GATT.

4.50 The US interpretation of Article X:3(a) and (b) GATT is without basis in the text of these provisions. According to the United States, Article X:3(a) and (b) GATT seems to prescribe in detail the way in which a WTO Member must implement its customs laws. The EC does not believe that this is the objective underlying Article X:3 GATT. Article X:3 GATT is a provision laying down minimum standards for the administration of customs law, not a legal basis for the harmonization of the systems of customs administration of WTO Members.

4.51 The weakness of the US case is also illustrated by the lukewarm reaction of traders to the US case. In response to a request for input by the United States Trade Representative following the consultation request, USTR received a mere three submissions. Only one of these submissions is referred to in the US First Written Submission. Of the other two submissions, one was unsubstantiated, one unhelpful to the US case since it provided an example of the uniform application of EC classification rules.

2. Factual background

(a) General principles of the EC legal system

4.52 The progress of European integration has largely been built on legislation. Over the decades, the EC has built a large body of Community law covering an increasing range of policy areas on the basis of the powers attributed to it in its founding treaties.

4.53 The success of European integration is based on the direct and uniform application of Community law in the legal order of the member States of the Community. The European Community is therefore very much a Community based on the rule of law. This fact is explicitly recognized in Article 6(1) EU Treaty.

4.54 However, with the exception of some limited policy fields, the EC does not itself administer Community law through an EC-level administration. Rather, the execution of EC law takes place through the national administrations of the member States, and similarly through the Courts of the member States. This principle of administration through the member States can be described as "executive federalism".

4.55 The US attack on the EC system of customs administration directly puts into question fundamental principles of EC law. In order to place these issues in their proper context, a deeper explanation of the basic principles of EC constitutional law is required.

(i) The EC institutions and the EC legislative process

4.56 According to Article 5 of the EC Treaty, the Community shall act within the limits of the powers conferred upon it by the Treaty. Furthermore, Article 5 EC Treaty requires the EC to act in accordance with the principles of subsidiarity and proportionality. The EC Treaty sets up a number of institutions which shall carry out the tasks entrusted to the European Community. The main institutions involved with the EC legislative process are the European Parliament, the Council of Ministers, and the European Commission.

4.57 The legislative procedure applicable to the adoption of a particular legal act is laid down in the specific legal basis conferring the powers on the Community to adopt such an act. In the large majority of cases, the adoption of a legislative act of the Community will require a proposal from the European Commission. In most cases, the EC Treaty foresees that legislative acts shall be adopted jointly by the European Parliament and the Council in accordance with the co-decision procedure set out in Article 251 EC Treaty. To this extent, the European Parliament and the Council can be

regarded as the primary legislative organs of the EC. In certain cases, the Treaty also provides that the Council may adopt legislative acts alone, usually after consultation of the European Parliament.

(ii) The implementing powers of the European Commission

4.58 Article 202, third indent, of the EC Treaty provides that the Council may confer on the Commission powers for the implementation of Community law. Article 202, third indent, further provides that the Council may impose certain requirements in respect of the exercise of those powers. Finally, the last sentence of Article 202, third indent, EC Treaty provides that these procedures must be "consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the opinion of the European Parliament".

4.59 On the basis of Article 202, third indent, of the EC Treaty, the Council has adopted Decision 1999/468. This decision, also known as the "Comitology Decision"**,** lays down, at a general level, the procedures for the exercise of implementing powers which the Council may delegate to the Commission.

4.60 The Comitology Decision distinguishes three types of procedure: the advisory procedure, the management procedure, and the regulatory procedure. In accordance with Article 2 of the Decision, the regulatory procedure should be applied for the adoption of "measures of general scope designed to apply essential provisions of basic instruments". The management procedure is applicable to the adoption of "management measures", such as those relating to the application of the common agricultural and common fisheries policies, or to the implementation of programmes with substantial budgetary implications. The advisory procedure is applicable in all other appropriate cases.

4.61 The specific procedures to be followed are respectively set out in Articles 3, 4 and 5 of the Comitology decision. Under each of the procedures, the Commission is assisted by a committee composed of representatives of the member States, and chaired by a representative of the Commission. The Commission shall submit a draft of the measures to be adopted to the Committee.

4.62 Where the advisory procedure is applicable, the Committee shall deliver its opinion by simple majority. In contrast, where the management and the regulatory procedure are applicable, the Committee shall deliver its opinion by qualified majority, which involves a weighing of the votes of the member States as foreseen in Article 205(2) EC Treaty.

4.63 The main difference between the three procedures lies in the consequences of a negative opinion of the Committee. In the case of the advisory procedure as described in Article 3 of the Comitology Decision, the Commission shall take "utmost account" of the opinion delivered by the Committee. However, it may adopt the measure even if it is not in accordance with the opinion of the Committee.

4.64 In the case of the management procedure described in Article 4 of the Comitology Decision, the Commission adopts measures which shall apply immediately. However, if these measures are not in accordance with the opinion of the committee, they shall be communicated by the Commission to the Council. In that event, the Commission may defer application of the measures on which it has decided for a period to be laid down in each basic instrument but which shall in no case exceed three months from the date of such communication. The Council, acting by qualified majority, may take a different decision within the period provided for by paragraph 3 of Article 4 of the Decision.

4.65 In the case of the regulatory procedure as described in Article 5 of the Comitology Decision, if the measure is not in accordance with the opinion of the Committee, the Commission shall submit

to the Council a proposal relating to the measures to be taken. In this case, the applicable procedure is set out in Article 5(6) of the Decision.

4.66 Accordingly, the committees established pursuant to the Comitology Decision fulfil an important role in the Community's internal decision-making process. In particular, in the context of the management and the regulatory procedure, the opinion of the Committee may determine whether a measure can be adopted by the Commission, or must be referred to the Council.

4.67 In accordance with Article 7(1) of the Comitology decision, each Committee shall establish its own rules of procedure on the proposal of its chairman on the basis of standard rules of procedure.

(iii) The legal effect of Community law

4.68 On the basis of the powers attributed to the European Community in the EC Treaty, the institutions may adopt a number of legislative and other acts. Article 249(1) EC Treaty states that the competent institutions may adopt regulations, directives, decision, recommendations, and opinions. The legal effect of these acts is described in Article 249(2) EC Treaty.

4.69 According to the constant case law of the Court of Justice, the law of the European Community has primacy over the national law of the member States. This primacy of Community law is a fundamental principle of the Community legal order. It applies to all provisions contained in the EC Treaty and in acts of the EC institutions. It also applies against any provision of national law at any level, including member States' constitutions. This means that whenever a Court of a Member State encounters a conflict between a provision of Community law and a provision of its national law, it must set aside the provision of national law, and apply Community law only.

4.70 A second fundamental principle of Community law is that of direct effect. As the Court has held in its constant case law, Community law may create rights for individuals which can be directly invoked by those individuals in proceedings before national courts and authorities. This direct effect may apply both to provisions of the founding treaties and to acts of secondary Community law.

4.71 Taken together, the principles of supremacy and of direct effect are essential for the effective and uniform application of Community law. They enable individuals to invoke provisions of Community law in proceedings before national courts. They thereby enable national judges – acting in constant dialogue with the European Court of Justice through the preliminary reference procedure – to safeguard the respect of Community law.

4.72 Moreover, the Court of Justice held that when the conditions under which individuals may rely on the provisions of Community law before the national courts are met, all organs of the administration, including decentralized authorities, are obliged to apply those provisions and if necessary must directly set aside national provisions that are in contradiction with EC law.

(iv) The Commission, the member States, and the execution of Community law

4.73 Community law is typically implemented through the national administrations of the member States. Only in a limited number of policy fields is the execution of Community law directly carried out by European Commission.

4.74 The system of the execution of EC law has frequently been referred to as "executive federalism". The principle of executive federalism within the EC also reflects the principle of subsidiarity enshrined in Article 5(2) EC Treaty, according to which the Community should take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member States.

4.75 The executive federalism of the EC is fully compatible with the requirements of uniformity in the interpretation and application of Community law. In this regard, the principles of primacy and direct effect once again have an important role. Through those principles, Community law becomes directly binding on national administrations, and may be invoked against them. This enables the European Court of Justice to ensure, through the preliminary reference procedure, the uniform interpretation and application of Community law.

4.76 Moreover, Article 10 EC Treaty imposes on the member States a duty of cooperation, which applies also to the execution of Community law by the member States.

4.77 In addition, Article 211, first indent, of the EC Treaty provides that the Commission shall "ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied". In reflection of this role, the Commission is frequently referred to as the "guardian of the Treaty".

4.78 Where the Commission considers that a Member State has failed to fulfil an obligation under the Treaty, the Commission has the possibility, in accordance with the procedures of Article 226 EC Treaty, to bring this matter before the Court of Justice. Such "infringement proceedings" can be brought in response to any violation of Community law by a Member State, and can also concern the incorrect application of Community law by the administrations of the member States.

4.79 In accordance with Article 228(1) EC Treaty, if the Court of Justice finds that a Member State has failed to fulfil an obligation under the EC Treaty, the State concerned shall be required to take the necessary measures to comply with the judgment of the Court of Justice. Where the Member State concerned fails to comply with the judgment, the possibility exists under Article 228(1) of the EC Treaty for the Court of Justice to impose a penalty payment on the Member State.

4.80 Individuals have a vital role in detecting infringements of Community law. There is a standardized procedure for complaints to be addressed to the European Commission regarding infringements of Community law. Such complaints, which may also concern the application of Community law by national administrations, can lead to the institution of infringement proceedings by the Commission.

4.81 The public service of the European Commission is guided by a code of conduct which is part of the Commission's rules of procedure, and which sets out the principles of good administrative behaviour to be observed by all Commission staff. The Code of Conduct provides in particular that all enquiries must be dealt with as quickly as possible, and sets out time limits within which correspondence should be answered. Complaints regarding non-compliance with the Code of Conduct may be addressed to the Secretariat-General of the Commission.

4.82 The Commission in the exercise of its duties is also subject to certain other controls. In particular, the Commission is politically responsible to the European Parliament. Moreover, in accordance with Article 194 EC Treaty, any citizen may direct a petition to the European Parliament on any matter which comes within the Community's fields of activity. Finally, in accordance with Article 195 EC Treaty, the European Parliament has appointed an Ombudsman empowered to receive complaints from individuals concerning instances of maladministration in the activities of the Community institutions or bodies.

(b) The administration of EC customs law

(i) The basic principles of the EC Customs Union

4.83 According to Article 23(1) EC Treaty, the Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in relation to third countries.

4.84 Accordingly, the EC customs union has an internal and an external dimension. As regards the internal dimension, Article 25 EC Treaty provides for the prohibition of all customs duties and charges having equivalent effect in trade between the member States. Articles 28 and 29 EC Treaty contain a prohibition of quantitative restrictions and measures having equivalent effect on imports and exports between the EC member States.

4.85 As for the external dimension, the EC Treaty establishes a common commercial policy. According to Article 133(1) EC Treaty, the common commercial policy is based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy, and measures to protect trade such as those to be taken in the event of dumping or subsidies. As the Court of Justice has confirmed on numerous occasions, the customs union and the common commercial policy fall within the exclusive competence of the EC.

4.86 The internal dimension of the EC customs union also benefits products originating in third countries. According to Article 23(2) EC Treaty, the prohibitions contained in Articles 25, 28 and 29 EC Treaty shall also apply to products from third countries which are in free circulation in member States. Article 24 EC Treaty defines products from third countries as being in free circulation when the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from total or partial drawback of such duties or charges. In other words, once goods from a third country are in free circulation in the EC, they are treated in every respect like Community goods, and benefit from the free movement of goods in the internal market in the same way as goods originating in the Community.

(ii) The EC's international commitments in the field of customs administration and cooperation

4.87 The EC is a founding Member of the WTO. As such, the EC respects and implements its commitments under the covered agreements. In particular, EC customs law implements, and fully respects, relevant WTO agreements such as the GATT, the Customs Valuation Agreement, or the Agreement on Rules of Origin.

4.88 While the EC is not yet a Member of the World Customs Organization (WCO), the EC is a party to numerous Conventions negotiated under the auspices of the WCO. Notably, the EC is a party to the International Convention on the Harmonized Commodity and Coding System (HS Convention), and the International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto Convention).

4.89 The EC also has concluded a number of bilateral agreements with third countries on customs cooperation. In particular, the EC has concluded such an agreement with the United States.

(iii) The legislative framework of the EC Customs Union

4.90 On the basis of the powers attributed to them in the EC Treaty, the EC institutions have adopted a number of legislative acts which establish the legal framework of the EC customs union. The three main instruments of EC customs legislation are the Community Customs Tariff, the Community Customs Code (CCC), and the Implementing Regulation. It is noteworthy that all these instruments are regulations, which, according to Article 249(2) EC Treaty, are binding in their entirety and directly applicable in all member States.

4.91 The Community Customs Tariff is established by Council Regulation (EEC) 2658/87. The Community Customs Tariff establishes a combined nomenclature (CN) with a description of goods up to an eight-digit code. The CN is based on the six-digit HS nomenclature, to which it adds Community subdivisions, referred to as "CN subheadings".

4.92 In addition, the CN contains preliminary provisions. These preliminary provisions notably contain general rules for the interpretation of the CN, other general provisions, as well as special provisions for certain types of goods. In addition, the CN also contains section and chapter notes, as well as footnotes relating to the application of duty rates.

4.93 The CN is contained in Annex I to Council Regulation 2658/87. In accordance with Article 12 of this Regulation, the Commission adopts each year a regulation containing the complete version of the CN. The CN contains the conventional rate of duties applicable on importation to the Community and, where applicable, lower autonomous rates.

4.94 In accordance with Article 2 of Regulation 2658/87, an integrated tariff of the European Communities (Taric) is established by the Commission. The Taric is based on the CN, and contains all measures contained in the CN, additional Community subdivisions, referred to as Taric subheadings, which are needed for the implementation of specific policies, any other information necessary for the implementation or management of the Taric, as well as the rates of customs duty applicable and other import and export charges, including duty suspensions and preferential tariff rates. Taric codes include the 8-digit CN codes plus a 9^{th} and 10^{th} digit. The Taric is established and continuously updated by the Commission, and available online through the internet.

4.95 Article 9(1)(b), (d), (e) and (f) of Regulation 2658/87 also give the Commission the possibility to amend the combined nomenclature in certain respects. Such amendments must be adopted in accordance with the management procedure referred to in Article 10 of the Regulation.

4.96 Council Regulation (EEC) 2913/92 establishes the Community Customs Code (CCC). The CCC comprises 253 articles and is divided into nine Titles. The CCC together with its implementing provisions constitutes a comprehensive codification of the rules for the administration of customs throughout the Community.

4.97 According to Article 247 CCC, the measures necessary for the implementation of the CCC are to be adopted by the Commission in accordance with the Regulatory Procedure referred to in Article 247a CCC. Article 247a refers to Article 5 of the Comitology Decision.

4.98 On the basis of Article 247 CCC, the Commission has adopted Regulation (EEC) No. 2454 of 2 July 1993 laying down provisions for the Implementation of the CCC. The Implementing Regulation is a voluminous text comprising ca. 800 articles and over 100 annexes. It sets out in detail the provisions necessary for the implementation of the CCC. Its structure follows broadly that of the CCC.

(iv) The Commission, the member States, and the Customs Code Committee

4.99 As is generally the case for Community law, Community customs law is executed by the national authorities of the EU member States. Member States' customs authorities are bound by Community customs law, which applies directly and uniformly through the Community legal order.

4.100 As in other fields of Community law, the Commission is not normally directly involved with the administration of EC customs law. There are only a limited number of cases in which the Commission may itself take decisions regarding the application of EC customs law. Generally, the function of the European Commission as the guardian of the Treaties is to monitor the correct and uniform application of EC customs laws by the member States.

4.101 A specific forum for cooperation between the member States and the Commission is the Customs Code Committee. This Committee is established by Articles 247a(1) and 248a(1) of the CCC. It is composed of representatives of all member States and chaired by a representative of the Commission. It has adopted its own Rules of Procedure, which are based on the standard rules of procedure for comitology committees.

4.102 In accordance with Article 1(1) of its Rules of Procedure, the Customs Code Committee comprises a number of sections covering specific areas of customs law and administration. The Customs Code Committee has a number of functions which are attributed to it in Community legislation. Articles 247a and 248a CCC provide that the Customs Code Committee shall act as a regulatory or management committee within the meaning of the Comitology Decision. Article 247 CCC foresees that the measures necessary for the implementation of the CCC are normally adopted according to the regulatory procedure. In certain cases, including those mentioned in Article 248 CCC, it is the management procedure which shall apply.

4.103 Legal acts other than the CCC may also include references to the Customs Code Committee. In this case, the specific procedure applicable is laid down in the respective provision attributing the decision-making power to the Commission. One example is Article 10 of Regulation 2658/87 establishing the Common Customs Tariff, which provides that the Commission will be assisted by the Customs Code Committee in accordance with the management procedure.

4.104 In addition, Article 249 CCC provides that the Committee may examine any question concerning customs legislation which is raised by its chairman, either on his own initiative or at the request of a Member State's representative. A similar provision is also found in Article 8 of Regulation 2658/87 establishing the Common Customs Tariff, according to which the Committee may examine any matter referred to it by its chairman, either on his own initiative or at the request of a representative of a Member State, concerning the combined nomenclature or the Taric nomenclature.

4.105 The Customs Code Committee is not a mechanism for the administrative or judicial review of customs decisions. Rather, it is an integral part of the Community's regulatory process, through which the member States' expertise is integrated into this process. The US complaints are accordingly based on an erroneous understanding of the nature and functions of the Committee.

4.106 However, any individual with a concern regarding the administration of customs matters can bring this issue to the attention of the Commission, which will consider the matter and respond in accordance with the Commission's Code of Conduct. If the Commission considers that the matter requires consideration by the Committee, it will put this matter on the Committee's agenda. In a similar fashion, a concerned individual may also address the administration of a Member State, which may equally decide to raise the matter in the Committee.

4.107 Moreover, Article 9(1) of the Committee's Rules of Procedure allows the Chairman, on his initiative or at the request of a Member, to invite experts to talk on particular matters. Thus, where this is justified by the complexity of a particular issue, the Committee may also hear representatives of the concerned industry or traders, and has done so in the past.

(v) Tariff classification

4.108 According to Article 20(1) of the CCC, duties legally owed where a customs debt is incurred shall be based on the Common Customs Tariff. In accordance with the constant case law of the Court of Justice, tariff classification is carried out on the basis "of the objective characteristics and properties of products which can be ascertained when customs clearance is obtained".

4.109 In principle, the classification of goods is the responsibility of the customs authorities of the member States which carry out the customs clearance of the goods concerned. In addition, there exists a variety of tools which ensure a uniform classification practice throughout the Community. These tools include classification regulations, HS explanatory notes and opinions, EC explanatory notes, and opinions of the Customs Code Committee. Moreover, the CCC provides for binding information on questions of tariff classification. In this way, Community law provides for a graduated set of tools adaptable to the circumstances of the specific case in order to ensure a uniform classification practice. Finally, judgments of the Court of Justice also are an important tool for ensuring a uniform classification practice.

4.110 According to the first indent of Article 9(1)(a) of Regulation 2658/87, the Commission may adopt Regulations on the classification of goods. Such classification regulations are adopted by the Commission in accordance with the management procedure referred to in Article 10 of Regulation 2658/87.

4.111 Classification regulations will determine the tariff subheading to be applied to the specific good described in the Regulation. The Court of Justice has confirmed that under certain circumstances, classification regulations may also become relevant by analogy to products similar to those described in the regulation. A classification regulation is binding throughout the Community in accordance with Article 249(2) EC Treaty. However, classification regulations cannot amend the CN, and must therefore respect the Common Customs Tariff.

4.112 Where a national Court has doubts about the validity of a classification regulation, it may refer this question to the Court of Justice in accordance with Article 234(1)(b) of the EC Treaty. If the question arises before a national court against the decision of which there is no further remedy, the Court must refer this question to the Court of Justice. In determining whether or not the Commission has exceeded its powers, the Court of Justice has sought to establish whether the Commission has committed "a manifest error of assessment".

4.113 In contrast, since classification regulations are acts of general applicability, they would normally not be of direct and individual concern to individuals as required by Article 230(4) EC Treaty. Accordingly, classification regulations cannot normally be challenged through a direct annulment action before the Tribunal of First Instance. Only under exceptional circumstances, where a classification regulation is so specific that it affects only the applicant by virtue of certain attributes which are peculiar to it, can a classification regulation also be challenged directly through an annulment action.

4.114 The Community is a party to the HS Convention, and the common customs tariff is based on the HS nomenclature. According to Article 7(1)(b) of the HS Convention, the HS Committee can prepare Explanatory Notes, Classification Opinions and other advice as guidance to the interpretation of the HS. The EC considers that WCO explanatory notes and classification opinions constitute an

important tool for uniform tariff classification not only within the Community, but also beyond. The EC participates actively in the drafting of the explanatory notes and classification opinions, and has up to now adopted all of the HS measures.

4.115 The Court of Justice has stated in its case law that even though they are not normally binding in Community law, HS Explanatory Notes and Classification Opinions of the WCO are an important aid in the interpretation of the Community customs tariff. In other cases, the Court of Justice has also judged that an interpretation of the HS approved by the WCO Council is binding on the Community when it reflects the general practice followed by the member States, unless it is incompatible with the wording of the heading concerned or goes manifestly beyond the discretion conferred on the Customs Cooperation Council.

4.116 According to Article 9(1)(a), second indent, of Regulation 2658/87, the Commission may issue explanatory notes. Such explanatory notes are adopted by the Commission in accordance with the management procedure foreseen in Article 10 of the Regulation.

4.117 Explanatory notes may equally clarify particular issues of tariff classification arising under the CN. They must, of course, be distinguished from the notes which introduce the chapters of the CN, and which are an integral part of the tariff and cannot be modified by explanatory notes. EC explanatory notes are not legally binding, and cannot amend the CN. However, the Court of Justice has repeatedly acknowledged that explanatory notes are an important aid in the interpretation of the CN.

4.118 On the basis of Article 8 of Regulation 2658/87, the Customs Code Committee may adopt opinions on questions relative to the application and interpretation of the combined nomenclature. Such opinions must be distinguished from opinions which the Committee adopts in the context of a comitology procedure on measures proposed by the Commission.

4.119 Opinions adopted by Committee are not legally binding. However, the Court of Justice has held that that such opinions constitute an important means of ensuring the uniform application of the common customs tariff by the authorities of the member States and as such can be considered as a valid aid to the interpretation of the tariff.

4.120 According to Article 12(1) of the CCC, the customs authorities shall, upon written request, issue binding tariff information (BTI). The basic provisions on binding tariff information are set out in Article 12 CCC. Further rules concerning binding information are contained in Title II of Part I of the Implementing Regulation (Articles 5-14). These additional provisions address in particular the procedures for obtaining binding information, measures to be taken in the event of binding information, the legal effect of binding information, and the expiry of binding information. In addition, in order to ensure a harmonious and uniform application of the rules on binding tariff information, the Commission has issued administrative guidelines on the European Binding Tariff Information (EBTI) System and its operation.

4.121 According to Article 6(1) of the Implementing Regulation, applications for binding information are to be made in writing, either to the customs authorities in the Member State or member States in which the information is to be used, or to the competent customs authorities in the Member State in which the applicant is established.

4.122 The application shall be made on a standard application form conforming to the specimen contained in Annex 1 B to the Implementing Regulation. The details which an application for BTI must contain are set out in Article 6(3)(A) of the Implementing Regulation. According to Article 6(3)(A)(j), the application must in particular contain the indication by the applicant whether, to his knowledge, binding tariff information for identical or similar goods has already been applied

for, or issued in the Community. When customs have possession of all the elements necessary for them to determine the classification of the goods, binding information shall be notified to the applicant as soon as possible in accordance with Article 7(1) of the Implementing Regulation.

4.123 Article 8(1) of the Implementing Regulation provides that a copy of the application for BTI, a copy of BTI notified to the applicant, and the information contained in copy 4 of the BTI form shall be transmitted to the Commission. This transmission is done by electronic means. In accordance with Article 8(3) of the Implementing Regulation, this data is stored in a database of the Commission, which is called the EBTI data base.

4.124 There are two versions of this database. One is available to the public for consultation, the other is exclusively available to the Commission and issuing authorities of the member States. The version available to the public allows searches of valid BTI by issuing country, start and end date of validity, BTI reference, CN code, keyword, or product description. The public version of the EBTI database is accessible on the website of the European Commission.

4.125 The version available to the Commission and national customs authorities contains additional information of a confidential nature which is not made available to the public (i.e. the name and address of the applicant, holder and agent, if one has been appointed, confidential commercial details concerning the goods for which the BTI has been issued, including trade names). The version available to the Commission and issuing customs authorities also contains all applications for BTI which have been submitted to customs administrations and BTI that has ceased to be valid.

4.126 The EBTI database is an important tool for securing a uniform BTI practice. In particular, according to the administrative guidelines issued by the Commission on the EBTI system, the EBTI data base must be consulted by customs authorities prior to the issuance of BTI in all cases where there is a doubt regarding the correct classification, or where different headings merit consideration.

4.127 According to Article 12(2) CCC, BTI will be binding on the customs authorities as against the holder of the BTI. It follows furthermore from Article 12(2) CCC and Article 5 No. 1 of the Implementing Regulation that BTI is binding not only on the administration which has issued it, but on the administrations of all member States.

4.128 According to Article 12(3) CCC, BTI will be binding only in respect of the tariff classification of goods which correspond in every respect to those described in the information. In accordance with Article 12(4) CCC, BTI will be valid for a period of six years. Further details regarding the legal effect of binding information are set out in Articles 10 to 12 of the Implementing Regulation.

4.129 Article 12(5) CCC sets out the cases in which BTI shall cease to be valid. According to Article 12(6) of the CCC, the holder of binding information which ceases to be valid may still use that information for a period of six months, provided that he concluded binding contracts for the purchase or sale of the goods in question, on the basis of the BTI, before the measure was adopted. Further details are set out in Articles 13 and 14 of the Implementing Regulation.

4.130 In the event that despite the procedural safeguards described above, different BTI exists, Article 9(1) gives the Commission the power to adopt the necessary measures to ensure the uniform application of the CN. The measures foreseen in the second indent of Article 9(1) of the Implementing Regulation may take the form of a classification regulation adopted by the Commission on the basis of Article 9(1)(a) of Regulation 2658/87. In accordance with Article 12(5)(a)(i) of the CCC, where such a regulation is adopted, BTI which is not in accordance with it will cease to be valid. Alternatively, the Commission may also, on the basis of Article 12(5)(a)(iii) CCC and the second

indent of Article 9(1) of the Implementing Regulation, adopt a decision obliging the Member State who issued the BTI to revoke it.

4.131 A decision requiring the revocation of BTI is of direct and individual concern to the holder of the BTI. Therefore, the holder may bring a direct action for the annulment of such a decision by the Commission before the Court of First Instance in accordance with Article 230(4) EC. In contrast, a direct action for annulment is normally not possible against a classification regulation. However, the validity of such classification could be raised in the context of proceedings before a national tribunal, and could then be referred to the Court of Justice in accordance with the preliminary reference procedure.

(vi) Customs valuation

4.132 Community customs law contains a complete set of rules for customs valuation in the EC. The basic provisions are contained in Chapter 3 of Title II of the CCC (Articles 28 through 36). More detailed provisions are contained in Title V of the Implementing Regulation (Articles 141 to 181a). Title V is subdivided into seven chapters, concerning general provisions, royalties and licensing fees, the place of introduction into the Community, transport costs, rates of exchange, simplified procedures for perishable goods, and declarations of particulars and documents to be furnished.

4.133 In addition, Annex 23 to the Implementing Regulation contains interpretative notes on customs value, which reflect the interpretative notes contained in Annex I to the WTO Valuation Agreement. Article 141(1) of the Implementing Regulation requires that when applying the provisions the provisions of the CCC and the Implementing Regulation, member States shall comply with the interpretative notes. In addition, Article 141(2) of the Implementing Regulation refers to Annex 24 to the Regulation, which sets out the generally accepted accounting principles to be applied for the determination of customs value. Finally, Annex 25 to the Implementing Regulation contains details on the calculation of air transport costs to be included in the customs value.

4.134 In accordance with the WTO Valuation Agreement, Article 29(1) of the CCC provides that the customs value of imported goods shall normally be the transaction value, i.e. the price actually paid or payable for the goods when sold for export to the customs territory of the Community. The details and exceptions to this rule are contained in the Community legislation referred to above, in accordance with the WTO Valuation Agreement.

4.135 EC customs law also provides for a number of mechanisms to ensure the uniform application of EC valuation rules. These tools are not as numerous as those available in the case of tariff classification. However, this is due to the substantial differences between tariff classification and valuation which must be kept in mind.

4.136 First, it should be noted that the EC valuation rules are extremely detailed. For this reason, the room for specific additional interpretations is relatively small. Second, since the valuation of goods is normally based on the transaction value, customs valuation very much depends on evaluations to be carried out on a case-by-case basis. This means that valuation rules typically must be of a general and abstract character, rather than product specific. In other words, whereas it may be possible to decide in the abstract on the classification of a defined type of good, it is not possible to lay down once and for all in the abstract the value of a particular good.

4.137 Where a need for further detailed rules on valuation occurs, the Commission may, in accordance with the procedure of Article 247 CCC, amend the valuation rules contained in the Implementing Regulation. Such amendments will be legally binding in all member States. From this perspective, amendments to the Implementing Regulation and its annexes may, in relation to specific issues, be regarded as functionally similar to classification regulations.

4.138 Moreover, in accordance with Article 249 CCC, the Customs Code Committee (through its Customs Valuation Section) may examine any questions concerning the application of EC customs legislation in the field of valuation. On this basis, the CCC may issue opinions on specific issues of application of EC valuation rules. Whereas such opinions are not legally binding, they may constitute useful guidance for the interpretation of the applicable EC law.

4.139 The Commission has also issued a Compendium of Customs Valuation texts. This Compendium contains commentaries prepared and conclusions reached by the Customs Code Committee on specific issues of customs valuation on the basis of Article 249 CCC. In addition, it contains excerpts from relevant judgments of the Court of Justice on valuation issues, as well as indices of other relevant texts.

4.140 As in other areas of EC customs law, the ECJ plays an important role in ensuring the uniform interpretation of EC valuation rules. Wherever a dispute occurs between an importer and EC customs authorities on the interpretation and application of EC valuation rules, the national court may – and sometimes must – refer the question to the Court of Justice in accordance with Article 234 EC Treaty.

(vii) Processing under customs control

4.141 The processing under customs control procedure (PCC) allows the nature or state of non-Community goods to be altered without subjecting them to import duties or commercial policy measures. The resulting products are released for free circulation at the rate of import duty applicable to the processed products in order to benefit from a lower import duty amount or to fulfil technical requirements for placing the goods on the market.

4.142 The detailed provisions governing PCC are laid down in Articles 84 to 90 and 130 to 136 of the CCC and Articles 496 to 523 and 551 to 552 of the Implementing Regulation. The use of the procedure requires an authorization, which is granted only if certain conditions are fulfilled. The US First Written Submission deals only with one type of condition, the so-called "economic conditions" which are described in Article 133(e) CCC. EC law ensures the uniform application of the assessment of the economic conditions by several means.

4.143 For the types of goods and operations mentioned in Annex 76, Part A, of the Implementing Regulation, which represent the majority of the cases, the economic conditions shall be deemed to be fulfilled in accordance with Article 552(1) first subparagraph of the Implementing Regulation. This means that, in these cases, customs authorities do not examine the economic conditions.

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

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

consult before or after issuing an authorization, an examination of the economic condition may take place at Community level.

(viii) Local clearance procedure

4.146 Community customs legislation contains simplified procedures in order to facilitate completion of formalities for placing goods under a custom procedure as far as possible while ensuring that operations are conducted in a proper manner. The local clearance procedure is one of those simplified procedures, where an importer may have goods released for free circulation at its own premises or certain other designated locations without having to present the goods to customs.

4.147 The basic provision for the local clearance procedure is Article 76(1)(c) CCC. Where a data-processing technique is used, Article 77 CCC applies in addition. More detailed provisions are laid down in Articles 263 to 267 of the Implementing Regulation.

4.148 According to Article 263 of the Implementing Regulation, authorization to use the local clearance procedure shall be granted to any person wishing to have goods released for free circulation at his premises or at the other places designated or approved by the customs authorities in respect of goods subject to certain procedures (transit or customs procedures with economic impact) or which are brought into the customs territory of the Community with an exemption from the requirement that they be presented to customs.

4.149 Under Article 267 of the Implementing Regulation, the authorization shall lay down the specific rules for the operation of the procedure. Article 266 of the Implementing Regulation imposes some obligations on the holder of the authorization in order to enable the customs authorities to satisfy themselves as to the proper conduct of the operations. Generally speaking, these obligations consist in the notification to the customs authorities of some events (like the arrival of the goods to the place designated for release or the holder's desire to have the goods released for free circulation) and the obligation to enter the goods in the holder's records.

(ix) Penalties for violations of customs law

4.150 EC customs law does not explicitly set out the sanctions which apply in case of a violation by individuals of provisions of EC customs law. Accordingly, the nature and level of such penalties, whether administrative or criminal in nature, is determined by the national laws of the member States.

4.151 However, this does not mean that the member States have complete freedom in the determination of the appropriate level of penalties. In its constant case law, the European Court of Justice has repeatedly stated that Article 10 EC Treaty requires the member States to take all measures necessary for the proper implementation and application of Community law, including the provision of penalties for violations of EC law.

4.152 According to the case law of the Court, member States are obliged to provide for effective, proportionate and dissuasive penalities for any violation of EC law. Where a member States fails to provide such effective, proportionate and dissuasive penalities, it fails to fulfil its obligations under the EC Treaty. This has been confirmed by the ECJ specifically also in respect of the application of EC customs law.

4.153 The principles set out in the case law of the ECJ regarding the imposition of penalties for the violation of EC law can be regarded as generally accepted principles of EC law. This is illustrated by the Council resolution of 29 June 1995 on the effective uniform application of Community law and on the penalties applicable for breaches of Community law in the internal market. This resolution recalls the relevant case law of the Court of Justice, and calls upon member States to ensure that "Community

law is duly applied with the same effectiveness and thoroughness as national law and that, in any event, the penalty provisions adopted are effective, proportionate and dissuasive".

(x) EC customs cooperation

4.154 An important instrument in the field of EC customs cooperation is Regulation (EC) 515/97 on mutual assistance between the administrative authorities of the member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters.

4.155 Title I of Regulation 515/97 deals with assistance on request between member States customs authorities. According to Article 4(1) of the Regulation, EC customs authorities must transmit to one another, upon request, any information necessary to ensure compliance with the provisions of EC customs legislation. The modalities of such assistance are set out in the following articles of Regulation 515/97. Article 7 provides that at the request of a customs authority, the requested authority shall keep a special watch for certain persons, places, movements of goods, or means of transport. Article 9 provides that customs authorities shall, at the request of another customs authority, carry out investigations concerning operations which appear to constitute a breach of customs legislation.

4.156 Title II deals with spontaneous assistance between customs authorities. Article 15 provides in particular that EC customs authorities must provide each other spontaneously any information concerning operations which appear to constitute violations of EC customs legislation.

4.157 Title III deals with relations between member States' customs authorities and the Commission, and obliges member States in particular to provide information to the Commission on all operations which appear to constitute breaches of EC customs law. According to Article 18(3) of the Regulation, in response to a reasoned request from the Commission, the member States' authorities shall take the actions foreseen in Articles 4 to 8 of the Regulation. According to Article 18(4) of the Regulation, where the Commission considers that irregularities have taken place, it may prompt a Member State to carry out an inquiry, at which Commission officials may be present under the conditions set out in Articles 9(2) and 11 of the Regulation. The Member State authorities shall, as soon as possible, communicate to the Commission the findings of the enquiry.

4.158 Title V establishes the Customs Information System (CIS). The CIS is an automated information system for the use of the administrative authorities of the member States and the Commission. In accordance with Article 23(2) of the Regulation, its aim is to assist the EC customs authorities in preventing, investigating, and prosecuting operations which are in breach of customs law by allowing the rapid dissemination of relevant information among all EC customs authorities. The conditions for the operation and use of the CIS are set out in detail in the following chapters of Title V of the Regulation.

4.159 Finally, customs cooperation is obviously an area which is subject to constant evolution, reflecting changing circumstances and technological and practical needs. For this reason, the Community has adopted and implemented successive action programmes aimed at strengthening the effective implementation of the EC customs union. The current action program is Customs 2007, which applies for the period of 1 January 2003 to 31 December 2007. It is established by Decision No. 253/2003/EC of the European Parliament and the Council.

4.160 The objectives of Customs 2007 are set out in Article 3(1) of Decision 253/2003. For the attainment of its objectives, Customs 2007 foresees a number of programme actions, which include actions in the field of communication and information exchange systems, benchmarking, exchanges of officials, seminars, workshops and project groups, training activities, monitoring actions, and

external actions in the form of technical assistance and training. According to Article 14 of the Decision, the financial framework for the operations to be undertaken is set at €133 million.

(xi) Budgetary and financial aspects

4.161 The uniform implementation of the EC customs union is also important for the EC for budgetary and financial reasons. According to Article 2(1)(b) of the Council Decision 2000/597/EC, Euratom on the system of the European Communities' own resources, common customs tariff duties and other duties established in respect of trade with non-member countries shall constitute an own resource entered into the budget of the European Communities. According to Article 2(3) of the Decision, of the amount collected, Members shall retain an amount of 25% by way of collection cost. Accordingly, the correct implementation of Community customs law has direct implications for the EC budget, and is also for this reason closely monitored by the EC institutions, and in particular the European Commission.

4.162 Council Regulation (EC/Euratom) No. 1150/2000 sets out further procedures for the implementation of the own resources decision. This Regulation provides further tools for the uniform implementation of Community customs law, and therefore deserves to be considered here. According to Article 17(1) of the Regulation, member States must take all requisite measures to ensure that the amounts corresponding to the Community's entitlement are made available to the Community as specified in the Regulation. In accordance with Article 18(2)(a) of the Regulation, the member States must, at the request of the Commission, carry out additional inspections, with which the Commission shall be associated at its request. According to Article 18(3) of the Regulation, the Commission may also itself carry out inspection measures on the spot.

4.163 A failure to make available the Community's own resources is an infringement of the treaty, which can give rise to infringement proceedings against the Member State concerned. Where such a failure results from an incorrect application of EC customs law, the infringement procedures may at the same time also result in a finding that the member States has incorrectly applied EC customs law.

(xii) The continuous evolution of EC customs law

4.164 The EC institutions keep EC customs law under constant review in order to ensure that EC customs authorities can operate under the best possible conditions possible.

4.165 As the most recent example in this respect, the European Commission has launched a process of public consultations with a view to the preparation of a modernized customs code. The draft versions of the customs code have been submitted to several rounds of public consultations, in which traders, national administrations and third countries were provided with an opportunity to comment on the envisaged amendments. The United States did not provide any comments in the context of these consultations, even though it would have been perfectly possible for it to do so.

4.166 The Unites States has stated that "the most vocal critics of the EC frequently have been the EC's own officials". However, the statements to which the United States refers simply reflect the ongoing process of reform and review of EC customs law. Indeed, the EC is not complacent about its own system, and is committed to continue developing it in accordance with changing needs and circumstances. However, this does not prove that the EC is in any way failing to comply with its obligations under Article X:3(a) and (b) GATT.

(c) Judicial control in EC law

(i) The EC court system

4.167 In the EC, all disputes concerning matters governed by Community law which are not subject to the jurisdiction of the Court of Justice of the EC (and the EC Court of First Instance) fall within the competence of the national courts. The national courts thus assume the status of Community courts of general competence, in the sense that they are competent to determine any dispute that is not expressly conferred on the EC Court of Justice and on the EC Court of First Instance. The situation of the national courts is such that they perform a dual functional role. When determining a dispute governed by national law, they continue to form part of the national legal order. When determining a case governed by Community law, they belong from the functional point of view to the Community legal order. Since the very foundation of the EC, the use of national courts to implement Community law has been considered as the best way of ensuring justice in a swift manner close to the citizens.

4.168 The EC Treaty itself established the role of the national courts in the application of the Community legal order, as well as the scope and consequences thereof, by virtue of its Article 234 concerning references to the Court of Justice by national Courts. Such role cannot be negated by Community legislation. Therefore, any modification in the boundaries between the competences of the Court of Justice and the national Courts would require the amendment of the EC Treaty.

4.169 The Court of Justice and the Court of First Instance of the European Communities are constituted under the EC Treaty and the Protocol on the Statute of the Court of Justice annexed to it. Both Courts are composed of one judge per Member State and they normally decide in chambers of three or five judges. The Court of Justice is assisted by eight Advocates General, who act with complete impartiality and independence in delivering an individual reasoned opinion on cases which require his or her involvement.

4.170 According to Article 220 of the EC Treaty, the central task of the Court of Justice and the Court of First Instance is to ensure that in the interpretation and application of the Treaty, the law is observed. This is done through different procedures, which delimitate the jurisdiction of both European Courts between themselves and with the national courts. The Court of Justice and the Court of First Instance are to act within the limits of the powers conferred upon them by the founding treaties.

4.171 The main division between the different kinds of proceedings before the Court of Justice is between those originating and terminating before the Court itself and those originating and terminating before national courts. In addition, the Court of Justice is competent to hear appeals on points of law from decisions of the Court of First Instance, where that Court has jurisdiction at first instance.

4.172 The main kinds of proceedings originating and terminating before the Court of Justice are, amongst others, actions against member States for failure to fulfil an obligation under Community law, actions for the annulment of a Community measure, actions for failure by a Community institution to act, and action for damages relating to the Community's non-contractual liability. The second category of proceedings before the Court of Justice is actions which originate before a national court but are referred to the Court of Justice for a ruling on the interpretation or validity of a point of Community law.

4.173 Article 225(1) of the EC Treaty provides that the Court of First Instance shall have jurisdiction at first instance in actions for annulment, actions for failure to act, actions founded on non-contractual liability, staff cases and cases under arbitration clauses in Community contracts, with the exception of those reserved in the Statute to the Court of Justice. As the Statute reserves to the

Court actions for annulment and actions for failure to act brought by institutions and member States in some sectors, the jurisdiction conferred on the Court of First Instance covers virtually all direct actions brought by natural or legal persons as well as direct actions by member States challenging executive action by the Community institutions. In the fields thus defined, the Court of First Instance has exclusive jurisdiction at first instance, its decisions being subject to a right of appeal on points of law only to the Court of Justice.

(ii) Judicial protection in the EC legal system

4.174 As a Community based on the rule of law, the Community recognizes the right of individuals to judicial protection. This right to an effective remedy before a tribunal is, first of all, recognized in Article 47 of the Charter of Fundamental Rights of the European Union, which reflects, in accordance with Article 6(2) EU Treaty, the constitutional traditions of the member States. It should be also stressed that all EC members States are parties to the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms of 14 November 1950, where Article 6(1) lays down the right to a fair trial by an independent and impartial tribunal established by law.

4.175 In the EC legal system, national courts guarantee this right when a decision taken by national authorities is challenged. This also applies to acts of the member States through which they implement Community law. While the judicial organization and procedures in the member States result from their various political, constitutional and legal traditions, they all provide complete legal protection in relation to administrative decisions.

4.176 As regards the decisions of the EC institutions, the main action to exercise this right is the action for annulment. Under Article 230 of the EC Treaty, the Court is to review the legality of acts, amongst others, adopted jointly by the European Parliament and the Council, of the acts of the Council, and of the Commission, other than recommendations or opinions. Generally speaking, an action for annulment is available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects. However, this jurisdiction does not cover acts adopted by a national authority. Neither does it extend to the Treaty and its amendments.

4.177 Under Article 230(4) of the EC Treaty, natural or legal persons may institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former person. The Court of Justice has interpreted "of direct concern" to mean that the effect of the measure on the person's interests must not depend on the discretion of another person, including the relevant Member State. The requirement of "individual concern" is fulfilled where the measure in question affects specific natural or legal persons by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee.

(iii) Preliminary rulings: the Court of Justice and the uniform interpretation and application of Community law

4.178 The Court of Justice plays a central role in the uniform interpretation and application of Community law throughout the Community by means of the preliminary reference procedure set out in Article 234 EC Treaty.

4.179 Where a question as to any of these matters arises before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give Judgment, request the Court of Justice to give a ruling on it. Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is

no judicial remedy under national law, that court or tribunal must bring the matter before the Court of Justice.

4.180 However, where the validity of a Community act is challenged before a national court, the Court of Justice has declared that the power to declare the act invalid must be reserved to the latter. Therefore, if a national court considers that an act of an EC institution is invalid, it is obliged to make a reference to the Court of Justice. The latter has justified this case law with the need to secure the uniform application of all acts of the Community.

4.181 In a recent case, the Court of Justice confirmed that the principle of Member State liability for breaches of Community law also applies when a breach is attributable to a Member State court, because it fails to refer a case to the Court of Justice. In such cases, the affected claimant is entitled to bring another suit, affording the national judge hearing that case the opportunity to refer the issue to the Court of Justice at the second attempt.

4.182 When entertaining a preliminary reference, the Court of Justice does not exercise an appellate power to approve or overrule determinations of the referring courts. Rather, it assists the national court in coming to a decision which has not been made at the time of the reference. The relationship between national courts and the Court of Justice is co-operative and not hierarchical, based on the recognition that each court has a different function, and on mutual goodwill and respect.

4.183 The main objective of this preliminary reference system is to guarantee the proper and uniform interpretation and application of Community law throughout all the member States, avoiding the establishment of a long and expensive appellate system before the Court of Justice. This is extremely important because the administration of the Community is, to a large extent, carried out by the member States rather than by the Community institutions and because Community legislation may require implementing measures to be adopted by national legislatures or executives. It is through preliminary references that divergences within and between the member States can be avoided and the effective application of Community law be assured. At the same time, the reference procedure constitutes the principal method by which the compatibility of national law and administrative decisions with Community law is tested.

4.184 Apart from providing a means of ensuring uniformity throughout the Community, individual litigants find that their national cases are referred to the Court of Justice as to the validity or interpretation of an act of a Community institution. All parties to the main action are entitled to participate in the preliminary reference proceedings, as well as Members States and Community institutions. It is the practice of the Commission to participate in every case before the Court of Justice, as a consequence of its role as guardian of the Community interest. A preliminary ruling given by the Court of Justice is binding on the national court hearing the case in which the ruling is given. Besides, national courts and tribunals implement faithfully the preliminary rulings of the Court of Justice. If a referring court does not follow the ruling of the Court of Justice, this would constitute a breach of the obligations of the Member State under the Treaty, which could be brought before the Court of Justice under Articles 226 to 228 of the EC Treaty.

4.185 A preliminary ruling has also an effect on persons who are not parties to the case referred. In *Simitzi v. Municipality of Kos*, the Court held that Greece could no longer reasonably have believed that a duty was compatible with Community law after the date of the Judgment in which a comparable French charge was held not to be. In a recent case, the Court of Justice has expanded the effects of preliminary rulings to certain *res judicata* situations. The Court declared that, in view of the obligation on all the authorities of the member States to ensure observance of Community law and because of the principle of cooperation arising from Article 10 EC, an administrative body may be under an obligation to review a final administrative decision in order to take account of the interpretation of the relevant provision given by the Court in a subsequent preliminary ruling.

(iv) Judicial review of customs decisions

4.186 Article 243(1) CCC provides that any person shall have the right to appeal against decisions taken by the customs authorities which relate to the application of customs legislation and which concern him or her directly and individually. Article 243(1) CCC also provides that any person who has applied to the customs authorities for a decision relating to the application of customs legislation and has not obtained a ruling on that request within the period referred to in Article 6(2) CCC shall also be entitled to exercise the right of appeal. Article 243(1) finally provides that the appeal must be lodged in the member State where the decision has been taken or applied for.

4.187 Since Community customs law is implemented through the customs authorities of the member States, the appeal is lodged before a tribunal of the member State whose customs authorities have issued the decision. In accordance with Article 245 CCC, the provisions governing the appeals procedure are laid down in the national laws of the member States. The CCC abstains from harmonising the national law on administrative and judicial appeals against customs decisions. This reflects the fact that such procedural laws often apply uniformly to the whole field of national administration. Harmonization might therefore have led to the fragmentation of hitherto uniform national appeals procedures.

4.188 As it has already been explained above, the role of the member States' courts in the judicial review of customs decision is fully compatible with the uniform application of EC customs law. member States' courts are obliged to apply EC law according to the interpretation given by the Court of Justice and set aside any national provision or measure that is inconsistent with EC law. Wherever a question of interpretation of Community law arises, such a question may be referred to the Court of Justice in accordance with Article 234 EC. Where the national court is a court of last instance or any national court considers that the Community measure is invalid, such court is obliged to refer the question to the ECJ.

4.189 Finally, it should be noted that in exceptional cases, a right of appeal against customs decisions may also be available directly to the EC Court of First Instance. This is the case when the European Commission takes decisions applying EC customs law which are of direct and individual concern to individuals within the meaning of Article 230(4) EC Treaty. Examples for such decisions are Commission decisions revoking BTI. Another example would be Commission decisions on the repayment or remission of import duties on equitable grounds on the basis of Article 907 of the Implementing Regulation.

(d) The US system in comparison

(i) The administration of US customs law

4.190 In the United States, customs laws, which are federal laws, are essentially administered by US Customs and Border Protection. US Customs and Border Protection is an agency of the US Federal Government part of the US Department of Homeland Security. US Customs and Border Control has 20 Field Operations Offices which oversee 317 US ports of entry and 14 preclearance offices.

4.191 However, it is noteworthy that the fact that US customs law is implemented by a federal agency is not specific to customs matters. On the contrary, it reflects a fundamental interpretation of US constitutional law according to which Congress may not require US states to implement federal law. This has been confirmed by the US Supreme Court in the case *Printz vs. United States.*

4.192 The US dual federalism is diametrically opposed to the basic principles of the EC legal order. The US system is characterized by a principle of "dual sovereignty", in which the individual States may not be "conscripted" or "commandeered" to administer federal law. EC law is characterized by

the principle of executive federalism, where all EC law must be executed by the national authorities of the member States, acting under the guidance and supervision of the EC institutions.

4.193 The EC does not intend to question the constitutional choices which the United States has made. However, in response to the US claims under Article X:3(a) GATT, it is important to stress that the EC's executive federalism is just as fundamental and legitimate a constitutional choice as the US system of dual sovereignty. The EC considers that its constitutional choices should be afforded the same respect as those of the United States.

(ii) Review of customs decisions in US law

4.194 Judicial review in the US concerning customs and trade issues is in the first step attributed to the United States Court of International Trade (the "USCIT"), which is a federal court established under Article III of the US Constitution. The USCIT is equal in rank to a federal district court.

4.195 Appeals against the USCIT's decisions may in all cases be taken as of right to the US Court of Appeals for the Federal Circuit (the "CAFC"). It is a specialized appellate court with the rank of a federal circuit court, which has exclusive jurisdiction over appeals from the USCIT as well as a disparate group on non-USCIT issues, patents appeals being the most common. Ultimately, an appeal to the US Supreme Court, via petition for writ of certiorari, can be lodged.

4.196 It is worth noting that this centralized first instance judicial review at federal level through the USCIT is a political choice that the United States has made. Under US law, State courts have also a role in enforcing federal law, as was clearly explained by the US Supreme Court in the case *Claflin v. Houseman*.

4.197 The EC does not intend to question the political choices which the United States has made to organize its judiciary in relation to customs matters. However, in response to the US claims under Article X:3(b) GATT, it is important to stress that the EC's judiciary system is just as fundamental and legitimate a constitutional choice as the US centralized system. The EC considers that its constitutional choices should be afforded the same respect as those of the United States.

3. The US claims under Article X:3(a) GATT

(a) The requirements of Article X:3(a) GATT

(i) Article X:3(a) GATT concerns the administration of customs laws, not the customs laws themselves

4.198 The requirements of Article X:3(a) GATT do not concern the customs laws themselves, but only their *administration*. This was clearly spelt out by the Appellate Body in *EC – Bananas III*.

4.199 This distinction is highly important for the present case. It means that Article X:3(a) GATT does not require a harmonization of laws within a Member where, for instance, different legal regimes are applicable within different parts of the territory of a WTO Member.

4.200 This is particularly relevant for all WTO Members which have a federal structure. In a federal State or entity, different laws may apply in the different parts of the territory of the Member concerned, depending on whether it is the federal or the sub-federal level which has legislated on a particular issue.

4.201 Article X:3(a) GATT does not interfere with the question of whether a particular issue should be dealt with at the federal or the sub-federal level. It guarantees merely that whatever laws exist

must be administered in uniform manner. However, where laws apply only in part of the territory of a Member, this requirement is met provided that those laws are applied uniformly within the part of the territory in which they are applicable.

4.202 Further confirmation for this interpretation is found in Article XXIV:12 GATT. The Panel in *Canada – Gold Coins* found that this provision has the "function of allowing federal States to accede to the General Agreement without having to change the federal distribution of competence". Accordingly, any interpretation of Article X:3(a) GATT which would affect the internal distribution of competence is incompatible with Article XXIV:12 GATT.

4.203 In other words, Article X:3(a) GATT does not require that customs laws be regulated at the central level of each WTO Member. The WTO Agreements respect the internal structure and divisions of competences in each WTO Member. Where sub-federal laws exist in a particular WTO Member, it is therefore to the administration of those laws that Article X:3(a) GATT refers.

(ii) Article X:3(a) GATT does not prescribe the ways in which WTO Members must administer their customs laws

4.204 Article X:3(a) GATT does not prescribe the specific way in which WTO Members should administer their customs laws. It merely sets out an obligation to administer customs laws in a uniform manner.

4.205 Article X:3(a) GATT is not the only provision of the covered agreements dealing with the administration of customs laws. Indeed, a number of Agreements contained in Annex 1A to the WTO Agreement deal with specific matters of customs administration, notably the Valuation Agreement, the Agreement on Rules of Origin, and the Agreement on Import Licensing Procedures.

4.206 Wherever it was felt necessary to lay down specific disciplines on how WTO Members should administer their customs laws, appropriate provisions were included in the respective agreements. For example, Articles 2(h) and 3(f) of the Agreement on Rules of Origin require WTO Members to issue advance rulings on the origin of goods. If it had been felt necessary to include similar obligations for the issuance of advance rulings on other issues, such as tariff classification or customs valuation, such provisions could have been included in the covered agreements. If they were not, it must be concluded that WTO Members did not consider such obligations appropriate.

4.207 Article X:3(a) GATT must therefore not be interpreted in such a way as to create WTO obligations where WTO Members consciously abstained from laying them down. In other words, Article X:3(a) GATT is not a legal basis for engaging in a harmonization of the customs law and administrations of WTO Members through the DSU.

4.208 Respect of these principles is particularly necessary since the revision of Article X GATT is currently the subject of the ongoing Doha negotiations on trade facilitation. In the context of these negotiations, WTO Members have made a large number of proposals to supplement and improve Article X GATT, including on issues which are the subject of the US claims. This also applies to the United States itself, which has made a number of proposals in relation to Article X GATT, including a proposal to create an obligation to "make available, upon request of a trader, binding rulings in certain specific subject areas (e.g., tariff classification, customs valuation, duty deferral)". Proposals on advance rulings, the majority of which however is limited to issues of tariff classification, have also been made by a number of other countries.

4.209 These ongoing negotiations underline that on those matters in which it is currently silent, Article X GATT in fact does not contain any obligations. It is unclear to the EC how the United States can simultaneously make proposals for the creation of new obligations going beyond Article X

GATT, and then argue that very similar obligations are already owed under Article X GATT as it currently stands.

4.210 The US case is motivated less by legal than by political considerations. In fact, this has been explicitly admitted by the United States in a press release that was issued by USTR to announce the US request, which indicated that "pressing a major player in world trade to administer its customs laws and regulations in a uniform manner will help to advance" the Doha Round trade facilitation negotiations. The EC is highly concerned by this attempt by the United States to instrumentalize the DSU for the purposes of influencing the ongoing Doha Round negotiations.

(iii) Article X:3(a) GATT lays down minimum standards

4.211 In line with the foregoing, it must be considered that Article X:3(a) GATT only lays down minimum standards. It does not oblige WTO Members to meet the highest possible standard achievable at a given point in time. This character of Article X:3(a) as a minimum standard has been emphasized by the Appellate Body in *US – Shrimp*. The Panel in *Argentina – Hides and Leather* has also cautioned against reading too much into Article X:3(a) GATT.

4.212 Moreover, minor administrative differences in treatment cannot be regarded as implying a violation of Article X:3(a) GATT. This was clearly stated by the GATT Panel in *EC – Dessert Apples*, which confirmed that certain variations between EC member States in the administration of import licensing, e.g., as regards the form in which licence applications could be made and the requirement of pro-forma invoices, did not constitute a breach of Article X:3(a) GATT.

4.213 Overall, Article X:3(a) GATT is therefore a minimum standards provision which guarantees only a certain minimum level of uniformity in administration. Moreover, Article X:3(a) GATT does not prohibit administrative variations where such variations are minor or do not significantly affect the interests of traders.

(iv) The meaning of "uniform administration"

4.214 The meaning of the requirement of "uniform administration" must be established in the light of the foregoing observations. Moreover, account must be taken of the practical realities in which customs administrations must work.

4.215 The administration of customs laws in the real world involves a number of difficulties and challenges. First of all, the administration of customs frequently involves complex questions of law and fact. Second, the circumstances under which customs authorities operate are in continuous evolution due to changes in goods traded or commercial behaviour. This requires customs authorities to continuously adapt to new realities. Third, customs administration is a mass business.

4.216 Therefore, a measure of realism is required in the application of Article X:3(a) GATT. If customs authorities struggle with a complex new question of law and fact, this does not already mean that authorities in the member concerned administer customs law in a non-uniform manner. Similarly, if it takes a certain amount of time to come to an established practice on a new and complex issue of customs law, this does not yet mean that customs laws are being administered in a non-uniform way.

4.217 A complete uniformity in the application of customs laws could never be achieved by any Member, even those with the most efficient systems of customs administration. In a large country with a large bureaucracy, a minimum degree of non-uniformity is *de facto* unavoidable. This may occur, for instance, because a trader in a particular case does not challenge a particular decision even though it was illegal. In such a case, non-uniformity may be the result, but this does not mean that the Member in question fails to meet its obligations under Article X:3(a) GATT. The EC notes that the

United States appears to agree with this, since it states that "the fact that divergences occur is not problematic in and of itself".

4.218 The proposition that individual instances of administration are not probative for a violation of Article X:3(a) GATT also finds support in the case law under the DSU. In *EC – Poultry*, the Appellate Body already confirmed that individual measures of application do not fall within the scope of Article X GATT. In *US – Hot Rolled Steel*, the Panel stated that rather than relying on individual instances of administration, it was necessary for the complaining party to establish a pattern of decision making contrary to Article X:3(a) GATT.

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

(b) The burden of proof

4.220 It is established case law under the DSU that the party which asserts a particular claim bears the burden of proof. In the present case, it is the United States which claims that the EC does not administer its customs laws in a uniform manner. It is accordingly the United States which must adduce evidence to establish a *prima facie* case that its claim is true. Only if the United States discharges this burden of proof will the burden shift to the EC to rebut the US case.

4.221 The United States does not even come close to discharging this burden of proof. In fact, the United States adduces only very sparse evidence regarding the actual administration of EC customs law. The examples given by the United States are partially irrelevant, partially inconclusive, and in any event do not show a general pattern of non-uniform administration of EC customs law.

4.222 Instead of adducing concrete evidence regarding the administration of EC customs law, the United States tries to build its case on systemic criticisms of the EC system of customs administration, arguing for instance that because EC law is administered by the authorities of the 25 EC member States, "divergences will inevitably occur". However, the assertion that such "divergences are inevitable", which the EC strongly contests, does not replace the proof that divergences actually occur.

4.223 The entirely speculative nature of the US case is also illustrated by the US references to the expected effects of the enlargement of the EU by 10 new member States on 1 May 2004. In the press release of USTR announcing the US Panel Request, the anticipated effects of EU enlargement were cited as the primary reason for requesting a Panel.

4.224 At the time the United States made its request for a Panel, EU enlargement had been in effect for less than eight months. The United States has not referred to any lack of uniformity in the implementation of EC customs law by the administrations of the 10 new member States. Pure speculation about possible future developments cannot replace facts and evidence as a basis for claims made under the DSU.

4.225 In its efforts to avoid its own burden of proof, the United States prefers to refer to pronouncements of EC officials or institutions, which it claims are the "most vocal critics" of the EC system. However, these references are taken out of context, and do not support the conclusions the Unites States would draw from them. In any event, the desire to make further progress is natural in the context of a healthy system of customs administration. Such statements have nothing to do with

the question of whether the EC is in compliance with its obligations under Article X:3(a) GATT, and do not exempt the United States from the necessity of discharging its burden of proof.

4.226 Finally, that the US case is not really based on any pattern of non-uniformity in the administration of customs in the EC is strikingly confirmed by the almost complete lack of reaction to the call for input by the United States Trade Representative following the consultation request. If really there was a pattern of non-uniformity, as the United States alleges, one could have expected that the United States would receive more than three contributions, two of which were not even pertinent to the US case.

(c) General issues underlying the US claims under Article X:3(a) GATT

(i) The fact that EC customs law is administered by the customs authorities of EC member States is compatible with Article X:3(a) GATT

4.227 Article X:3(a) GATT does not prescribe the ways in which a WTO Member must implement its customs laws. This also includes the question through what authorities or administration customs laws are administered. Article X:3(a) GATT in no ways excludes that in a federal or quasi-federal state or entity, customs laws could be administered by authorities at the sub-federal level. Contrary to the United States, it does not prescribe the creation of a customs agency similar to US Customs and Border Protection.

4.228 Moreover, when they administer EC customs law, the EC member States act as the organs of the EC. This has been confirmed with by the recent Panel report in *EC – Trademarks and Geographical Indications (US)*, where the Panel noted that when EC member States execute a particular EC regulation, they do so as organs of the EC, for which the EC is responsible under public international law.

4.229 For this reason, the United States is wrong to assert that there "is no EC customs authority to speak of". The customs authorities of the EC member States, acting together with and under the supervision of the competent institutions of the EC, are the EC customs authority. That this system of customs administration is different from that of the United States is of no relevance under Article X:3(a) GATT. It should also be recalled that the United States itself has accepted, in the EC-US Agreement on customs cooperation, the fact that the EC member States together with the European Commission constitute the EC customs authority.

4.230 The United States is also wrong to assert that due to the involvement of EC member States in the administration of EC customs law, "divergences inevitably occur". As the EC has already shown, and will recall again in the following section, the EC has numerous mechanisms in place to ensure that the administration of EC customs law takes place in a uniform manner. In addition, the US statement that in the EC system, a lack of uniformity would be "inevitable" is unsupported by evidence.

(ii) The EC has measures in place to ensure the uniform administration of EC customs laws throughout the EC

4.231 The US claim that the EC does not provide for the systematic reconciliation of divergences in the application of EC customs law is false. It reflects a biased and incomplete presentation of the EC system, in which the United States focuses on a small number of instruments while ignoring a wide range of other instruments which equally contribute to the uniform interpretation and application of EC customs law. Moreover, the United States fails to take into account the overall context of the EC legal system and the ways in which uniformity is ensured within the EC system.

4.232 The EC finds it remarkable that the United States would make sweeping statements about the uniformity of EC law without ever once mentioning such fundamental principles of EC law as the supremacy and direct effect of EC law, the duty of cooperation, infringement proceedings, the various instruments of EC customs cooperation, or the budgetary control aspects.

4.233 A particularly striking example of the highly selective US approach is customs classification, where the United States concentrates mainly on the EC BTI system, without giving any consideration to the other tools for ensuring a uniform classification practice within the EC, such as classification regulations, HS instruments, EC explanatory notes, or opinions of the Customs Code Committee. Even where the US considers parts of the EC system, it presents these in a highly distorted way.

4.234 The question of whether the EC, at a systematic level, administers EC customs law in a uniform manner cannot be evaluated by simply considering one single instrument in isolation. Rather, the EC system has to be evaluated as a whole, taking into account all of the relevant instruments in their proper context.

4.235 This evaluation should be made taking into account the structural elements of the EC legal system and the overall record and experience of European integration. The structural elements which the United States criticises are not specific to the administration of customs laws, but are general structural elements of the EC constitutional order. More than fifty years of successful integration in Europe based on the EC's model of executive federalism should not lightly be dismissed.

(iii) Some necessary corrections regarding the role and functioning of the Customs Code Committee

4.236 The United States argues that the Customs Code Committee does not function efficiently enough and that individual traders are not given enough rights in the context of the proceedings of the Committee. These US criticisms are unfounded.

4.237 As regards the alleged inefficiency in the Committee's operation, the United States relies essentially on general statements about "institutional disincentives" which would keep the Commission from putting matters to a vote. These allegations regarding "institutional disincentives" are unfounded and are not supported by any evidence. Moreover, the United States neglects that the conditions under which the Chairman puts a matter to the vote or may postpone a vote are laid down in Article 6 of the Rules of Procedure of the Committee.

4.238 The fact that in some cases, the Committee may have to be seized more than one time of the same or of related matters has nothing to do with "institutional disincentives". Rather, this may reflect the complexity of the issue in question and the need to gather a full understanding of the factual situation before a decision can be taken.

4.239 The entirely speculative nature of the US claims is also illustrated by the references it makes to the supposed negative effects of EU enlargement on the efficiency of the Committee. The United Sates makes these statements without being able to support them with any concrete evidence.

4.240 As regards the rights of individual traders in respect of the proceedings of the Committee, the United States makes these arguments in the context of a discussion of whether the EC administers its customs laws uniformly in accordance with Article X:3(a) GATT. The EC does not understand the relevance of these arguments regarding the rights of private traders before the Committee for the question of whether EC customs law is uniformly applied throughout the EC.

4.241 The US complaints seem to be based on a fundamental misunderstanding of the role of the Customs Code Committee. The Committee is not a mechanism for the administrative or judicial

review of customs decisions. Rather, it is an integral part of the Community's regulatory process, through which member States expertise is integrated into this process. There is accordingly no basis for the extensive rights of private traders requested by the United States.

4.242 Any individual with a concern regarding the administration of customs matters can bring this issue to the attention of the Commission, which will consider the matter and respond in accordance with the Commission's Code of Conduct. If the Commission considers that the matter requires consideration by the Committee, it will put this matter on the Committee's agenda. In a similar fashion, a concerned individual may also address the administration of a Member State, which may equally decide to raise the matter in the Committee.

4.243 As regards the publication of agendas or reports of the Committee, there is no obligation of publication in this respect. The United States also has not raised any claim under Article X:1 GATT. In any event, the US claims are factually wrong. Documents relating to the Customs Code Committee, including agendas and summary records of meetings, are available on the public register of comitology of the European Commission. Moreover, access to the agendas and records of the Committee is governed by the EC rules on access to documents laid down in Regulation EC/1049/2001.

(iv) The role of the Court of Justice in ensuring uniformity in the administration of EC customs law

4.244 The United States contests that uniform administration can be guaranteed by the Court of Justice through preliminary references made by national courts. To sustain its arguments, the United States relies on the opinion of AG Jacobs in *Wiener*. However, AG Jacobs´ position departs from the case-law of the Court of Justice and, what is even more fundamental, his position as to the exercise of a greater measure of self-restraint either on the part of the Court or by national courts was not followed by the Court.

4.245 AG Jacobs proposed to the Court that the question referred by the Bundesfinanzhof should be answered by reminding the principles enshrined in the case-law of the Court of Justice in relation to customs classification. Contrary to the conclusions of the AG, the Court of Justice provided a specific answer to the question of how the goods in question were to be classified.

4.246 As to AG Jacobs' advice for self-restraint addressed to national courts, the ruling of the Court of Justice is completely silent on this issue. Therefore, AG Jacobs' non-binding opinion constitutes a doctrinal position with no influence on the case law of the Court of Justice.

4.247 Concerning AG Jacob's statement about the supposedly minimal contribution of the Court to the uniform application of the Common Customs Tariff, the United States has clearly taken it out of context. What AG Jacobs underlined in its opinion is that, considering the detailed character of the Common Customs Tariff, there were also other ways of ensuring uniformity in the field of customs classification and gave the Commission's classification regulations as an example.

4.248 To confirm that AG Jacobs' advice for self-restraint is being followed by national courts, the United States refers to two Judgments given by two different UK courts. Thus the support found by the United States to its arguments is limited to two cases in one of the 25 EC member States. No evidence is provided on the position taken by the other 24 national judiciary branches in relation to the AG's advice (should such a position exist). The EC considers that these two UK cases are not sufficient to support the US claim.

4.249 Moreover, in *Anchor Foods Limited*, the UK Queen's Bench Division did not rely on AG Jacobs´ opinion to decide that there was no need to refer to Court of Justice. Indeed, the Queen´s

Bench Division decided not to refer because of the limited importance of the case. It should also be pointed out that the Queen's Bench Division did not act in this case as a court of last instance and that, therefore, it was not under an obligation to refer the case to the Court of Justice.

(d) The US claims under Article X:3(a) GATT

(i) Tariff classification

The ECJ and tariff classification

4.250 The United States argues that the ECJ as an institution is ill-equipped to bring uniformity to the administration of the Tariff. This statement, which is solely based on the Opinion of AG Jacobs, in Wiener, is wrong.

4.251 Concerning specifically the role of the ECJ in classification disputes, the EC disagrees with the US opinion that because of this fact-intensive nature of classification questions, the ECJ cannot play a useful role in securing a uniform administration of EC classification rules. Even if classification questions may typically be fact-intensive, this does not make them fundamentally different from other questions of law, which also involve the application of abstract rules to factual situations.

4.252 Moreover, it is in the nature of classification issues that they concern the classification of specific goods. To which extent a classification of particular goods may be transposable by analogy to different, but similar goods is a complex question which can be evaluated only on a case-by-case basis. Once again, however, this is a general issue of classification, and is not in any way specific to the role of the Court.

4.253 Finally, the US attempts to belittle the role of the Court are strikingly at odds with its allegations that the EC acts in a non-uniform manner. The US comments would actually seem to cast doubt on whether classification questions can be regulated effectively at all. The concerns expressed by the United States concerning the fact-intensive nature of classification questions arise regardless of whether the final decision-maker is a Court or an administrative agency.

4.254 Overall, the US line of argument leaves the EC perplexed. The United States seems to practically claim that a uniform classification cannot be achieved, and then fault the EC for not doing enough to achieve it.

Binding tariff information

4.255 Article X:3(a) GATT is a provision which sets out minimum standards, and does not prescribe the specific means a Member must employ in order to ensure a uniform administration of customs laws. For this reason, there is no obligation under WTO law for a Member to have a system of binding tariff information in place. This is clearly illustrated also by the US proposals in the context of the Doha Round trade facilitation negotiations, which aim at supplementing Article X GATT by introducing an obligation to provide for advance rulings on classification matters.

4.256 The United States alleges that the EBTI system encourages "BTI shopping" and thus leads to an increased risk of divergent BTIs. These US allegations are based on numerous misconceptions about the EBTI system. The United States claims that the "holder or other applicant chooses the member States to which it will make the application". This is misleading. EC customs law does not allow applicants to "pick and choose" the member State which will issue the BTI. According to Article 6(1) of the Implementing Regulation, applications for BTI must be made either to the

competent authorities in the Member State or member States in which the information is to be used, or to the competent authorities in the Member State were the applicant is established.

4.257 The United States also complains that a BTI "is not binding on the holder, in the sense that it does not need to be invoked by the holder". First, this is not entirely true. According to Article 10(2)(a) of the Implementing Regulation, the customs authorities may require the holder, when fulfilling customs formalities, to inform the customs authorities that he is in possession of BTI in respect of the goods being cleared through customs.

4.258 Second, the EC fails to see the practical relevance of this issue from the point of view of a uniform BTI practice. The United States states that a person that has received unfavourable BTI in one Member State "may ignore it, not apply for BTI in another State, and simply attempt to import merchandise through another member State asserting the more favourable classification without relying on BTI at all". This may be so, but the situation would be no different if no BTI had been granted at all. BTI is granted for the benefit of the holder. In the situation described by the United States, it would therefore be more natural for the person which has received the unfavourable BTI to challenge it, if it believes it to be wrong. Moreover, there is no reason to assume that other EU customs authorities will apply a different tariff classification than the one foreseen in the BTI, just because the BTI is not invoked.

4.259 The US claim that an applicant may apply in one Member State and, if it is not favourable, decline to invoke it and apply for BTI in another member State is wrong. According to Article 6(3)(A)(j) of the Implementing Regulation, when applying for BTI, the applicant must indicate whether, to his knowledge, binding tariff information for identical or similar goods has already been applied for, or issued in the Community. Moreover, Box 11 of the Standard BTI Application form requires the applicant to declare whether he has applied or been issued with BTI for similar or identical goods. The United States cannot here try to show deficiencies in the EC system by constructing scenarios which are based on flagrant violations of EC rules. In addition, Article 12(4) CCC provides that BTI based on inaccurate or incomplete information from the applicant shall be annulled.

4.260 The United States argues that where divergent BTIs exist, the EC system does not provide for sufficient mechanisms to correct these divergences. The scenarios and supposed difficulties which the United States describes in detecting divergent BTIs are largely theoretical. Classification differences typically occur in cases where several headings potentially merit consideration, and the choice between them is not entirely obvious. Such cases do not remain secret for long. It is the customs authorities themselves which will first notice the difficulty, and if they do not, traders will make them aware of it by challenging decisions which they perceive as unfavourable to them. If a challenge occurs, the question may be referred to the Court of Justice, which will ultimately lead to its being clarified.

4.261 However, even before the Courts have been seized or have given judgment, frequently the national customs authorities themselves will raise the issue in the Customs Code Committee. Alternatively, they may first seize the Commission of the matter, which may decide to bring it before the Customs Code Committee.

4.262 Individual traders also frequently approach the Commission or member States authorities with particular problems of customs classification, who can then decide to take the necessary action, including raising the issue before the Customs Code Committee. In brief, difficulties in detecting "hidden" divergent BTI are greatly exaggerated by the United States; experience in fact shows that such divergences, if they have economic implications, do not remain hidden for long.

4.263 The EC also has the EBTI data base, which allows searches of all BTIs both by the public and by the customs authorities. This data base is an important instrument of transparency in the EBTI system. The EBTI database is very well received by traders and used frequently; in the first six months of 2005, for instance, the average number of consultations per month was about 324.000.

4.264 The United States is wrong to argue that the search might be difficult because product descriptions might vary. First, that product descriptions might vary is true, but this is hardly a barrier to conducting a search. Searches of the public EBTI data base can be conducted using a variety of parameters, and a careful targeting of criteria will yield results. Keywords are available in all official languages of the EC. There is also a translation facility available to translate keywords into any of the 19 languages. Accordingly, language should not be a major difficulty in making searches.

4.265 Moreover, as the EC has also explained, there exists a version of the EBTI data base accessible to the member States' customs authorities and the Commission. This data base allows searches of BTI using additional parameters, including notably the name and address of holder and applicant. Moreover, this data base also allows searches of pending applications for BTI. Detailed instructions for the EC customs authorities as to how to conduct searches have also been included in the Administrative Guidelines on the EBTI system issued by the European Commission.

4.266 It is untrue that the EC has no means of detecting divergent BTIs. It is interesting to note that the United States, in order to illustrate its claim of a divergent classification practice regarding blackout drapery lining has provided as an exhibit excerpts from the public EBTI data base. Thus, the United States has itself disproved its claim that use of the EBTI data base is impossible.

4.267 The US criticisms of the judgment in decision of the Court of Justice in Case C-133/02, *Timmermans*, are without merit. There is no reason to assume, as the United States does, that a revocation of a BTI as allowed by the Court in *Timmermans* would lead to less uniformity. On the contrary, a revocation may precisely be necessary in order to take into account that other customs authorities have adopted a different classification practice, which is confirmed to be the correct one. This in fact is precisely what happened in *Timmermans*, where the withdrawal of the BTI occurred because "on a closer examination and in consultation with the customs authorities of a neighbouring district concerning the interpretation of the applicable nomenclature, it had become apparent the goods in question should be classified under" a different subheading. The same reasoning could also have been applied if the divergence had arisen in relation to the practice of the authorities of another Member State.

4.268 In any event, the Timmermans judgment does not primarily concern a question of uniform application, but a question of legal security for the trader. The Court of Justice held that the legitimate interests of the trader were sufficiently protected by the provisions of Article 12(6) CCC, which under certain conditions allow continued use of the BTI for a limited period of time. This is not problematic under Article X:3(a) GATT.

Alleged divergences in EC classification practice

4.269 In order to support its claim, the United States has referred to two cases in which the EC allegedly has administered its laws in the field of tariff classification in a non-uniform manner. However, both cases do not show any lack of uniformity in the EC's administration.

4.270 The first case of alleged divergences concerns the classification of Blackout Drapery Lining (BDL). However, in this case, the goods examined by the German customs authorities were not identical to those described in the BTI, since they were not flocked with a layer of textile flock. Whether the product was flocked or not is an important difference, which justifies the different classification of the product. Accordingly, since the United States has not shown that the products

were identical in the relevant respect, the United States fails to show that there is in fact any inconsistency.

4.271 Moreover, the EC would like to recall that according to Article 12(3) CCC, the holder of BTI must be able to prove that the good declared correspond in every respect to those described in the information. Goods as described in the decision of the German customs authorities would not appear to fall under the description contained in the BTIs.

4.272 In addition, it should be noted that according to Article 6(3)(A)(d) of the Implementing Regulation, it is the applicant which must provide a detailed description of the goods permitting their identification and the determination of their classification in the customs nomenclature. In contrast, the United States has not provided information as to whether samples were submitted to the authorities issuing the BTI, and whether these samples were indeed identical with the ones that were analysed by the German authorities.

4.273 Even if a mistake had occurred in the factual appraisal of the products, this does not mean that there is a lack of uniformity in the application of EC customs law. In particular, if the importer in question felt that the German authorities had erred in their appraisal of the good in question, he could have appealed the decision of the Main Customs Office of Bremen before the Bremen Tax Court. The United States has not provided information whether the importer in question has made an appeal. If the importer has chosen not to appeal, then this cannot be used to claim a lack of uniformity in the EC's system of customs classification. The EC would also note that neither the importer nor the producer have ever brought the issue of classification of BDL to the attention of the European Commission.

4.274 The administrative aids referred to by the lower German customs office contain nothing contrary to Community law, and in any event is purely an interpretative aid prepared for administrative purposes which does not in any way have force of law, and does not derogate from Community law. That handbooks, guidance or other compilations prepared by member States have no legally binding character in Community law has been clarified by the European Court of Justice in *Binder*.

4.275 Finally, it is not without interest to note that the United States has had its own difficulties in classifying BDL, and has had to revoke previous classification rulings regarding BDL.

4.276 As regards the case of LCD monitors, the essential question is whether they are to be classified as computer monitors or as video monitors. The correct classification of these monitors is a relatively recent question which has arisen due to the increasing convergence of information technology and consumer electronics. Many LCD monitors, by virtue of their design and technical characteristics, can serve both as a computer monitor and as a video monitor. It is therefore difficult for customs authorities to establish on an objective basis the precise purpose for which a particular monitor is intended.

4.277 In addition, there are a high number of different types of LCD monitors on the market. These monitors differ in various aspects, including their size, the interfaces they possess and the signals they can process, and their general design. To the extent that such features may have an impact on their use, such differences between different types of monitors may also need to be taken into account.

4.278 The US claims that the EC does not ensure a uniform classification practice in respect of LCD monitors must be regarded as unfounded. In fact, the EC institutions have kept this particular classification issue under very close review from the outset, and have taken the necessary measures to ensure a correct and uniform classification practice in this respect.

4.279 The Customs Code Committee was seized of the issue for the first time in April 2004 and has reviewed the situation at regular intervals since. Since the classification issue also requires technical input from industry, the Committee also has, in accordance with Article 9 of its Rules of Procedure, heard representatives of the industry. At its meeting of 30 June to 2 July 2004, the Customs Code Committee concluded that unless an importer can demonstrate that a monitor is only to be used with an ADP machine (heading 8471) or to be used as an indicator panel (heading 8531), it has to be classified under heading 8528.

4.280 The allegation that the Netherlands wrongly classifies LCD Monitors as Video Monitors is therefore misplaced. In principle, such a classification is in line with the CN, as confirmed by the Customs Code Committee. It must of course also be taken into account that the actual classification of LCD monitors depends on the concrete monitor.

4.281 The EC institutions have taken further measures to ensure a uniform practice. The first such measure is Council Regulation (EC) 493/2005 of 16 March 2005. The purpose of this measure is to provide certainty about tariff treatment to the concerned importers through a suspension of duties for a transitional period of time. From a practical purpose, the suspension of the duties fulfils exactly the same purpose as that of a classification regulation, since it assures traders that, regardless of whether the goods fall under heading 8471 or 8528, their goods will receive the same tariff treatment.

4.282 The US claim that the example of LCD Video Monitors shows that the Customs Code Committee is inadequate to reconcile differences in member States interpretations is misplaced. The Customs Code Committee has shown itself perfectly able to adopt the necessary conclusions, and it continues to be involved in the continuous monitoring of the situation.

4.283 The EC has adopted another relevant measure, namely Regulation 634/2005, which classifies LCD monitors of a particular type under heading 8528. Currently, the Commission keeps monitoring the situation, and may adopt further classification regulations for LCD Monitors or other appropriate measures as and when the need arises.

4.284 The US customs authorities have also found it difficult to properly classify LCD monitors. For instance, in a ruling of June 3, 2003, US Customs found that it was not possible to determine the principal function of a particular type of LCD monitor, and therefore decided to classify it under heading 8528 in application of General Interpretative note 3(c), which foresees classification under the heading which occurs last in numerical order.

4.285 Of the two cases which the United States has raised, neither shows any lack of uniformity in the EC's administration of tariff classification. Both cases involve classification questions of a high technical complexity, with which the United States has had its own difficulties. Accordingly, the United States is far from having established any significant pattern of non-uniformity in EC tariff classification practice. On the contrary, the preceding discussion has shown that the EC customs administration has the necessary mechanisms in place to ensure uniformity in tariff classification.

(ii) Customs valuation

The uniform administration of valuation rules in the EC

4.286 Valuation questions are regulated in Articles 28 through 36 of the CCC and in Articles 141 to 181 a of the Implementing Regulation, with further details being contained in Annexes 23 to 29 to the Implementing Regulation. These provisions constitute an exhaustive regulation of customs valuation, which overall does not leave room for discretion to member States' administration.

4.287 The EC rules are based on, and fully integrate, all the rules contained in the WTO Valuation Agreement. According to the third preambular paragraph of the WTO Valuation Agreement, the central objective of the WTO Valuation Agreement was to "provide greater uniformity and certainty" in the implementation of valuation rules. The EC wonders how the WTO Valuation Agreement can achieve this objective if, as the US argues, it leaves "significant discretion" to WTO Members in the valuation of goods for customs purposes.

4.288 There is no obligation under WTO law to institute a system of binding information for valuation matters. Article X:3(a) GATT does not prescribe the specific ways in which WTO Member must implement their customs laws. This is particularly obvious in the area of customs valuation, which is governed by the WTO Valuation Agreement. If WTO Members had wished to provide for a specific obligation to introduce or maintain systems of binding information on valuation matters, it would have been natural to include such a an obligation in the Valuation Agreement. Further support for this view comes from the fact that the US itself has, in the context of the Doha Negotiations on trade facilitation, proposed to supplement Article X GATT by creating an obligation to provide for advance rulings on customs issues including customs valuation.

4.289 The case for binding valuation information as a tool for ensuring uniformity is far less clear than it is for binding tariff information. Specific goods do not change much over time, and are certainly identical regardless of the place of import. On the other hand, customs valuation is based on sets of data which can change from transaction to transaction, and from importer to importer. This makes the matter of direct comparability between transactions, and importers, rather difficult. Moreover, valuation data is of a relatively temporal nature, since sales contracts, prices and other factors such as relationships between parties, and the details of royalty and licence fee agreements, can change very frequently.

4.290 For these reasons, the content of binding valuation information would have to differ considerably from the content of binding tariff information. In particular, unlike for tariff information, where it is possible to provide in the abstract for the classification of a good corresponding to a particular description, it is not possible to lay down in the abstract the value of a good. Rather, binding information on valuation would have to take on a much more nuanced and specific character, focussing for instance on the characterization of specific elements inherent in certain recurrent transactions between the same parties.

4.291 Classification and valuation have inherent differences which must be taken into account. Therefore, elements such as classification regulations and binding tariff information are not easily transposable to the area of valuation. Instead, the Commission can carry out necessary clarifications through amendments to the Implementing Regulation. Such amendments can be seen as fulfilling a function which is rather similar to that of classification regulations or EC explanatory notes. Moreover, the Customs Code Committee, and in particular its valuation section, has a very important role in the area of valuation, and has contributed to uniformity in particular by elaborating commentaries and conclusions on numerous topical issues relating to the administration of valuation rules.

4.292 The general mechanisms for providing for a uniform application of EC law also apply in the area of customs valuation. First, if an individual trader feels incorrectly treated by a decision of a member States' customs authority, he can bring an action against such decision before the member States' court. If there is an issue of Community law to be clarified, such question can, and in certain circumstances must be, referred to the European Court of Justice. In this way, the Court of Justice has clarified numerous issues of Community law in the area of customs valuation.

4.293 Second, if the Commission finds that a member State applies Community provisions in the field of customs valuation incorrectly, the European Commission can bring infringement proceedings

against such member State in accordance with Article 226 EC Treaty. There is no evidence whatsoever that this system of administration does not suffice to ensure a uniform administration of EC valuation rules.

4.294 It is remarkable that the United States has never raised any problem regarding the administration of EC valuation law in the WTO Committee on Customs Valuation, nor in the Technical Committee. Moreover, not a single case has ever been brought under the DSU against the EC for a violation of the WTO Valuation Agreement.

Report 23/2000 of the EC Court of Auditors

4.295 The Court of Auditors is an institution which, through its examination and reporting activity, equally contributes to the uniform application of Community customs law. Therefore, Report 23/2000 is evidence for the ability of the EC system to detect difficulties wherever they occur.

4.296 Report 23/2000 is only the expression of the views of one EC institution, which are not necessarily shared by other institutions, or by the EC as a whole. Moreover, it is clear that the Report of the Court of Auditors also contains certain political and technical judgments, which cannot necessarily be assumed to be correct.

4.297 The objective of the Court of Auditors is to ensure the optimal collection and utilization of the Community's own resources. This is entirely unrelated to the question of whether the EC is compliant with Article X:3(a) of the GATT. Therefore, it cannot simply be assumed, as the United States seems to do, that a criticism made by the Court of Auditors in its Report translates into a violation of Article X:3(a) GATT.

4.298 Report 23/2000 relates to a set of facts as examined by the Court in 1999-2000. It is striking that the United States in its First Written Submission never asks the question as to what the EC might have done in order to address the criticisms or suggestions raised by the Court of Auditors. As the EC will show, the EC has in fact systematically worked through the issues raised by the Court of Auditors, and wherever necessary taken the measures to ensure uniformity. A clear example for this is the adoption of Commission Regulation 444/2002, which now clarifies the issue of warranties. Even to the extent that any lack of uniformity actually existed, it cannot therefore be assumed that such situation continues to exist today.

4.299 The Report of the Court of Auditors is a highly synthetic document, which reflect the results of a number of audits carried out by the Court at the time. Consequently, the conclusions in the Court's report are of a certain level of generality. For this reason also, they are not adequate for addressing the question of the EC's compliance with its obligations under Article X:3(a) GATT.

4.300 Accordingly, the United States should not be allowed to rely on the Report of the Court of Auditors, but rather be required to establish its *prima facie* case. In any event, Report 23/2000 of the EC Court of Auditors does not show that the EC is in any way non-compliant with its obligations under Article X:3(a) GATT.

The Reebok case

4.301 The only concrete example that the United States provides in support of its allegation of non-uniform administration of EC valuation rules is a case concerning Reebok International Limited (RIL). However, this case does not support the US claim that the EC fails to administer its valuation laws in a uniform manner.

4.302 The case, which is relatively complex, is currently being examined by the Commission. Moreover, the Commission submitted the issue to the Customs Code Committee (Valuation Section), where it was discussed at two instances in October and December 2004. On the basis of the information which had been submitted by RIL, the Committee did not establish any incompatibility with EC law, or lack of uniformity between EC member States.

4.303 In any event, the EC notes that if the Spanish customs authorities had erred in assessing the conditions of Article 143(1)(e) of the Implementing Regulation, RIL can appeal this decision before the competent Spanish courts, and such an appeal is currently pending. If there are questions of Community law arising, such questions can then be referred to the Court of Justice via a request for a preliminary ruling.

4.304 Overall, the Reebok case provides any support for the US allegation that the EC fails to administer is customs valuation rules in a uniform manner. The EC institutions have taken the necessary action in response to the concerns of Reebok. Moreover, and appeal is currently pending. The Customs Code Committee is not a substitute for the normal appeals mechanisms before the national courts.

(iii) Processing under customs control

4.305 The US claim that the UK authorities apply tests that go beyond the requirements of Community law in respect of processing under customs control is wrong. The UK requirements are exactly the same two laid down by Article 133(e) CCC.

4.306 Article 502(3) of the Implementing Regulation repeats the first part of the sentence and this has to be considered as an abbreviated reference to the requirements laid down in Article 133(e) CCC. It cannot be otherwise considering that this Regulation, which has been adopted by the Commission, is implementing legislation and cannot modify the requirements laid down by the CCC.

4.307 Indeed, both documents, the CCC and the UK guidance, require the same two conditions (amongst others) for the granting of an authorization for processing under customs control, which are named as "economic conditions. Furthermore, it is worth noting that, contrary to what the US states, the French "Bulletin officiel des douanes" also refers to the test relating to the absence of harm to competitors in the EC. The US claim on Article X:3(a) is not founded in relation to processing under customs control.

(iv) Local clearance procedure

4.308 The US presentation is flawed in that it does not differentiate between the three steps of the summary declaration, the local clearance notification and the supplementary declaration. All goods brought into the EC customs territory have to be presented to customs and the summary declaration is the act by which this presentation is formalized. The lodging of the summary declaration is, therefore, not a formality which is part of the local clearance procedure. Moreover, contrary to the US claims, all these declarations may be lodged either under a paper-based or an electronic procedure.

4.309 Due to this confusion between the general obligations stemming from border crossing and those attached to LCP, the description of the situation in the UK in the US First Written Submission is inaccurate and does not correspond to the actual situation in this Member State.

4.310 In relation to the customs involvement prior to release, the fact that, at the frontier, anti-smuggling and admissibility checks are made electronically does not mean that there is no involvement of customs. Moreover, if the goods do not fulfil these checks, there will be a customs

action (physical check, seizure…). It is therefore wrong to state that there is no customs involvement prior to release in the UK.

4.311 Concerning the requirements after release, the United States makes a misleading description of the use of electronic clearance systems versus paper-based systems. Both systems can be used in all member States. As far as LCP is concerned, detailed Community rules for paper-based clearance can be found in Articles 263 to 267 of the Implementing Regulation. Where the clearance system used is electronic, additional rules are applicable and can be found in Articles 4(a) to (c) and Articles 222-224 of the same Regulation.

4.312 As regards supporting document requirements, all EC member States apply identical rules. The issue raised by the United States concerning the valuation form "DV1" again stems from a confusion, since all member States allow operators having regular trade flows with the same suppliers to submit only once the relevant DV1 together with the initial application to benefit from LCP.

4.313 In relation to the document retention requirements, the information on the Netherlands provided by the United States is wrong. Moreover, Article 16(1) CCC provides that the requisite documents shall be retained for a minimum period of three years, but leaves member States the possibility to stipulate longer periods taking into account their general administrative and fiscal needs and practices. The resulting time-frame differences between the EC member States for which the United States submits evidence are not fundamental. Besides, the EC has already explained above that Article X:3(a) GATT concerns the administration of customs laws, not the customs laws themselves and this provision does not impose an obligation to harmonize legislation within a WTO member.

4.314 In addition, in the light of the GATT Panel in *EEC – Dessert Apples*, the EC considers that any such differences are not substantial in nature and do not entail a lack of uniformity in the application of customs laws contrary to Article X:3(a) GATT.

(v) Penalties for violations of customs law

4.315 The US claim that the EC violates is obligations under Article X:3(a) GATT by not providing for a uniform administration of penalties for violations of customs laws must fail for three reasons. First, penalty provisions are not covered by Article X:3(a) GATT. Second, Article X:3(a) does not require the harmonization of member States' penalty provisions. Third, EC law does ensure a sufficient degree of uniformity of member States' penalty provisions.

4.316 The obligation of uniform administration in Article X:3(a) GATT applies only to the administration of the laws referred to in Article X:1 GATT. In this respect, it is necessary to distinguish between the customs laws themselves, and the provisions which set out the nature and level of the penalty applicable for a violation of such laws. This is regardless of whether the penalty is criminal or administrative in character, or whether it involves a fine, a prison term, or another sanction. Therefore, penalty provisions, which provide for a sanction in the case of a violation of a provision of customs laws, are not themselves customs laws. It must also be noted that the imposition of sanctions concerns illegal behaviour, i.e. it concerns illegitimate actions rather than legitimate trade, which is the focus of Article X:3(a) GATT.

4.317 Moreover, Article X:3(a) GATT concerns only the <u>administration</u> of customs laws, not the substance of the customs laws themselves. This means in particular that Article X:3(a) GATT does not create an obligation to harmonize laws which may exist within a WTO Member at the sub-federal level. It merely requires that such laws be administered uniformly within the territory in which they apply.

4.318 The penalties applicable for violations of customs laws are set out in the national laws of the member States, which of course must respect the principles set out by Community law. Accordingly, it is not the administration of penalty provisions which varies within the EC; it is the laws themselves which are different, albeit within the limits set by Community law.

4.319 The United States has not shown that the administration of those penalty provisions varies within the member States which have adopted them. Rather, the United States is effectively requiring a harmonization of penalty provisions within the EC. Article X:3(a) provides no legal basis for such a claim.

4.320 The European Court of Justice has developed clear guidelines for penalty provisions for violations of EC customs law, which must be effective, proportionate, and dissuasive. These principles have also been confirmed by the Council of the European Union.

4.321 Contrary to the US submission, in *Andrade*, the Court confirmed that member States cannot act freely when laying down penalty provisions, but must ensure that the penalty is effective, proportionate and dissuasive. In other words, member States are limited in two directions. They cannot lay down penalties which are excessively severe and therefore violate the principle of proportionality. On the other hand, they cannot lay down penalties which are so lenient that they have no dissuasive effect and therefore do not ensure the effective application of Community law.

4.322 These fundamental principles are sufficient to ensure uniformity in the application of customs laws. This is also confirmed by Article VIII:3 GATT, which specifically addresses the issue of sanctions for violations of customs regulations, by merely laying down minimum standards of proportionality.

4. The US claim under Article X:3(b) GATT

(a) The requirements of Article X:3(b) GATT

4.323 Article X:3(b) GATT requires the WTO members to have tribunals or procedures of a judicial, arbitral or administrative nature with the main purpose of reviewing and correcting promptly administrative decisions in customs matters. There are, therefore, four conditions laid down in the provision: the material scope of the control (administrative decisions in customs matters), its nature (tribunals or procedures of a judicial, arbitral or administrative nature), its purpose (review and correction), and a time requirement principle (promptness).

4.324 In relation to the nature of the control, the provision allows a certain margin of discretion to the WTO members. The control may consist not only in tribunals but also in procedures, which implies that there is no obligation to create a separate body to ensure the control. Furthermore, the nature of the control may be not judicial but also arbitral or administrative. But what is particularly important in our case is that Article X:3(b) refers to each of these controls in plural: WTO members are obliged to have "tribunals or procedures" not "a tribunal" or "a procedure". The Spanish and French versions of the provision also use the equivalent terms in plural. This clearly allows the WTO members to have several tribunals, each of them covering a part of its geography and being competent for the review of the administrative decisions taken by their different customs offices.

4.325 Finally, the Appellate Body's interpretation of Article X GATT in *EC – Poultry* and *EC – Bananas III* further supports that this provision does not impose any specific structure for the review system (specific type of courts or procedures, number of instances, degree of centralization of the review system…).

4.326 The EC may also comply with its obligation under X:3(b) through the courts of its member States, as it has already been recognized by the Panel in *EC – Trademarks and Geographical Indications (US)*. The reasoning of this Panel does not only apply to the executive authorities, but also to the judicial authorities of the member States when they apply and interpret Community law.

4.327 As to the time requirement, Article X:3(b) GATT requires a "prompt review and correction" (emphasis added). Though the three linguistic versions of Article X:3(b) do not have exactly the same meaning, all of them have a common denominator: the period of time to review a customs decision has to be reasonably short. To be more precise on this question will certainly require making an analysis on a case by case basis.

4.328 The EC does not agree with the US argument that the relevant context for the interpretation of Article X:3(b) GATT includes the immediately preceding subparagraph in the paragraph in which the obligation at issue appears, and that therefore the decisions of the tribunals or procedures must provide for the review and correction of customs matters for the EC as a whole, not just within limited geographical regions within the EC. Subparagraphs (a) and (b) lay down different obligations: one of uniform administration, the other on remedies. From a legal point of view, Article X:3 GATT does not make any link between both subparagraphs, which should, therefore be considered as separate obligations.

(b) The EC provides for prompt review of customs decisions

(i) The claim regarding the absence of an EC customs court

4.329 The United States affirms that the EC fails "to provide for an EC court […] to which a member State customs decision can be promptly appealed". This is clearly wrong. Article X:3(b) GATT does not require a central court or procedure to appeal administrative decisions in customs matters. There is no obligation under the GATT for the WTO members to establish a court similar to the US Court of International Trade. Decisions of the member States' customs authorities, which are based on EC law, are reviewed by the national courts and tribunals acting as the ordinary judges for EC law. Customs decisions adopted by the EC institutions are reviewed by the Court of Justice (and, in some cases, by the Court of First Instance) through direct actions or preliminary rulings on validity. There is, therefore, a complete system of judicial protection in place.

4.330 Furthermore, the US analysis of the review system established by the EC and its member States relies on an erroneous interpretation of Article X:3(b), which is based on the existence of a link between this provision and Article X:3(a). However, there is no such link. Assuming, *ad arguendo*, that there were a link between those two provisions, the US analysis would be partial and biased because it does not take into account the EC mechanisms to ensure uniform administration in the customs sector.

4.331 The *Bantex* decision mentioned by the United States shows the artificial analysis made by the United States. In the absence of a real problem in the EC remedies system, the United States relies on an individual case and tries to transform it into a systemic problem by relying on two hypotheses ("if another member State's authorities had correctly classified Bantex's products" and "if a trader in Bantex's position invokes the United Kingdom BTI in the territory of another member State"). None of these two situations have occurred in Bantex and, therefore, the US arguments have to be rejected as not based on real facts.

4.332 On the contrary, the final outcome of the Bantex case shows that EC legal remedies ensure uniform administration in customs matters. Following the UK High Court judgment, the HM Customs and Excise decided on 23 March 2004 to revoke the BTIs on the basis of Articles 12(5)(a)(iii) and 9 CCC and in the light of the Judgment of the Court of Justice in

Timmermans. This case proves that preliminary rulings given by the Court of Justice are taken into consideration by national authorities other than those directly involved in the specific case. It also shows that the *Timmermans* Judgment in fact contributes to the uniform administration of EC law.

4.333 The United States misunderstands the EC system when it claims that "at the top of the structure for reviewing customs authorities' administration of EC customs law is the ECJ". This is not correct. The European Court of Justice does not review national customs administrations decisions. On the contrary, as we have already explained several times, it helps the national courts in such a review through the preliminary ruling procedure. This procedure is based on a cooperation relationship between the Court of Justice and national courts, not on a hierarchical one.

(ii) Promptness in the review

4.334 The US First Written Submission provides no arguments for why customs decisions are appealed before the national courts of the EC member States in a manner that cannot be qualified as "prompt". The only argument of the United States is that "the time periods for first instance reviews conducted by member State customs authorities can vary widely", for which purpose it compares the time period for administrative reviews in three member States. Three other eventual divergences between member States are mentioned in the US First Written Submission but the United States neither develops these allegations in its argumentation nor provides representative specific examples in the member States mentioned.

4.335 The EC recalls, first, that the burden is on the United States, as complainant, to make a *prima facie* case in support of its position, and that, therefore, this burden cannot be shifted on the EC, as respondent, by using the tactics of making general and unsubstantiated assertions.

4.336 In relation to the time periods for first instance administrative reviews conducted by member State customs authorities, the only US claim is that they vary widely in the three member States mentioned above. Again, the United States does not give the reasons to conclude that the three time periods do not comply with the Article X:3(b) GATT requirement for a "prompt" review. Differences as to time periods are not contrary to that provision, which does not impose the obligation on the WTO to harmonize time periods in administrative, judicial or arbitral reviews of customs administrative decisions. A different interpretation would be contrary to the intrinsic nature of Article X GATT, which is a provision, as it is spelled in its heading, on publication and administration of trade rules, not on their contents.

C. FIRST ORAL STATEMENT OF THE UNITED STATES

4.337 In its First Written Submission, the United States demonstrated that the European Communities fails to administer its customs laws in the uniform manner required by Article X:3(a) of the GATT. The United States also demonstrated that the EC fails to provide the tribunals or procedures for the prompt review and correction of administrative action relating to customs matters that Article X:3(b) of the GATT requires.

4.338 The EC responded to the US claims in part by re-casting them, incorrectly, as either broad-based attacks on European federalism or narrow complaints about the particular outcomes of specific cases. To the extent that the EC confronted the US arguments directly, its responses appeared to fall into five categories: (1) that Article X:3(a) is a narrow provision setting out "minimum" obligations; (2) that material divergences in member State administration of customs laws do not occur or are systematically reconciled when they do occur; (3) that various principles, instruments, and institutions in the EC ensure the uniform administration that Article X:3(a) requires; (4) that where certain material differences admittedly exist among member State practices, these differences do not concern administration of customs law at all but, rather, matters of general member State administrative law;

and (5) that, with respect to Article X:3(b), the EC fulfills its obligation by virtue of the fact that each member State provides a separate forum for review of customs administrative decisions.

4.339 The claims of the United States are straightforward. Both claims stem from the fact that the EC, as a Member of the WTO in its own right – as distinct from its constituent member States – is bound by the obligations set forth in Articles X:3(a) and X:3(b). With respect to Article X:3(a), the EC provides for the administration of its customs law by each of its 25 member States while failing to ensure that the member States administer that law uniformly. That divergences among the member States occur is undeniable. This fact is admitted by the EC even in its own Written Submission. Outside the context of this dispute, it has been acknowledged by EC officials and has been a constant complaint of traders. The claim of the United States is that no EC institution systematically provides for the reconciliation of such divergences, so as to achieve the uniformity of administration required by Article X:3(a).

4.340 The US Article X:3(b) claim is that the EC fails to provide any forum for the prompt review and correction of administrative action by member State customs authorities. While review is provided for under the laws of individual member States, that review does not meet the EC's obligation under Article X:3(b). Fragmentation of review, on a member State-by-member State basis, is not consistent with Article X:3(b). That obligation must be interpreted in light of its context, which includes Article X:3(a).

4.341 The issues raised by these claims are not new. Contrary to the EC's suggestion, this dispute is not the first time the United States has raised these issues with the EC. In fact, the United States has raised these issues routinely in the context of EC trade policy reviews since 1997. The United States also has raised these issues in other WTO and bilateral settings. The United States has decided to pursue its claims through dispute settlement precisely because the underlying problems persist despite its efforts to address them in other fora.

4.342 It is important to make clear what this dispute is *not* about. The United States complaint is not that the very decision to retain competence over customs administration in the hands of member State authorities is per se inconsistent with the obligation of uniform administration under Article X:3(a). The US complaint is that because the retaining of competence over customs administration in the hands of member State authorities is not coupled with the systematic reconciling of divergences among member State authorities, it is inconsistent with the obligation of uniform administration under Article X:3(a). The EC is not subject to a lower requirement of uniform administration than every other WTO Member simply by virtue of its "executive federalist" structure.

4.343 Just as this dispute is not about the EC's right to adopt an executive federalist form of government, it also is not about the particular decisions of individual member State authorities in particular cases. In its First Submission, the United States set forth a number of illustrations to demonstrate the lack of uniform administration of customs law in the EC. In its First Submission, the EC treats these cases not as illustrations but as actual matters in dispute. The US argument is not that any particular good should be classified or valued one way or another. Rather, the argument is that the system for administering customs law in the EC does not ensure the uniformity that Article X:3(a) requires.

4.344 In its First Submission, the United States identified the obligation of uniform administration in Article X:3(a) and explained the scope of that obligation applying customary rules of treaty interpretation of public international law. In particular, the United States considered the ordinary meaning of the operative terms in Article X:3(a) in their context and in light of the object and purpose of the GATT 1994. Applying this rule, the United States identified the relevant question as whether the EC manages, carries on, or executes its customs law in a manner that is the same in different places or circumstances, or at different times. The United States also discussed the report of the panel

in *Argentina – Hides and Leather*, which confirmed this understanding of the concept of uniform administration.

4.345 In its First Submission, the EC entirely avoids the ordinary meaning of the operative terms of Article X:3(a). Tellingly, its discussion under the heading "The meaning of 'uniform administration'" does not actually discuss the meaning of "uniform administration." Instead, it discusses supposed limitations on the obligation of uniform administration. Thus, the EC asserts that the obligation of uniform administration must be qualified by "practical realities," that "a minimum degree of non-uniformity is *de facto* unavoidable," and that "uniformity can be assessed only on the basis of an overall pattern of customs administration."

4.346 Not only does the EC's explanation of "uniform administration" fail to come to grips with the ordinary meaning of those words, but the limitations that it posits would effectively render the obligation of uniform administration meaningless. For example, the EC suggests a limitation of "practical realities," but identifies no standard by which that limitation might be assessed. Similarly, while it asserts that "a minimum degree of non-uniformity is *de facto* unavoidable," it offers no standard for judging the degree of non-uniformity that may exist without running afoul of Article X:3(a).

4.347 Moreover, the EC's contention that non-uniformity is impermissible only when it amounts to a pattern of non-uniformity is entirely misplaced. The EC draws this proposition from two reports that are not at all on point. First, it purports to rely on the Appellate Body's report in *EC – Poultry*. However, the relevant issue there was not the meaning of "uniform administration," but rather, the applicability of Article X at all to a particular import license issued with respect to a particular shipment.

4.348 Similarly, in the panel report in *US - Hot-Rolled Steel* on which the EC relies, the panel did not reach the question of what "uniform administration" means. As is clear from the sentence immediately preceding the extract on which the EC relies, the relevant issue was "whether the final anti-dumping measure before [the panel] in [that] dispute can be considered a measure of 'general application.'"

4.349 More importantly, neither of the reports from which the EC seeks support concerned the issue presented by this dispute, which is lack of geographical uniformity in administration of a Member's customs laws. Whatever the relevance of showing a pattern of non-uniformity may be in other contexts, the EC has failed to demonstrate its relevance to establishing a breach of Article X:3(a) based on geographical non-uniformity.

4.350 The EC's other arguments attempting to narrow the obligation of uniform administration are similarly flawed. For example, the EC characterizes as "highly important for the present case" the distinction between the substance of customs laws and their administration. The significance the EC apparently attaches to this distinction is that differences among member States' laws – as, for example, in the area of penalties – are beyond the purview of Article X:3(a), as they are differences of substance rather than differences of administration.

4.351 The problem with this argument is that it ignores the different forms that administration can take. It assumes that laws cannot be instruments that administer other measures. That assumption, however, is plainly incorrect. Customs laws may be administered through instruments which are themselves laws. This is the case with respect to penalty laws, which are instruments for administering customs laws by enforcing compliance with those laws. To the extent different EC member States use different penalty measures to enforce compliance with EC customs laws, they administer EC customs laws non-uniformly.

4.352 This latter observation is supported by the panel report in *Argentina – Hides and Leather*. In that dispute, the EC had challenged as inconsistent with Article X:3(a) an Argentinian measure that provided for private persons to be present during the customs clearance for export of certain goods. Argentina defended in part on the ground that the EC really was complaining about the substance of a measure rather than its administration. In rejecting Argentina's argument, the panel stated: "Of course, a WTO Member may challenge the substance of a measure under Article X. The relevant question is whether the substance of such a measure is administrative in nature or, instead, involves substantive issues more properly dealt with under other provisions of the GATT 1994. . . . If the substance of a rule could not be challenged, even if the rule was administrative in nature, it is unclear what could ever be challenged under Article X. . . ."

4.353 Likewise, in the present dispute, the line the EC draws between substance and administration would render Article X:3(a) meaningless. By characterizing all laws, regulations, and rules pertaining to customs matters as substantive measures, the EC would put all laws, regulations, and rules that are instruments of customs administration beyond the reach of the disciplines Members have agreed to in Article X:3. It defies logic to suggest that a GATT obligation can be eliminated simply by virtue of such characterization.

4.354 In its second line of argument, the EC challenges the proposition that in the administration of customs law, divergences among member State authorities occur and are not systematically reconciled by the EC. In our First Submission, we demonstrated this point through evidence of the EC's own admissions, statements by traders, and illustrations of particular cases in which divergences have occurred. The EC's response does not rebut this evidence.

4.355 When it comes to admissions by the EC or EC officials, the EC does not deny the truth of the statements asserted. At most, it belittles them. For example, a statement by the EC's Commissioner for Taxation and Customs Union recognizing that the Community Customs Code "may result in divergent application of the common rules" is summarily dismissed by the EC as "reflect[ing] the ongoing process of reform and review of EC customs law." Statements by the EC's Court of Auditors identifying systemic problems in reconciling divergent administration of customs valuation laws are similarly tossed aside as "the expression of the views of one EC institution." Admissions by the EC in the context of another recent dispute – *European Communities – Customs Classification of Frozen Boneless Chicken Cuts* – regarding institutional difficulties in monitoring divergences in binding tariff information issued by different member States are not acknowledged at all.

4.356 Unlike the EC, the United States finds statements by EC institutions and officials highly relevant to the matter at hand. These statements are blunt acknowledgments of how the system of customs law administration operates by persons who are in positions to have the information and experience to know. The cumulative message that there is a problem of divergent administration and no mechanism to systematically reconcile divergences is undeniable.

4.357 Nor is the EC's treatment of the illustrative cases cited by the United States any more effective at rebutting this point. For example, in its First Submission the United States laid out an illustrative case concerning divergent classification of LCD monitors. The United States noted that a regulation by the Council of the European Union suspended duties on a subset of such monitors, but that member States continued to apply different classifications to other monitors. In particular, the United States noted that the Netherlands continues to classify monitors with a diagonal measurement of greater than 19 inches as video monitors, whereas other member State classify them as computer monitors. The EC's terse response is that the classification by the Dutch authorities "is in line with the CN, as confirmed by the Customs Code Committee."

4.358 That response is quite revealing for at least three reasons. First, it does not deny the divergence among member State authorities on this matter. Second and relatedly, by characterizing

the Dutch classification as "in line" with the CN, the EC suggests that more than one classification may be "in line" with the CN. But this is precisely the point of the illustration: Where more than one classification is "in line" with the CN, the EC does not provide a mechanism for systematically reconciling different classifications adopted by different member State authorities. Third, the Customs Code Committee conclusion with which the Dutch classification supposedly is "in line" is not itself in line with the relevant Chapter Note from the Common Customs Tariff. Specifically, the Committee conclusion would prohibit a monitor from being classified as a computer monitor (under Tariff heading 8471) unless an importer can demonstrate that it is "only to be used with an ADP machine" – a computer machine. However, under the relevant Tariff chapter notes, a monitor may be classified as a computer monitor if "it is of a kind solely or principally used in an automatic data-processing system." It hardly is conducive to uniform administration for member State authorities to have to reconcile notes to the Common Customs Tariff that say one thing and a Customs Code Committee conclusion that says something entirely different.

4.359 To take another example, in its First Submission the United States described the illustrative case of differential administration of EC valuation rules with respect to Reebok International Limited. The United States described a situation in which different member State authorities have reached different conclusions as to whether RIL's contracts with non-EC suppliers establish a control relationship for customs valuation purposes, and EC institutions have not reconciled the divergence. The EC dismisses this case as "relatively complex" and states without explanation that, upon its consideration of the matter, the Customs Code Committee "did not establish any incompatibility with EC law, or lack of uniformity between EC Member States." Then, the EC goes on to state that "the Customs Code Committee is not a substitute for the normal appeals mechanisms before the national courts."

4.360 This response is notable for at least two reasons. First, the EC does not deny the essential facts as described in the US First Submission. It merely calls them "complex" and states that the Customs Code Committee found no lack of uniformity. Second, in stressing that "the Customs Code Committee is not a substitute for the normal appeals mechanisms before the national courts" the EC in effect reinforces the crux of the US argument: There is no EC mechanism for ensuring uniform administration. In any case, in numerous other parts of its First Submission, the EC readily acknowledges that divergences among member States exist.

4.361 In its third line of argument, the EC challenges the proposition that there is no EC mechanism to ensure uniform administration of EC customs law. In its First Submission, the United States demonstrated that customs law in the EC is administered by 25 different member State authorities, that this results in divergences of administration, and that no EC institution exists to systematically reconcile those divergences. To demonstrate this last point, the United States focused on the role of the Commission and the Court of Justice in matters of customs administration. The United States focused on these two institutions, because the EC had asserted to the DSB that it was through the operation of these two institutions that uniform administration is enforced. The United States showed that neither institution functions in a way that results in uniform administration. Its discussion of the role of the Commission logically led the United States to focus on the Customs Code Committee which, as the EC acknowledges, "is an integral part of the Community's regulatory process."

4.362 Because of the integral part played by the Committee, it is important to understand how the Committee functions. The United States demonstrated that various aspects of the Committee's operation make it ineffective as a mechanism to systematically bring uniformity to the administration of customs law. These include the absence of any right for a trader affected by a member State's administration of the law to petition the Committee and the difficulty of obtaining answers to technical questions of divergence in member State customs administration where those answers require the support of qualified majorities of 25 member State representatives.

4.363 With respect to the ECJ, the United States demonstrated that limitations on the ability to get questions reviewed by the ECJ, procedural hurdles that must be passed before doing so, and the time it takes to get questions answered by the ECJ make this institution, too, an ineffective mechanism to systematically bring uniformity to the administration of customs law.

4.364 The EC challenges the US understanding of the operation of EC law and institutions, contending that in seeking to identify EC mechanisms that ensure uniformity of administration the United States has focused inappropriately on the Customs Code Committee and given inadequate attention to principles of EC law as well as EC institutions and instruments of administration. The main problem with this argument is that, on closer inspection, the individual elements that the EC describes as contributing to uniform administration do not add up to a mechanism that systematically leads to uniform administration where administration in the first instance is the responsibility of 25 different member State authorities.

4.365 For example, the EC refers to the existence of detailed substantive laws. But, detailed substantive laws surely do not themselves ensure uniform administration. Indeed, the EC itself stresses the distinction between substance and administration. Moreover, the cataloging of divergent administration in the EC Court of Auditors report on customs valuation (Exhibit US-14) demonstrates that detailed laws are not themselves a substitute for uniform administration.

4.366 In other instances, the mechanisms the EC identifies represent an ideal of uniform administration to which the EC aspires. For instance, the EC refers to the "duty of cooperation" in Article 10 of the EC Treaty. It also attaches importance to the principles of supremacy and direct effect as doctrines that are "essential for the effective and uniform application of Community law." However, it cannot be assumed that by virtue of the duty of cooperation or the doctrines of supremacy and direct effect uniformity of administration necessarily is achieved. Indeed, these principles do not answer the question of what happens when EC law itself permits more than one manner of administration.

4.367 Another instrument for achieving uniform administration that the EC describes is the ability of traders to address matters of concern to the Commission or to member State representatives, which may or may not, in turn, address them to the Customs Code Committee. As the EC itself acknowledges, the Commission and member State representatives are under no obligation to bring any given matter before the Committee.

4.368 The EC also emphasizes the role of appeals to national courts, with the possibility of preliminary references to the ECJ, as a means of ensuring uniform administration. Where a trader encounters a lack of uniform administration, its recourse is to appeal one or more of the divergent actions to a national court which (unless it is a court from which there is no recourse) may or may not make a preliminary reference to the ECJ. Even if the court does make a preliminary reference to the ECJ, the matter still may take years to decide.

4.369 In short, where a trader detects a lack of uniform administration it has no right to appeal to an EC institution to correct the lack of uniformity. Instead, it must proceed through "the normal appeals mechanisms before the national courts" in the hope that this may lead eventually to an elimination of the non-uniformity. The proposition that the normal appeals mechanism is a key instrument of uniform administration is notable for at least three reasons. First, litigation is a particularly cumbersome tool to achieve the day-to-day operational uniformity of administration that Article X:3(a) contemplates. Second, the EC's contention in this regard is at odds with its separate contention – in discussing the US Article X:3(b) claim – that the obligation of uniform administration and the obligation to provide remedies from administrative action are discrete obligations without any inherent link to one another. Here, the EC suggests that they are inherently intertwined. Third, the EC's emphasis on the normal appeals mechanisms leaves open the critical question of what happens if

a national court or, eventually, the ECJ finds that both the administrative action appealed and the divergent administrative action to which it is compared are consistent with the applicable provision of EC customs law. In other words, the EC does not, and cannot, contend that lack of uniformity itself is grounds for appeal from and correction of administrative action. Thus, the emphasis the EC places on a trader's right to pursue the "normal appeals mechanisms" does not really answer the question of how non-uniformity is eliminated when EC law permits two or more non-uniform measures to co-exist.

4.370 In a similar vein, the EC's reference to the Commission's power to bring infringement proceedings against member States that violate EC law is of little relevance. It may be that there are instances in which a divergence in administration of EC law is so extreme as to give rise to an infringement proceeding. But, this extraordinary tool hardly serves to achieve uniformity of administration where divergent practices do not give rise to breaches of EC law.

4.371 In short, a large part of the EC's argument is devoted to painting a picture of customs law administration in the EC in which various instruments combine to ensure uniformity. But, when looked at closely, the elements of that picture do not add up to a mechanism that provides for the systematic reconciliation of divergences among member State customs authorities. What is glaringly absent from this picture is any EC mechanism to systematically reconcile divergences in member State administrative actions.

4.372 The EC's fourth line of argument is that certain divergences in member State practice – in particular, penalty provisions and audit procedures – are not really matters of administration of EC customs law at all. It characterizes such matters as part of the general administrative law of individual member States. It follows, according to the EC's reasoning, that the EC has no Article X:3(a) obligation with respect to these matters. The only Article X:3(a) obligation applies to the particular member States in which the laws at issue apply, according to the EC.

4.373 By the EC's logic, one could define away almost any obligation under Article X:3(a). Where a divergence in administration takes the form of different measures applicable in different regions within a Member's territory, the Member could label the measures as substantive law rather than instruments of administration of customs law and thus avoid the obligation of Article X:3(a) entirely. The panel in *Argentina – Hides and Leather* saw through and rejected a similar argument.

4.374 The EC's argument in this dispute is even more troubling than the argument that the panel rejected in *Argentina – Hides and Leather*, because the EC is suggesting that the obligation of uniform administration does not necessarily extend to the limits of each WTO Member's territory. The obligation is mutable, according to the EC. For any given law being administered, it applies only to the limits of the territory covered by that law. By this logic, there is no obligation of uniform administration from region to region or even from locality to locality.

4.375 This argument has no basis in Article X:3(a). That Article applies to "each Member." Like other GATT obligations, the obligation of uniform administration is an obligation on the Member. It is not a separate obligation on each individual region or locality within the Member's territory. Were it otherwise, any instance of geographical non-uniform administration could be argued away simply by sub-dividing the Member's territory and treating each sub-division separately for purposes of Article X:3(a).

4.376 It is especially puzzling that the EC characterizes penalty provisions and audit procedures as outside the scope of Article X:3(a). Those instruments go to the heart of the way substantive customs rules are administered. Indeed, that penalties are a critical tool for administering other laws is expressly acknowledged in the Council Resolution on penalties set forth in Exhibit EC-41.

4.377 The EC also asserts that penalties fall outside the scope of Article X:3(a) because they pertain to "illegitimate actions rather than legitimate trade." That argument mischaracterizes both Article X and the concept of penalties. Article X does not make the distinction between legitimate and illegitimate trade that the EC posits. Even if it did make such a distinction, it is not the case that penalties apply only to illegitimate trade. The *de Andrade* case cited in the US First Submission is a perfect example of the application of a penalty in the context of legitimate trade. The only offense at issue there was a failure to clear goods through customs within the time period specified in the Community Customs Code.

4.378 The EC argues in the alternative that even if Article X:3(a) does apply to penalties, fundamental principles of EC law ensure that penalties meet the requirements of uniform administration. The fundamental principles to which the EC refers are requirements that penalties be "effective, proportionate, and dissuasive." But, these very general principles permit a wide range of member State practices. As the EC itself acknowledges, "Specific offences may be considered in one Member State as a serious criminal act possibly leading to imprisonment, whilst in another Member State the same act may only lead to a small – or even no – fine."

4.379 The same flaws attach to the EC's discussion of customs audits. The US First Submission called attention to significant divergences in auditing practices identified in the EC Court of Auditors report. As with penalties, the EC summarily asserts that "questions of auditing are not part of customs procedures, and therefore do not concern the administration of customs law as such." Nowhere does the EC state the basis for its assertion, which is entirely incorrect. Like penalties, audits are essential tools in administering substantive customs laws.

4.380 The US First Submission explained that, in connection with audits, some member State authorities provide traders with binding valuation guidance that may be relied upon in future transactions, while others do not. The EC dismisses this observation by stating that "[w]hether such advise might be legally binding is a question of general administrative law of the Member States." By a simple act of characterization, the EC again purports to remove a matter from review under Article X:3(a). The United States sees no basis for this assertion that different member State approaches to valuation guidance are not "significant from the point of view of Article X:3(a)."

4.381 The United States turns, finally, to the EC's argument regarding Article X:3(b). In its First Submission, the United States demonstrated that the EC does not provide tribunals or procedures for the prompt review and correction of administrative action relating to customs matters. The individual member States provide fora for review of customs decisions, but the existence of these fora does not fulfill the obligation of the EC, as a WTO Member in its own right. The United States argued that the Article X:3(b) obligation must be interpreted in light of its context, which includes Article X:3(a), and that a fragmentation of review of customs decisions across the territory of a Member runs contrary to that provision's obligation of uniform administration.

4.382 The EC's assertion that there is no link between subparagraphs (a) and (b) of Article X:3 and no obligation to interpret the latter in light of the former is especially surprising, given the EC's explanation of how uniformity of customs law administration is achieved in the EC. A theme repeated throughout the EC's First Submission is that appeals of customs decisions to national courts, coupled with the possibility of national courts making preliminary references to the ECJ, constitutes a critical instrument of ensuring uniform administration of customs law. In other words, in its Article X:3(a) argument, the EC effectively contends that reviews of customs decisions and administration of customs laws are closely intertwined. That position supports interpreting the obligation to provide reviews of customs decisions in light of the obligation to administer customs laws uniformly.

4.383 Moreover, the EC simply is wrong to assert that Article X:3 "does not make any link" between subparagraphs (a) and (b). The second sentence of subparagraph (b) expressly states that the decisions of the tribunals or procedures maintained or instituted in accordance with that subparagraph "shall govern the practice of" "the agencies entrusted with administrative enforcement." Administrative enforcement, in turn, is the subject of subparagraph (a).

4.384 The EC's contention that use of the plural form in Article X:3(b) "clearly allows" the provision of separate review tribunals covering different parts of a Member's territory is equally flawed. Use of the plural form in Article X:3(b) might allow for the possibility that a Member may provide different fora for different types of review. For example, a Member might provide an administrative tribunal for reviews of classification and valuation decisions and a separate judicial tribunal for reviews of penalty decisions. This interpretation gives effect to use of the plural form in Article X:3(b) without running afoul of the obligation to interpret that provision in light of the context of Article X:3(a).

4.385 Finally, the EC asserts that it fulfills its Article X:3(b) obligation, because member State courts are EC courts when it comes to the application and interpretation of EC law. To support this assertion, the EC refers to the panel report in *EC – Trademarks and Geographical Indications (US)*. There, the panel found that in the exercise of certain executive functions, member State authorities "'act *de facto* as organs of the Community.'" Without any explanation at all, the EC asserts that the panel's reasoning in that dispute applies with equal force to member State judicial authorities exercising adjudicatory functions.

4.386 The EC's assertion does not, in fact, flow from the statement it quotes from that panel report. First, the issue presented there was substantially different from the one presented here. The issue there had absolutely nothing to do with obligations of the EC; it had to do with obligations of particular member States. The question was whether an individual member State executing an EC regulation in a manner that discriminated between persons of other EC member States, on the one hand, and persons of non-EC member States, on the other, violated a most-favored-nation obligation. This very different context makes it impossible to extrapolate from the finding in that dispute to the issue presented in this dispute.

4.387 Second, the nature of the Article X:3(b) obligation is such that it cannot be carried out in a geographically fragmented way in a single Member, such as the EC. It cannot be assumed that one panel's recognition of member State *executive* authorities as *de facto* EC authorities for one particular purpose in the context of one particular WTO obligation means that another panel must recognize member State *judicial* authorities as *de facto* EC authorities for a different purpose in the context of an entirely different WTO obligation.

4.388 In short, the fact that the EC may consider member State courts to be acting as *de facto* EC courts when they interpret and apply EC law does not mean that the EC itself provides the tribunals or procedures required by Article X:3(b). It remains the fact that member State tribunals interpret and apply the law within the territory of their respective member States. They can bind administrative agencies only within their respective member States. This arrangement does not meet the EC's obligation under Article X:3(b).

D. FIRST ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

1. The significance of the case

(a) The constitutional significance of the case for the EC

4.389 The US case constitutes an unprecedented attack on fundamental principles of the EC legal order. By challenging the involvement of the customs authorities of the EC member States in the administration of EC customs law, the United States is essentially requesting the EC to establish an EC customs agency. This runs counter to the principle of executive federalism in the EC legal order, according to which EC law is generally implemented through the authorities of the member States.

4.390 Similarly, the US claim that the EC is obliged to provide judicial review through "EC-level tribunals" is diametrically opposed to a fundamental structural principle of the EC judicial system, in which judicial review of decisions of the member States authorities is provided by the tribunals of the member States. Thus, on the sole basis of Article X:3(b) GATT, the United States is effectively requiring the EC to engage in a complete overhaul of its judicial system, a task which could not be carried out without a modification of the founding treaties of the EC.

4.391 The EC would like to emphasize that it recognizes and fully respects its obligations under Article X GATT. The EC does not claim that it is in any way subject to different or lesser obligations under Article X GATT than other WTO Members. However, the EC also believes that its constitutional arrangements for the administration of customs laws, and review of customs decisions, are fully compatible with the WTO Agreements. Indeed, the WTO Agreements respect and uphold the constitutional autonomy of the WTO members. It is therefore a matter of great concern that, in the present case, fundamental constitutional arrangements are as such made the subject of WTO dispute settlement.

4.392 In fact, with its present challenge, the United States seems to expect the EC to establish a customs agency and a customs court similar to those existing in the United States. The EC believes that Article X:3 GATT provides no legal basis for such a claim. Moreover, whereas the EC fully respects the right of the United States to opt for a centralized system of customs administration and judicial review, it believes its own constitutional choice of a system based on federal principles deserves an equal measure of respect.

(b) The systemic importance of the case for the WTO

4.393 The present case is highly important for the WTO Membership at large. Indeed, in its criticisms of specific instruments of EC customs administration, the United States adopts a maximalist approach that should be of genuine concern to WTO members.

4.394 With this approach, the United States overstretches the legal requirements of Article X:3 GATT beyond all recognition. Indeed, what is a stake in the present dispute is essentially whether Article X:3 GATT should become a legal basis for the harmonization of the systems of customs administration of WTO Members through the DSU.

4.395 The EC emphatically believes that it should not. The DSU is not a peer review process through which the optimal design of customs administrations can be sought. Rather, the purpose of the DSU is, in accordance with Article 3.2 DSU, to preserve the rights and obligations of the Members under the covered agreements, and thus prevent the nullification and impairment of benefits accruing to Members under such agreements.

4.396 A rigorous focus on legal obligations is also made necessary by the overlap between the present dispute and the ongoing negotiations on trade facilitation of the Doha Round. According to a public statement by the United States Trade Representative, one of the essential objectives of the United States in the present dispute is to enhance the Doha Trade Facilitation Negotiations "by pressing a major player in world trade". This political motivation behind the US case is also illustrated by the overlap between some of the criticisms made by the United States in the present case and its own proposals in the context of the Doha Round.

4.397 The EC is fully committed to the success of the Doha Round Negotiations, including the negotiations on trade facilitation. However, as Japan has correctly pointed out in its Written Submission, specific initiatives to ensure a uniform administration of customs laws should be addressed through the Doha Negotiations, and not through the dispute settlement process.

2. The uniform administration of EC customs law

(a) The requirements of Article X:3(a) GATT

4.398 Article X:3(a) GATT requires WTO Members to administer the laws and regulations referred to in Article X:1 GATT in a uniform manner. In its First Submission, the United States significantly overstates the requirements imposed by Article X:3(a) GATT. Moreover, the United States ignores almost completely the existing case law on this provision.

4.399 First, it is consistent case law since the Appellate Body Report in *EC – Bananas* that Article X:3(a) GATT concerns only the *administration* of laws and regulations, and not those laws and regulations themselves. This is a highly important point for Members which have a federal structure, and where certain matters are regulated at a sub-federal level. Where laws and regulations exist at a sub-federal level, all that Article X:3(a) GATT requires is that such laws are administered in a uniform manner in the area where they apply. Article X:3(a) GATT does not impose any requirement to harmonize sub-federal laws within a WTO Member.

4.400 Second, Article X:3(a) GATT merely requires WTO Members to administer their laws and regulations in a uniform manner, but is neutral as to the means which WTO Members employ for this purpose. In other words, Article X:3(a) GATT does not prescribe the specific instruments and structures which WTO Members should use in the administration of their customs laws. Accordingly, Article X:3(a) GATT does not have the purpose of harmonising the customs laws and practices of WTO Members, and is not a legal basis for achieving such a result through the DSU.

4.401 Third, as the Appellate Body has stressed in *US – Shrimp*, and as Japan has equally confirmed, Article X:3(a) GATT is a minimum standards provision. It is a subsidiary provision which provides WTO Members with certain minimum guarantees of uniformity in the administration of customs laws and regulations. Wherever more precise and ambitious disciplines were necessary, the corresponding obligations have been laid down in other provisions of the covered agreements.

4.402 Fourth, given the character of Article X:3(a) GATT as a minimum standards provision, not every minor variation in administrative law and practice constitutes a lack of uniformity contrary to Article X:3(a) GATT. This follows clearly from the GATT Panel Report in *EEC – Dessert Apples*, where the Panel held that certain variations between EC member States in the implementation of import licensing arrangements were minor and therefore did not amount to a violation of Article X:3(a) GATT. In other words, there is a certain minimal threshold in Article X:3(a) GATT, which implies that a variation in administrative practice must have a significant impact on the administration of customs laws in order to constitute a breach of Article X:3(a) GATT.

4.403 Fifth, it is very important to recall the findings of the Panel in *US – Hot Rolled Steel*, according to which it is not possible to establish a lack of uniformity solely on the basis of an individual instance of administration. Rather, as Japan has convincingly explained, it is necessary to establish that there is a *pattern* of non-uniform administration with a significant impact on how customs laws are administered. Such an interpretation of Article X:3(a) GATT is particularly necessary given that customs authorities have to operate in complex and rapidly changing circumstances, to which they constantly need to adapt. Moreover, systems of customs administration are complex, and their outcomes are determined by many factors, not all of which can be controlled by the WTO Member in question. For instance, where an individual trader does not exhaust all the remedies and procedural possibilities afforded to him by the system of a WTO Member, a resulting lack of uniformity cannot be attributed to a failure in that Member's system. Similarly, if a trader in an individual case abuses procedural possibilities, or violates provisions of the law of the Member in question, this cannot be regarded as proof of a lack of uniformity contrary to Article X:3(a) GATT.

(b) The burden of proof

4.404 The burden of proof for establishing that there is a pattern of non-uniformity in the administration of the EC's customs laws is on the United States. The United States does not even come close to discharging this burden of proof.

4.405 The United States has not primarily focussed on the actual administration of customs laws in the EC, but rather on systemic aspects of the EC's system of customs administration. At the most general level, the United States challenges the involvement of the EC's member States authorities in the administration of EC customs law. At a second level, the United States criticizes the role or capacity of various EC institutions and arrangements, such as the European Commission, the Court of Justice, or the Customs Code Committee. Finally, at the management level, the United States also criticizes various aspects of the EC's system of customs administration, such as the design of the EC's EBTI system.

4.406 None of these arguments are relevant for the application of Article X:3(a) GATT, and none of them amount to proof that there is a pattern of non-uniformity in the EC's customs administration. To take the most fundamental point, the United States submits to the Panel that the involvement of the authorities of EC member States in the administration of EC customs law is incompatible with Article X:3(a) GATT because "divergences inevitably occur". The EC strongly contests this statement. The EC would also express its amazement that the United States would assert that a fundamental element of the EC legal order is incompatible with the GATT without offering any proof for such a statement.

4.407 As regards the more specific instruments and institutions of the EC system, and as the EC has already shown in its First Written Submission, the US criticisms are based on misunderstandings or misrepresentations of the EC system. In addition, Article X:3(a) GATT leaves WTO Members a large measure of freedom as to how they administer their customs law, provided they do so in a uniform manner. Therefore, the US criticisms are irrelevant for the purposes of assessing the EC's compliance with Article X:3(a) GATT.

4.408 Moreover, in its First Written Submission, the United States presents an incomplete and distorted picture of the EC's system of customs administration. On the basis of this inadequate presentation of the facts, the United States chooses to address only those specific issues where it perceives the EC system exhibits a weakness. However, in order to assess whether there is a deficiency in the EC system, it is not sufficient to look at a particular issue or instrument in isolation. Rather, as Japan has aptly explained, it is necessary to look at the EC's system as a whole.

4.409 As regards the actual administration of EC customs law, the US Submission remains almost silent. In essence, the United States presents the Panel with two examples of alleged non-uniformity in the area of tariff classification, and with one example in the area of customs valuation. Even if these cases actually demonstrated a lack of non-uniformity, one or two cases in a particular area hardly amount to a statistically significant sample on which to assess whether there is a pattern of non-uniformity. Moreover, as the EC has shown in its First Written Submission, none of the examples adduced by the United States, all of which involve questions of customs administration of a high technical complexity, in fact shows a lack of uniformity in the EC's administration.

4.410 No single fact could illustrate the weakness of the US case more clearly than the tepid reaction which the USTR received when it launched a call for comments following its consultation request in the present dispute. In response to this call, USTR received a mere three submissions, two of which the United States itself does not seem to have judged helpful for its case. The EC would submit that if there indeed was a significant pattern of non-uniformity in the EC's practice, a stronger reaction from interested industry and traders could have been expected.

4.411 Overall, the United States fails to establish that there is a pattern of non-uniformity in the EC's system of customs administration.

(c) The claims raised by the United States

(i) Tariff classification

4.412 The first area in which the United States alleges that there exists a lack of uniformity is tariff classification. The United States bases this claim essentially on a criticism of the role of the Court of Justice, and of the EC system of binding tariff information. In addition, the US sets out two examples of classification of specific products, which it alleges demonstrate a lack of uniformity in the EC's practice.

4.413 As regards the two systemic issues, the US criticisms are unwarranted. The ECJ, acting in particular through the preliminary reference procedure, plays an important role in ensuring a uniform interpretation and application of EC classification rules, and will continue to do so in the future.

4.414 Similarly, the EC's BTI system is an important tool for providing uniformity in tariff classification throughout the EC, and security to traders. However, the EC is under no obligation under Article X:3(a) GATT to establish a BTI system, let alone to design this system in a particular way.

4.415 Moreover, as Japan as pertinently remarked, both the ECJ and the EBTI system are only part of the EC's classification system. As the EC has already noted, in order to assess whether the EC administers classification rules in a uniform manner, it is not sufficient to only consider two elements in isolation. Rather, the EC system should be considered as a whole, including also instruments such as classification regulations, HS explanatory notes and opinions, and EC explanatory notes.

4.416 The two specific examples given by the United States concern the classification of blackout drapery lining and of LCD monitors. However, neither case demonstrates a lack of uniformity in the EC's classification practice. In fact, both cases involve classification issues of a high complexity, with which the United States itself has experienced certain difficulties. Accordingly, rather than demonstrate a lack of uniformity in the EC's practice, these cases simply serve as an illustration of the technical complexities of tariff classification in the rapidly evolving world of today.

(ii) Customs valuation

4.417 The second field where the United States alleges a lack of uniformity is customs valuation. However, the US case here is as unsubstantiated as its claim in the field of tariff classification.

4.418 At a systemic level, the United States complains that the EC does not even provide for binding valuation rulings. However, these complaints are unjustified. The EC is not obliged under Article X:3(a) GATT to provide for binding rulings on valuation questions or any other issues.

4.419 Moreover, there are considerable structural differences between tariff classification and customs valuation which explain why the EC provides for binding information in the area of tariff classification, but not in the area of valuation. In particular, customs valuation is normally based on the transaction value, and therefore involves data which can change from transaction to transaction, and from importer to importer.

4.420 At the same time, EC valuation rules are quite detailed, and guide the EC customs authorities in all relevant circumstances. Wherever clarification is necessary, this can be achieved through amendments to the valuation rules contained in the Implementing Regulation or the Customs Code. Moreover, the European Commission, the Customs Code Committee, and the European Court of Justice all play an important role in securing a uniform valuation practice.

4.421 In order to substantiate its allegations, the United States mainly relies on a report of 2000 by the EC Court of Auditors. However, this report does not support the US case. In fact, as much as anything else, it is evidence of the EC's ability to itself ensure uniformity in its customs administration. Where necessary, the report has given rise to the appropriate action by the EC institutions, and therefore does not constitute relevant evidence today. In addition, the EC would also point out that the Court of Auditors did not in any way make judgments as to whether the EC was in compliance with Article X:3(a) GATT, and it cannot be assumed that the issues raised in the report of the Court of Auditors translate into a violation of the GATT.

4.422 At the level of actual practice, the United States presents only one example, concerning a valuation dispute between Reebok International Limited (RIL) and the Spanish customs authorities. However, this is a complex valuation dispute concerning the assessment of whether RIL has a control relationship with certain of its suppliers. The European Commission has kept this case, which is currently pending before a Spanish court, under close review, and has also discussed it in the Customs Code Committee. However, it must also be recalled that neither the European Commission nor the Customs Code Committee are a substitute for the normal appeals mechanisms before the national courts.

(iii) Processing under customs control and local clearance procedure

4.423 The United States alleges that there is a lack of uniformity as regards two customs procedures, namely processing under customs control and the local clearance procedure. These US arguments are based on wrong interpretations and factual errors.

4.424 In relation to processing under customs control, the reality is that Community customs legislation and the UK and French guidances require the same two "economic conditions" for the granting of an authorization for processing under customs control. Therefore, there is no evidence showing that the EC customs authorities administer this procedure in a non-uniform manner.

4.425 As to the local clearance procedure, the US First Written Submission is deficient in four aspects. First, the United States does not provide a single exhibit to illustrate and support its claim. Second, from the description provided in the US First Written Submission, it is clear that the United

States has misunderstood the different steps in the process followed when goods are imported through this procedure. Third, the US description of the procedure and of the documents retention requirements contains fundamental errors. Finally, any variations which might remain are not substantial in nature and therefore do not exceed the minimal threshold of Article X:3(a) GATT.

(iv) Penalties for violations of customs law

4.426 Finally, the United States also claims that the EC fails to comply with its obligations by not administering penalties for violations of customs laws in a uniform manner. This US claim must be rejected for three reasons.

4.427 First, the EC submits that provisions which establish the penalty for a violation of customs laws are not themselves related to the administration of customs laws and therefore do not fall within the scope of Article X:3(a) GATT.

4.428 Second, it is important to note that the penalties applicable to violations of customs laws are set out in laws and regulations of the EC member States. Accordingly, it is not the administration of the laws which varies, but rather it is the laws themselves which are different. However, as the EC has already explained, there is no requirement in Article X:3(a) GATT to harmonize laws which apply in a WTO Member at a sub-federal level.

4.429 Finally, EC law does provide for a sufficient degree of harmonization of sanctions for violations of customs law. As the European Court of Justice has clarified in its case law, member States penalty provisions must be effective, proportionate and dissuasive. Through these principles, a uniform application of customs law throughout the EC is sufficiently safeguarded.

3. The prompt review of customs decisions in the EC

(a) The requirements of Article X:3(b) GATT

4.430 Article X:3(b) GATT merely requires WTO Members to ensure that administrative decisions in customs matters are reviewed promptly by an independent tribunal or through an independent procedure. The United States misrepresents the requirements imposed by Article X:3(b) GATT.

4.431 The EC would like to recall once more that it is consistent case law since the Appellate Body Reports in *EC – Bananas* and *EC – Poultry* that Article X GATT, and, therefore, its subparagraph 3(b), does not impose any requirement of harmonization of laws within a WTO Member. This means that where, within a WTO Member, separate systems of judicial review exist at a sub-federal level, Article X:3(b) GATT does not require that such separate systems be harmonized. It merely requires that in each of these separate systems of judicial review, a prompt review of customs decisions is ensured.

4.432 In addition, it should also be recalled that Article X:3(a) and (b) GATT are separate obligations. Accordingly, Article X:3(b) GATT, unlike Article X:3(a) GATT, is not concerned with questions of uniformity, but exclusively with the prompt review of customs decisions.

4.433 It should also be noted that in the EC, the review of customs decisions currently takes place as part of the general systems for review of administrative decisions in the field of administrative law or tax law. Creating a separate jurisdiction for customs matters at EC level would, therefore, lead to more, rather than less fragmentation of procedures for judicial review. This would not be in the interest of traders, who in this case, rather than being able to have recourse to lawyers qualified in general administrative or tax litigation in a particular Member State, would have to have recourse to specialized lawyers experienced in specific EC-level procedures.

4.434 Moreover, Article X:3(b) GATT is neutral as to the means which WTO Members employ for ensuring prompt review. In other words, this provision does not prescribe the specific bodies or instruments, structures and time periods which WTO Members should use to ensure prompt review of customs decisions. Accordingly, Article X:3(b) GATT does not have the purpose of harmonising the laws of WTO Members, and is not a legal basis for achieving such a result through the DSU.

(b) The burden of proof

4.435 The burden of proof for establishing that the EC does not guarantee a prompt review of customs decisions is on the United States. Again, as in the field of uniform administration, the United States does not come close to discharging this burden of proof.

4.436 The United States has not primarily focussed on the actual review of customs decisions in the EC, but rather on a systemic question of the EC's court system. At the most general level, the United States considers insufficient the involvement of the EC's member States' courts and tribunals in the review of customs decisions. The United States submits to the Panel that the involvement of the courts and tribunals of EC member States in the application of EC customs law is incompatible with Article X:3(b) GATT because "the burden to traders of non-uniform administration is not alleviated through the appeals process". The EC strongly contests this statement.

4.437 As regards the actual functioning of EC court system, the US Submission remains almost silent. In essence, the United States refers only to the maximum time-limits for the administrative reviews in three EC member States and one of these references is not even accurate.

(c) The claims raised by the United States

(i) The absence of an EC customs court

4.438 The first US criticism is about the nature of the judicial review system established in the EC. According to the United States, the absence of an EC-level review reinforces the divergences in interpretation between the authorities in two different member States.

4.439 This interpretation is wrong in that it makes an unwarranted link between the two subparagraphs in Article X:3 GATT and because Article X:3(b) GATT does not require a central procedure or court, like the US Court of International Trade (USCIT), to appeal administrative decisions in customs matters. In its Third Party Submission, Japan has supported the EC´s interpretation.

4.440 Moreover, as the EC has explained in its Written Submission, where the tribunals of the member States provide judicial review of decisions taken by the member States' customs authorities, they act as organs of the EC, through which the EC discharges its obligations under Article X:3(b) GATT. This view also finds support in the recent Panel Report in *EC – Geographical Indications and Trademarks (US)*.

(ii) The lack of promptness in the review

4.441 The second criticism made by the United States of the EC system is that it does not guarantee a prompt review of customs decisions.

4.442 First of all, this US allegation is based on the divergence of the maximum time periods for administrative reviews between three EC member States. However, the information given by the United States in relation to the Netherlands is not fully correct. Point 6.2.7 of the Regulation to the General Tax Act of the Netherlands provides that the tax authorities, which include the customs

authorities, will in principle decide on all objections within six weeks. According to the same provision, the legal time limit of one year, which is laid down in a separate act, is only to be applied in exceptional cases, e.g., in the case of mass complaints, or where the complainant does not provide the necessary cooperation.

4.443 Second, the US First Written Submission alleges that the time periods for administrative reviews in the EC member States can vary widely. However, the United States provides no actual evidence for this statement. In particular, it should be kept in mind that the periods referred to by the United States are purely maximum time limits, and do therefore not necessarily provide information on the actual length of administrative reviews.

4.444 The EC has already explained that Article X:3(b) GATT does not impose an obligation of harmonization. Besides, the fact that an EC Member provides a one-year period instead of the three-months period of another Member State does not mean that the former does not guarantee a prompt review.

4.445 Even in the United States, the statutory maximum time-limit for deciding on protests is two years. The United States does not explain why this maximum time limit would be compatible with Article X:3(b) GATT, whereas the shorter periods provided for in certain EC member States would not be. As a further illustration, it is also instructive to consider the practice of the US Court of International Trade. In three recent classification cases, the USCIT invested nearly four years as an average to take a decision.

4.446 These examples illustrate that establishing what is "prompt" and what is no longer "prompt" may not be quite as straightforward as the United States would seem to suggest. Indeed, the actual length for the administrative and judicial review of a customs decisions may depend on a number of factors, not all of which are always fully under the control of the WTO Member concerned. Such factors may include the caseload, the factual and legal complexity of the case, the behaviour of the complainant, the involvement of other parties, as well as questions of administrative and judicial procedure and organization. It is therefore highly difficult to provide abstract rules on the length of administrative and, even more so, judicial procedures, since there may always be exceptional cases where a longer duration is justified by special circumstances of the case.

4.447 For this reason, the EC also submits that whether a WTO Member complies with its obligation under Article X:3(b) GATT cannot be established on the basis of isolated individual cases. Rather, it would have to be established that there is a general pattern of a lack of prompt review in order to consider that the obligation of Article X:3(b) GATT is violated.

E. SECOND WRITTEN SUBMISSION OF THE UNITED STATES

1. Introduction

4.448 The 25 member States of the European Communities do not act as one when it comes to the administration of EC customs law or the review and correction of customs administrative decisions. Even though the EC in this proceeding disputes the US claims, the EC and EC officials have readily acknowledged the underlying problem in statements outside the dispute settlement context.

4.449 Not surprisingly, uniformity is a goal to which the EC aspires. For example, in the Decision adopting the EC's "Customs 2007" program (Exhibit EC-43), the European Parliament and the Council of the European Union called for the continuous adaptation of customs policy "to ensure that national customs administrations operate as efficiently and effectively as would one single administration." However, the system of customs administration and review currently in place not

only falls far short of that goal, it also falls far short of the requirements of GATT 1994 Article X:3, and therefore is in breach of that article.

4.450 Before countering the key themes that have emerged in the EC's response to US claims, it is necessary to discuss two general points that cut across the EC's various arguments. First, the EC repeatedly strikes an alarmist tone in responding to the US arguments. The Panel should regard the EC's prediction of widespread upheaval with a healthy dose of skepticism. Nowhere does the United States argue that Article X:3 compels WTO Members to have identical systems for customs administration and review, nor is that the implication of US arguments.

4.451 Similarly flawed is the proposition that accepting the US arguments will lead to a requirement of harmonization of non-customs-related provisions typically regulated at the regional or local level of government. The EC draws that inference from the fact that the United States calls attention to certain tools of administration of EC customs law – in particular, penalty provisions and audit procedures – which vary dramatically from member State to member State. However, the EC disregards that the US argument is directed at laws and regulations at the sub-federal (i.e. member State) level that are used to verify and enforce compliance with laws and regulations prescribed at the federal (i.e. EC) level. The US argument is not directed at the vast body of laws and regulations at the sub-federal level that have nothing at all to do with verification and enforcement of compliance with other laws and regulations or that concern only verification and enforcement of compliance with other sub-federal laws and regulations.

4.452 Moreover, in suggesting that the logic of the US argument on Article X:3(b) would force every WTO Member to have a single, centralized customs court, the EC again distorts the US position. It is not the US view that Article X:3(b) requires every WTO Member to have a single, centralized customs court. It is the US view that Article X:3(b) requires every WTO Member to have review tribunals or procedures whose "decisions . . . govern the practice of" "the agencies entrusted with administrative enforcement" of its customs laws. A Member may be able to accomplish that where courts with regional jurisdiction review actions of a single customs authority. But, this does not occur where, as in the EC, fragmentation of review is coupled with fragmentation of administration.

4.453 Just as the Panel should not be swayed by the EC's prediction of a parade of horribles should it accept the US arguments, it also should not be swayed by the EC's contention that coming into compliance with its obligations would be difficult. Difficulty of coming into compliance has no bearing on whether the EC is or is not currently in compliance with its obligations under GATT 1994 Article X:3. Relative difficulty of compliance sheds no light on the ordinary meaning of the treaty's terms. Nor is it an element of context or the treaty's object and purpose.

2. GATT 1994 Article X:3 does not contain a relative, Member-specific standard

(a) The obligations in GATT 1994 Article X:3 do not vary according to the particular features of a Member's customs administration system

4.454 The EC incorrectly urges on the Panel a relative view of Article X:3(a). The EC suggests that the obligation of uniform administration may mean different things for different WTO Members, depending on the design of each Member's customs administration system. A relative standard is suggested by, among other statements, the EC's allusion to GATT 1994 Article XXIV:12. That Article simply provides that each WTO Member "shall take such reasonable measures as may be available to it to ensure observance of the provisions of [the GATT 1994] by the regional and local governments and authorities within its territories." It is not applicable here, because the present dispute does not concern "observance of the provisions of [the GATT 1994] by the regional and local

governments and authorities" in the EC. Rather, it concerns observance of the provisions of Article X:3 of the GATT 1994 by the EC itself.

4.455 Moreover, the EC does not formally invoke Article XXIV:12, but it does argue that "any interpretation of Article X:3(a) which would affect the internal distribution of competence is incompatible with Article XXIV:12 GATT." The EC appears to be trying to turn Article XXIV:12 on its head. Paragraph 13 of the *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994* makes it clear that Article XXIV:12 does not excuse or alter a Member's obligations. That paragraph explicitly states that "[e]ach Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994." The EC instead seems to be saying that read in light of Article XXIV:12, Article X:3(a) will mean different things for different Members depending on whether, as a matter of "the internal distribution of competence," a Member has decided that certain tools for the administration of its customs law (such as penalties and audits) are to be prescribed and applied by regional governments.

4.456 This construction of Article X:3(a) as applying differently to different Members has no basis in Article X:3(a) or in Article XXIV:12. Article XXIV:12 does not limit or otherwise qualify the obligation of uniform administration. Indeed, Article XXIV:12 does not qualify the *applicability* of GATT obligations at all. Rather, it is a narrow provision concerning the *implementation* of certain obligations, which must be construed to avoid "imbalances in rights and obligations between unitary and federal States." (GATT Panel Report, *Canada – Gold Coins*, paras. 63-64)

4.457 That GATT 1994 Article XXIV:12 does not support a construction of Article X:3(a) that varies from Member to Member is further demonstrated by contrasting that provision to a provision in another WTO agreement – the *General Agreement on Trade in Services* ("GATS") – that does, in fact, qualify Members' obligations. GATS Article VI:2(a), like GATT 1994 Article X:3(b), requires Members to provide tribunals or procedures for the prompt review of certain administrative decisions. However, that obligation is expressly qualified in the next subparagraph, which states that "subparagraph (a) shall not be construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system." No similar exception appears in GATT 1994 Article X:3.

4.458 Moreover, it should not pass without notice that despite its oblique assertion of "constitutional implications" and its reference to "fundamental principles of the EC legal order," the EC does not formally invoke Article XXIV:12. Had it done so, it would have had the burden to demonstrate that lapses in the uniform administration of EC customs law concern matters "which the central government cannot control under the constitutional distribution of powers." (GATT Panel Report, *US – Beverages*, para. 5.79) Evidently this is a burden that the EC is not prepared to assume.

(b) The United States does not seek the harmonization of WTO Members' customs administration systems

4.459 Finally, an essential aspect of the EC's urging a relative standard for application of Article X:3 is its mischaracterization of US claims as seeking "the harmonization of the systems of customs administration of WTO Members through the DSU." Contrary to the EC's assertion, the United States does not argue that Article X:3 requires each Member to have a single customs agency and customs court. The United States recognizes the diversity of systems of customs administration among WTO Members, which is evidenced in part by the responses to the Panel's Questions No. 10 and 11 to third parties. It is notable, however, that each of these third parties prominently identified the existence of a single, centralized customs agency in explaining how it ensures uniform administration of customs laws across its territory. Just as it would be improper for the United States to argue that Article X:3(a) requires harmonization of Members' systems of customs administrations, it is improper for the EC to argue that its unique status within the WTO as perhaps the only Member

without a single, centralized customs agency makes it subject to a different standard with respect to the obligation of uniform administration.

3. GATT 1994 Article X:3(a) is not a "subsidiary," "minimum standards provision" that is breached only when the non-uniform administration of a Member's customs laws exhibits a discernible pattern

(a) There is no basis for the EC's characterization of GATT 1994 Article X:3(a) as a "subsidiary," "minimum standards provision"

4.460 The EC persists in characterizing Article X:3(a) as "a minimum standards provision" or "a subsidiary provision." This characterization is based entirely on a passing reference by the Appellate Body in its report in *US – Shrimp*. That statement, however, does not support the diminished significance the EC attaches to Article X:3(a).

4.461 The EC misreads the phrase "minimum standards" as used in the *US – Shrimp* report to mean, in effect, "low standards" or "minor standards." In context, however, it is clear that this was not the sense in which the Appellate Body used the term. At issue was a law for which the United States had invoked an exception under Article XX of the GATT. The Appellate Body looked to Article X:3 as a provision establishing requirements analogous to "due process" that would be relevant to analyzing whether the requirements in the chapeau of Article XX had been met. (para. 182) However, the Appellate Body was not probing how strict or lenient the Article X:3 standard is. In fact, it found it to be clear that various aspects of the measure at issue were "contrary to the spirit, if not the letter, of Article X:3 of the GATT 1994." (para. 183)

4.462 Thus, in context, it is evident that in using the phrase "minimum standards," the Appellate Body in *US – Shrimp* was not making a judgment about how high or low the Article X:3 threshold is, only that there is a threshold that must be met.

4.463 In any event, it is not clear how the EC's characterization of Article X:3(a) as a "minimum standards provision" translates into a legal standard that may be applied by the Panel. The EC suggests that in using "minimum standards" and similar phrases, what it really meant was that a breach of the obligation of uniform administration can be established only if non-uniform administration is shown on the basis of "an overall pattern" or "general patterns" of customs administration.

(b) The United States is not required to demonstrate a "pattern" of non-uniform administration to establish that the EC is in breach of its GATT 1994 Article X:3(a) obligation

(i) The "pattern" requirement asserted by the EC has no basis in GATT 1994 Article X:3(a)

4.464 The Appellate Body report in *US – Shrimp* on which the EC relies for its characterization of Article X:3 as a "minimum standards provision" makes no reference at all to a pattern requirement. Indeed, the Appellate Body's finding that transparency and procedural fairness were lacking in administration of the measure at issue there was based on a finding that certain formal safeguards were absent from the system for administration of that measure, rather than a finding of any "pattern" of non-transparency or lack of procedural fairness as a matter of practice. (para. 181) Likewise, the EC provides no mechanism to safeguard against the non-uniform administration of EC customs laws by 25 different member State authorities.

4.465 More fundamentally, there is no basis in the text of Article X:3(a) (or any other WTO provision) for the proposition that a breach is established only when a pattern of non-uniform administration is shown. The one panel to have examined in any depth the obligation of uniform

administration in Article X:3(a) – the *Argentina – Hides and Leather* panel – made no reference to a "pattern" requirement for establishing a breach of that obligation. (paras. 11.80-11.83) That panel found it "obvious . . . that it is meant that Customs laws should not vary, that every exporter and importer should be able to expect treatment of the same kind, in the same manner both over time and in different places and with respect to other persons." (para. 11.83) As the obligation of uniform administration was explained there, it plainly is capable of being breached even if various instances of non-uniform administration do not exhibit a discernible pattern.

(ii) The EC fails to even explain what it believes the United States must establish to meet the so-called "pattern" requirement

4.466 The simple fact that "pattern" would be an element of a breach in addition to "non-uniform" administration demonstrates the fatal flaw in the EC's proposed approach. The text of Article X:3(a) does refer to administering in a "uniform manner." It does not refer to a "pattern of non-uniform" administration.

4.467 Furthermore, the EC's proposed approach does not make sense even divorced from the agreed text of the GATT 1994. The ordinary meaning of the word "pattern" as relevant here is "[a]n arrangement or order discernible in objects, actions, ideas, situations, etc." Central to the concept of a pattern is discernability of arrangement or order. Central to the concept of non-uniformity is the absence of these very qualities. Thus, a pattern of non-uniform administration would appear to refer, paradoxically, to a discernability of arrangement or order in something that lacks a discernability of arrangement or order (i.e. that is non-uniform). Despite this apparent anomaly, the EC does not elaborate on the asserted "pattern" requirement.

4.468 The EC does make oblique references to a "statistically significant sample" of non-uniformity, occurrences of non-uniformity that are "so widespread and frequent as to constitute an overall pattern of non-uniformity," and occurrences of non-uniformity "on a large scale," as if to imply that it equates the existence of a pattern of non-uniform administration with the frequency and scope of non-uniform administration. However, these references shed little light on what the EC believes must be shown in order to satisfy the so-called pattern requirement.

4.469 More importantly, the suggestion that there is some quantitative criterion for assessing uniformity of administration is at odds with the EC's own acknowledgment that "Article X:3(a) GATT does not require uniformity for its own sake, but rather intends to protect the interests of traders." The interests of traders in uniform administration of the customs laws do not depend on the statistical significance of occurrences of non-uniform administration, just as they do not depend on whether instances of non-uniform administration manifest a pattern, in the ordinary sense of that term, or occur in a haphazard way.

(iii) The reference to a "pattern" in the panel report in US – Hot-Rolled Steel is not relevant to the present dispute

4.470 Moreover, the EC's assertion of a pattern requirement relies on a single sentence from the panel report in *US – Hot-Rolled Steel*. The concept of a pattern was relevant to the question at issue in that dispute in a way that it is not relevant in the present dispute.

4.471 In any dispute involving a claim of *non-uniform* administration, it must be asked what *uniform* administration would look like. In the present dispute, which concerns a claim of overall geographical non-uniformity of administration, the actual system in the EC is contrasted to a system in which traders can reasonably expect treatment of the same kind, in the same manner when entering their goods through different EC member States. To the extent that traders do not receive treatment of the same kind, in the same manner when entering goods through different EC member States, that

state of affairs is recognizable as non-uniform administration, whether or not such non-uniform administration constitutes a pattern.

4.472 Conversely, in *US – Hot-Rolled Steel* the relevant claim was that a particular application of US antidumping law to particular producers in a particular investigation amounted to non-uniform administration of US antidumping law. That proposition could be tested only if the panel had an understanding of what uniform administration of US antidumping law looked like.

4.473 The claim at issue in the present dispute is far different. The United States is arguing that the EC's system of customs law administration as a whole does not result in the uniform administration that Article X:3(a) requires. Evidence of a pattern is not necessary to distinguish the EC system of customs law administration as one that does not meet that obligation.

4.474 Curiously, in arguing for a generic "pattern" requirement, the EC cites the panel's summary of the US argument in *US – Hot-Rolled Steel*. But, in that dispute, the United States was not arguing for a generic "pattern" requirement. Quite to the contrary, the United States was arguing for a distinction to be made between the way the panel analyzed Japan's Article X:3 claims and the way panels had analyzed Article X:3 claims in disputes challenging the overall administration of particular measures of general application. The present dispute is one in which the United States challenges the overall administration of EC customs law. In that sense, the US claim is more like the claim at issue in *US – Shrimp* than the claim at issue in *US – Hot-Rolled Steel*.

(c) The EC acknowledges the existence of divergences among member State authorities in the administration of EC customs law

4.475 Finally, it is important to recall that the EC itself acknowledges that divergences in administration of its customs law among the 25 different member State authorities do in fact occur. It submits that when they occur they either are reconciled through various EC instruments and institutions, or they simply are immaterial or not relevant to the EC's Article X:3(a) obligation. But, it acknowledges that divergences occur, and this point should not be lost.

4.476 In addition to general acknowledgments by the EC of divergences in the administration of EC customs law, it has made particular acknowledgments of such divergences in the context of this dispute. Specifically, it has acknowledged divergences in the areas of penalties and audit procedures, approaches to permitting certain customs valuation methods, and administration of the economic conditions test for use of the procedure known as processing under customs control.

4.477 In calling attention to the EC's various acknowledgments of non-uniform administration of EC customs law, the US purpose is to show that the EC's argument concerning the US burden of proof is not written on a blank slate. While the EC charges that the United States has not met its burden, its own statements preclude it from asserting that the 25 separate member State customs authorities administer EC customs law as would a single EC-wide authority.

4. The instruments that the EC holds out as ensuring uniform administration do not do so

4.478 Central to the EC's argument that it complies with its obligation of uniform administration under GATT 1994 Article X:3(a) is its assertion that certain EC instruments prevent divergences among member States from occurring or correct them when they do occur.

(a) Most of the instruments that the EC holds out as securing uniform administration are non-binding, discretionary, or extremely general in nature

4.479 First, the EC's replies to the Panel's questions underscore the non-binding, discretionary, or extremely general nature of the instruments that supposedly secure uniform administration. For example: (a) The EC acknowledges that the Administrative Guidelines on the European Binding Tariff Information (EBTI) System and its Operation "are not legally binding;" (b) When asked about "practical mechanisms" to deal with the situation in which member States disagree on the classification for a particular good, the EC replies that the member States "*should* consult with one another," that if the disagreement persists the Customs Code Committee "*may* examine the question," and that "[i]n practice, the responsible official in the Member State concerned *will* submit the issue to the Commission" (though the EC does not say what rule will compel this submission); (c) When asked how, "in practical terms," the Customs Code Committee reconciles differences in the application of EC rules on customs valuation, the EC explains that "[t]he Committee may issue opinions" which, it later explains, are not legally binding on member States' customs authorities; and (d) When asked to explain "in practical terms" a finding by the ECJ that EC law must be applied uniformly in all member States, the EC states that "this means that they [the authorities of the member States] should interpret and apply Community law in accordance with all available guidance as to its proper meaning."

4.480 Frequently, in referring to instruments that secure uniform administration, the EC falls back on member States' general duty of cooperation under Article 10 of the EC Treaty. That provision sets forth a general obligation of member States under EC law. Tellingly, when the EC refers to it as an instrument to secure uniform administration, it does not refer to any measures making that general obligation operational in the specific area of customs administration.

(b) Binding tariff information does not secure uniform administration

4.481 A more concrete instrument for securing uniform administration that the EC identifies is binding tariff information. The EC's replies to questions confirm that BTI does not secure uniform administration.

(i) The EC system permits "shopping" for favorable BTI from among the 25 member State customs authorities

4.482 One reason that BTI does not secure uniform administration is that traders may engage in BTI shopping. That is, in a system where each of 25 different member State customs authorities is separately responsible for issuing BTI, traders may manipulate the system to obtain the optimal classification for their goods, regardless of whether such classification is uniformly agreed to among all member States. The opportunity for manipulation is facilitated by the fact that under Article 12(2) of the Community Customs Code (Exhibit US-5), BTI is "binding on the customs authorities as against the holder of the information," but it is not binding on the holder.

4.483 In fact, in its explanatory introduction accompanying the draft Modernized Community Customs Code (Exhibit US-32), the EC acknowledges the problem of BTI shopping as a factor detracting from uniform administration. Thus it states that "it is proposed to extend the binding effect of the decision [i.e. the BTI] also to the holder(s) of the decision in order to avoid the system only being used where the applicant is satisfied with the result." (p. 12) Similarly, in its arguments in the *EC – Chicken Cuts* dispute, the EC explained that "it is possible under EC law to withdraw an application for a BTI where the outcome is considered unfavourable by the importer." (Panel Report, para. 7.261)

4.484 At the first Panel meeting, the United States had understood the EC to assert that the situation in which BTI is used only where the applicant is satisfied with the result is a rather rare circumstance. In a question following the first Panel meeting, the United States asked the EC to substantiate that assertion. The EC's terse response was that it "does not have any evidence that would indicate that such situations are frequent," while also in effect conceding that it does not have evidence that such situations are "rare." This response is not surprising. A problem of BTI shopping from the point of view of uniform administration is precisely the fact that it is done in a way that does *not* generate evidence and thus is difficult to identify. Traders hardly can be expected to come forward and openly admit that they are taking advantage of the opportunity to seek optimal classification of their goods from among 25 different customs authorities.

(ii) The power of a member State customs authority to revoke BTI based on nothing more than its own reconsideration of the applicable classification rules, as affirmed in the Timmermans decision, detracts from uniform administration

4.485 The EC's discussion of the *Timmermans* case and the possibility for member State authorities to amend or revoke BTI on their own initiative also reinforces the point that BTI does not secure uniform administration of EC customs law. *Timmermans* was the case in which the Court held that a member State's customs authorities may amend or revoke BTI even where the only basis for amendment or revocation is the authorities' own reconsideration of the applicable classification rules. The Court reached that conclusion despite the Advocate General's observation (Exhibit US-21) that "the possibility of revoking BTI in this way is not readily compatible either with the objective of the uniform application of the customs nomenclature or with the objective of legal certainty pursued by the introduction of BTI." (para. 59)

4.486 In explaining its disagreement with the Advocate General's observation, the EC stated that "[t]he correct classification in the combined nomenclature is not a matter of discretion, and neither is the revocation of BTI which has been found to be incompatible with the combined nomenclature." The EC went on to point out that "the Court made clear that the Customs authorities may revoke the BTI only if it is wrong."

4.487 There is a serious flaw in the EC's logic. It assumes, without any basis, that the correct classification of any given good will always be objectively known to all member State authorities and, therefore, "is not a matter of discretion." Under this assumption, the application of classification rules is always a straightforward, mechanical exercise, and if a member State authority revokes BTI, it must be due to an obvious error in the performance of that exercise, the correction of which necessarily will advance uniformity.

4.488 The EC ignores the fact that applying classification rules to a particular good may require a customs authority to make certain judgments and that, especially in complex cases, these judgments may evolve upon further reflection. It is not the case that the correct classification is a matter of discretion, but the findings leading to determination of the correct classification may entail exercises of discretion, in the sense of judgment. It is incorrect for the EC to assume that the classification of a particular good will always be objectively known and obvious to all 25 customs authorities. In relying on the Court's finding that "the Customs authorities may revoke the BTI only if it is wrong," and asserting that discretion has no part in such action, the EC misunderstands the sense in which discretion is referred to and begs the question of who determines that BTI is wrong. Of course, absent a Commission regulation, it is *the member State authority itself* that determines that the original BTI is wrong. Accordingly, it cannot be assumed that, where a customs authority revokes BTI based on its revised assessment of the good's correct classification, such action will necessarily yield the objectively correct classification and thereby align it with the other member State customs authorities, resulting in uniform administration.

4.489 Where a member State authority initially issues BTI – presumably believing it has applied the classification rules correctly – that BTI is supposed to be binding on other member State authorities with respect to the particular holder of the BTI and the goods concerned. If that authority reconsiders its application of the classification rules – again, presumably believing that its revised application of the classification rules is correct – there is no mechanism to impose its reconsideration on a uniform basis. It is in this sense that the member State autonomy recognized in *Timmermans* detracts from uniform administration.

4.490 A final point that bears recalling with respect to BTI is the very limited sense in which BTI is ostensibly binding at all. As Korea underscores in its Third Party Submission, "The BTI from one member state does not necessarily bind another member state to classify similar or identical goods imported by a person other than the holder of the BTI in the same way, resulting in different classifications and treatment for the same or similar product." The EC itself called attention to this limited applicability of BTI in the *EC – Chicken* dispute.

(c) The availability of review by member State courts as the "normal" means of reconciling divergences in member State administration of EC customs laws does not fulfill the EC's GATT 1994 Article X:3(a) obligation to administer its customs laws in a uniform manner

4.491 The one instrument the EC holds out as securing uniform administration that is binding in character is review of customs administrative decisions by member State courts. The emphasis that the EC puts on this instrument is problematic for at least three reasons. First, as the decision of a member State court is binding only within that member State, an appeal to a member State court will not necessarily engender uniform administration. It is notable that the EC confirms that it has in place no mechanism to notify the courts of other member States of the outcome of review of a customs decision in one member State court. Absent such a mechanism, it is difficult to see how one member State court would be able to take account of relevant decisions of other member State courts, let alone take the step of seeking to bring about uniform administration by affirmatively aligning itself with other member State courts.

4.492 Second, while the pursuit of an appeal before one member State court might or might not lead to uniform administration in the case of a simple divergence between two member States, it does not address the situation of a divergence involving several member States. In that case, the EC evidently would require a trader to pursue an appeal through each of several member State courts in order to achieve uniform administration. This is a particularly onerous burden to impose on traders to achieve a result – uniform administration – that they are entitled to as a matter of procedural fairness in the first instance, pursuant to GATT 1994 Article X:3(a).

4.493 Third, the EC's emphasis on appeals to member State courts in effect stands GATT 1994 Article X:3(a) on its head. It takes a GATT obligation under which traders are *entitled* to certain elements of procedural fairness in customs administration and submits that it is fulfilled largely though a system that imposes a requirement on traders to overcome legal hurdles in order to attain those elements of procedural fairness. This can be seen, for example, in the EC's assertion in its statement at the first Panel meeting that "where an individual trader does not exhaust all the remedies and procedural possibilities afforded to him by the system of a WTO Member, a resulting lack of uniformity cannot be attributed to a failure in that Member's system."

4.494 Article X:3 contains a pair of complementary obligations that afford procedural fairness to traders. Pursuant to Article X:3(a), a trader may expect that, consistent with a Member's WTO obligations, its customs laws will be administered in a uniform, impartial and reasonable manner across the Member's territory. Pursuant to Article X:3(b), the trader may expect, consistent with the Member's WTO obligations, access to an independent forum for the prompt review and correction of particular instances of the uniform administration of the Member's customs laws. Pursuant to that

same provision, the trader may expect not only that the decisions of such independent fora will be implemented by the authorities responsible for customs administration, but also that they will govern the practice of all such authorities, such that the customs laws will continue to be administered in a uniform manner in light of those decisions.

4.495 Yet the EC appears to say that compliance with Article X:3(b) would in and of itself necessarily equate to compliance with Article X:3(a). In other words, the EC's approach would mean that Article X:3(b) would render Article X:3(a) redundant. As the EC describes it, the trader is not necessarily entitled to expect that the EC's customs laws will be uniformly administered in the first instance. Rather, it is through exercise of the right to review that the trader eventually *may* attain uniform administration.

4.496 Moreover, according to the EC's explanation, a trader must be willing not only to pursue a first level of review in order to attain uniform administration, but to "exhaust all the remedies and procedural possibilities afforded to him by the system." Unless a trader is prepared to pursue multiple layers of appeals, possibly in more than one member State, including opportunities for preliminary reference of questions to the ECJ – a process which itself takes an average of 19 to 20 months to complete – then any resulting lack of uniformity in the administration of EC customs law "cannot be attributed to a failure in [the EC's] system."

4.497 The United States submits that in emphasizing appeals to member State courts as a key instrument in securing uniform administration, the EC has taken an obligation of the EC to provide an important element of procedural fairness to traders and shifted the obligation to traders to seek out that element of procedural fairness themselves. This is contrary to the text of GATT 1994 Article X:3 and the widely recognized focus of that Article on the interests of traders.

5. In arguing that matters such as penalties and audit procedures are outside the scope of its obligation under GATT 1994 Article X:3(a), the EC relies on an erroneous understanding of what it means to "administer" customs laws

4.498 There are no EC rules prescribing penalties for violations of EC customs laws. As the EC Commission itself has acknowledged, "Specific offences may be considered in one Member State as a serious criminal act possibly leading to imprisonment, whilst in another Member State the same act may only lead to a small – or even no – fine." (Exhibit US-32, p. 13)

4.499 With respect to audit procedures, there are differences among working practices, including the balance between reliance on examinations of goods at time of importation and post-release audits. As the EC Court of Auditors observed, due to such differences, "'individual customs authorities are reluctant to accept each other's decisions.'" (Exhibit US-14, para. 37) At the conclusion of audits, some member State authorities provide traders what amounts to binding valuation information, which they may invoke in future transactions, while others do not.

4.500 In dismissing the foregoing instances of non-uniform administration, the EC argued that they are outside the scope of its obligation under GATT 1994 Article X:3(a) because penalties and audit procedures are not measures of the type described in Article X:1, and because penalties and audit procedures do not constitute administration of measures that are described in Article X:1. Alternatively, the EC argued that certain EC guidelines cause penalties and audit procedures to be uniform within the meaning of Article X:3(a). Of these arguments, the main emphasis to have emerged is the proposition that differences among member States in penalties and audit procedures do not constitute non-uniform administration of EC measures that indisputably *are* within the scope of Article X:1.

(a) The EC relies on an erroneous understanding of what it means to "administer" customs laws

4.501 In its reply to the Panel's Question No. 93, the EC refers to the definition of the term "administer" and states that, in light of that definition, "Article X:3(a) GATT refers to the execution in concrete cases of the laws, regulations, decisions and rulings of general application referred to in Article X:1 GATT." It then reasons that since a law of a member State, such as a penalty law, "itself needs to be executed or applied," "it cannot be said that such a law 'executes' or 'applies' another." This reasoning is flawed for several reasons.

4.502 First and fundamentally, the EC relies on an exceedingly narrow, erroneous definition of the term "administer." It begins correctly by referring to the dictionary definition of "administer" as "execute." But, it then purports to paraphrase the definition and in so doing introduces a concept from outside the dictionary definition and relies heavily on that concept in its argument. Specifically, it asserts that "in Article X:3(a) GATT, to 'administer' means to execute the general laws and regulations, i.e. to apply them *in concrete cases*." Thus the EC argues that only when a member State authority applies EC customs laws "in concrete cases" is it administering those laws, and only divergences in the application of EC customs laws "in concrete cases" may constitute non-uniform administration. Conversely, according to the EC's reasoning, the mere employment of dramatically different tools by different member State customs authorities for giving effect to EC customs laws does *not* constitute non-uniform administration.

4.503 Of course, the concept of "concrete cases" appears nowhere in the definition of "administer" as quoted by the EC itself. The United States does not dispute that the application of laws and regulations in concrete cases is an action encompassed by the term "administer." However, the United States disputes the EC's suggestion that the term "administer" is *limited* to application in concrete cases.

4.504 In fact, the absence of any such limiting concept is evident from a closer examination of the term "administer." The EC correctly quotes the dictionary definition of "administer" as "execute." But, it does not probe further to define "execute." In fact, the ordinary meaning of "execute" as relevant here is "[c]arry out, put into effect." The question, then, is whether audit procedures and penalty provisions of different member States put EC customs laws into effect, or whether it is only the application of those laws by customs authorities in concrete cases that puts them into effect. The answer is that audit procedures and penalty provisions put EC customs laws into effect by verifying and enforcing compliance with those laws.

(b) Penalties and audit procedures play a critical role in carrying out EC customs laws

4.505 The administration of EC customs laws depends in large part on the actions of traders themselves. It is traders who make who make declarations and provide the customs authorities information concerning classification and valuation of goods. It would be impossible for the authorities to thoroughly inspect every shipment or verify the contents of every declaration before clearance. It is for this reason that tools for verifying and enforcing compliance with the customs laws are critical to "carrying out" or "putting into effect" those laws.

4.506 Given the critical role that audits and penalties play in giving effect to EC customs laws, it is somewhat surprising that the EC asserts, for example, that "provisions which establish the penalty for a violation of customs laws are not themselves related to the administration of customs laws." Indeed, in other contexts (e.g., Exhibit EC-41, p. 1) the EC has acknowledged the critical relationship between penalties and the administration of customs laws.

4.507 The EC's position with respect to audits is equally puzzling. In its First Written Submission, the EC asserted that audits, like penalties, "are not part of customs procedures, and therefore do not

concern the administration of customs laws as such." In its response to the Panel's Question No. 64(e), the EC explained that it does not consider audits to be customs procedures "[b]ecause they are not one of the procedures referred to in Article 3(16) CCC." However, the specific sense in which the EC uses the term "customs procedure" for purposes of the CCC has absolutely no bearing on whether audits are customs procedures for administering the CCC. Indeed, the EC so acknowledged in response to the Panel's Question No. 64(c).

4.508 In other contexts, the EC has acknowledged that audits are tools for administering EC customs laws. For example, the Customs Audit Guide contained in Exhibit EC-90 refers to CCC Articles 13 to 16 as "a legal basis for the undertaking of audits." (A framework for post clearance and audit based controls, p. 4) CCC Article 13, in turn, states that member State customs authorities may "carry out all the controls they deem necessary to ensure that customs legislation is correctly applied."

(c) Member States' penalties and audit procedures are properly characterized as tools for the administration of EC customs laws

4.509 The EC contends that, in describing member States' disparate penalty and audit provisions as tools of the administration of EC customs law which constitute the non-uniform administration of those laws, "the US is undermining the clear distinction between the administration of laws and the laws themselves." In the EC's view, penalty and audit provisions are themselves laws that are administered and therefore cannot be described as tools for administering other laws (in this case, EC customs laws).

(i) A law may be a tool for administering other laws

4.510 The flaw in the EC's reasoning is its assumption that a law can be viewed only one way, as the thing that is administered and not also as a tool for administering something else. The United States does not disagree with the proposition that a law providing for penalties or audit procedures may be considered as something to be administered. But that does not exclude the possibility of considering the same law as a tool for administering other laws, for example, by putting those laws into effect through verification and enforcement. The EC itself recognized this precise point in *Argentina – Hides and Leather*, where it challenged the same Argentinian measure from the perspective of its substance *and* from the perspective of its character as a tool for administering other laws. (Panel Report, para. 4.203)

(ii) Basing a claim of non-uniform administration on differences among member State laws that are tools for administering the EC's customs laws is not inconsistent with the Appellate Body's finding that a GATT 1994 Article X:3(a) claim must concern the administration of customs laws rather than their substance

4.511 The distinction between administration and substance that the Appellate Body referred to in *EC – Bananas III* is not to the contrary. The Appellate Body there did not have occasion to consider whether the different licensing procedures at issue represented a non-uniformity in the administration of some other law. That question simply was not at issue there, as it is here.

4.512 By contrast, the panel in *Argentina – Hides and Leather* did have occasion to consider whether a regulation could be challenged under Article X:3(a) as a tool for administering Argentina's customs laws in a manner inconsistent with that provision. The EC in that dispute challenged a measure of Argentina (Resolution 2235) as a tool for administering Argentina's customs laws (set forth in other statutes and resolutions) in a manner inconsistent with Article X:3(a). Argentina defended, just as the EC does here, by arguing that the complaint was about the substance of a measure rather than its administration, and therefore was outside the scope of Article X:3(a) under the Appellate Body's reasoning in *EC – Bananas III*. The panel rejected that argument, noting that "[t]he

relevant question is whether the substance of such a measure is administrative in nature or, instead, involves substantive issues more properly dealt with under other provisions of the GATT 1994." (para. 11.70) In finding that the measure in question was administrative in nature the panel observed, "Resolution 2235 does not create the classification requirements; it does not provide for export refunds; it does not impose export duties. It merely provides for a certain manner of applying those substantive rules." (para. 11.72)

4.513 Following the panel's reasoning in *Argentina – Hides and Leather*, the fact that tools for administration of EC customs laws themselves take the form of laws does not mean that the United States has ignored the difference between substance and administration highlighted in *EC – Bananas III*. Like Resolution 2235 in *Argentina – Hides and Leather*, member States' penalty and audit provisions do not prescribe rules on classification and valuation, but they do provide means of "putting into effect" laws that do prescribe rules on classification and valuation.

(iii) The findings of the panel in Argentina – Hides and Leather are directly relevant to the present dispute

4.514 The EC disputes the relevance of the panel report in *Argentina – Hides and Leather*. First, it asserts that a distinguishing feature of the measure challenged in *Argentina – Hides and Leather* was that it mandated administration in a manner inconsistent with Article X:3(a). Second, it suggests that unlike the measure challenged in *Argentina – Hides and Leather*, penalty provisions are not recognizable as being administrative in nature. Neither of these arguments is well founded.

4.515 The question of whether the measure at issue in *Argentina – Hides and Leather* mandated administrative behavior inconsistent with GATT 1994 Article X:3(a) or merely permitted it was entirely irrelevant to the panel's findings in that dispute. The EC's suggestion that the panel report in *Argentina – Hides and Leather* is irrelevant because unlike the measure at issue there penalty provisions are not readily distinguishable as "administrative" or "substantive" is addressed in the US response to the Panel's Question No. 90.

4.516 Of course, the relevant question for Article X:3(a) purposes is not whether a measure is *either* "administrative" *or* "substantive" in character. A measure may have both qualities depending on the perspective from which it is examined, as the EC argued in *Argentina – Hides and Leather*. Distinguishing a measure as "administrative" in character, as the panel in that dispute explained, is a matter of determining whether it prescribes the means for "executing" or "putting into effect" substantive rules on classification and valuation, for example, which themselves are set forth in other measures. Like the measure at issue in *Argentina – Hides and Leather*, EC member State penalty and audit provisions do not prescribe substantive rules on classification and valuation, but they do put such substantive rules as prescribed in EC regulations into effect.

4.517 Since, in the EC's view, a Member administers its customs laws only when it applies those laws "in concrete cases," the EC cannot conceive of the possibility that non-uniform administration of customs laws may take the form of different audit procedures and penalty provisions in different regions of the Member's territory. The EC's understanding ignores the ordinary meaning of "administer" as "execute," which in turn means "put into effect."

4.518 The EC recognizes that the focus of Article X:3 is on protecting the interests of traders. From traders' point of view, however, the liability they may face for misclassification of goods or technical errors in clearing goods through customs, the likelihood of being audited, and the possibility that at the conclusion of an audit the customs authorities may issue binding guidance that the traders may rely upon in the future all are considerations that can be as important as the consideration of how the customs authorities will classify and value their goods.

(d) Reference to "penalties" for "minor breaches" in GATT 1994 Article VIII:3 does not put penalties outside the scope of Article X:3(a)

4.519 The EC makes the additional argument that the mention of "penalties for minor breaches of customs regulations or procedural requirements" in GATT 1994 Article VIII:3 is evidence that penalties are not addressed by GATT 1994 Article X. But this argument is a non-sequitur. The fact that Article VIII:3 sets substantive parameters for penalties for certain types of breaches of customs regulations or procedural requirements – i.e. "minor breaches" – has nothing to do with whether penalties may be considered to be tools for administering a Member's customs laws.

4.520 Carried to its logical extension, the EC's reasoning would lead to manifestly absurd results. For example, it would mean that a Member could discriminate among other Members by applying penalties to customs breaches involving products of some Members but not applying penalties to customs breaches involving like products of other Members. This would not be a breach of GATT 1994 Article I, according to the EC's logic, because that article, like Article X:1, refers only to "charges" and not expressly to "penalties."

(e) The US argument does not imply a requirement of harmonization of all sub-federal laws of WTO Members that have any similarity in subject matter to federal laws

4.521 Equally unavailing is the EC's argument that a finding that differences in member States' penalty and audit provisions constitutes non-uniform administration of EC customs laws would have dire implications for all WTO Members in a variety of regulatory areas. This argument is based on the erroneous premise that under the US argument any sub-federal law that had any similarity in subject matter with a federal law (i.e. a "link") "could be said to constitute 'administration' of the law." However, it is not the mere existence of a "link" between member States' penalty and audit provisions and EC customs laws that makes the former administrative in nature. Rather, it is the fact that the very purpose of member States' penalty and audit provisions is to "execute" or "put into effect" EC customs laws that gives them that quality.

6. The decisions of review tribunals in the EC do not govern the practice of "the agencies" entrusted with administrative enforcement of EC customs laws, contrary to GATT 1994 Article X:3(b)

4.522 The EC fails to comply with Article X:3(b) because the one review tribunal that it provides whose decisions have EC-wide effect is the ECJ, and review by the ECJ does not meet the requirement of promptness. Review by member State courts does not fulfill the EC's obligation, as the decisions of each such court apply only within its respective member State. The decisions of any given member State's courts do not "govern the practice of" "the agencies entrusted with administrative enforcement" of customs laws in the EC as a whole. Further, Article X:3(b) must be read in light of the obligation of uniform administration in Article X:3(a); accordingly, where review leads to decisions whose effect is limited to particular regions within a Member's territory such review is not consistent with Article X:3(b).

(a) The decisions of the tribunals or procedures a WTO Member provides pursuant to GATT 1994 Article X:3(b) must govern the practice of "the agencies" entrusted with administrative enforcement of the Member's customs laws

4.523 The first sentence of Article X:3(b) requires Members to provide tribunals or procedures for the prompt review and correction of administrative action relating to customs matters. The second sentence requires that such tribunals or procedures "be independent of the agencies entrusted with administrative enforcement" *and* that their decisions "be implemented by, and . . . govern the practice of, such agencies." It is the requirement that the decisions of review tribunals or procedures govern

the practice of the agencies entrusted with administrative enforcement that makes clear that the EC does not fulfill its obligation under Article X:3(b), since each of the multiple review tribunals it provides renders decisions that govern the practice only of a subset of agencies entrusted with administrative enforcement within a particular region in the EC.

4.524 The EC states that "Article X:3(b) GATT, unlike Article X:3(a) GATT, is not concerned with questions of uniformity, but exclusively with the prompt review of customs decisions." But if this were so, there would be no need for Article X:3(b) to specify that the decisions of review tribunals must "govern the practice of" the agencies entrusted with administrative enforcement. It would suffice simply to require the provision of tribunals or procedures whose decisions are "implemented by" the agencies entrusted with administrative enforcement.

4.525 The ordinary meaning of the term "govern" as relevant here is "[c]ontrol, influence, regulate, or determine" or "[c]onstitute a law, rule, standard, or principle for." Accordingly, the distinct "govern the practice" requirement in Article X:3(b) looks beyond the simple implementation of a decision in the case at hand and requires that the decision "control, influence, regulate or determine" the practice of or "constitute a law, rule, standard, or principle for" "the agencies entrusted with administrative enforcement" of the customs laws.

4.526 Moreover, it is "*the* agencies entrusted with administrative enforcement" whose practice is required to be governed by the decisions of review tribunals or procedures. That requirement is not fulfilled where the decisions of review tribunals or procedures govern the practice of only *some of* the agencies entrusted with administrative enforcement.

4.527 This understanding is reinforced by the context provided by Article X:3(a). The EC concedes that Articles X:3(a) and X:3(b) must be interpreted "in a harmonious way." Where the decisions of review tribunals govern the practice of the agencies entrusted with administrative enforcement, they become part of the agencies' administration of the Member's customs laws in future cases. Since the Member's customs laws must be administered in a uniform manner, the decisions of review tribunals must govern the practice of "the agencies" throughout its territory.

4.528 Australia put the point succinctly in its statement at the first Panel meeting when it observed that "the decisions and rulings of the review bodies should be applied consistently and be available equally throughout the territory of the WTO member." That is not the case in the EC. Not only are the decisions of individual member State courts applicable only within their respective member States, and therefore not applied consistently throughout the EC's territory, but such decisions are not "available equally throughout the territory" of the EC. As the EC explained in response to the Panel's Question No. 72, there is no mechanism to ensure that member State courts are kept apprised of the customs review decisions of other member State courts.

4.529 The only review tribunal decisions that govern the practice of "the agencies" entrusted with administrative enforcement of EC customs laws throughout the EC's territory are decisions of the ECJ. However, review by the ECJ can hardly be considered to satisfy the Article X:3(b) requirement of prompt review. The ordinary way for questions to be put before the ECJ is through the preliminary reference procedure, in which it may take 19 to 20 months for the ECJ to render a decision (and that is only an average).

(b) The US argument does not imply a requirement for every WTO Member to establish a single, centralized customs court

4.530 The EC has indicated that the EC is not the only WTO Member to provide for review of customs administrative actions on a regional basis and suggested that the US argument would imply an obligation for each WTO Member to establish a single review tribunal with jurisdiction throughout

its territory. However, whether or not there are other Members that provide for review of customs administrative action on a regional basis, the EC is the only WTO Member of which the United States is aware that has a combination of geographically fragmented customs administration *and* geographically fragmented review.

4.531 The United States does not argue that Article X:3(b) requires every WTO Member to have a single, centralized tribunal for the prompt review and correction of customs administrative actions. What the United States does argue is that Article X:3(b) requires that the decisions of the tribunals that a Member provides for the prompt review and correction of customs administrative actions govern the practice of the agencies entrusted with administrative enforcement of the customs laws *throughout the Member's territory*.

4.532 Where a Member has a single, centralized agency entrusted with the enforcement of its customs laws, it is conceivable that it may fulfill its obligation under Article X:3(b) even where it provides for review and correction through multiple tribunals each of whose jurisdiction is regionally limited. In that case, where the court for a given region renders a decision, the agency should be able both to implement that decision in the region and conform its practice throughout its territory. In this way, the Member's administration of its customs laws would be governed by that decision, and its customs law administration would be uniform. If the decision of a court in one region conflicts with a decision of a court in another region, the agency should be able to resolve the conflict by appealing one or the other decision to a court or tribunal of superior jurisdiction, a possibility contemplated by the second sentence of Article X:3(b).

4.533 Further evidence for the proposition that the review and correction provided for pursuant to Article X:3(b) must result in decisions that govern the administration of a Member's customs laws throughout its territory is the *proviso* in the second sentence, which states that "*the central administration of such agency* may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts." (Emphasis added.) The *proviso* contemplates "the central administration" challenging a tribunal's decision collaterally – i.e. "in another proceeding" – when the central administration determines that "the decision is inconsistent with established principles of law or the actual facts." But, that possibility makes sense only if the decision in the original proceeding would otherwise have effect outside of that proceeding. If the decision's effects were confined to the proceeding in which it was rendered, there would be no need or basis for a collateral challenge.

4.534 As the possibility of collateral challenge to tribunals' decisions implies that the effects of such decisions are not confined to the particular proceedings in which they are rendered, there is no basis for suggesting that Article X:3(b) contemplates these effects having a scope that is narrower than the Member's entire territory. Not only is there no basis for such a suggestion, but the reference to "the central administration" of the agency entrusted with administrative enforcement itself supports the proposition that the effects of tribunals' decisions are contemplated as having a scope that covers the Member's entire territory.

4.535 In sum, the combination of 25 separate EC member State customs authorities and review tribunals that are distinct to each member State results in review tribunal decisions that do not govern the practice of "*the* agencies entrusted with administrative enforcement" of the EC's customs laws. For this reason, the provision of review and correction of member State customs administrative decisions by member State tribunals fails to meet the EC's obligation under Article X:3(b).

F. SECOND WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

1. The measures at issue in the present dispute

4.536 The US claim under Article X:3(a) GATT relates to "the manner in which the EC administers" its customs laws. As regards the US claim under Article X:3(b) GATT, the EC understands that the measure at issue is the alleged failure of the EC to provide for tribunals or procedures for the prompt review and correction of customs decisions.

4.537 However, in relation to the claim under Article X:3(a) GATT, the United States goes on to add that "the specific measure at issue" within the meaning of Article 6.2 DSU "are the laws regulations, decisions and rulings that make up EC customs law", i.e. the measures listed in the first paragraph of the US Panel request.

4.538 The EC does not agree that the measure listed in the first paragraph of the US panel request, which include notably the Community Customs Code, the Implementing Regulation, and the Community Customs Tariff, are the "measures at issue" in the present dispute within the meaning of Article 6.2 DSU. It follows clearly from the first sentence of the first paragraph of the US Panel request that the US claim relates to the manner in which the EC *administers* the measures listed, not to the measures themselves. The enumeration at the end of the first paragraph of the US request serves merely the purpose of identifying the laws which the EC allegedly fails to administer in a non-uniform manner. However, this does not mean that these laws themselves become measures at issue in the present dispute.

4.539 The EC also does not share the view of the United States that administration of laws "may not itself be a measure". As the Appellate Body has confirmed in *US – Corrosion-Resistant Steel Sunset Review*, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of WTO dispute settlement. This also applies to the administration of laws as referred to in Article X:3(a) GATT.

4.540 Close attention to what is the measure at issue in the present dispute is particularly necessary given the specific features of Article X:3(a) GATT as the legal basis of the US claim. As the Appellate Body has confirmed in *EC – Bananas III*, Article X:3(a) GATT relates only to the administration of the laws and regulations referred to in Article X:1 GATT, not to those laws and regulations themselves.

4.541 The US suggestion that administration may not be a measure would lead to the absurd result that non-compliance with Article X:3(a) GATT could never be challenged under the DSU.

4.542 At the same time, the EC is concerned that the United States is trying to blur the distinction between the administration of measures, and the measures themselves, and thereby effectively attempts to enlarge the scope of the present dispute. For these reasons, the Panel should hold that the acts of general application listed in the US panel request are not measures at issue in the present dispute.

4.543 On a further point, the United States has refused to identify the specific aspects of EC customs administration that it was challenging. It has merely stated that it challenged the administration of the listed measures, which it described as "capturing the universe of measures that constitute EC customs law".

4.544 This does not constitute a sufficiently precise description of the measure at issue in the present dispute. EC customs legislation is a large and complex body of law. It would therefore not be sufficient to describe the measure at issue in the present as the "administration of EC customs law".

Rather, the measure at issue in the present dispute is the administration of EC customs law in those respects referred to in the US Panel request, as further refined in the US First Written Submission, notably tariff classification, customs valuation, processing under customs control, local clearance procedure, and penalties. This is also confirmed by the title of the present dispute, which is "Selected Customs Matters", and thus cannot include simply all customs matters.

4.545 The United States attempts to keep the scope of the present panel proceedings vague are also illustrated by the US's refusal to provide an exhaustive list of the customs procedures in respect of which it alleges a lack of uniform administration, and instead claims that this lack is "not confined to any particular customs rule or group of rules". In this respect, the EC would remark that it cannot be expected to defend itself against nebulous charges of non-uniform administration in areas that the United States has not identified in its Panel request and its First Written Submission. Accordingly, the US attempt to keep the scope of the present proceedings vague should be rejected.

2. The US claims under Article X:3(a) GATT

(a) The requirements of Article X:3(a) GATT

(i) Article X:3(a) GATT concerns the administration of customs laws, not the customs laws themselves

4.546 The EC has explained, with reference to the relevant case law of the Appellate Body, that Article X:3(a) GATT does not concern the laws and regulations themselves, but only their *administration*. This means that Article X:3(a) GATT does not require a harmonization of laws within a Member where, for instance, different legal regimes are applicable within different parts of the territory of a WTO Member. This is relevant in all areas where matters at issue in the present dispute are governed by laws of the EC member States, which is the case in particular with respect to penalties for vi c olations of customs law.

4.547 The United States contests this interpretation by arguing that "customs laws may be administered through instruments which are themselves laws".

4.548 The EC considers this interpretation to be manifestly incompatible with the wording of Article X:3(a) GATT, which refers only to the *administration* of the laws, regulations, decisions and rulings of the kind referred to in Article X:1(a) GATT. Article X:1 GATT specifies that these measures are all measures of *general application*. The administration of such measures is thus their application in concrete cases. Laws, which are of general application, can therefore not at the same time be regarded as measures of administration. The US argument would also be incompatible with the clear distinction made by the Appellate Body in *EC – Bananas III* between the administration of laws and the laws themselves.

4.549 The United States tries to escape from this conclusion by drawing a distinction between "substantive" and "administrative" laws, for which it claims as support the Panel Report in *Argentina – Hides and Leather*. According to the United States, only laws which are of an administrative nature must be administered in a uniform manner, whereas no such obligation would exist with respect to laws which are of a "substantive" character.

4.550 Apart from the fact that the United States furnishes no explanation of what it understands by "substantive" and what by "administrative" laws, the EC does not believe this interpretation to be correct. The Panel Report in *Argentina – Hides and Leather* does not provide any support for the US interpretation. The obligation of uniform application applies to all the measures of the kind referred to in Article X:1 GATT, regardless of whether they are "substantive" or "administrative" in nature.

The real distinction for Article X:3(a) GATT is thus not between substantive and administrative measures, but between administration and the measures to be administered.

4.551 This matter is of great importance for all WTO Members where certain matters covered by Article X:3(a) GATT may be regulated at the sub-federal level. This is even more important since Article X:3(a) GATT does not only apply to the administration of customs laws, but also to laws regarding the internal taxation and internal sale of products. In many WTO Members, including the United States, such matters are frequently governed by sub-federal laws, which may result in the existence of divergent rules across the territory of such WTO Members. If the US arguments were accepted, differences in sub-federal legislation would have to be regarded as incompatible with Article X:3(a) GATT. This would upset the federal balance in numerous WTO Members, and can therefore not be a reasonable interpretation of Article X:3(a) GATT. This would be incompatible also with the findings of the GATT Panel in *Canada – Gold Coins*, which held that the GATT respects the internal distribution of competences within each WTO Member.

4.552 The United States has wrongly argued that the EC interpretation would put "all laws and regulations that are instruments of customs administration beyond the reach of the disciplines of Articles X:3(a) GATT".

4.553 First of all, the EC argument applies only to those matters which are the subject matter of sub-federal legislation, which is in the EC the case notably for penalties. In the EC, as in other WTO members, most areas of customs law are governed by laws at the federal level.

4.554 Moreover, even where a law exists at the sub-federal level, this does not mean it is "beyond the reach" of Article X:3(a) GATT. On the contrary, Article X:3(a) GATT requires the uniform administration of all laws, including those which might exist in a WTO Member at the sub-federal level, within the area in which they apply.

4.555 Finally, the United States looses sight of the actual object and purpose of Article X:3(a) GATT. The purpose of this provision to ensure a certain minimum level of predictability and security as regards the administration of the covered laws and regulation to WTO Members and traders. This objective is entirely respected if laws which apply at a sub-federal level within a WTO Member are applied in a uniform manner within the territory in which they apply. It is not compatible with this objective and purpose to transform Article X:3(a) GATT into a provision which requires legislative changes, and notably a harmonization of sub-federal within a WTO Member.

(ii) Article X:3(a) GATT does not prescribe the ways in which WTO Members must administer their customs laws

4.556 Article X:3(a) GATT contains an obligation to administer customs laws in a uniform manner, but does not prescribe the specific way in which WTO Members should administer their customs laws.

4.557 At the level of principle, the United States does not appear to contest this point. In fact, it states on a number of occasions that "prescribing the method for the EC to come into compliance with Article X:3(a) GATT is not necessary to resolve this dispute".

4.558 However, the reality of the US claims is rather different. In particular, the United States is effectively requiring the EC to establish a customs agency, which in addition should have competences to issue advance rulings for a number of matters. A more prescriptive application of Article X:3(a) GATT is hardly imaginable.

4.559 It is also interesting to note that the United States has so far not provided any explanation of how its claims relate to its own proposal made in the context of the Doha Round Trade Facilitation Negotiations, which in particular foresee the creation of an obligation to provide for advance rulings on tariff classification and valuation matters. The United States has also not contested that one of its essential motives behind the present case is to influence the Doha Trade Facilitation Negotiations.

4.560 The EC therefore maintains its view that the United States is seeking an application of Article X:3(a) GATT which would be highly prescriptive in character, and effectively transform Article X:3(a) GATT into a basis for the harmonization of customs laws and practices along the US model. The EC submits that such an interpretation should be rejected.

(iii) Article X:3(a) GATT lays down minimum standards

4.561 The United States has attempted to deny the importance of the statement of the Appellate Body in *US – Shrimp*, and criticized in particular that the Appellate Body "did not elaborate on what it meant by minimum standards". However, this does not change the fact that the Appellate Body qualified Article X:3 GATT as a provision which lays down certain minimum standards of transparency and procedural fairness. While this does not replace the need to interpret the actual terms of Article X:3(a) GATT, it does shed some light on the limited objective underlying this provision, which is directly opposed to the highly ambitious interpretation advocated by the United States.

4.562 In its First Written Submission, the EC has also explained, with reference to the GATT Panel Report in *EEC – Dessert Apples*, that minor administrative differences in treatment cannot be regarded as implying a violation of Article X:3(a) GATT. This view has also been shared by Japan. In its response to a question by the Panel, the EC has explained that this means that it is for the United States, as the complaining party, to show that variations of administrative practice, even where they existed, have a significant impact on traders.

4.563 The United States has tried to sweep this case law aside by claiming that it has "provided evidence of a system that engenders and fails to cure myriad divergences of administration in matters that go to the core of customs administration and affect traders liability for customs duty, as well as other aspects of their operations". The EC does not contest, for instance, that where the liability for customs duty is affected, this is significant for the competitive situation of a trader. However, as the EC has already remarked, for some of the other alleged differences, for instance as regards the local clearance procedure or valuation audits, the United States has so far provided no explanation as to why such differences, even if they existed, would be significant for traders.

(iv) The meaning of "uniform administration"

4.564 As the Panel in *US – Hot Rolled Steel* has held, uniformity can be assessed only on the basis of an overall pattern of customs administration. Only if, on the basis of such general patterns, a WTO Member's administration of its customs laws can be shown to be non-uniform, is the standard of Article X:3(a) GATT violated. Very similar views have also been expressed by certain of the third parties in the present case, namely Australia and Japan.

4.565 The United States has tried to distinguish the present case from *US – Hot Rolled Steel* and *EC – Poultry* by arguing that these cases were not concerned with "geographical uniformity". However, the US fails to explain why "geographical uniformity" should be treated any differently from other kinds of uniformity, e.g., uniformity across time. Nor is it clear why a different standard would apply to the requirement of uniform administration on the one hand, and the requirement of impartial and reasonable administration, on the other. The EC would also like to recall that it has

been the United States itself, which – in cases such as *US – Hot Rolled Steel* – has argued against judging compliance with Article X:3(a) GATT only on the basis of individual cases.

4.566 In response to a question from the Panel, the United States has further elaborated that in the present case, "the question is not whether a particular administrative authority is applying a particular law in a uniform manner", but "whether different authorities across the territory of a WTO Member [...] are applying various laws uniformly". Apparently, the United States is thus suggesting that a stricter standard should apply to WTO Members with a decentralized system of customs administration compared to WTO Members with a centralized customs administration. The EC sees no basis for such double standards, which should therefore be rejected.

4.567 Finally, contrary to what the US claims, the EC has never suggested that the pattern of non-uniformity needed to be "neat". If instances of non-uniformity in the system of a WTO Member are so widespread and frequent as to have a significant impact on the administration of that Member's system, then this will amount to a pattern of non-uniform administration. There is no need for them to be arranged in a particular pattern. Therefore, the US argument that the standard set out by the Panel in *US – Hot Rolled Steel* would make it impossible to challenge an overall absence of uniformity is simply incorrect.

(b) The burden of proof

4.568 The burden of proof rests on the United States as the complainant in the present case. It is for the United States to bring forward sufficient evidence to establish that there is a pattern of non-uniform administration in respect of the aspects of EC customs law raised by the United States.

4.569 In its First Written Submission, the United States failed to bring forward any evidence to this effect. It limited itself to raising a small number of cases on issues of tariff classification and customs valuation. A limited number of cases in a particular area are insufficient for assessing the overall administration of the EC's system. Moreover, the cases raised by the United States in fact do not constitute examples of lack of uniformity in the EC's system.

4.570 The Panel asked the United States a number of questions aimed at obtaining from the United States evidence concerning the actual incidence of non-uniform administration in the areas of EC customs law raised by the United States.

4.571 In its responses, the United States does not furnish a single new piece of evidence of non-uniformity in the EC's system. Instead, it responds that its claim "does not turn on the statistical frequency of non-uniform administration". Moreover, it claims "that it is the EC, rather than the United States, that is likely to have the information sought in the question", and requests the Panel to exercise its authority under Article 13 of the DSU to seek relevant information from the EC. For instance, the United States suggests that the EC should be requested to provide "a statistically significant sample of BTI and other classification decisions from various member States (including explanations of the bases for those decisions) in order to determine the frequency of divergent administration". As another example, the United States suggests that the "Panel might seek from the EC information of the type that enabled the EC's Court of Auditors to make the findings contained in its report on customs valuation".

4.572 These responses must be regarded as transparent attempts of the United States to rid itself of the burden of proof, and should be rejected as such. It is not credible for the United States to claim, on the one hand, that there is a widespread pattern of non-uniform administration in the EC, and then to claim that it does not have any evidence to support this claim.

4.573 Instead, the United States wishes to pass the burden of proof to the EC by requesting that it should be the EC which provides the information requested. With this request, the United States is essentially suggesting that the EC should proof its own innocence. This request is not only completely without basis in WTO law, it also amounts to a logical impossibility. Whereas it should be possible for the United States to provide evidence of instances of non-uniform administration, if such instances in fact existed, it is logically impossible for the EC to proof that such instances never occur.

4.574 For this reason, it would be entirely impractical for the Panel to request the EC, as suggested by the United States, to provide "a statistically significant sample of BTI and other classification decisions from various member States (including explanations of the bases for those decisions) in order to determine the frequency of divergent administration". Similarly, it is impractical for the United States to suggest that the "Panel might seek from the EC information of the type that enabled the EC's Court of Auditors to make the findings contained in its report on customs valuation". The Report of the Court of Auditors was based on audit visits that took place on the premises of the Commission and the customs administrations of 12 EC member States in 1999-2000. The US suggestion therefore amounts in essence to requesting the EC to conduct a new audit of customs valuation. This is not a reasonable request to make of a defending party in the context of proceedings under the DSU.

4.575 Moreover, the request made by the United States goes considerably beyond the functions of a Panel under Articles 13 of the DSU. Whereas the Appellate Body has confirmed that Panel's have a certain investigative authority, this authority also has its limits, which were clearly spelt out by the Appellate Body in *Japan – Agricultural Products II*. In the present case, the United States is asking the Panel to do precisely what the Appellate Body said it should not. Having failed to make its own *prima facie* case, the United States is asking the Panel to seek the relevant information from the EC. In this way, the Panel would relieve the United States of its original burden of proof, and make the case for the complainant.

4.576 The United States seems to believe that it can establish a lack of uniformity by making broad allegations of absence of uniformity in particular areas. However, the administration of customs law in areas such as tariff classification or customs valuation depends on the particular circumstances of each case. Accordingly, whether administration is uniform or not cannot be established without knowledge of the "particular details of each case", and it is the responsibility of the United States as the complainant to provide these details.

4.577 Finally, while the EC can certainly not be expected to prove that it administers its laws in a uniform manner, it would like to point out that certain elements of the context of the present case provide an indication that the factual allegations made by the United States are incorrect. The EC has already, in its First Written Submission, pointed out the almost complete lack of reaction by US industry and traders to the request by USTR for input to the present case.

4.578 A similarly interesting indication is provided by the reactions of other WTO Members, and notably the third parties, to the present dispute. Of the nine WTO Members which have chosen to become a party to the present dispute, not one has pointed to the existence of any examples of lack of uniformity. The only third party which claimed that a lack of uniformity in the EC's practice existed is Korea. However, Korea refused to do so, invoking "the business confidential nature of the underlying business transactions". The EC considers that if Korea had indeed information which might be helpful for the EC to ensure a uniform administration of its customs laws, Korea should have shared this information in the first place with the EC. This would also be in accordance with the customs cooperation agreement between the EC and Korea, which provides for obligations of mutual information and assistance**.**

4.579 Finally, the United States keeps on referring to what it calls "blunt acknowledgements of how the EC system operates" by certain EC officials of institutions, and claims that the "cumulative message is that there is a problem of divergent administration". The United States is referring here to a handful of dispersed statements by EC officials and institutions, which are taken out of context, and are of no relevance for the present case. Most of these statements should be seen as a normal reflection of the process of self-monitoring and improvement which is necessary for any system of customs administration in the context of a rapidly evolving world. If every critical comment made in the context of WTO Member's administrative and regulatory processes were immediately interpreted as evidence of WTO-incompatibility, this would create a serious chilling effect on the internal policy debates of WTO Members.

(c) General issues underlying the US claims under Article X:3(a) GATT

4.580 In its First Written Submission, the EC has already addressed a number of general issues underlying the US claims under Article X:3(a) GATT, including the role of the member States, the Commission, the Court of Justice, and the Customs Code Committee. The United States has so far not responded in detail to these explanations of the EC. Instead, its subsequent interventions have highlighted two central tendencies underlying the US case: first, the US attempt to force the EC to create an EC customs agency; and second, its tendency to belittle and ignore the functioning of the EC institutions and procedures designed to ensure a uniform application of Community law throughout the EC.

(i) The US case is aimed at compelling the EC to create an EC customs agency

4.581 The US submissions confirm that the US case is essentially aimed at compelling the EC to establish an EC customs agency. While the United States has formally claimed that prescribing the method for the EC to come into compliance with its obligations under Article X:3(a) GATT is "not necessary to resolve this dispute", its claims and submissions in the present dispute tell a very different story. Indeed, the alleged need for an EC customs agency is a recurrent theme in the submissions of the United States. Consequently, the United States has referred to the creation of such an agency as an "obvious option" for addressing its claims.

4.582 That the US case is exclusively aimed at the creation of an EC customs agency is also illustrated by the US response to a Panel's question on the specific measures the United States would expect the EC to adopt to address its claims. The United States referred only to creation of a customs agency. While the United States indicated that it did not "rule out" that other options might exist for addressing its claims, it failed to identify any other concrete measures which the EC could take.

4.583 The exclusive focus of the United States on the establishment of an EC customs agency is also revealed by the US response to a Question by the Panel, where it asked the United States to comment on the EC's observation that the US criticisms of the ECJ judgment in *Timmermans* was inconsistent with its criticism of the decision of the UK Court in *Bantex*. In response, the United States explained that in the absence of a centralized customs authority, any scenario would lead to non-uniform administration.

4.584 In the view of the United States, in the absence of such an agency, no modification to the EC's rules and procedures in the areas of tariff classification, customs valuation and customs procedures would be sufficient to address the US claims.

4.585 Another confirmation of the nature of the US claims is the "wish list" which the United States addressed to the EC following the consultations in the present dispute. This wish list included as its first point the "establishment of a single, centralized EC authority for issuing advance rulings, within

a brief, specified period following request, to traders regarding matters including classification, valuation, and origin (both preferential and non-preferential)".

4.586 The United States has attempted to present this request as a sort of concession, since the agency in question would be responsible only for issuing advance rulings. In response, the EC would recall that there is – with the exception of origin matters – currently no obligation to provide for advance rulings on customs matters. Accordingly, the suggestion that the EC should create an agency with a competence to issue such rulings goes beyond current WTO commitments.

4.587 Overall, it becomes clear that the US case is not concerned with the actual administration of EC customs law, but is an extremely ambitious case aimed at a complete overhaul of the EC's system of customs administration. It would leave the EC with almost no other choice but to establish an agency with operational tasks which are unprecedented in the history of the EC. Such an enterprise would entail profound changes in the way EC law is administered, and have legal, financial and personnel implications which are very difficult to project at the current stage. The EC also doubts that this could be regarded as a "reasonable measure" within the meaning of Article XXIV:12 GATT.

4.588 More importantly still, executive federalism is a feature not just of EC customs law, but of EC law in general. Since Article X:3(a) GATT applies not only to customs matters, but to all the matters referred to in Article X:1 GATT, the issues raised in the present case do not seem necessarily limited to the field of customs, but concern almost areas of EC law. Accordingly, it is a frontal attack on the executive federalism of the EC legal order, with implications that would go far beyond the area of customs.

4.589 This claim cannot have a legal basis in Article X:3(a) GATT. This provision provides for certain minimum standards of procedural fairness and transparency. Like the WTO Agreements overall, it does not prejudge the internal autonomy of WTO Members on fundamental questions of internal organization and administration.

(ii) The United States misrepresents the EC legal system

4.590 In its First Written Submission, the EC has set out in detail how the EC legal system ensures the uniform interpretation and application of EC law through the EC. The EC has also set out how the various institutions and actors involved contribute to the uniform application of EC customs law.

4.591 In its subsequent submissions, the United States has provided almost no reaction to these explanations of the EC. Instead, the United States chooses to persist in its highly selective reading of the EC legal system, and ignores everything that does not fit into the negative picture it wishes to draw. The dismissive approach of the United States towards the EC legal system is reflected in a repeated statement, where the US claims that the EC system consists in "a loose web of principles, instruments, and institutions, including non-binding guidance, plus general obligations of cooperation between member States, plus discretionary referrals of matters to the Customs Code Committee".

4.592 The EC considers such statements to be derogatory towards the EC as a whole. The mechanisms which the EC has described are typical not only for the area of customs law, but for the way in which the uniform interpretation and application of EC law is ensured throughout the EC. Accordingly, if the United States considers the EC customs union to constitute a "loose web", then presumably this must apply to the EC as a whole.

4.593 Such statements betray a lack of understanding and appreciation of the history and success of European integration over the last 50 years. It may also reflect the fact that there are considerable difference between the constitutional structures and processes of the United States on the one hand,

and the EC on the other. However, such differences must be tolerated within the WTO, and cannot simply be presumed to amount to violations of Article X:3(a) GATT.

4.594 As regards the role of the Commission, the Court of Justice, and the Customs Code Committee, the United States has so far not further substantiated its criticisms. As regards the Customs Code Committee the United States, when asked whether it had any evidence to proof its allegation that decision-making in the Committee has become more difficult since the most recent enlargement on 1 May 2005, the United States failed to produce the requested evidence, and instead stated that this was "evident". In addition, it again referred to a statement from an EC official. However, this statement was made in a personal capacity and right after the entry into force of enlargement, and therefore can hardly be regarded as "evidence" of what has happened since enlargement.

(d) The US claims under Article X:3(a) GATT

(i) Tariff classification

Binding tariff information

The alleged risk of BTI shopping

4.595 The Panel asked the United States to provide evidence that "picking and choosing" actually occurs in the EC's BTI system. In response, the United States failed to provide such evidence. Instead, it attempts to circumvent the question by referring to observations which are of no relevance to the question.

4.596 First, the United States refers to a passage from Panel Report in *EC – Chicken Cuts*, in which the EC is reported to have stated that it is possible under EC law to withdraw an application for a BTI where the outcome is considered unfavourable by the importer. However, this statement does not contain anything that would indicate that BTI shopping occurs in the EC. Since BTI is granted upon application, and in the interest of the applicant, it is normal that the application can be withdrawn until the BTI has been issued. Before the issuance of BTI, the applicant will in most cases not know the tariff classification envisaged by the customs authorities. In contrast, once the BTI has been issued, the application can no longer be withdrawn. In addition, it should be noted that all applications, including those which have been withdrawn, are entered into the version of the EBTI data base to which the customs authorities have access.

4.597 Second, the United States claims that the issuance of BTI is "heavily skewed in favor of certain member States", and claims that this "skewing suggest strategic selection of the member States in which importers apply for BTI". The EC considers that the fact that the authorities of certain member States issue more BTIs than others simply reflects differences between member States in terms of market size, geographical location, trading patterns, other practical considerations.

4.598 Finally, the US states that "importers regularly approach the US embassies in EC Member States to enquire as to the optimal authorities from which to apply for BTI". The EC would remark that even if such questions were asked, this is no proof that divergent practices in fact occur. Indeed, there is no "optimal authority", and the application should be submitted to the competent Member State authorities as determined by Article 6(1) of the Implementing Regulation.

The alleged difficulties of detecting and correcting divergent BTIs

4.599 The United States has also argued that the EC system does not provide for sufficient mechanisms to detect and correct divergences between BTIs, should they occur.

4.600 In its responses to the Panel's question, the United States has criticized that the EBTI data base "does not reveal in any detail the rationale applied by different authorities in classifying a particular good in a particular way". The EC is astonished by this statement. For each BTI issued, the EBTI data base (in both its versions) includes a detailed description of the product sufficient to permit their identification and classification, the CNN code under which the product was classified, and the justification of this classification. The justification will typically identify the interpretative rules and principles applied, and where appropriate other relevant authority, such as case law of the Court of Justice. The EC considers this information entirely sufficient to ensure full information about the BTI practice of EC customs authorities.

4.601 The EC has also explained that the EBTI data base is very well received and intensively used by traders and by customs authorities, as evidenced by the fact that the average number of consultations per month in the first half of 2005 was about 324.000. The United States has argued that this number might "indicate anything from academic curiosity to collection of statistical information". The EC finds the explanation that 324.000 consultations per months would be generated by "academic curiosity" or "collection of statistical information" remarkably far-fetched. It is clear that the EC EBTI data base is a useful tool for securing a uniform classification practice, which is widely used by traders and customs authorities alike.

The US claim that member States do not treat BTI issued by other member States as binding

4.602 In its First Written Submission, the United States has claimed that "Member States do not always treat BTI issued by other Member States as binding". Once again, the United States has failed to provide specific examples to prove its allegation. Instead, it points to a survey of a trade association to which it has already referred to in its First Written Submission. According to this survey, one company reported that "binding tariff information from Germany is still not accepted by other EU countries, especially Greece and Portugal".

4.603 The EC contests the existence of any problem regarding the recognition of BTI from Germany in other EC member States. The "survey" referred to by the United States is no "evidence" to the contrary. It merely reflects a comment made by one unidentified company which is not supported by any further explanation or evidence. Accordingly, it is impossible to verify the accuracy of the statement. The EC would remark that even if an importer claims that BTI was not accepted, this might in fact reflect a range of problems of an entirely different kind, for instance a lack of identity of the products imported with those described in the BTI. Moreover, if indeed a customs authority fails to recognize BTI issued by another Member State, the importer can obtain judicial review. The importer can also inform the European Commission, but the EC is not aware of this having occurred.

4.604 Second, the United States refers to a statement by the EC in the context of the dispute *EC – Chicken Cuts*, where the EC is quoted as asserting that a particular "interpretation" was not followed in other EC customs offices. As the EC will explain further below, there was no difference of interpretation or application of EC classification rules in this case. However, for the purposes of the present discussion, it suffices to point out that the EC's statement related only to "interpretation". Nowhere in the Panel Report in *EC – Chicken Cuts* has the EC said that BTI was not recognized when presented by the holder. Accordingly, the statement quoted by the United States is not a pertinent answer to the Panel's question.

4.605 Finally, the United States refers the Panel to the decision of the Main Customs Office Bremen in the *Bantex* case, in which the Customs Office noted that "numerous binding customs tariff decisions have been handed down regarding comparable goods". This remark once again betrays a misunderstanding of how the EC's BTI system works. BTI is binding on the customs authorities only

as against the holder of the BTI and it does not appear that *Bantex* GmbH was the holder of BTI for the products at issue. Accordingly, once again, the United States responds to the Panel's question with an example that is of no relevance to the question. In addition, it is noted that in the *Bantex* case, the question was not whether there existed BTI for comparable goods, but whether the goods were identical to those described in the BTIs. As this was not the case, the example is even less apt to support the US claim.

The legal effect of BTI

4.606 In its First Written Submission, the United States has also made numerous criticisms of the legal effects of BTI, which relate notably to the *Timmermans* case law of the European Court of Justice. These criticisms are unfounded: the *Timmermans* case in fact can contribute to the uniform application of EC customs law. The EC has also pointed out that the US' arguments were inconsistent with its criticisms of the decision by the UK Court in the *Bantex* case.

4.607 When questioned by the Panel about this obvious inconsistency, the United States responded that "in the absence of a centralized customs administration", both situations, i.e. either allowing the revocation of BTI or not allowing it, could lead to a lack of uniformity. As the EC has already explained above, this US response demonstrates irrefutably that the specific features of the EC's BTI system are not in any way problematic from the point of view of the uniform application of EC classification rules. Rather, the US case is uniquely aimed at compelling the EC to create an EC customs agency.

4.608 That there is nothing wrong with the EC's BTI system, and notably the effect of BTI in the EC legal order, is also borne out by a comparison with the US rules on advance rulings. For instance, the United States has criticized in its First Written Submission that BTI in the EC is "specific to the holder". Interestingly, exactly the same appears to be true for advance rulings in the United States, where US law explicitly cautions that "no other person [than the one to whom the ruling is addressed] should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter".

4.609 Similarly, US law also provides that a ruling letter may only be invoked "in the absence of a change of practice or other modification or revocation which affects the principle of the ruling set forth in the ruling letter". The EC fails to see how this is fundamentally different from the *Timmermans* case law.

4.610 The rather limited effect of rulings issued by US Customs has also been confirmed by the US Supreme Court in *United States v. Mead Corp*, in which the Court held that ruling letters of US Customs have no legal force and that Customs has regarded a classification as conclusive only as between itself and the importer to whom it was issued.

Alleged divergences in EC classification practice

Blackout Drapery Lining

4.611 In its First Written Submission, the EC has already demonstrated that the products at issue were not identical to the products described in the BTI referred to by the United States, and that accordingly, this case does not demonstrate a lack of uniformity in the EC's classification practice.

4.612 When required by the Panel to comment on the EC's explanations, the United States starts its observations by contesting the EC's statement that the product "before the German authorities was not flocked". In support, the United States refers to a "decision" of the Main Customs Office Hamburg on which the Main Customs Office Bremen is supposed to have relied. These statements are incorrect as

the letter of the Main Customs Office Hamburg related to an administrative appeal introduced by a company called Ornata GmbH. This appeal is in any way related to the administrative appeal introduced by Bautex-Stoffe GmbH which was the subject of the decision of the Main Customs Office Bremen, let alone that the Main Customs Office Bremen relied on the letter of the Main Customs Office Hamburg.

4.613 It is also noted that contrary to the US claims, that letter does not contain a decision, but rather requested the observations of the importer on the envisaged classification. In response to this letter, the Ornata GmbH withdrew its protest by letter of 16.9.1998.

4.614 As regards the substance, the United States accuses the decision of the Main Customs Office Bremen of being incompatible with an HS explanatory note to heading 59.07. This statement is manifestly wrong. HS explanatory note (G)(1) to heading 59.07 provides that the fabrics covered include "fabric, the surface of which is coated with glue (rubber glue or other), plastics, rubber or other materials and sprinkled with a fine layer of other materials such as (1) textile flock or dust to produce imitation suèdes". Therefore, the presence of textile flock or dust was a relevant criterion for the classification under heading 59.07. The decision of the Main Customs Office Bremen took account of this factor and, since the product was not flocked, it could accordingly not be classified under heading 59.07.

4.615 The United States also unwarrantedly criticises the decision of the Main Customs Office Bremen for having considered the density of the web of the product. According to Note (2)(a)(5) to Chapter 59 of the CN, heading 5903 does not apply to plates, sheets, or strips of cellular plastics, combined with textile fabric, where the textile fabric is present merely for reinforcing purposes. The question whether the web was fine is a relevant criterion for establishing whether it is present for reinforcement purposes or not.

4.616 The United States has also criticized the EC for having referred to a classification regulation concerning a type of ski trousers. This criticism is unwarranted. Commission Regulation 1458/97 concerned the classification of garments under heading 6210, which covers "garments made up of fabrics of heading 5602, 5603, 5903, 5906 or 5907". Accordingly, the classification regulation in question concerned implicitly the classification of the fabric out of which the trouser was made. In doing so, it had to apply Note 2(a)(5) to Chapter 59 of the combined nomenclature, i.e. determine whether the fabric serves merely for reinforcing purposes, and in this context took into account a.o. the "tight weave" of the fabric. Accordingly, Commission Regulation 1458/97 was certainly a relevant precedent for the interpretation of note 2(a)(5) to Chapter 59.

4.617 For the same reason, the EC can also not find anything contrary to Community law in the "interpretative aid" referred to by the lower German customs office: the criteria of the density of the web mentioned in that text was fully compatible with Community law and the German text was purely an interpretative aid without any legally binding character.

4.618 Finally, the United States also alleges that by relying on the tightness of the fabric, the Main Customs Office Bremen violated the chapeau of Note 2(a) to Chapter 59, which states that heading 5903 applies to "textile fabrics impregnated, coated, covered or laminated with plastics, whatever the weight per square meter". This criticism is equally unjustified because the weight referred to is the weight of the entire product, i.e. the fabric as impregnated, coated, covered or laminated. The Main Customs Office Bremen did not consider the weight of the product, but rather the density of the web of the polyester fabric, which is only a part of the product. Accordingly, the decision of the Office is entirely compatible with the Chapeau of Note 2(a) to Chapter 59.

4.619 Furthermore, the United States attempts to find fault with individual aspects of the reasoning of the German customs authorities are also irrelevant for the present case, which does not concern the

question under which heading a particular product should properly have been classified, but the question of uniformity of administration of EC classification rules. Moreover, to the extent that the United States considers EC practice to be incompatible with an HS explanatory note, it could raise this matter in the context of the WCO in accordance with Article 10 of the HS Convention.

4.620 It is clear that the products as described in the decision of the Main Customs Office Bremen were not identical to the products described in the BTIs referred to by the United States, since the former were not flocked with textile flock, while the products in the BTIs are described as having been flocked. On the basis of these product descriptions, the products had to be classified differently. Accordingly, this difference in tariff classification is not a lack of uniformity, but on the contrary the result a correct application of the Combined Nomenclature.

4.621 Moreover, if an error had occurred in respect of the description of the goods by the German customs authorities, the importers in question could have challenged the decision before the German courts. However, no such action has been taken.

LCD Monitors

4.622 The EC has notably pointed to the fact that Council Regulation 493/2005, by suspending the tariff duties under heading 8528 for monitors up to a certain size, ensures a uniform tariff treatment for all the monitors covered by the Regulation. The United States continues to criticize this regulation as being "provisional" and a "stop-gap measure" and it argues that a duty suspension is "far different from a classification regulation".

4.623 The EC considers these objections to be unfounded. That the regulation is valid only until 31 December 2006 reduces in nothing its value for ensuring a uniform tariff treatment throughout the EC today. Moreover, before the expiration of the measure, the EC will examine the situation and will adopt the measures which are necessary. The United States cannot build an allegation of non-uniform administration on the mere speculation that the EC might fail to take certain measures in the future.

4.624 The United States is also wrong to claim that Regulation 493/2005 fails to ensure uniform administration because the measure concerns the suspension of a duty rate, rather than the classification of a product. The United States fails to appreciate that Article X:3(a) GATT does not require uniform administration for its own sake, but rather in order to ensure uniform conditions of treatment for traders. Accordingly, Article X:3(a) GATT can be held to be violated only where a variation of practice in fact has a significant impact on traders. In the case of LCD monitors, due to Regulation 493/2005, for the monitors covered by the regulation, there is no difference in tariff duties between monitors classified under heading 8471 and those classified under heading 8528, since the tariff rate for both will be 0%. Nor are there any other relevant differences in treatment. Accordingly, even if there were differences in tariff classification for the monitors at issue, this would have absolutely no impact on traders. This is why the trading community was in fact strongly supportive of the measure.

4.625 In addition, the EC considers that even if the Panel were to hold that there was an incompatibility with Article X:3(a) GATT, this incompatibility could not be held to constitute nullification or impairment of any benefit accruing to the United States under Article X:3(a) GATT. Since the United States has not contested that the tariff treatment for the monitors covered by Regulation 493/2005 is uniform, and the duty rate is 0%, the presumption of nullification and impairment established by Article 3.8 DSU would therefore have to be considered as rebutted in the present case.

4.626 The United States also criticizes the conclusions reached by the Customs Code Committee at its 346th meeting of 30 June to 2 July 2004, according to which "unless an importer can demonstrate

that a monitor is only to be used with an ADP machine (heading 8471) or to be used as an indicator panel (heading 8531), its has to be classified in heading 8528". The US argues in particular that this conclusion is incompatible with Note 5 to Chapter 84 of the Common Customs Tariff, according to which a unit is to be regarded as part of a complete system if "it is of a kind solely or principally used in an automatic data-processing system".

4.627 The EC recalls that the present case does not concern the correctness of individual classifications, but rather the question of uniform administration. The United States does not show that there is any lack of uniformity; rather, it questions the substantive classification practice of the EC. Such arguments are not admissible under Article X:3(a) GATT. This has also been confirmed by *US – Hot Rolled Steel*, in which the Panel held that it was not "properly a Panel's task to consider whether a Member has acted consistently with its own domestic legislation".

4.628 Moreover, the US allegations that the conclusions of the Customs Code Committee are incompatible with note 5(a) to Chapter 84 are false. On the basis of several presentations by the industry concerned, the Committee concluded that industry had not succeeded in presenting any criteria on which principal use could be established.

4.629 The EC would add that it does not understand what purpose conclusions of the Customs Code Committee could have if, as the United States seems to suggest, they should be limited to restating the language of the Combined Nomenclature. In order to provide for a uniform application of the CN, it must be possible for the Committee to reach, on the basis of the facts available, and acting in conformity with the Combined Nomenclature, specific conclusions concerning the classification of particular goods. It is in this way that the Committee can and does contribute to the uniform classification of goods throughout the EC. The US suggestion that the Committee's conclusions "actually detracts rather than promotes uniformity" is thus manifestly unfounded.

4.630 The US' own practice does not seem to differ greatly from that of the EC on this point. In its First Written Submission, the EC had already pointed to a ruling in which US Customs had found it impossible to establish the "principal use" of a monitor. In another recent ruling on LCD monitors, US Customs found that "the dual purpose of the monitors is indicative of a lack of principal use for this good", and accordingly classified the good under heading 8528. Similarly, in a recent guidance to traders on flat panel display modules, US Customs stated the following: "The issue of principal/sole use has been difficult to ascertain in the past. As a result of this review by US Customs, it has been determined that only specific size flat panel display modules are principally used in ADP system [...]".

Further examples of alleged non-uniformity in classification practice

4.631 The Panel has asked the United States to provide evidence for its allegation that there are other instances of non-uniform administration in the classification practice of the EC. In response, the United States refers to a limited number of largely unsubstantiated statements which it had already made in its First Written Submission.

4.632 First, the United States refers to a questionnaire of a trade association of March 2005, in which a respondent company is reported to have stated that "[u]nisex articles or shorts have different classifications in Italy and Spain to those in Germany". This "survey" is based on a comment from a single unidentified company, and is not supported by further evidence or explanations. On this basis, it is impossible to ascertain the precise nature of the products concerned, or to identify the questions of tariff classification which might be involved. Accordingly, the EC considers that this statement does not provide any evidence of a lack of uniformity in EC classification practice.

4.633 Second, the United States refers once again to Case C-339/98, *Peacock*, in which Germany had classified certain network cards differently from the classification envisaged in BTIs issued by

certain other member States. The EC fails to see how this case illustrates an absence of uniform administration. First, the EC would recall that this case relates to importations carried out before 1995. In 1995, however, the European Commission had, in order to ensure a uniform application of Community law, adopted Regulation 1165/95 foreseeing the classification of the adapter cards in question under heading 8517 (electrical apparatus for line telegraphy).

4.634 The classification by the German customs authorities was appealed in the competent courts, which referred the question to the European Court of Justice. By judgment of 19 October 2000 in case C-339/98, the Court of Justice decided that the products in question had to be classified under heading 8471 (automatic data-processing machines and parts thereof). In a further ruling, in case C-463/95, *Cabletron*, the Court of Justice confirmed this interpretation and decided that Regulation 1165/95 was invalid.

4.635 Overall, the case of network cards is a case in which the Commission had already in 1995 taken the necessary measures to ensure a uniform classification practice. As the United States itself has recognized, what is significant is not that a divergence may occur, but rather that it is addressed and removed once it occurs. This is precisely what happened in *Peacock*.

4.636 In addition, the EC would remark that the correct classification of network equipment is a complex technical question with which many customs authorities have had to come to terms. The United States itself experienced difficulties in classifying networked equipment, and has revoked or modified numerous rulings concerning the classification of such equipment. Finally, the classification of network equipment has also led to a WTO dispute between the EC and the United States concerning the correct classification of LAN equipment, in which the United States unsuccessfully alleged that due to its classification practice, the EC was not respecting its tariff concessions in respect of LAN equipment. The EC does not find it appropriate that the United States raises what is essentially a substantive classification question in the context of the present case, which is concerned with uniformity of administration under Article X:3(a) GATT.

4.637 Third, the United States refers to the dispute *EC – Chicken Cuts*. However, it must be recalled that *EC – Chicken Cuts* concerned the interpretation of the EC's tariff concessions, and incidentally the question of the correct classification of the products in question. In contrast, in *EC – Chicken Cuts*, the complainants did not make any claims under Article X:3(a) GATT, and it was never alleged that the EC's classification practice had not been uniform. On the contrary, the facts of the case show that for the entire period in question, the EC had measures in place which ensured the uniform tariff classification of the products. On this basis, the Panel and the Appellate Body came to the conclusion that the EC's classification practice had been entirely uniform.

4.638 Finally, the United States refers again to an alleged lack of uniformity regarding the classification of drip irrigation products. This is a case of temporarily diverging BTI which was promptly addressed through the adoption of a classification regulation, and which is today resolved.

4.639 Binding tariff information was issued by France on 6 July 1999 for a Roberts Irrigation Product (Ro-Drip) under CN code 8424 81 10. On 9 February 2001, Spain issued BTI in which it classified the product under CN code 3917 32 99. This issue of divergent BTI was discussed by the Tariff and Statistical Nomenclature Section of the Customs Code Committee. During the process, Roberts Irrigation Systems made a submission to the Committee. Furthermore, the US government also made several submissions to the Commission. The issue was resolved by the adoption of Commission Regulation (EC) No. 763/2002 of 3 May 2002, which classified the product under heading 3917 32 99. Consequently, France revoked and replaced the previously issued binding tariff information.

4.640 The United States has alleged that this case supports its claims because one or more member States did not treat as binding BTI issued by other member States. This remark appears beside the point, since the BTI were not issued for the same holders. In any event, as the United States has itself argued, what matters is not whether divergences occurred, but whether they are addressed and removed when they occur. In the case of drip irrigation products, this is precisely what happened. Once the divergent BTIs had been detected, the case was promptly addressed and solved within 15 months, which is a period of time that is reasonable for for definitely resolving a complex classification issue.

(ii) Customs valuation

Report 23/2000 of the EC Court of Auditors

4.641 The Panel asked the United States to provide evidence as regards the incidence of non-uniform administration with respect to the issues of customs valuation discussed in Report 23/2000 and referred to by the United States. In response, the United States declined to provide such evidence, arguing that its claim "does not turn on the statistical frequency of non-uniform administration".

4.642 The EC disagrees with this response. First of all, a violation of Article X:3(a) GATT requires the existence of a pattern of non-uniform administration. Accordingly, the statistical incidence of instances of non-uniform administration in the areas in question is a highly relevant question. Since the United States has failed to provide such evidence, it has failed to establish a *prima facie* case of violation of Article X:3(a) GATT.

4.643 More importantly still, with its references to Report 23/2000, the United States has not proved the existence of a lack of uniformity in the EC's system. The Report of the Court of Auditors did not have the purpose of assessing compliance with Article X:3(a) GATT. Moreover, for all the issues raised in the report, the report has been followed up by the EC institutions, and wherever necessary, the appropriate measures have been taken.

4.644 The US response to these remarks is to ask the Panel "to exercise its authority under Article of the 13 DSU [...] to seek information of the type that was made available to the Court of Auditors in preparing its report on valuation". As the EC has already remarked, this request amounts to shifting the burden of proof to the EC, and should therefore be rejected.

4.645 Moreover, the US request is also impracticable. Report 23/2000 was based on audit visits that took place on the premises of the Commission and the customs administrations of 12 EC member States in 1999-2000. Whatever information the Court of Auditors, which is an independent EC institution, may have collected at that time is in the possession of the Court of Auditors only. In addition, such information would reflect the situation in 1999-2000, but not the situation today. Accordingly, the US suggestion therefore amounts in essence to requesting the EC to conduct a new audit of customs valuation. In this way, the United States seems to want to transform an EC institution which is devoted to ensuring the proper collection and administration of the EC's own resources into a mechanism intended to provide it with the necessary evidence for conducting a WTO challenge. The US request must be regarded inadmissible.

4.646 As regards the issue of repair costs covered by a warranty, the United States now seems to accept that this issue has been resolved by Commission Regulation 44/2002, of 11 March 2002. However, the United States faults the EC for allegedly having taken more than 12 years to resolve the matter. First of all, it is not accurate that the EC tolerated a lack of uniformity for 12 years. More importantly still, what matters is that, on a complex issue of customs valuation, the EC itself detected the problem and took the necessary measures to correct it. Accordingly, rather than showing any failure in the EC's system, this case shows that the EC system functions properly.

4.647 The United States also refers again to the specific issue of valuation audits. In particular, the United States refers to a statement in the report of the Court of Auditors according to which one member States lacked the authority to perform post-importation audits.

4.648 In this respect, the EC would like to clarify that under Article 76(2) CCC, every Member State may proceed to all necessary verifications in order to satisfy themselves of the accuracy of the particulars contained in the declaration. This also includes all questions regarding the value of the goods. The Member State referred to by the Court of Auditors was Greece, which, in 2000, has established a service with powers to conduct post-clearance audits. In addition, the EC has also referred to the EC Customs Audit Guide, which ensures a uniform audit practice across the EC.

The Reebok case

4.649 The Panel has requested the United States to provide concrete evidence to support its submission that there is a lack of uniform application as regards the treatment of related parties under Article 143(e) of the Implementing Regulation. In its response, the United States informs that its description of the case is based on a "narrative account by the importer at issue". Moreover, the US states that "due to concerns relating to the pendency of litigation over the matter at issue and the commercial sensitivity of the information that supporting documentation would contain, the importer declined to provide documentation at this time".

4.650 The United States does therefore not provide any evidence for its claim that there is a lack of uniformity in the application of Article 143(1)(e) of the Implementing Regulation. The United States cannot justify this failure to discharge its burden of proof on the basis of the refusal of the importer in question to provide the necessary evidence. It is for the United States itself, as the complaining party, to provide the evidence for the claims it makes.

4.651 The United States has repeatedly stated that the "EC does not deny the essential facts". The EC has certainly not contested that it has been contacted by Reebok with a problem regarding the application of Article 143(1)(e) of the Implementing Regulation by the Spanish customs authorities. However, the EC contests that there is a problem of non-uniform application of this provision.

4.652 The United States also faults the EC for having stated that the Commission and the Customs Code Committee cannot serve as substitutes for the normal appeal procedures applicable in individual cases, and has claimed that there is "no EC institution before which the trader has a right to obtain uniform treatment". This is in stark contrast to the fact that according to the US' own statements, the case is currently pending before the Spanish courts, and the importer concerned refuses to share information on account of this pendency. Moreover, as the EC has explained repeatedly, where a court of a Member State applies Community law, it acts as an organ of the EC. Finally, if there is a question of interpretation of Community law, this question can – and in certain cases must – be referred to the European Court of Justice by way of a request for a preliminary ruling, which ensures a uniform interpretation of EC law throughout the Community.

4.653 In addition, the United States has referred to a decision by the European Ombudsman on a complaint by an individual importer. The EC can confirm that the complaint was made on behalf of Reebok, which claimed that the European Commission was not properly discharging its responsibilities in respect of the administration of customs valuation law.

4.654 At the outset, the EC would like to point out that the Ombudsman did not take a decision on the substance of the complaint. Rather, the complainant withdrew the complaint indicating that the he "was satisfied with the position the Commission had adopted on the matter and with its proposal to look into pending problematic issues".

4.655 Second, the EC would like to recall that the European Ombudsman is another mechanism which contributes to the proper administration of EC law by the EC institutions. The fact that there is a decision of the European Ombudsman is therefore not as such problematic, but rather shows the working of the various mechanisms of the EC's system.

4.656 Finally, the EC would remark that the facts as set out in the decision are not presented entirely correctly. Notably, the United States quotes from a letter of the European Commission of 20 December 2000, in which the Commission is supposed to have stated "that the interpretation issues raised by the complainant were a matter for the national customs authorities". This quotation is not correct. In its letter of 20.12.2000, the Commission stated that "[t]he application of this criterion [of Article 143(1)(e) Implementing Regulation] in individual cases is of course a matter for national administrations and the Commission Services could only express an opinion if a detailed file on all aspects of the case was to be forwarded by the customs services in question. However, our services do not, in general, have a responsibility to undertake a detailed examination of very specific cases, this being the task of the national administrations".

4.657 The EC considers that this statement reflects correctly the division of competences between the European Commission and the customs authorities of the member States, which are competent for the application of customs law in individual cases. It is neither possible nor appropriate for the Commission to substitute itself for the competent authority simply because in an individual case of application a trader is not satisfied with an approach taken by the customs authority. On the contrary, the European Commission is responsible for monitoring and ensuring the correct and uniform interpretation and application of EC customs law.

4.658 In the case in question, Reebok had simply not, at the time in question, submitted to the European Commission any evidence that showed an incorrect application of EC law, or a divergence in the application of EC law. Accordingly, the Commission did not see any need to intervene in the specific pending case.

4.659 Where the Commission is informed of a wrong interpretation of Community law, including Community customs law, the Commission will take the appropriate action. A pertinent example is furnished by a complaint submitted by Reebok regarding the imposition of compensatory interest by the Spanish customs authorities. Since this complaint showed an incompatibility with Community law, this complaint led the Commission to initiate infringement proceedings against Spain. The EC would underline that Reebok did not lodge a similar complaint as regards the application of Article 143(1)(e) CCC.

(iii) Processing under customs control

4.660 In relation to this customs procedure, the United States has progressively limited its claims. In its First Written Submission, the United States identified an eventual contradiction between Article 133 CCC and Article 502(3) of the Implementing Regulation, in that the former requires an applicant to provide information both on the creation or maintenance of processing activities in the EC and an absence of harm to essential interests of Community producers of similar goods, while, in contrast, the Implementing Regulation requires the former but not the latter. At the same time, the United States highlighted that, according to its interpretation, a guidance adopted by United Kingdom required both types of information, while the French guidance simply sets out the first condition.

4.661 The EC explained in its First Written Submission that there is no contradiction between the CCC and the Implementing Regulation, because the latter is subsidiary legislation and cannot modify the conditions laid down in the CCC. The EC also explained that both the United Kingdom and the French guidance required the importer to provide the two sets of information.

4.662 The United States insists that the French guidance makes no reference to information on harm to Community producers, which is, on the contrary, required by the United Kingdom's guidance.

4.663 The EC considers that the US criticism is based on an isolated and incorrect interpretation of the French guidance, which has to be interpreted in the context of the EC legislation. The guidance refers to the economic conditions required to obtain an authorization to process under customs control in the same way as Article 502(3) of the Implementing Regulation: by using an abbreviation of the requirements laid down in Article 133(e) CCC. The French authorities require the same kind of information as the United Kingdom: the information needed to assess whether "the necessary conditions for the procedure to help create or maintain a processing activity in the Community without adversely affecting the essential interests of Community producers of similar goods (economic conditions) are fulfilled".

4.664 This interpretation is also supported by paragraph 78 of the French guidance, which, within Chapter III "Examination of economic conditions", plays the role of a chapeau to Section I, where paragraph 83 is located. Contrary to what the United States affirms, this paragraph 78 is more than simply an introductory paraphrase of certain provisions from the CCC. This paragraph reminds, for Section I as a whole, that the absence of adverse effects on the essential interests of Community producers is a general economic condition that is common to the three customs procedures therein covered (inward processing, outward processing and processing under customs control), as it is clearly laid down in Articles 117(c), 148(c) and 133(e) CCC, respectively.

4.665 In the present case, the United States has not submitted any evidence on the application of the guidance issued by the French authorities. The EC would like to recall that according to the case law of the Appellate Body, it is the party which asserts that a measure of another Member is inconsistent with WTO obligations which has the burden of proving that the measure in question has the alleged content or meaning. Relevant evidence for establishing the meaning may also include evidence regarding the application of the measure. This was explained by the Appellate Body in *US – Carbon Steel* and in *US - Oil Country Tubular Goods Sunset Reviews*.

(iv) Local clearance procedure

4.666 In response to two questions from the Panel, the United States has explained its understanding of the procedures applicable in the EC for clearance of goods for free circulation and it has claimed that the lack of uniform administration described in its First Written Submission exists independently of the particular stages in which the clearance process is articulated.

4.667 The description made by the United States is still not correct. The US states that simplified procedures are separated into three groups (local clearance, warehousing and simplified declaration), but the correct classification in relation to declarations for release for free circulation should be "incomplete declarations" (Articles 254-259 of the Implementing Regulation), "simplified declaration procedure" (Articles 260-262) and "local clearance procedure" (Articles 263-267). The US description mixes local clearance procedure for release for free circulation and other simplifications for customs procedures with economic impact, like warehousing. In any case, the EC considers the United States has not explained the alleged divergences between the practices of the customs authorities and whether the differences occur between EC member States at equivalent steps in the same procedure.

4.668 Besides, the EC would like to insist that paragraphs 110 to 115 and the table in paragraph 116 of the US First Written Submission describe inexistent divergences. Thus, taking the United Kingdom and France as representative examples in relation to inspection of goods by the customs authorities prior to release, there is no contradiction between the practices in these two EC member States. In both cases, customs officials may (or may not) inspect goods prior to release. The EC

already explained this question in its First Written Submission, without receiving an answer from the United States either in its First Oral Statement or in its response to the questions from the Panel. The same problems occur with the other divergences alleged by the United States.

4.669 It is clear that, contrary to what the United States claims, the EC disputes the existence of divergences in the administration of local clearance procedures and that the United States has not provided a single exhibit to illustrate and support its claim.

(v) Penalties for violations of customs law

Penalty provisions are not covered by Article X:3(a) GATT

4.670 The United States argues that penalty provisions are "tools" for the administration of customs laws. Interestingly, the United States itself appears to concede that penalty provisions are not as such laws pertaining the matters referred to in Article X:1 GATT. Indeed, the United States itself explains that "it is important to distinguish between the administration of penal laws and the application of penal laws to administer customs laws of the type described in Article X:1".

4.671 The EC does not contest that penalty provisions are relevant tools for ensuring a uniform administration of customs law. This is precisely why EC law provides that penalty provisions must be effective and dissuasive. However, the fact that penalty provisions are "tools" for the uniform administration of customs laws does not mean that they are themselves laws or regulations pertaining to the matters enumerated in Article X:1 GATT, in particular tariff classification, customs valuation, or rates of duty. If, as the United States correctly argues, penalty provisions are merely "tools" to ensure a uniform administration of those laws, then penalty provisions as such do not fall within the scope of Article X:3(a) GATT.

4.672 The United States has tried to counter this argument by arguing that standards for penalty provision also are addressed in the Kyoto Convention. However, the fact that the Kyoto Convention, which is a Convention negotiated in the context of the WCO, may contain certain provisions or standards on penalty provisions has nothing to do with the scope of Article X:3(a) GATT. On the contrary, the fact that the Kyoto Convention contains a harmonization of certain specific matters may rather provide an indication that the WCO Members considered that such matters were not yet sufficiently addressed in the GATT.

4.673 The United States has also contested the EC's argument that penalties are concerned with illegitimate actions rather than with legal trade. In support, it has referred to the example of the judgment of the ECJ in *de Andrade*, where, according to the US, "the only offense at issue was a failure to clear goods through customs within the period specified in the Community Customs Code".

4.674 The EC fails to see the basis for the US objection. Penalties for violations of customs law by definition are responses to contraventions of customs law. Penalties are sanctions for acts or omissions which are illegal. Penalty provisions therefore have a fundamentally different character from provisions which establish the conditions for legal trade, e.g., by setting tariff rates or establishing rules for customs valuation.

4.675 The *de Andrade* case referred to by the United States confirms precisely this point. In *de Andrade*, the importer had infringed Article 49 CCC, according to which, where goods are covered by a summary declaration, the formalities necessary for them to be assigned a customs-approved treatment of use must be carried out within certain specified time-limits. The measures taken by the customs authorities in *de Andrade* were a sanction for the failure of the importer to comply with these time-limits. The *de Andrade* case demonstrates simply that sanctions are a tool for ensuring compliance with EC law, and that EC member States apply the necessary sanctions. In contrast, *de*

Andrade does nothing to support the view that penalty provisions as such fall within the scope of Article X:1 GATT.

Article X:3(a) GATT does not require the harmonization of member States' penalty provisions

4.676 Article X:3(a) GATT concerns only the administration of customs laws, not the substance of the laws themselves. This means in particular that Article X:3(a) GATT does not create an obligation to harmonize laws which may exist within a WTO Member at the sub-federal level. It merely requires that such laws be administered uniformly within the territory in which they apply.

4.677 The United States continues to claim that because penalty provisions are contained in laws of the EC member States, the EC administers its laws in a non-uniform manner. This is manifestly wrong. As the EC has already stressed, it is not the administration of penalty provisions which varies within the EC; it is the laws themselves which are different, albeit within the limits set by Community law.

4.678 In its submissions, the United States has not claimed that EC member States fail to administer their penalty provisions in a uniform manner. Indeed the United States has stated that "whether each individual member State administers its own penal law uniformly within its own territory is not relevant to our claim". This is a striking admission, because it shows that the US claim in fact has nothing to do with the administration of penalty provisions. Rather, the US claim is about the harmonization of legislation within the EC, which is a claim which has no basis in Article X:3(a) GATT.

4.679 The United States also reiterates its argument that the EC's reasoning would "dramatically diminish the effectiveness of Article X:3(a) GATT. However, this statement is incorrect. Article X:3(a) GATT applies to the administration of all of the laws referred to in Article X:1 GATT, regardless of whether they apply in all or part of the territory of a WTO Member. If Article X:3(a) GATT were held to apply penalty provisions, then it should apply to the administration of the penalty provisions of each Member State. Accordingly, the clear distinction drawn by the EC between the administration of measures and their content does not in any way diminish the effectiveness of Article X:3(a) GATT, but simply reflects the proper scope and content of this provision.

Community law ensures a sufficient degree of uniformity of penalty provisions

4.680 Finally, to the extent that penalty provisions can be regarded as relevant for ensuring a uniform administration of the laws referred to in Article X:1 GATT, the EC considers that EC law provides for a sufficient level of harmonization in this respect.

4.681 As the EC has already explained, the European Court of Justice has developed clear guidelines for penalty provisions for violations of EC customs law, which must in particular be effective, proportionate, and dissuasive. These principles have also been confirmed by the Council of the European Union.

4.682 The United States has not shown that the fact that penalty provisions are contained in laws of the member States leads in any way to a non-uniformity in the administration of the laws covered by Article X:1 GATT, in particular laws regarding tariff classification, customs valuation, and rates of duty.

4.683 Instead, the United States has simply stated that "[t]o the extent that different member States have different penalty provisions that apply to the violation of EC customs law [...] they administer

EC customs law differently." This argumentation is logically flawed, since the US fails to distinguish between the application of the penalty provisions, and the application of the relevant substantive laws.

4.684 Indeed, it is not correct to assume that differences in penalties would necessarily lead to a lack of uniformity in the application of the provisions the violation of which is sanctioned. Such a consequence would result only if sanctions were not dissuasive or effective. If, on the contrary, sanctions are dissuasive and effective, then it must be assumed that the related substantive provisions will be respected, regardless of differences in the level of sanctions applicable.

4.685 Is is true that differences in the level of penalties may also be important from the point of view of proportionality. However, proportionality has nothing to do with the question of uniform administration under Article X:3(a) GATT. Rather, the proportionality of penalties is addressed in Article VIII:3 GATT, and the United States has not made any claim that the EC does not comply with this provision.

4.686 As the EC has explained, EC law requires that sanctions be effective, proportionate, and dissuasive. The United States has not shown that sanctions in the EC do not comply with these principles. Moreover, the United States has not shown that divergences in penalty provisions of the member States in any way lead to a non-uniformity in the application of the laws of the member States. The US case remains therefore purely theoretical, and unsupported by any facts.

4.687 The United States has also again referred to the EC's work on the modernized customs code, which includes proposals for a harmonization of administrative penalties for violations of customs law. In this respect, it must be stressed that the purpose of these proposals is to further develop and advance the EC the single market also in the field of penalties. This has nothing to do with the EC's obligations under Article X:3(a) GATT.

3. The US claim under Article X:3(b) GATT

(a) Nature of the review: independent tribunals or procedures

4.688 The United States agrees with the EC that a WTO Member complies with this obligation under Article X:3(b) GATT only when the review system is independent of the agencies entrusted with administrative enforcement in customs matters.

4.689 In this respect, the United States has raised no criticism about the independence of the remedies instituted by the EC, either at Community level or at Member State level. It should, however, be noticed that the United States applies a less strict standard of independence than the EC. The latter has considered that a body ensuring administrative review is independent of the agencies entrusted with administrative enforcement only when it is not integrated into the organization of the agencies. On the contrary, for the United States independence is already ensured when the office responsible for administrative review is functionally independent of the ports whose decisions it reviews, even if both offices form part of the same agency. The EC considers that the US interpretation is not in conformity with Article X:3(b), which requires that the reviewing tribunals or procedures must be independent of the agencies entrusted with administrative enforcement. This provision imposes an external separation between the tribunals or procedures and the agencies and an internal separation within an agency between the controller and the controlled is not sufficient to comply with Article X:3(b).

4.690 The thrust of the US claim concentrates on the fact that the review decisions taken by the EC member States "have effect only within their respective member States and not on EC agencies generally" and that "the provision of tribunals or procedures by individual member States within the EC does not satisfy the EC's obligations under Article X:3(b)".

4.691 The United States relies on several arguments to support that assertion. First, the United States has constantly argued that the Article X:3(b) GATT obligation must be interpreted in the light of Article X:3(a) GATT, which the United States considers to be its context.

4.692 The EC has explained several times that each of those two subparagraphs in Article X:3 GATT lay down separate obligations and that it cannot be considered that there is a legal relationship between these two provisions (i.e: the obligations from one provision cannot be imported into the other).

4.693 The structure of Article X:3 GATT itself already justifies that interpretation. First, subparagraph (b) does not make any reference to subparagraph (a), unlike subparagraph (c), which contains an explicit link to subparagraph (b). Second, Article X:3 GATT is not introduced by a chapeau allowing to affirm that the two separate subparagraphs are linked and that the obligations therein instituted have to be interpreted in light of the each other.

4.694 Moreover, contrary to what the United States claims, review of customs decisions by the courts of the EC member States does not run counter to the obligation of uniform administration. That type of review is perfectly compatible with the obligation of uniform administration, provided that the latter is ensured by other means that are appropriate to this aim.

4.695 Finally, there is a substantial reason to reject the US interpretation. If we consider that, as the United States has accepted, the review established by Article X:3(b) is only a review of first instance, to require uniformity at first instance would necessarily imply the establishment of a central court of first instance with jurisdiction over the whole territory of any WTO Member. This conclusion finds no support in the wording of Article X:3(b) GATT, which makes no reference to the obligation to establish such central court of first instance. Article X:3(b) GATT does not even require appeals to be decided by a central court or tribunal of superior jurisdiction. The conclusion is that Article X:3(b) does not deal with uniform administration/application of customs law, which is covered exclusively by subparagraph (a), but only with first instance remedies.

4.696 The United States is interpreting Article X:3(b) through the glass of its own legal system and requiring all WTO Members to establish the equivalent to its Court of International Trade. Japan has aligned with the EC in the rejection of this unilateral interpretation. It is worth noting that Australia has also argued that "Article X:3(b) is not a prescriptive Article and includes no obligation to have a central court".

4.697 Furthermore, the EC would like to recall that the establishment of a central customs court within the EC institutional framework runs contrary to one of its fundamental constitutional principles: that the EC Court of Justice and the Court of First Instance are to act within the limits of the powers conferred upon them by the founding treaties and that the courts of the EC member States act as "ordinary" EC courts when applying Community law. In the absence of a provision in the Treaties attributing a competence to any or both of those Courts to review decisions taken by the EC member States and in the presence of the preliminary reference system laid down by Article 234 of the EC Treaty, any modification in the boundaries between the competences of the Court of Justice or the Court of First Instance and the nationals courts would require the amendment of the EC Treaty.

4.698 The EC believes that similar problems, at least at legislative level, may arise in those WTO Members where a central tribunal or court of first instance in customs matters does not exist.

4.699 The United States claims to have found an argument to justify a relationship between subparagraphs (a) and (b) of Article X:3 in the second sentence of subparagraph (b), which states that the decisions of the tribunals or procedures shall govern the practice of the agencies entrusted with administrative enforcement.

4.700 The EC considers that sentence as a provision aimed at securing a fair implementation of tribunal decisions in administrative law matters. To ensure respect by an administrative authority of the decisions taken by a tribunal, most of the legal systems have developed different methods to enforce the *res iudicata* principle. That is the sense that the EC gives to the "shall govern the practice" sentence. It cannot mean, as it is sustained by the United States, that a first instance review decision on a specific case constitutes the source of a general obligation upon the relevant agency. Article X:3(b) only sets up an obligation to implement in fair terms the decision given by an independent tribunal or through an independent procedure.

4.701 Second, the United States has contested the EC's argument that the use of the plural form in Article X:3(b) GATT means that a WTO Member is allowed to have several different review tribunals, each of them covering a part of its geography. According to the United States, "the use of the plural form […] might allow for the possibility that a Member State may provide for different types of review".

4.702 The EC contests this argument, because it does not take into account that the United States and the EC interpretations are not mutually exclusive: the use of the plural form may indicate that a WTO Member is entitled to maintain geographically limited tribunals and it may also indicate that a WTO Member is allowed to maintain multiple fora for review of customs decisions.

4.703 Third, in its First Written Submission, the EC has explained that when the courts of the member States apply Community law, they act as organs of the Community. This is one of the cornerstone principles in the EC constitutional framework. In support, the EC has also referred to the findings of the Panel in *EC – Trademarks and Geographical Indications (US)*.

4.704 In its First Oral Statement, the United States has argued that the Panel Report in *EC – Trademarks and Geographical Indications (US)* is not relevant, because "the issue presented there was substantially different from the one presented here". The EC disagrees. The issue in *EC – Trademarks and Geographical Indications* was a US claim that, by applying an EC regulation, EC member States were granting each other advantages not available to other third countries, and thus violating most-favoured nation obligations. In response to this claim, the Panel held that member States authorities, when implementing Community law, were acting as organs of the EC; for this reason, the Panel found that such application could not be regarded as the granting of advantages to "other countries". The finding of the Panel in *EC – Trademarks and Geographical Indications* that member States' authorities, when implementing EC law, act as organs of the EC, is highly relevant to the present case. The fact that in the present case, the United States has made a claim under Article X:3(a) GATT, and not regarding most-favoured national obligations, is no reason why the Panel should ignore this case law.

4.705 In addition, the United States argues "that it cannot be assumed that one Panel's recognition of member States *executive* authorities as *de facto* EC authorities [...] means that another panel must recognize member States *judicial* authorities as *de facto* EC authorities". The EC fails to see the basis of this distinction. Both executive and judicial authorities are relevant public authorities in each WTO Member. Both the actions of the executive and of the judicial branches may be relevant for compliance with WTO obligations. Accordingly, the EC sees no reason why only executive authorities, but not judicial authorities of the member States, should be recognized as authorities of the EC when implementing EC law.

4.706 The US arguments are also incompatible with principles of general international law regarding responsibility for wrongful acts. In this regard, the EC would refer to Article 4(1) of the Articles on responsibility of States for internationally wrongful acts elaborated by the International Law Commission (ILC).

4.707 It follows clearly from this provision that, when it comes to the acts of a State under international law, there is no distinction between acts of the legislative, executive and judicial organs. For this very same reason, it would seem unjustifiable to consider that only the executive authorities of the member States, but not the judicial authorities of the member States, can act as EC organs.

4.708 Similarly, it follows from the ILC's articles on state responsibility that the responsibility for internationally wrongful acts extends not only to organs of the central government, but also to organs of territorial units. Accordingly, the EC has never contested that it is responsible in international law for the compliance by EC member States with the obligations of the EC under the WTO Agreements.

4.709 With its argument that member States courts cannot be regarded as EC courts, the United States seems to suggest that whereas the EC is responsible for the actions of EC member States, it cannot have recourse to organs of the EC member States for discharging its obligations, such as the one under Article X:3(b) GATT. Such a result would be highly contradictory. Under the general principles of state responsibility, attribution of conduct relates to all acts and omission, regardless of their legality. Accordingly, not only must conduct be attributed for the purposes of establishing a violation of international obligations, but also in order to assess whether obligations have been complied with. In other words, it is perfectly possible for the EC to have recourse to its member States for the purposes of discharging international obligations, including the obligation to provide for prompt review under Article X:3(b) GATT.

(b) Time requirement: promptness in the review

4.710 Along these proceedings, the claim has been progressively reduced by the United States. Indeed, the United States has lately explained that it is not arguing the lack of promptness of review and correction provided by the EC member States tribunals.

4.711 As to the European Court of Justice and the Court of First Instance, the United States has never claimed that the proceedings before these two Courts, when reviewing decisions taken by the EC institutions, do not ensure prompt review. The only criticism sustained by the United States refers to "preliminary rulings" (i.e.: references to the Court of Justice by national courts). The United States argues that "the time it takes for questions to get presented to and decided by the ECJ and the fact that, in general, referral of questions to the ECJ is discretionary […] means that the ECJ is not a tribunal or procedure for the prompt review and correction of customs administrative decisions".

4.712 The EC has already explained that this criticism underlay the US misunderstanding of the EC system: the ECJ does not review national customs administrations decisions, but it helps the national courts in such a review through the preliminary ruling procedure with the aim of ensuring the uniform application of Community law throughout the Community. Therefore, preliminary rulings by the ECJ are one of the EC mechanisms to ensure uniform administration of the EC trade laws, regulations, judicial decisions and administrative rulings of general application, as required by Article X:3(a) GATT, and cannot be considered as such a mechanism of "review" of national customs decisions.

G. SECOND ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

1. The EC is not obliged to create an EC customs agency and a customs court

4.713 The EC has already explained the significant constitutional implications of the present case for the EC as well as for the WTO Membership in general. It has also explained that the US claims under Article X:3 GATT are essentially directed at forcing the EC to create a centralized customs agency and a customs court.

4.714 The subsequent submissions of the United States have entirely confirmed this assessment. The US has offered no evidence of non-uniform administration of EC customs law, or of judicial review which would be less than prompt. Instead, it has focussed entirely on the involvement of the customs authorities of the EC member States in the administration of EC customs law, which it claims "as such" leads to a lack of uniformity contrary to Article X:3(a) GATT. Similarly, in its claims under Article X:3(b) GATT, the US has focussed entirely on the absence of an EC customs court.

4.715 The US has protested this as a "caricature" of its claims. However, as so often, caricature reveals the true nature of things. Immediately after assuring the Panel that it does not argue that Article X:3(a) GATT requires WTO Members to have a single customs agency, the US retreats from this assurance by stating that "establishing such an agency is the principal manner by which the United States understands the vast majority of WTO Members (if not all WTO Members) to have undertaken to discharge their obligation" under Article X:3(a) GATT. The US also claims that because the EC does not have a single customs agency, it is obliged to have a single customs court.

4.716 The US fixation on the creation of a centralized customs agency and a customs court has been a constant feature of the present proceedings. The creation of such an agency, which should be equipped also with a competence to issue advance rulings on a number of issues, was the first demand made by the United States of the EC during the consultation phase of the present dispute. The second demand was the creation of an EC customs court. Moreover, when questioned by the Panel as to which measures, short of establishing a customs agency and a customs court, the EC should take if the US were to prevail with its claims, the US failed to identify a single concrete measure.

4.717 The US is therefore wrong to complain about the EC's misrepresenting its claims. The US claim under Article X:3(a) GATT is clearly directed against the involvement of the customs authorities of the EC member States in the administration of EC customs law. It is thus a direct challenge to the EC's system of executive federalism, which is a general structural element of the EC legal order, and not only in the field of customs administration. The same is true for the US claim under Article X:3(b) GATT, which is aimed at replacing the courts of the member States by an EC customs court. The EC cannot be faulted for clearly spelling out the US claim.

4.718 The United States has accused the EC of advocating a relative view of Article X:3(a) GATT. This argument is unfounded. The obligation of uniform, impartial and reasonable administration in Article X:3(a) GATT is the same for all WTO Members, including the EC. The EC has never argued that it is subject to standards which are different from those applicable to other Members.

4.719 In support of its view, the US has referred to the fact that the EC, supported by Japan, has argued that whether there exists a lack of uniformity must be established taking into account the features of the system of customs administration in question. This is equally unfounded. It goes without saying that whether a lack of uniformity exists in a particular system of customs administration can only be determined on the basis of all relevant facts, which necessarily include the features of the customs system in question. This has nothing to do with advocating a relative standard, but is simply a requirement inherent in an objective assessment of the facts.

4.720 The US has claimed that "it is improper for the EC to argue that its unique status within the WTO as perhaps the only Member without a single centralized customs agency makes it subject to a different standard with respect to the obligation of uniform administration". The US has also stated that "the EC is the only WTO Member [...] that has a combination of geographically fragmented customs administration and geographically fragmented review". As the EC has already remarked, it is not arguing that it is subject to a different standard than other WTO Members. However, even if it were indeed the only WTO Member with a decentralized system of customs administration and judicial review, this does not mean that its system is in any way incompatible with Article X:3 GATT.

4.721 The EC is an original Member of the WTO. When the EC became a party to the WTO Agreements, including the GATT 1994, its system of customs administration and judicial review was perfectly well known to all Contracting Parties. With this knowledge, the Contracting Parties, including the United States, agreed that the EC should become an original Member of the WTO. It cannot seriously be argued that a fundamental characteristic of the EC such as the involvement of the EC member States in the administration of EC law, including customs law, and in the provision of judicial review, is nonetheless to be regarded as incompatible with Article X:3(a) GATT.

4.722 This point deserves particular emphasis because it is not limited to the area of customs laws. Article X:3(a) GATT applies to all the laws referred to in Article X:1 GATT. Accordingly, the interpretations of the US would not just apply to the area of customs law. Rather, they would make the involvement of sub-federal entities in the execution of federal laws generally impossible in large areas of economic regulation.

4.723 This is of considerable concern to the entire WTO Membership. While the US has a constitutional system in which the spheres of competence of the federal government and of the 50 states are clearly separated, other WTO Members have systems which are marked by a system of executive federalism, in which federal laws are implemented through sub-federal units. As has been recognized even by Judges of the US Supreme Court, executive federalism is a perfectly legitimate constitutional choice, and there is no reason why it could not also apply in the area of customs. Accordingly, the Panel should not accept an interpretation of Article X:3 GATT which would impose a particular US view as to how federal laws should be implemented on other WTO Members.

4.724 The United States has also faulted the EC for having referred to Article XXIV:12 GATT. These criticisms are unwarranted. The EC has invoked this provision as support for its view that GATT commitments, including Article X:3(a), were undertaken by the Contracting Parties in full respect of their respective constitutional systems. As the Panel in *Canada – Gold Coins* has explained, Article XXIV:12 GATT is a provision which has the "function of allowing federal states to accede to the General Agreement without having to change the federal distribution of competences". As a counterpart, Article XXIV:12 GATT requires every WTO Member to take such reasonable measures available to it to ensure observance of the provisions of the GATT at the sub-federal level.

4.725 The EC is fully committed to ensuring compliance by its member States with the requirements of Article X GATT, in accordance with Article XXIV:12 GATT. However, this is not what the US is asking of the EC. The US is arguing that the EC should create a centralized customs agency, a customs court, and should replace all relevant legislation of the member States, notably on the matter of penalties, by EC legislation. This would result in a radical shift in the federal balance within the EC. Such an interpretation is therefore not compatible with the purpose of Article XXIV:12 GATT.

4.726 As regards specifically the issue of a customs court, the US has also referred to Article VI:2(b) GATS, and argued that the EC is trying to transpose this provision to Article X:3 GATT. This argument is manifestly unfounded. Article VI:2(b) GATS contains a general exception which renders the obligation to institute the tribunals or procedures required by Article VI:2(a) GATS essentially facultative for certain members. To this extent, the provision can be regarded as a more far-reaching equivalent to Article X:3(c) GATT, which gives the possibility to provide review also through procedures which are administered by bodies which are not independent. However, this has nothing to do with the EC's arguments in the present case. The EC is not contesting that it is obliged to institute tribunals or procedures for the provision of judicial review which are independent of the agencies which they control. The EC merely points out that the question how the EC organizes its court system through which it provides judicial review is not prejudged by Article X:3 GATT.

4.727 The US has also argued that difficulties of coming into compliance should have no bearing on assessing whether the EC is in compliance with Article X:3 GATT. At a general level, the EC agrees that difficulties of compliance are not as such decisive for the interpretation of an international obligation. However, the US cannot expect that its claim should be accepted without any consideration of its practical implications. Whereas the Panel is not required to decide on which measures would be necessary for securing compliance, it should also not decide on this particular dispute without giving due consideration to the real-world implications of the US claims.

2. The US claims under Article X:3(a) GATT

(a) The United States misrepresents the requirements of Article X:3(a) GATT

(i) Article X:3(a) GATT is a non-prescriptive, minimum standards provision

4.728 The US has disputed the EC's characterization of Article X:3(a) GATT as a minimum standards provision. It also disputes the relevance of the Appellate Body Report in *US – Shrimp*, where the Appellate Body refers to the requirements of Article X:3(a) GATT as "minimum standards". In the view of the US, "minimum standards" does not mean that these standards are "low standards".

4.729 These US arguments amount to a mischaracterization of the EC's arguments. The EC has not argued that Article X:3(a) GATT contains a "relative" standard, nor has it taken a position on whether it is a "low" or a "high" standard. However, given the highly ambitious application of Article X:3(a) GATT sought by the US, it is necessary to reflect on the nature and purpose of the obligations contained in this provision.

4.730 Article X:3(a) GATT is not a provision which prescribes in detail how WTO Members should administer their customs laws. There are other provisions in the GATT, and in other covered agreements, which contain the detailed substantive disciplines with which Members must comply. Article X:3(a) GATT complements these disciplines of the GATT and its annexes in order to ensure that the enjoyment of the benefits of the GATT by other Members is not frustrated through measures of administration which are unreasonable, partial, or non-uniform. It cannot be lightly assumed that the administration of a WTO Member falls below these minimum standards.

4.731 This is confirmed by the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*, in which it held as follows: "A claim under Article X:3(a) of the GATT 1994 must be supported by solid evidence; the nature and the scope of the claim, and the evidence adduced by the complainant in support of it, should reflect the gravity of the accusations inherent in claims under Article X:3(a) GATT". This clearly confirms that the Appellate Body considers that Article X:3(a) GATT sets out basic minimum standards, a violation of which cannot be assumed lightly. Moreover, in a very recent case, the United States itself argued that the evidence offered to support an Article X:3(a) GATT claim must reflect the gravity of such a claim.

(ii) Article X:3(a) GATT requires the United States to demonstrate the existence of a pattern of non-uniform administration

4.732 In its Second Written Submission, the United States contests that it is required to demonstrate the existence of a pattern of non-uniform administration in order to establish a violation of Article X:3(a) GATT. The United States has also contested that the Panel Report in *US – Hot-Rolled Steel* provides authority for such a requirement, and has claimed that the EC has based itself on "one single sentence" of this report. This is manifestly untrue. The reference by the Panel in *US – Hot Rolled Steel* to the requirement of a pattern was not a mere *dictum*, but based on a considered reflection of the requirements of Article X:3(a) GATT. It reflected the Panel's view that in order to

amount to a violation of Article X:3(a) GATT, the actions in question must "have a significant impact on the overall administration of the law, and not simply on the outcome in the single case in question". This, incidentally, was also the submission of the United States in *US – Hot Rolled Steel*.

4.733 The US tries to distinguish *US – Hot Rolled Steel* by submitting that in the present case, it is not arguing that "a particular application" of EC customs law represents non-uniform administration, but rather that the "EC's system of customs law administration as a whole" does not comply with Article X:3(a) GATT. The EC is baffled by this argument. The US seems to believe that because it makes more sweeping claims, it needs to present less evidence. The EC submits that the opposite should be true. It is not comprehensible to the EC how the US can challenge the "overall administration" of the EC's system without actually showing how customs law is administered in that system. It seems to the EC that in order to condemn the EC's system of customs administration as a whole as incompatible with Article X:3(a) GATT, a very clear pattern of non-uniform administration would have to be demonstrated.

4.734 The US has also referred to the Panel Report in *Argentina – Hides and Leather*, and has stated that this Panel did not refer to the requirement of a pattern. However, the Panel *Argentina – Hides and Leather* provides no support for the US arguments. The measure challenged in *Argentina – Hides and Leather* was a resolution which authorized representatives of Argentinean industry to participate in certain parts of the administrative procedure. It thereby made it impossible for Argentina to ensure the protection of business confidential information, and administer its customs laws in an impartial and reasonable manner. It was not contested that in the practical application of the resolution, industry representatives did indeed participate in the process. Accordingly, since there was no doubt that the administration by Argentina was uniformly unreasonable and partial, there was no reason for the Panel to examine whether there was a pattern. This is entirely different from the present case, where no EC measure mandates non-uniform administration; quite on the contrary, EC measures ensure uniform administration, and the EC strongly contests that there is a lack of uniformity in the EC's administration of its customs laws.

4.735 Finally, the US takes to misrepresenting the EC's argument by claiming that the EC had requested it to show the existence of a "neat pattern" of non-uniform administration. The EC does not understand the Panel in *US – Hot Rolled Steel* to have required the pattern of instances of administration to be arranged in any particular order, or to be "neat". A pattern can also be constituted by a repetition of similar acts or omissions. Where such instances of administration become sufficiently widespread and frequent as to have an impact on the overall administration of the law, this constitutes a lack of uniformity contrary to Article X:3(a) GATT. This is the standard which the US must meet, no more, but also no less.

4.736 The US has also argued that a pattern cannot be required because "the interests of traders in [....] uniform administration of the customs laws do not depend on the statistical significance of occurrences of non-uniform administration". The EC disagrees. Article X:3(a) GATT protects traders against an administration of customs law in which they cannot reasonably predict the treatment they will receive. It does not protect them against individual instances of administrative error, which can and should be corrected through mechanisms of administrative and judicial review. Accordingly, how widespread and frequent instances of non-uniform administration are is a relevant consideration under Article X:3(a) GATT.

(b) The US has not provided any evidence of a lack of uniformity in the EC's administration of its customs laws

4.737 As the EC has already mentioned, the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* has required that any claim under Article X:3(a) GATT must be supported by "solid evidence". The United States, which has the burden of proof as the complainant, has singularly failed

to discharge this burden. Far from producing solid evidence, it has not produced any evidence to support its claim of non-uniform administration in the EC's system of customs administration.

4.738 When required by the Panel to provide evidence to support its claim, the United States has monotonously responded that such evidence was not relevant to its claim, and that if it were relevant, it should be the EC which should provide it. As the EC has already remarked, this is a transparent attempt to shift the burden of proof to the EC, which should be rejected by the Panel.

4.739 The US claims that the EC has "acknowledged" instances of non-uniform administration in the areas of penalties and audit procedures are unfounded. As regards the issue of penalties, there is no non-uniform administration, rather, as the EC will show further below, it is the laws of the member States containing sanctions provisions which are different. As regards the issue of audits, the EC has already contested, and continues to contest, that there is a lack of non-uniform administration. As explained, all member States have the necessary audit capacity, and the audit practices of the member States are sufficiently harmonized, with guidance provided by the EC Customs Audit Guide. This Guide also addresses the selection of audit targets, and the question of risk assessment. It therefore addresses the issue of the balance between inspections at import and post-clearance audits which has been raised by the US. The US therefore has not substantiated its allegation that there is a lack of uniformity in the EC's customs auditing practice.

4.740 The US also claims to have demonstrated that there is a lack of uniformity in the area of processing under customs control. The EC does not see the basis for this statement. The US has merely referred to guidance on this procedure, which it claims to contain certain divergences as regards the application of the economic conditions. The EC has contested this interpretation made by the US, which is not supported by the text of guidance. In contrast, the US has not provided any evidence of actual administration which would support its claim that there are differences in administration.

4.741 The US alleges that the EC has recognized that such differences exist by explaining that in certain cases, the examination of the economic conditions takes place at EC level. This statement is unfounded. The EC has merely correctly explained the various ways in which the economic conditions for processing under customs control are applied in the EC. That in certain cases, the conditions are examined at EC level, whereas in other cases, they are examined at member States level, does not mean that in the second case, there is a lack of uniform application. It is also noted that in accordance with Article 522 of the Implementing Regulation, member States are obliged to communicate to the Commission the information about authorizations issued and applications refused on the grounds that the economic conditions are not fulfilled. This allows the Commission to verify that the economic conditions are applied correctly.

4.742 Overall, the US has therefore not shown the existence of any lack of uniformity in the administration of EC customs law, let alone the existence of a pattern of non-uniform administration.

(c) The US criticisms of the EC's system of customs administration are unjustified, and do not demonstrate any incompatibility with Article X:3(a) GATT

4.743 Since the United States has been unable to demonstrate any actual lack of uniformity in the EC's practice, it has instead tried to build its case on criticism of the various elements of the EC's system of customs administration. Before addressing the specific arguments made by the United States, the EC would like to make three general remarks.

4.744 First, systemic criticism cannot replace proof of actual lack of uniform administration. As the EC has said time and time again, Article X:3(a) GATT does not prescribe how WTO Members should administer their laws. The specific design of the EC's system could therefore become relevant under

Article X:3(a) GATT only if it necessarily led to a lack of uniformity. However, the US has provided no evidence for such a proposition. In this regard, it is also necessary to recall the findings of the Appellate Body in *US – Carbon Steel*, according to which it is the responsibility of the complainant who alleges that the municipal law of another member has a particular meaning or effect to provide evidence for such statement.

4.745 Second, in order to assess whether the EC's system ensures uniform administration of customs laws, it is not sufficient to look at one particular instrument or feature in isolation. Rather, the question is whether the EC's system as a whole, including all its relevant instruments, ensures uniform administration. The approach followed by the United States in its Second Written Submission is precisely the opposite. The US selects a particular instrument, mischaracterises it, and then triumphantly declares that such instrument is not sufficient to ensure uniform administration. It is obvious that such a way of proceeding does not constitute a fair and objective way of appraising the EC's system.

4.746 Third, the US shows a marked tendency to ignore all elements that do not suit it for the purposes of its claims. For instance, in its discussions of EC classification practice, the US focuses almost exclusively on the EBTI system, but does not acknowledge the existence of other binding instruments of Community law, such as classification regulations or explanatory notes. Similarly, the US has not acknowledged with one word the EC instruments existing in the field of customs cooperation, or the budgetary and financial instruments. To put it differently, whereas the US is happy to rely on a report of the Court of Auditors as alleged proof for a lack of uniformity in the EC's system, the US does not wish to acknowledge that such EC institutions might also contribute to uniformity, and therefore have to be taken into account in the evaluation of the overall system.

(i) Administrative guidance and the duty of cooperation

4.747 As the first of its systemic criticisms, the United States claims that "most of the instruments that the EC holds out as securing uniform administration are non-binding, discretionary, or extremely general in nature".

4.748 This statement turns the EC's system upside down. The EC's system of customs administration is based on a very comprehensive body of law, which is entirely binding. In all areas of customs law, the EC institutions dispose of the necessary powers to adopt legally binding measures as and wherever the need arises. This is complemented by a complete system of judicial protection and review, which includes rights of appeal of traders, but also the possibility to bring infringement proceedings. To claim, therefore, that the EC's system is primarily based on non-binding means is simply self-refuting.

4.749 The US also criticizes the reliance of the EC, in certain cases, on administrative guidance and other instruments which are not legally binding, such as the EBTI guidelines, or the conclusions of the Customs Code Committee. This criticism is unwarranted. The EC has recourse to non-binding guidance as a complement to binding measures whenever this is warranted by the specific issue at hand, given for instance its technical character. To take but one example, the EC does not see what would be gained by transforming the EBTI guidelines, which, for instance, contain instructions as to how and when to consult the EBTI data base, into a legally binding instrument. Moreover, more important is whether the guidelines are actually followed, and the US has produced no evidence to the contrary.

4.750 As regards the duty of cooperation, the US has criticized that this obligation is too general in nature. The EC does not agree. What matters is not that the duty of cooperation is a general obligation, but that it exists. Moreover, it is legally binding, and can be sanctioned by the Court of Justice. That cases before the Court may not be very frequent does not mean that the duty of

cooperation does not have practical effect. Quite on the contrary, it shows that it is generally respected.

(ii) The EBTI system

4.751 The second systemic aspect criticized by the US is the EC's BTI system. The EC has already intensively responded to the US arguments in this respect, and will therefore highlight only a number of new aspects in the US arguments.

4.752 In its Second Written Submission, the US repeats its claim that the EC's system facilitates BTI shopping. However, as the EC has already noted, the US does not provide any evidence for this statement. In an apparent attempt to explain this failure, the US now states that BTI shopping "is done in such a way that it is does not generate evidence and thus is difficult to identify". Moreover, the US remarks that "traders can hardly be expected to come forward and openly admit that they are taking advantage of the opportunity to seek optimal classification of their goods". The EC would submit that alleged difficulties of providing evidence are not a reason for exempting the United States from discharging its burden of proof. The United States cannot expect the Panel to accept its claim on faith just because it states that providing evidence is too difficult.

4.753 Second, assuming for a moment that the United States presentation of the situation was right, the EC also wonders wherein precisely would lie the nullification or impairment of benefits to the US. It seems to the EC that if there is nullification and impairment, then the US should be able to support this with some evidence. Inversely, if its traders have no interest in the case, because they achieve optimal classification of their goods, then the US has itself rebutted the presumption of nullification and impairment in Article 3.8 DSU.

4.754 In its Second Written Submission, the US also continues its criticisms of the *Timmermans* case law of the Court of Justice, which it claims is contrary to the uniform application of EC customs law. In this respect, the EC can largely refer to its earlier submissions. However, a new element in the US arguments is that the US now appears to view classification a matter of discretion. In fact, the US argues that tariff classification requires a customs authority to make certain judgments, which may evolve over time. In this way, the US seems to take a highly dynamic approach to tariff classification, which for the US seems to be at least partially a policy issue.

4.755 This approach may explain the frequent reconsiderations of classification issues in US practice. It may also explain why the US seems to be much more concerned with geographical uniformity than with uniformity over time. However, the EC does not agree with the US's point of departure. Tariff classification, albeit complex, is a legal issue which is fully subject to judicial review. At any given moment, there is only one correct classification for a particular product, and this classification does not rapidly change on the basis of policy considerations.

4.756 Accordingly, the *Timmermans* case law does not in any way detract from the uniformity of EC law. On the contrary, it allows member States to correct errors, where such errors have been made. Contrary to the US view, this has nothing to do with applying the member States' "own interpretation", but rather with applying the correct interpretation. A perfect illustration for this is the *Bantex* case, where the *Timmermans* case law allowed the UK authorities to bring their classification practice into line with an EC classification regulation they had overlooked. Moreover, as the EC has already shown, US rules for the revocation of advance rulings in the event of error or change of practice do not seem to fundamentally differ from those in the EC.

(iii) Judicial review by member States' Courts

4.757 As the third and last issue, the US criticizes the EC for having referred to the judicial review of customs decisions as another mechanism for securing the uniform application of EC customs law.

4.758 The US' first objection is that because decisions of member States' courts are "binding only within that Member State", a decision in a particular case might be inconsistent with the decisions of the courts of other member States. This objection is spurious. Apart from the fact that there is no requirement, as the EC will show later, for first instance judgments to be "binding throughout the Community", the US is forgetting that the EC member States courts are not operating in a vacuum. Precisely in order to avoid the danger to which the United States refers, the EC Treaty has established has the preliminary reference procedure. This procedure allows the Court of Justice, acting in constant dialogue with the member States' courts, to ensure a uniform interpretation and application of Community law. It is important to note that in deciding whether a question of Community law should be referred to the ECJ, or whether it can be regarded as obvious, member States' courts must also consider whether the matter will be equally obvious to the courts of other member States. Accordingly, where courts of different member States have decided, or might decide, a question of Community law differently, this is a reason for referring the question to the European Court of Justice.

4.759 Furthermore, the US has criticized the fact that the EC has no system of notification of judgements between the courts of member States. In order to counter the EC's argument that such a system would be burdensome and ineffective, the US has referred to the existence, in the United States, of data bases such as Lexis and Westlaw. These remarks are beside the point. The EC understands the Panel's Question No. 72 to have referred to mechanisms of formal "notification" of judgments of one court to another. The EC does not understand the question to have aimed at privately-run data bases such as Lexis and Westlaw. As for such mechanism, similar data bases, as well as legal and technical journals, obviously also exist in the EC. Moreover, typically traders and brokers interested in the classification of a particular good are well aware of relevant judicial decisions throughout the EC, and will bring them to the attention of the courts, if these are not already aware of them.

4.760 Second, the US argues that it is excessively burdensome for a trader which operates in several member States to pursue his appeal in several courts. The EC does not agree. The situation described by the US is due to the fact that the competence of EC tribunals is territorially limited, and, as the EC will show, there is nothing wrong with that. Moreover, no trader is obliged to import the same good through various different ports in different member States, but if he does so, the result may be that different courts will be competent. Finally, this still does not mean that the trader would normally have to conduct several appeals in parallel. If a question is referred to the Court of Justice, the normal situation will be that other procedures in which the same question is relevant can be suspended until the Court has given judgment. Once the Court has given judgment, this interpretation will guide all member States courts. Moreover, each referral to the European Court of Justice, as well as judgments rendered, is published in the Official Journal of the European Union, which allows traders and judges of other EC member States to be fully informed about cases which arose in another member State.

4.761 Finally, the US complains that the EC should not be allowed to refer to judicial review as an instrument for securing uniform application since this is an "entitlement" of traders under Article X:3(b) GATT. Moreover, the US claims that the EC is arguing that compliance with Article X:3(b) would be sufficient for compliance with Article X:3(a) GATT.

4.762 These allegations are entirely unfounded. The EC has never claimed that the provision of judicial review is sufficient for complying with Article X:3(a) GATT. On the contrary, the EC has acknowledged that a system which purely relies on private rights of appeal would not normally appear

to be compliant with Article X:3(a) GATT. This is however not the case in the EC, where judicial review is only one out of many mechanisms which contribute to the uniform application of EC law. That judicial review is also at the same time an entitlement under Article X:3(b) GATT is irrelevant. First of all, this provision concentrates solely on first-instance review. Secondly, there is nothing to prevent that it may also at the same time be a tool for securing uniform administration.

4.763 Overall, the United States has failed to show that there are any features in the EC system which necessarily would lead to a lack of uniformity in the EC's system of customs administration. Quite on the contrary, the EC's system contains numerous, interlocking mechanisms which together provide a high degree of assurance for a uniform interpretation and application of EC customs law. The US claims should therefore be dismissed.

(d) Article X:3(a) GATT does not require the EC to harmonize member States' penalty provisions

4.764 A final claim under Article X:3(a) GATT concerns the issue of penalties for customs violations. This US claim has nothing to do with the administration of laws, but rather is aimed at forcing the EC to harmonize the member States laws which contain penalty provisions and replace them with EC laws. This claim has no basis in Article X:3(a) GATT.

(i) Penalty provisions are not covered by Article X:3(a) GATT

4.765 First, the EC has explained that penalty provisions are not among the laws which are referred to in Article X:1 GATT, and therefore are not covered by Article X:3(a) GATT. So far, the United States has not provided any explanation as to why penalty provisions should be regarded as laws within the meaning of Article X:1 GATT, i.e. laws "pertaining to the classification or valuation of products for customs purposes, or to rates of duty, taxes, or other charges".

4.766 In fact, the United States does not even seem to argue that penalty provisions are laws within the meaning of Article X:1 GATT. Instead, it merely states that penalty laws are "tools" for the administration of the laws referred to in Article X:1 GATT. However, if penalty provisions are merely tools for the administration of the laws in Article X:1 GATT, they are not themselves such laws.

4.767 In its Second Written Submission, the US has also made an oblique reference to the term "charges" in Article X:1 GATT. However, the EC does not believe that this term covers penalties. "Charges" are contributions of a pecuniary nature, which are frequently "charged" in exchange for services rendered or goods provided. Penalties respond to illegal behaviour by imposing a sanction. Such sanctions may be financial in character, but can also take other forms. For instance, criminal sanctions may include not just fines, but also imprisonment or social work. Administrative sanctions may also include measures such as the destruction or forfeiture of the goods. It does not appear that all these different types of sanctions can be included under the term "charges". This is also illustrated by Article VIII GATT, which clearly distinguishes between fees and charges on the one hand, and penalties, on the other.

(ii) Article X:3(a) GATT does not require the harmonization of laws which exist in a WTO Member at sub-federal level

4.768 The second problem with the US claim is that member States' laws which contain penalty provisions are themselves laws of general application. Accordingly, even if these laws fell under Article X:1 GATT, it would be the administration of those laws to which Article X:3(a) GATT applies. The alleged differences between member States' penalty provisions to which the US has referred are not differences in administration, but differences between different legislative measures applicable in different territories. That a particular topic may be regulated differently in different

parts of the territory of a WTO Member has nothing to do with non-uniform administration. Accordingly, Article X:3(a) GATT cannot be used to create a duty to harmonize sub-federal laws existing within a WTO Member.

4.769 The United States has tried to escape this conclusion by repeating its mantra that "laws can also be administered through laws", and that therefore, member States' penalty provisions are to be regarded as "administration" for the purpose of Article X:3(a) GATT. This interpretation is fundamentally at odds with the ordinary meaning of the wording of Article X:3(a) GATT.

4.770 The United States has defined the term to "administer" as "to execute", which in term it defines as "to carry out, put into effect". The EC can agree with these definitions. However, the EC does not agree that a penalty provision "puts into effect" or "carries out" the substantive rule the violation of which it is intended to sanction. For instance, a provision which provides for the imposition of a sanction for the failure to declare a good does not "carry out" or "put into effect" the provision which imposes the obligation to declare the good. The penalty provision itself needs to be carried out through an administrative or judicial act imposing the sanction. It is this latter act which can be regarded as executing the prohibition, and thus to constitute "administration". In contrast, the penalty provision complements the substantive provision, but does not itself put it into effect.

4.771 Indeed, the United States itself has explicitly recognized that a penalty provision "may be considered as something to be administered". This exposes the logical fallacy of the United States. A law that itself needs to be "put into effect" cannot be said to "put into effect" another law. Rather, penalty provisions and substantive provisions are both measures of general application which complement one another. That the former exists at the member States level and the latter at the EC level does not mean that the former administers the latter.

4.772 The US has criticized the EC for having defined "administration" as the execution of laws "in concrete cases". This criticism is unjustified. The administration of a law, which is defined as an act of general application, by definition implies its application in concrete cases. This follows clearly from the structure of Article X GATT. Article X:1 GATT defines the laws of general application which must be published by WTO Members. Article X:3(a) GATT then refers to these laws of general application as the acts to be administered in a uniform, impartial and reasonable manner. It defies the internal logic of Article X GATT to argue that laws to be administered can at the same time themselves constitute administration. This would undermine the clear distinction between "administration" and the laws to be administered recognized by the Appellate Body in *EC – Bananas III*.

4.773 The US has sought support for its interpretation in the Panel Report in *Argentina – Hides and Leather*, in which the Panel found that a particular Argentinean resolution constituted a violation of the requirement of impartial and reasonable administration. However, as the EC has already explained, this was because the Argentinean measure made it impossible for Argentina to administer its customs laws in a manner that was reasonable and impartial. Nowhere does the Panel Report in *Argentina – Hides and Leather* indicate that the Argentinean measure administered some other measure. Accordingly, *Argentina – Hides and Leather* provides not support to the US interpretation in the present case.

4.774 Overall, the US interpretation that "laws may implement other laws" is highly contrived and self-serving. It is designed to achieve a condemnation of the EC in the present case while safeguarding those areas of economic activity which in the United States itself are regulated in state law.

4.775 In the United States, a wine exporter may have to deal with 50 different sets of state requirement for the sale of alcoholic beverages. This is probably far more burdensome than the fact

that an importer in the EC may have to reckon with the penalty provisions of one out of 25 member States, depending on where the offence is committed. It is therefore not clear why the EC should be obliged to harmonize its penalty provisions while the US is entitled to maintain sub-federal laws in numerous areas covered by Article X:3(a) GATT.

4.776 Of course, the United States has a system of dual federalism where State law may never implement federal law. However, this cannot mean that all WTO Members in which the borderlines between federal and state competence are less strict, and federal and state laws may therefore be complementing one another, are somehow in violation of Article X:3(a) GATT.

(iii) Community law ensures a sufficient degree of uniformity of penalty provisions

4.777 Finally, the EC would clarify that whereas it does not accept that penalty laws can be regarded as "administration", it does not contest that penalty laws may also be relevant for securing a uniform application of the laws referred to in Article X:1 GATT. This is precisely why Community law, as clarified by the Court of Justice, lays down certain basic rules for penalty provisions, which must be effective, proportionate, and dissuasive.

4.778 These general requirements are sufficient for securing a uniform application of EC customs laws, in accordance with Article X:3(a) GATT. The United States does not provide any evidence which would show that the absence of a full harmonization of penalty provisions in the EC leads to any lack of uniformity in the application of EC laws in areas referred to by Article X:1 GATT.

4.779 The US has repeatedly referred to the fact that the EC, in the context of the discussions on the modernized customs code, has considered including a provision which would provide for a further harmonization of administrative sanctions in the customs area. However, these discussions have nothing to do with the question of whether the EC is in compliance with the requirements of Article X:3(a) GATT. Where this is beneficial for the functioning of the internal market, the EC has adopted harmonising measures in numerous areas, without this necessarily being a reaction to a WTO obligation.

3. The US claim under Article X:3(b) GATT

(a) The ECJ and the requirement of prompt review

4.780 The US criticism on prompt review is limited to the role played by the ECJ through the preliminary reference procedure. The US has not presented any allegation concerning the actions for annulment of a Community measure, and, therefore, the US seems to admit that, in this type of procedure, the ECJ and the Court of First Instance comply with the requirement of prompt review.

4.781 It should be pointed out that preliminary references serve the purpose of ensuring the uniform application and interpretation of Community law by the tribunals of the member States. In this sense, the Court of Justice, when acting through the preliminary reference procedure, exercises a function, which is not dissimilar to that of a supreme court. As the EC has repeatedly explained, preliminary reference procedures at the same time also serve as one of the various instruments to ensure uniform administration in accordance with Article X:3(a) GATT. The EC has already affirmed that, in its view, "administer" means to execute the general laws and regulations, to apply them in concrete cases. Therefore, uniformity is ensured through a panoply of administrative and legal mechanisms, including some judicial ones, like preliminary references or appeals to a second instance court. In no respect, however, does the ECJ, through the preliminary reference procedure, provide "review" within the meaning of Article X:3(b) GATT, nor is this in any way required for the EC's compliance with this provision. In this context, it should be recalled that, as the US has already admitted, prompt review in Article X:3(b) GATT refers only to first instance.

4.782 In any case, even if the requirement of promptness is applied to cases where preliminary references are requested, the accumulated time span it takes for a case to go through the ECJ and the relevant national court rarely arrives to the nearly four years average of the USCIT cases mentioned by the EC in its First Oral Statement. In response to a question by the Panel, the US justifies these delays on "the fact that in the US courts the scheduling of proceedings is, to a significant extent, conducted by mutual consent of the parties". The EC finds it difficult to justify an exception to the "prompt review" obligation on the basis a procedural mechanism that relies on the discretionary will of the defending agency.

4.783 Moreover, the EC would like to recall that the average periods for review by the USCIT to which it has referred do not include the periods necessary for appeals to the US Court of Appeals for the Federal District or subsequently to the US Supreme Court. It would thus seem to the EC that if the activity of the US Supreme Court were to be regarded as "review", it would certainly be no more prompt than that provided by the ECJ.

(b) The requirement that the decisions of the tribunals must govern the practices of the agencies

4.784 The second US argument constitutes the core of its Second Written Submission in relation to Article X:3(b) GATT. This argument refers to the requirement that the decisions of the review tribunals govern the practice of the agencies entrusted with administrative enforcement of the WTO Member's customs law.

4.785 This argument has only appeared in these proceedings at a very last stage. The US used it for the first time in some of its replies to the first Panel questions, notably Question No. 35, where the Panel asked the US to identify what the US is challenging or alleging under Article X:3(b) GATT. This appears to replace the more general argument in the US First Written Submission, according to which "the opportunity for review and correction on a member-by-member State basis does not fulfil the EC's obligation under Article X:3(b)". This chapter included some arguments, mainly on timing and variations in review procedures, all of which seem to have been discarded in the course of the proceedings. Therefore, the US argument built on the second sentence of Article X:3(b) seems to be a last-minute fall-back position.

4.786 Although the late appearance of the argument has impeded a discussion between the parties, the EC will duly explain why the US position on the "govern the practice" requirement is a misrepresentation of Article X:3(b) GATT.

4.787 The US interpretation that any decision of a first instance tribunal binds the whole organization of the customs agencies throughout a WTO Member's territory is based on four grounds: three are related to the literal interpretation of the provision, namely the reference to two different obligations in the provision ("implement" and "govern"), " the ordinary meaning of the term "govern" and the use of the Article "the" before the term "agencies", while the fourth ground is based on the context provided by Article X:3(a) GATT.

4.788 The EC cannot agree with these arguments advanced by the US. In the first place, the EC has already explained in its Second Written Submission the meaning of "govern" compared to the expression "implement", and how the former refers first of all to an obligation of fairness when taking a second administrative decision following the issuance of an independent review decision.

4.789 Second, to interpret the term "govern", the different definitions of this term must be differentiated. Should we admit that "govern" means "control, regulate, determine, constitute a law, rule, standard or principle for", the decisions of first instance tribunals would be considered as having binding effects, contrary to a common element that is shared by most of the "civil law" and "common

law" legal systems: that only high level or last instance tribunals take decisions that are considered as binding and, therefore, a general source of law.

4.790 The EC can admit that a decision of a first instance regional tribunal plays the role of guidance to other first instance regional tribunals. Thus, the ordinary meaning of "govern", among those provided by the US, would be "influence". The decisions of a first instance tribunal are only binding for the specific cases decided by the same tribunal and, therefore, contrary to an argument constantly repeated by the US, they are not an instrument ensuring uniform administration.

4.791 This interpretation reflects the situation in those third parties to the dispute having regional courts of first instance in customs matters, like Brazil, China, Japan and, partially, India. On the contrary, as their submissions have shown, those third parties having centralized courts for first instance review of administrative decisions in customs (Argentina, Australia and Korea) can easily share the far-reaching interpretation of Article X:3(b) that the US follows in this case.

4.792 Third, the use of the term "the agencies" in Article X:3(b) does not mean that those agencies are all the agencies throughout the WTO Member's territory, in our case the EC. "The agencies" must be read in context with the term to which it relates, "tribunals", which are tribunals of first instance. Therefore, "the agencies" must be understood as "the agencies" whose decisions are reviewed by these tribunals of first instance. In the EC, "the agencies" are those established in each of its member States, not the agencies established in the other member States.

4.793 Moreover, the US fails to give a proper meaning to the term "decision" in Article X:3(b) GATT. The "decision" of a tribunal in a particular case must be distinguished from the reasoning which led it to this decision. For instance, if a tribunal decides on an action for the annulment of a decision of the customs authorities, then the decision will be to annul the decision or not. If the decision is to annul, then this decision will govern the practice of the agency. In contrast, there is no basis in Article X:3(a) GATT for assuming that all questions of interpretation which the tribunal may have considered in the course of its reasoning equally become binding on the agency. This would give a role to judicial precedent which would go far beyond the practice of numerous WTO Members which do not have a legal system based on case law.

4.794 This does not imply that the decisions of a tribunal of first instance, including the reasoning contained in the judgement, do not produce any effects in the EC system. Such reasoning will constitute relevant judicial practice which will be taken into account by the customs agencies. Moreover, if a customs agency or a court in a EC member State does not share the interpretation of the EC legislation given by a court of another member State, it will take the initiatives that are proper to its respective position in the system: the customs agency shall consult and discuss the issue with the Commission and the other member States, the court in another member State will or shall refer to the EC Court of Justice.

4.795 Fourth, the US considers that its understanding of X:3(b) is reinforced by the context provided by Article X:3(a). The EC has already challenged any linkage between these to set of obligations in the course of these proceedings. The EC considers that the US interpretation finds no support in the language, structure or objectives of Article X:3 GATT. The fact that, as the US underlines, the EC has conceded that Articles X:3(a) and X:3(b) must be interpreted "in an harmonious way" does not mean that we agree to an interpretation that transforms Article X:3 GATT in a "totum revolutum" provision, where the different obligations are melted, with the unwarranted consequence that the obligation to grant independent review and correction of customs administrative decisions at first instance level is absorbed by the obligation to ensure uniform administration of the legislation.

4.796 Finally, it is not true, contrary to what the US declares, that "if they [i.e. the decisions of review tribunals] govern the practice of only some of the agencies then, by definition, the administration of the Member's laws will not be uniform". This categorical conclusion does not take into account that, as the EC has explained, there are other means of ensuring uniform administration and that the EC counts with a wide range of instruments which contribute to the uniform interpretation and application of EC customs law.

(c) The US interpretation of Article X:3(b) GATT requires the establishment, in every WTO Member, of a single and centralized customs court or a single and centralized customs agency.

4.797 The US claims that it does not argue that Article X:3(b) requires every WTO Member to have a single, centralized tribunal for the prompt review and correction of customs administrative actions. The US accepts the existence of first instance regional courts provided that the WTO Member has a single, centralized agency entrusted with the enforcement of customs law or that the various regional customs authorities take other steps to ensure that the decisions of review tribunals govern the practice of the agencies and that the Member continues to administer its customs laws in a uniform manner.

4.798 It is unclear to the EC why the existence of a centralized customs agency, which at best is a question under Article X:3(a) GATT, should be linked to the design of the court system under Article X:3(b) GATT. The United States explains that "if the decision of a court in one region conflicts with a decision of a court in another region, the agency should be able to resolve the conflict by appealing one or the other decision to a court or a tribunal of superior jurisdiction". This explanation is revealing, because it shows that even according to the United States, judgments of courts of first instance are not binding on other courts, since otherwise, the conflict should not have occurred at all. More importantly still, the US seems to forget that it is the courts which should control the agency, not the agency which controls the courts. In the view of the US, it would be the agency which would be charged with ensuring the uniformity of the practice of the first instance tribunals, and which would select the judgment it wishes to appeal. This is an interpretation which totally blurs the borderlines between the role of the customs authorities and of the courts, and which should not be accepted.

4.799 The only additional reason given by the US to sustain that a central agency would cure the lack of a central court is a proviso that constitutes the fourth phrase in the second sentence of Article X:3(b). This proviso provides the possibility, for the central administration of a customs agency, to request the review of a first instance court decision when there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts. The US considers that "that possibility makes sense only if the decision in the original proceeding would otherwise have effect outside of that proceeding".

4.800 The US interpretation of this proviso is wrong in that it misunderstands the role played by the review mechanism laid down in that proviso. That mechanism is not established to rectify the effects of the original decision in the practice of the agencies but to provide a remedy, based on limited grounds, against a decision that is no more challengeable through ordinary means because it is time barred.

4.801 That is clear, first, from the structure of paragraph (b). The exception provided by the proviso refers to the time limits for appeals contained in the previous phrase in subparagraph (b) (the third phrase in the second sentence of the subparagraph), not to the "govern the practice" requirement, which is placed in the second phrase of the second sentence of Article X:3(b) GATT.

4.802 Second, that the proviso is not intended to rectify the effects of the original decision in the practice of the agencies also derives from the nature of this type of exceptional review. When the

review is based on the lack of consistency with established principles of law, its purpose is to protect the cornerstones of a legal system, with the view to eliminate conflicts with the case-law of the highest courts, which are responsible for refining those principles of law. When the review is based on the lack of consistency with the actual facts, its purpose is to annul a judicial decision on discovery of facts that were unknown to the court and to the party claiming the revision when the decision was given. Neither of these two grounds of review is linked to the eventual effects of a first instance judicial decision on the practice of the customs agencies. The review based on the respect of principles has as its objective to ensure respect of the legal system and of the highest courts, the review based on the discovery of new facts produces its effects only on the original decision.

4. Closing statement

4.803 The EC will begin its closing remarks by first presenting a number of general comments on the present case. It will then present its closing arguments on the US claims under Article X:3(a) GATT. The EC will subsequently present its closing arguments on the US claims under Article X:3(b) GATT.

4.804 A first general remark the EC would like to make is that the present case is not like any other which has been litigated under the DSU. It constitutes a fundamental challenge against the entire system of customs administration and judicial review of a WTO Member, namely the EC. Contrary to what the US has alleged, this has nothing to do with "scare tactics", but simply describes the reality. From the discussions it can be seen that the case is not limited to issues of customs law and administration. Rather, it touches upon fundamental differences between legal traditions and cultures, between Members which have a federal structure and those who do not, between Members who have a system of executive federalism and others who do not, and between common law and continental law systems on the value of judicial precedent. The EC believes that such issues are not properly litigated under the DSU, but should be left to the constitutional autonomy of each WTO Member. The EC is confident that the Panel will also be mindful of these considerations in its interpretation of Article X GATT, which is not a provision which should be used to interfere with fundamental questions regarding a Member's domestic legal system.

4.805 A second general remark the EC would like to make is that the Panel should not lose sight of the real implications of the US claims. The US case is, as the EC has repeatedly emphasized, aimed at the creation of an EC customs agency and an EC Court, plus the harmonization of member States' laws in a number of areas. Despite all US professions to the contrary, this is the clear conclusion from numerous US statements where the US declared that "in the absence" of an EC customs agency or a customs court, such and such issue necessarily leads to a lack of uniformity. This all-or-nothing nature of the US arguments is troubling, since it represents a highly prescriptive application of Article X:3(a) GATT on structural elements of the EC legal order which were well known at the time the EC became a WTO Member.

4.806 As a third issue, the EC was planning to raise the issue of the US's late submission of evidence. Given the Panel's decision to modify the timetable, for which the EC would like to thank the Panel, the EC will not further enter into this question at this stage. Nonetheless, the EC regrets that the US has not presented its evidence earlier, and that the EC does not feel to be in the same position as it would have been had the US presented its evidence as early as it should have. The EC would also like to add that at the end of these proceedings, the feeling is still one of a lack of conclusion. In fact, the EC feels as if it had been in a sort of trade policy review mechanism exercise, and it seems discussions could still have continued on the EC's system of customs administration forever. It does not seem that this is really how the WTO dispute settlement mechanism should be used.

4.807 The following are the EC's closing remarks on Article X:3(a) GATT.

4.808 The present proceedings have shown that the parties have strongly different views of the requirements of Article X:3(a) GATT. The US views this provision as a highly demanding legal standard, which can be used to prescribe in detail how a WTO Member administers its customs law. Moreover, the US also appears to believe, despite its professions that divergences as such are not problematic, that a violation of Article X:3(a) can already be demonstrated through reference to individual instances of administration.

4.809 The EC does not agree with these views of the US. In the view of the EC, Article X:3(a) is purely a non-prescriptive, minimum standards provision which complements the substantive disciplines of other provisions of the covered agreements. Moreover, given the high number of administrative instances in the day-to-day management of customs, it cannot be assumed that a violation can already be accepted because of individual instances of non-uniform administration. Rather, as the Panel in *US – Hot-Rolled Steel* has stated, demonstration of a pattern of non-uniform administration is required. Moreover, as the Appellate Body has clarified in *US – Oil Country Tubular Goods Sunset Reviews*, "solid evidence" is needed corresponding to the gravity of the allegation.

4.810 In the bulk of its submissions, the United States has tried to base its case not on evidence of actual administration, but on systemic criticisms of EC's system of customs administration. In its submissions, the EC has already responded in detail to these allegations. It has also provided a comprehensive description of the EC's system of customs administration, which it hopes will assist the Panel in its task of proceeding to an objective assessment of the facts.

4.811 The EC would therefore limit itself to addressing some systemic claims raised in the US Second Oral Statement. First, there is the continued insistence of the US on its arguments that the EC system encourages "BTI shopping". In support, it refers to what it calls "skewing" of the issuing of BTI, and in particular the fact that some member States, notably Germany, issue a higher percentage of BTIs than other member States. As the EC has already remarked, this fact does not in any way prove that BTI shopping occurs. Rather, it reflects different commercial patterns and the general importance of Germany as the largest economy in the EC internal market. It may also reflect different habits of traders due to the fact that Germany was the first member State to introduce BTI in the EC before its Community-wide introduction through the EC Customs Code.

4.812 The US has also complained against a lack of obligations on the part of one member State authority to take into account the BTI issued by other member States. This statement distorts the legal situation in the EC. As the EC has explained, where a member State, for instance through consultation of the EBTI data base, learns of BTI divergent from the classification intended by it, the Member State may not simply go ahead issuing conflicting BTI, but rather must refer this matter to the Commission and/or the customs code committee.

4.813 Finally, the US also has continued its criticism of the preliminary reference procedure as a means for ensuring uniform administration. In support, it has, in its Second Oral Statement, referred to a recent judgment of the ECJ in *Intermodal Transport*, from which it has quoted very selectively. The EC had planed to comment on this issue in its closing remarks, but given the additional time granted by the Panel for comments on Part III of the US Second Oral Statement, the EC will reserve this for its written remarks.

4.814 Leaving the systemic issues, the EC turns now to what should be the focus of the US case: namely the actual administration of EC customs law. In other words, when one takes stock of the US submissions, has the US shown that there is a pattern of non-uniform administration of EC customs law? The answer is a resounding "no".

4.815 As regards the area of tariff classification, the US has essentially referred to only two single cases of application, namely LCD monitors and blackout drapery lining (BDL).

4.816 As regards LCD monitors, the US position was first that the duty suspension regulation did not ensure uniform application. More recently, and notably in its Second Oral Statement, the US has shifted focus to the monitors not covered by this regulation. In this context, it has referred to some extremely recent developments which occurred during the Panel proceedings, for instance BTI issued by the German authorities in July 2005, and industry comments addressed to the European Commission in September 2005. In the EC's view, these recent developments do not show that there is a problem of non-uniform application contrary to Article X:3(a) GATT, but rather that there is an issue in the process of resolution. In fact, the classification of the relevant monitors is an issue which is currently under review, and relevant measures will be submitted to the Customs Code Committee in the very near future.

4.817 As regards BDL, the US has not shown any lack of uniformity, either. As the EC has said before, there is no evidence that the products before the German authorities were covered with textile flock, and thus identical to those described in the BTI issued by the Dutch, Irish and UK authorities. In a last-minute attempt to paper over this difficulty, the US has submitted an affidavit by the Chairman of Rockland, the producer of BDL. The EC has already explained that this statement by a person with a clear interest in the classification of BDL has no probative value whatsoever. Moreover, the affidavit does not concern the question whether the products before the EC authorities were in fact identical. Rather, it contains merely an assurance that Rockland has never produced any product that is not flocked. This, however, is not the issue, since it is not clear that the products were all produced by Rockland, nor that all of Rockland's products are indeed identical. Overall, the question of whether the products were flocked is purely a question of the examination of the physical goods by the competent customs authorities. Moreover, the EC notes that both importers concerned by the German decisions, the Bautex GmbH and the Ornata GmbH, have not appealed the decisions. For this reason, the United States cannot now claim there to be a lack of uniformity attributable to the EC system.

4.818 In the area of customs valuation, the US has been even less forthcoming with evidence. It has mainly referred to the report of the Court of Auditors, which is however in itself a tool for ensuring uniform administration, has been implemented, and no longer represents an accurate description of the situation today. As regards actual cases, the US referred only to one single case, involving Reebok. However, it has entirely failed to substantiate this case with evidence of non-uniform administration, and has thus not fulfilled its burden of proof.

4.819 Finally, in the area of customs administration, the US seems to have entirely dropped its arguments regarding the local clearance procedure. As regards processing under customs control, the US simply repeats its erroneous interpretations of the French guidance, which it misinterprets so as to create the impression of a conflict with EC law. However, if fails to support its doubtful interpretation with any evidence as regards the actual application of the guidance.

4.820 When one passes in review the factual basis of the US claims, one must conclude that it is extremely thin. From the beginning, the United States has struggled to come forward with evidence of non-uniform application. It has started by bringing two examples in the area of classification and one in the area of valuation. When it saw these examples evaporate, it tried to add, in a last-ditch effort, two more cases, one of which even concerns a matter outside the Panel's terms of reference.

4.821 The EC submits that there is a stark mismatch between this lack of factual evidence, and the extremely broad allegations of the US. Millions of customs issues are dealt with by the EC customs authorities every year. If the EC's system of customs administration were truly as deficient as the United States alleges, then evidence of non-uniform administration should be abundant, and the US

should have been able to provide numerous examples. But the opposite has been the case. Significantly also, of the numerous third parties in the present proceedings, none, not even those which in principle supported the US case, have pointed towards any examples of lack of uniformity in the EC's system. This difficulty of the US to provide evidence is essentially due to one fact: the EC's system is not anywhere near as bad as the US would want to make it appear, but on the contrary as a whole ensures a high degree of uniformity throughout the EC. For this reason, the US claims should be rejected.

4.822 Before concluding on Article X:3(a) GATT, the EC would like to make some last remarks on the issue of penalties. It has by now become clear that this US claim is rather different from the other claims in that it concerns not actual administration, but different legislation which exists at Member States level. As the EC has explained, this claim must fail for several reasons.

4.823 First, penalty provisions are not among the laws referred to in Article X:1 GATT. The US explanations in its Second Oral Statement that penalties somehow "pertain to classification", or would be "charges" or "requirements on imports" simply have no basis in the text of Article X:1 GATT.

4.824 Second, provisions which set out penalties do not constitute "administration", but rather are themselves laws of general application. That at the same time, they may be related to the substantive law which they sanction is neither here nor there. Laws may very well complement one another without for that reason becoming "administration".

4.825 Finally, to the extent that penalty laws have an impact on the uniform application of customs laws, the EC has taken the necessary measures to ensure that member States' legislation on sanctions does not undermine uniformity. In particular, the requirement that sanctions be dissuasive and deterrent means that traders will normally respect the substantive provisions of customs law; uniform application of these laws is thus ensured.

4.826 The US has, in its Second Oral Statement, argued that the uniform application of US customs laws "is not the point", because penalty laws still remain part of the "legal backdrop" against which traders decide into which member State of the Community they import. This is wrong for two reasons. First, because penalty provisions do not fall under Article X:1 GATT. And second, because Article X:3(a) GATT only concerns the administration of laws, but does not give traders the right to expect that in all parts of the territory of a WTO Member, the same laws will apply. In other words, the "legal backdrop" in a WTO Member with a federal structure may perfectly well include sub-federal laws, provided of course that these laws are administered in accordance with Article X:3(a) GATT.

4.827 Accordingly, the Panel should reject the US claim that the EC is obliged to harmonize the penalty laws of its member States.

4.828 Concerning Article X:3(b) GATT, the EC will mainly concentrate on some arguments put forward by the US recently.

4.829 First, the EC would like to insist that the US arguments concerning Article X:3(b) have been recently shifted to the requirement "govern the practice".

4.830 The EC will not repeat its arguments on this issue, tough it is worth insisting on the fact that the US carries out an interpretation that does not take into account that the obligations in Article X:3(b) apply to first instance courts.

4.831 The US claims that the "govern the practice" requirement means "that the review court decisions must control the way agencies administer the customs law". This interpretation imposes

very far-reaching obligations for all WTO Members, which do not correspond to the legal traditions of most of the WTO Members of both "civil law or roman-germanic law" and the "common law" families. In the US interpretation, first instance courts will deliver judgments that will be binding outside the relevant proceedings and will participate in the elaboration of a case-law or precedents that will constitute a general source of law.

4.832 This surprising outcome is aggravated by the fact, as the EC has heard from the present discussions, that the US understands the term "decision" to cover not only the operative part of a judgment but also its reasoning. The US interpretation would imply a radical change in the nature of those courts.

4.833 The EC would insist on the need to reject the far-reaching interpretation of Article X:3(b) made by the US. The EC has provided the Panel with its own interpretation, which clearly confirms that the EC court system complies with the requirements of Article X:3(b).

4.834 Second, the EC would like to note that, contrary to US claims, its position on the interpretation of the "govern the practice" requirement is not in conflict with its interpretation of Article X:3(b) GATT.

4.835 In paragraph 89 of its Second Oral Statement, the US distorts the EC's arguments in this respect. The EC has never referred to the review of decisions of customs agencies by member States' courts of first instance as a key means to achieve the aim of uniform administration. What the EC has sustained is something which has nothing to do with the misleading summary presented by the US. The EC has explained that preliminary rulings by the European Court of Justice constitute an important instrument of ensuring uniform administration of customs law. This role is played not because preliminary references are made by courts of first instance, but because of the effects that the resulting rulings by the ECJ have on all courts in the different member States.

4.836 Third, the EC would like to refer to the US rebuttal of the EC's argument that the creation of an EC Customs Court would breach fundamental EC constitutional principles. The US has alleged in its Second Oral Statement that Article 225a of the EC Treaty lays ground-work for the establishment of new EC courts like the new Civil Service Tribunal.

4.837 This interpretation shows a total lack of understanding of the EC judicial system by the US.

4.838 Article 225a of the EC Treaty is just an organizational provision allowing the creation of judicial organs to decide at first instance certain classes of action or proceedings in specific areas. In other words, the creation of a new court would only imply the redistribution of the work of the European Court of First Instance (CFI) and in no way entails the attribution of new competences to EC Courts.

4.839 Therefore, no new court established according to Article 225a of the EC Treaty would be entitled to examine actions other than the actions for annulment of some acts of EC institutions for which the CFI has jurisdiction according to Articles 225 and 230 of the EC Treaty. No such court would be entitled to review decisions taken by the member States' authorities. This remains the task of the EC member States' courts under the system of attribution of competences laid down in the EC Treaty, and will remain so unless an amendment to the EC Treaty is ratified by all member States.

4.840 The creation of a centralized customs court in the EC, therefore, would require a reform of the EC Treaty.

4.841 The US kindly offers the EC another option to comply with its ambitious reading of the obligation under Article X:3(b): instead of creating a central customs court, the EC can always

establish a centralized customs agency which, among other duties, will be in charge of ensuring that review decisions of courts of first instance "control" how agencies administer EC customs laws.

4.842 The EC has been repeatedly accused by the US of calling for a special standard in the application of Article X:3 GATT, accusation from which we have duly defended ourselves. It seems to the EC that it is rather the US who is trying to impose its own standard on the whole WTO membership, since their interpretation of the obligations under Article X:3(b) leads always to the imposition of one or the other body or institution found in the US system (a central customs agency and/or a central customs court). By contrast, the EC's interpretation of Article X:3(b) allows the US and other WTO Members to maintain their systems as long as they fulfill the important but distinct obligations of uniform administration and prompt review of administrative decisions.

H. SECOND ORAL STATEMENT OF THE UNITED STATES

1. Introduction

4.843 This dispute is about two things: *first*, the fact that the EC, through its 25 different customs authorities, does not administer EC customs law in a uniform manner; and, *second*, the fact that the EC fails to provide tribunals and procedures for the prompt review and correction of customs administrative actions as required by Article X:3(b) of the GATT 1994.

4.844 With respect to Article X:3(a), the United States has shown that EC customs law is administered by 25 separate, independent customs authorities. Absent some process or institution to prevent divergences among these authorities or reconcile them when they occur, such a system plainly would not satisfy the EC's obligation of uniform administration. And, indeed, such a process or institution does not exist.

4.845 The EC asserts that such processes and institutions do exist. However, the processes and institutions that the EC holds out as securing uniform administration do nothing of the sort. They are either extremely general (e.g., the overarching duty of cooperation in EC Treaty Article 10), non-binding (e.g., explanatory notes, guidance, and other "soft law" instruments to which the EC has referred), or discretionary in nature (e.g., the possibility that a question may or may not be referred to the Customs Code Committee). The one process of a binding nature that the EC holds out as securing uniform administration – appeals to member State courts with the possibility of referral to the ECJ – in effect puts a heavy burden on the trader to seek out uniform administration, rather than providing for uniform administration in the first instance, as GATT Article X:3(a) requires. And, even this process does not actually secure uniform administration.

4.846 The EC and individual EC officials acknowledge that the instruments purported to secure uniform administration do not in fact do so. Traders share this view. In some areas (e.g., penalties and audit procedures) the tools of administration differ from member State to member State such that administration of EC customs law is undeniably non-uniform. The US has supported its arguments with illustrations of particular instances in which member States have administered EC customs law in a non-uniform way and the EC has failed to effectively and timely reconcile the divergences.

4.847 Moreover, the only tribunals or procedures available for the prompt review and correction of customs administrative action in the EC are member State courts. The decisions of these courts govern only the actions of the customs authorities in the member States concerned. As there is no tribunal for the prompt review and correction of customs administrative actions whose decisions govern the practice of customs authorities throughout the EC, the EC fails to meet its obligation under Article X:3(b) of the GATT 1994.

4.848 It is important to keep in mind that this dispute stems from the fact that the EC is a Member of the WTO in its own right. This dispute could not have been brought under the GATT 1947, as the EC itself (as distinct from individual member States) was not a Contracting Party to the GATT 1947. EC arguments ranging from the timing of the US claim to the intentions of the drafters of Article X:3 need to be understood with this fact in mind.

2. The EC fails to rebut evidence supporting US Claims

4.849 The EC mistakenly asserts that there is a lack of evidence to support the US claims. In fact, the US claims are amply supported by un-rebutted evidence of: the manner of operation of the very "procedures and institutions of the EC legal system" that the EC claims "provide for a uniform application and interpretation of EC law"; admissions by the EC and EC officials; statements of traders; and illustrations of particular cases of non-uniform administration.

(a) EC admissions of non-uniform administration

4.850 Somewhat awkwardly, the EC attempts to distance itself from its own past admissions or admissions by senior EC officials. In some cases, the EC dismisses such statements as irrelevant on the theory that the speaker was not addressing the consistency of EC actions with Article X:3 *per se*. In the EC's view, it seems that an admission is relevant evidence only if the speaker actually draws the legal conclusion that the action or inaction in question breaches Article X:3.

4.851 Thus, even though the EC Court of Auditors made a number of critical findings demonstrating lack of uniform administration of EC customs valuation rules, the EC dismisses those findings because "the Court of Auditors did not in any way make judgments as to whether the EC was in compliance with Article X:3(a) GATT." Likewise, even though the explanatory note accompanying the EC's draft Modernized Customs Code observed that "[s]pecific offences may be considered in one member State as a serious criminal act possibly leading to imprisonment, whilst in another member State the same act may only lead to a small – or even no – fine" (Exhibit US-32, p. 13) the EC asserts that acknowledgment to be irrelevant because it did not draw a legal conclusion with respect to GATT Article X:3(a).

4.852 An admission by the EC or an EC official need not state a legal conclusion in order to constitute relevant evidence. What matters is that the representations concerning factual matters tend to support a legal conclusion relevant to the dispute.

4.853 Similarly, the Panel should decline the EC's suggestion that it pay no heed to the statements of individual officials simply because they were not speaking officially on behalf of the EC. The point that the EC consistently misses is that in each of these cases, a senior official with extensive knowledge of the administration of EC customs law – whether the Commission's Head of Customs Legislation Unit or an Advocate General of the Court of Justice, for example – was speaking authoritatively on that subject.

4.854 Yet another instance of the EC distancing itself from its own admissions is its discussion of the *EC – Chicken Cuts* dispute. In that dispute, where it was convenient to its immediate interests, the EC asserted an absence of uniform administration (i.e. lack of consistent classification of the product at issue under one Tariff heading). And now, where a lack of uniform administration does *not* serve the EC's immediate purpose, it latches onto the Panel's finding of consistent classification and disavows its earlier statements.

(b) There is no requirement to show a "pattern" of non-uniform administration

4.855 In addition to distancing itself from its own admissions, the EC responds to US evidence in support of its Article X:3(a) claim by arguing that the evidence does not exhibit a "pattern." However, such a "pattern" requirement has no basis in Article X:3(a). Nor is it supported by the Panel report in *US – Hot-Rolled Steel*, on which the EC heavily relies.

(c) Difficulty of certain customs administration questions does not counter evidence of non-uniform administration and, in fact, highlights the problem

4.856 A further line of EC argument asserts that the cases identified by the United States as illustrating non-uniform administration concerned "difficult" or "complex" matters of customs administration and that US Customs, too, has encountered problems in grappling with these matters. But Article X:3(a) does not excuse non-uniform administration in difficult or complex cases. In fact, it is precisely the difficult or complex cases that highlight most prominently the lack of uniform administration in the EC.

4.857 In dealing with simple, commodity-type products, for example, the risk of non-uniform administration of classification rules would seem to be less than for more sophisticated products. But, when confronted with more sophisticated products or products embedding new technologies, the fact that classification decisions are being made by 25 different authorities increases the likelihood of divergent administration.

4.858 Moreover, far from supporting the EC's argument, its assertion that US Customs has encountered difficulty in grappling with certain issues actually underscores the difference between non-uniform administration of EC customs law and uniform administration of US customs law. Whatever challenges US Customs may have encountered in dealing with difficult-to-classify products, its decisions applied throughout the customs territory of the US

(d) Resolution of divergences among member States after months or years does not counter evidence of non-uniform administration.

4.859 Another EC line of argument is that illustrations of non-uniform administration identified by the US are inapposite, because the non-uniformities at issue were resolved. This argument does not rebut evidence of non-uniform administration, because in each instance non-uniform administration existed and, moreover, was allowed to persist for months or years.

4.860 It cannot be the case that a Member fulfills its obligation of uniform administration under Article X:3(a) as long as it reconciles instances of non-uniform administration eventually, even if it takes many months or years to do so. Such a construction would deprive Article X:3(a) of any meaning, as a Member could respond to any instance of non-uniform administration simply by asserting that it was in the process of resolving it.

3. Recent cases confirm that processes EC holds out as securing uniform administration fail to do so

4.861 The EC accuses the United States of basing its claims on "theoretical" scenarios. A poignant rebuttal of that critique is evident in the presentation made by a seasoned EC customs law practitioner, Mr. Philippe De Baere, at a recent forum sponsored by the American Bar Association (ABA). (Exhibit US-59).

4.862 The EC has referred to explanatory notes and conclusions of the Customs Code Committee as instruments to secure the uniform administration of EC customs law. In fact, what Mr. De Baere's

presentation shows (p. 14) is just the opposite. In some member States, an explanatory note may be treated the same as a regulation and given prospective effect only. In others, an explanatory note may be treated as a clarification and given retrospective effect.

4.863 In particular, Mr. De Baere describes a recent case involving the classification of video camera recorders (i.e. camcorders) which demonstrates not only differences among member States in the treatment of EC explanatory notes, but also the problem of non-recognition of BTI from member State to member State, the problem of non-uniform administration of the EC law (CCC Article 221(3)) prescribing the period following importation during which a customs debt may be collected, and the problem of recourse to member State courts as a supposed tool of securing uniform administration. At issue in this case is the question whether certain camcorders should be classified under Tariff heading 8525.40.91 or 8525.40.99. A camcorder qualifies under the former heading if it is "[o]nly able to record sound and images taken by the television camera." (Exhibit US-60). "Other" camcorders qualify under heading 8525.40.99.

4.864 In July 2001, the Commission adopted an amendment to an explanatory note covering heading 8525.40.99. The amendment provided that this heading includes "'camcorders' in which the video input is obstructed by a plate, or in another way, or in which the video interface can be subsequently activated as video input by means of software." (Exhibit US-61). The amended note led to non-uniform administration of customs laws in at least three respects.

4.865 First, in view of the amended explanatory note, two member States (France and Spain) reached back to collect additional duty on certain camcorders imported prior to the amendment and classified under heading 8525.40.91. By contrast, other member States (in particular, the United Kingdom and Germany) have expressly declined to give retroactive effect to explanatory notes. (Exhibits US-63 and US-64).

4.866 Second, subsequent to issuance of the amended note, in June 2004, the Spanish customs authority issued BTI classifying 19 camcorder models produced by a particular company under heading 8525.40.91. (Exhibit US-65). In July 2004, the French affiliate of the Spanish importer informed the French customs authority of the existence of these BTI during the course of an audit by the French authority. Notwithstanding this information, in November 2005, 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.

4.867 Third, in deciding to give retroactive effect to the July 2001 explanatory note, the French authority followed an interpretation of EC rules not followed by other member States on the period after importation during which a customs debt may be collected. Article 221(3) of the CCC (Exhibit US-5) sets that period as three years. The only exception to this rule is the lodging of an appeal, which suspends the three-year period. However, beginning with a 1998 judgment of the French Cour de Cassation (Exhibit US-66) concerning the predecessor to Article 221(3), the French customs authority has taken the position that any administrative proceeding (procès-verbal) investigating a possible customs infraction also has the effect of suspending the three-year period. In appeals from decisions following that position, litigants have consistently failed to persuade the French court to refer to the ECJ the question of whether this position is consistent with CCC Article 221(3) (Exhibits US-67 and US-68). And, indeed, as of December 2002, France's national interpretation of Article 221(3) has become entrenched through an amendment to France's customs law (Exhibit US-69). The refusal of even France's court of last instance to refer this question to the ECJ, even in the face of evidence that other member States interpret Article 221(3) differently, is further demonstration that the availability of appeals to member State courts is not the instrument of securing uniform administration that the EC claims.

4.868 A second illustration in the De Baere presentation reinforces the point that, contrary to the EC's argument, the opportunity to appeal customs administrative decisions to member State courts, with the possibility of eventual referral to the ECJ, does not secure uniform administration. The case involves classification of the Sony PlayStation2 (PS2). The UK customs authority had issued BTI for a good and then revoked it based on an EC Commission regulation adopting a different classification for the good. When that regulation was annulled by the EC Court of First Instance, rather than restore the BTI, the authority kept it revoked based on a re-evaluation of its original classification decision. It confirmed the BTI's continued revocation on new, national grounds only weeks after the ECJ's *Timmermans* decision. But for that action, the PS2 would have been subject to classification instruments with (in theory) uniform EC-wide effect continuously, beginning with issuance of the UK BTI, continuing with issuance of the Commission regulation, and continuing after the annulment of that regulation with restoration of the BTI. The *Timmermans* judgment permitted the UK to disrupt that presumably continuous uniformity by keeping the BTI revoked on grounds other than the Commission regulation that had led to its revocation in the first place. Compounding this disruption of uniform administration is the fact that the UK High Court of Justice declined to refer to the ECJ the question of whether the customs authority could do this.

4.869 A third recent case that calls into question the effectiveness of appeals to member State courts with the possibility of referral to the ECJ as a tool of uniform administration is the judgment of the ECJ in *Intermodal Transports* (Exhibit US-71). That case concerned the classification of certain tractors by the Dutch customs authority. Contrary to the importer's request, the authority had classified the tractors under heading 8701 rather than heading 8709. In its appeal, the importer called to the Dutch court's attention the fact that the Finnish customs authority had classified similar goods under heading 8709. Despite the apparent divergence, the court declined to refer the matter to the ECJ. When the appeal reached the Supreme Court of the Netherlands, that court referred to the ECJ the question of whether a member State court should make a preliminary reference to the ECJ when a party brings to its attention conflicting BTI for similar goods issued by another member State authority to a third party and the court believes that the BTI wrongly classified those goods.

4.870 The ECJ found that a national court is under no such obligation to refer. With respect to courts other than courts of last instance, the ECJ said that evidence of divergent BTI "cannot limit the freedom of assessment thus vested in [the national] court under Article 234 EC." (Exhibit US-71, paras. 32 and 45). Moreover, it said that even a court of last instance is under no obligation to refer if, for example, it finds correct classification of the goods in question to be "so obvious as to leave no scope for any reasonable doubt." (paras. 33 and 45). It went on to note that the national court has "sole responsibility" for determining whether the correct classification of goods is "so obvious as to leave no scope for any reasonable doubt." (para. 37).

4.871 Perhaps the EC's advisor, Mr. Vermulst, put it best in his article, "EC Customs Classification Rules: Does Ice-Cream Melt?" (Exhibit US-72, p. 21) when he said:

> The EC system with respect to judicial review in classification matters and, more in general, all customs issues is not only expensive and time-consuming for affected parties, it also may lead to inconsistent judgments by national courts, at least in first instance. This problem is exacerbated by the fact that courts of certain member States are much less likely to request preliminary rulings than those of other member States.

4. It is appropriate for the Panel to exercise its authority under DSU Article 13

4.872 With respect to the US suggestion that the Panel exercise its authority under Article 13.1 of the DSU, the United States was not asking the Panel to make its *prima facie* case. The United States has already done that with the evidence and arguments it has put before the Panel. Rather, the United States was suggesting that if an understanding of the statistical incidence of non-uniform

administration of EC customs law would help the Panel to evaluate the evidence, it should exercise its authority under Article 13.1 to obtain certain information, which is exclusively in the hands of the EC or EC member States. As the panel in *US – Upland Cotton* recently explained, "Any suggestion that a panel 'makes the complainant's case', when it merely exercises its powers under the *DSU*, is entirely inaccurate." (para. 7.633).

5. The EC fails to rebut evidence that classification rules are administered in a non-uniform manner

(a) BTI does not secure uniform administration

4.873 With respect to US arguments showing that BTI does not secure uniform administration, the EC first denies that the ability of an importer to obtain BTI from any of 25 different member State customs authorities, without any centralized control, encourages "BTI shopping." In particular, it contends that its acknowledgment in the *EC – Chicken Cuts* dispute that "it is possible under EC law to withdraw an application for BTI where the outcome is considered unfavourable by the importer" (para. 7.261) does not indicate that BTI shopping occurs. But that contention is illogical. In a system in which the administration of customs law was uniform, there would be little point in an importer's withdrawing a request for a classification ruling upon learning the authority's proposed decision.

4.874 The EC also contends that the heavy skewing of BTI issuance in favour of certain member States does not indicate BTI shopping, but merely differences in various commercial factors from member State to member State. Such factors might be a logical explanation if the skewing were not as dramatic as it actually is. However, it seems remarkable that in a system which, according to the EC, does not encourage BTI shopping, a single member State (Germany), representing just over 19% of imports into the EC by value in 2004, issued about 37% of all BTI with a start date in 2004, while, for example, another member State (Italy), representing about 11% of imports, issued less than 1% of all BTI with a start date in 2004, and a member State representing almost 2% of imports into the EC (Greece), issued only a single BTI with a start date in 2004 (and only 10 with a start date in 2003 and 17 with a start date in 2002).

4.875 As the EC's advisor, Mr. Vermulst, has remarked (Exhibit US-74, pp. 1314-15):

> Unfortunately, the same disparity with respect to the origin of preliminary rulings is reflected in the requests for BTI, with several times more rulings issued by Germany than by any other country. Such a disparity of numbers of proceedings has several regrettable consequences. It implies that Germany has proportionally too much influence in this part of customs law. Moreover, the authority of a procedure is not enhanced if most member States barely apply it.

4.876 Moreover, it is not just the opportunity to shop for a favourable classification that makes BTI an inadequate instrument for securing uniform administration of customs classification rules. The lack of narrative explanation in BTI makes it difficult to see how a given member State authority came to its classification decision and thus for other authorities to determine whether they should follow that decision in classifying similar goods.

4.877 Further limiting the utility of BTI as a means of securing uniform administration is the very narrow sense in which BTI issued by one member State authority governs the actions of other member State authorities. BTI issued by one member State authority is binding on other member State authorities only to the extent that the person invoking the BTI is the person to whom it was issued (the "holder") and the goods at issue are identical to those described in the BTI. But for such cases, there is no obligation on the part of one member State authority to take account of BTI issued by other member State authorities for similar goods when such BTI is brought to its attention. This

problem is evident in the EC's response to the US discussion of the *EC – Chicken Cuts* dispute. Despite the EC's acknowledgment there that different customs offices classified the identical goods differently, the EC now states that "[n]owhere in the Panel Report in *EC – Chicken Cuts* has the EC said that BTI was not recognized when presented by the holder."

4.878 The point is illustrated again by the EC's discussion of the blackout drapery lining case. In response to evidence that the EC customs office in Germany failed to explain why it was not following the classification decisions reflected in other offices' BTI, the EC simply states that "BTI is binding on the customs authorities only as against the holder of the BTI."

4.879 The EC attempts to draw a comparison to the practice of US Customs. However, the very regulation that the EC cites as evidence of US practice illustrates the difference between the US advance ruling system, which promotes uniformity, and the EC BTI system, which does not. Thus, section 177.9(a) of the regulation (Exhibit EC-129) states that where US Customs issues a ruling letter with respect to a particular transaction or issue, "the principle of the ruling set forth in the ruling letter ... may be cited as authority in the disposition of transactions involving the same circumstances." The EC BTI system contains no such provision.

(b) LCD monitors

4.880 With respect to evidence showing that the LCD monitors case is an important example of the lack of uniform administration of EC rules on customs classification, the EC first asserts that the duty suspension regulation concerning LCD monitors with DVI has resolved the lack of uniformity of administration with respect to this particular classification question and that the trading community is satisfied with the outcome. In fact, this assertion simply glosses over the fact that the suspension regulation applies only to monitors below a certain size threshold, that it does not actually resolve the underlying classification question, and that, for monitors above the size threshold, a state of non-uniformity with serious financial consequences remains. Moreover, the implication that the trading community is satisfied is belied by recent statements from the very industry concerned with this classification question (Exhibit US-75).

4.881 The EC next contests the US argument that an EC Customs Code Committee conclusion that conflicts with an applicable chapter note in the Combined Nomenclature detracts from rather than promotes uniform administration. The Committee's conclusion stated that a monitor should not be classified under Tariff heading 8471 unless an importer can show that it is "*only* to be used with an ADP machine," whereas the applicable chapter note states that a monitor is classifiable under heading 8471 if "it is of a kind solely *or principally* used in an automatic data-processing system." The Committee's conclusion has put member State authorities in the quandary of having to decide what weight to give the conclusion in view of an apparently conflicting chapter note.

4.882 For example, in a Tariff Notice issued in 2004, the UK authority, evidently following the Customs Code Committee's conclusion, stated that "from October 2004, LCD/TFT Monitors that incorporate a DVI connector are to be classified in Combined Nomenclature (CN) code 8528 21 90." (Exhibit US-76). The Netherlands, by contrast, has taken a very different approach. In a decree of July 2005, the Dutch customs authority explained that since April 2004 it had been classifying LCD monitors with DVI under Tariff heading 8528, in view of a Commission regulation concerning plasma monitors. It then went on to state (Exhibit US-77) that

> [n]ot all member States are following this policy. The result is a diverted flow of business, which is harmful to the competitiveness of Dutch industry in the logistics and services sector. For this reason, The Netherlands is making the policy as regards classification of certain LCDs in the Combined Nomenclature more precise.

Accordingly, the decree set forth criteria that the Netherlands follows as of 22 November 2004.

4.883 Moreover, despite the Customs Code Committee's conclusion, the German authority, too, appears to have continued classifying LCD monitors with DVI under heading 8471, even where they are principally though not solely for use with computers (Exhibit US-78).

4.884 Finally, the EC once again tries to divert the focus from its own practice to the practice of US Customs. However, unlike the EC, where US Customs found LCD monitors difficult to classify, its rulings still applied throughout the territory of the United States.

(c) Blackout drapery lining

4.885 Similarly, the EC fails to rebut evidence demonstrating that the blackout drapery lining case is yet another example of non-uniform administration of customs classification rules. The EC erroneously calls into question whether the lining produced by Rockland Industries at issue in the decision by the Main Customs Office in Bremen, which was classified under Tariff heading 3921, was materially identical to lining that other member States had classified under heading 5907. In particular, the EC asserts that the product before the Bremen Customs Office lacked a textile flocking, while the product at issue in other classification decisions contained flocking. In fact, however, as Rockland's President and Chief Executive Officer attests under oath (Exhibit US-79), "All coated products produced by Rockland incorporate textile flocking as part of the coating process. Rockland has never produced a coated product that does not incorporate textile flocking. . . . Textile flocking is required to prevent the fabric from sticking together."

4.886 Moreover, in context it appears that the Bremen Customs Office did not find an absence of flocking *per se* but, rather, that flocking did not constitute a distinct layer in the Rockland product at issue. What was relevant to the Bremen Customs Office was the existence of plastic in the coating, regardless of whether textile flocking or other elements were mixed into that coating. That the German customs authority takes this approach, contrary to the approach taken by other member State authorities, is confirmed by the letter from the Hamburg customs office concerning Rockland's lining product (Exhibit US-50).

4.887 Having ruled out classification of the lining under heading 5907, apparently based on its view that the existence of plastic in the coating precluded such classification, the German authority then looked to a German interpretive aid, which the EC states was derived by analogy to an EC regulation classifying ski trousers. Though the EC states that the interpretive aid was "without any legally binding character," the German authority relied on it in a way that turned out to be determinative. In any event, it is not consistent with uniform administration for the German authority to classify a textile product based on the selection of one prong from a three-prong test for the classification of an apparel item, where no other member State authority has done this.

4.888 Finally, the EC asserts without any basis that density of weave, the key criterion under Germany's interpretive aid, is relevant to determining whether textile fabric is present merely for reinforcing purposes. In fact, the notes pertaining to Chapter 39 of the Tariff make no reference to density of weave as a relevant criterion, and the notes to Chapter 59 expressly provide that classification under that chapter is to be determined *regardless* of weight per square meter. The EC asserts without basis that the reference to weight per square meter is different from density of weave. In fact, however, weight per square meter necessarily is a function of density of weave.

6. The EC fails to rebut evidence that valuation rules are administered in a non-uniform manner

4.889 Nor does the EC succeed in rebutting evidence that EC valuation rules are administered in a non-uniform manner. In addition to the EC's failure to explain away the findings of non-uniformity in the Court of Auditors report, two other points should be noted.

4.890 First, as previously noted, one of the ways in which member States administer the EC's customs valuation rules non-uniformly is through different auditing practices. In response, the EC states that "under Article 76(2) CCC, every Member State may proceed to all necessary verifications in order to satisfy themselves of the accuracy of the particulars contained in the declaration." But, the fact that member States "may" do this proves nothing. It does not change the fact that member States' audit practices in fact vary dramatically such that, as the EC Court of Auditors put it, "individual customs authorities are reluctant to accept each other's decisions." (Exhibit US-14, para. 37).

4.891 The EC also claims that the EC Customs Audit Guide "ensures a uniform practice across" the EC. However, given that the Guide was only "recently finalized," and, in any event, given that it is merely "intended as an aid to member States," rather than a binding obligation on them, there is no basis for this assertion.

4.892 Second, with respect to the Reebok case, the EC fails to rebut that this is a stark illustration of non-uniform administration of valuation rules. The EC states that RIL's appeals to Spanish courts show that there is indeed a forum to which this trader can go to seek uniform administration. But, the EC cannot seriously contend that, from the point of view of uniform administration, the right to appeal a dispute to a member State court is comparable to a right to take a matter directly to an institution with authority to give an answer that is definitive for the entire EC – a right which does not now exist. GATT Article X:3(a) does not concern a trader's right to appeal adverse customs decisions; it concerns a Member's requirement to administer specified laws uniformly, whether or not traders appeal administrative actions in particular cases.

4.893 Further, the EC mistakenly suggests that because RIL withdrew its complaint to the EC Ombudsman the problem with respect to non-uniform administration has been resolved. That simply is not so. RIL's decision to withdraw its complaint does not change the Commission's evident avoidance of the non-uniformity for over three years. Nor does it change the fact that there is a divergence between the Spanish authority's administration of EC valuation rules and other member States' administration of those rules.

7. The EC fails to rebut evidence that customs procedures are administered in a non-uniform manner

(a) Processing under customs control

4.894 With respect to processing under customs control, the United States has shown that certain member States approach the economic conditions assessment in very different ways. The United Kingdom, for example, makes a two-prong assessment, looking first at whether processing under customs control will enable processing activities to be created or maintained in the EC, and second at whether it will harm essential interests of Community producers of similar goods. In contrast, France applies only the first prong.

4.895 The EC's response to this evidence is that the United States mis-reads the customs bulletin explaining how France applies the economic conditions assessment. The EC asserts that the bulletin in fact makes reference to harm to Community producers. However, that reference is merely an introductory paraphrase of the CCC provision on processing under customs control. The operative

text of the French bulletin sets forth a one-prong test, referring only to the creation or maintenance of processing activity in the EC.

4.896 The EC replies with a circular argument. It says that "the French guidance . . . has to be interpreted in the context of the EC legislation". In other words, even though the text of the French guidance plainly says something different from the text of the UK guidance, the EC contends that in fact it should not be read as diverging from the UK guidance because that would be inconsistent with EC law. However, the EC fails to substantiate its assertion that inconsistency with the applicable EC regulation automatically causes non-uniformity in member State administration of that regulation to disappear.

4.897 The EC also faults the United States for not providing "evidence on the application of the guidance issued by the French authorities". However, there was no need for the United States to do so. This is not a case in which the United States is alleging that either the French guidance or the UK guidance is itself inconsistent with WTO obligations and therefore, according to the EC, "has the burden of proving that the measure in question has the alleged content or meaning". Rather, the inconsistency with WTO obligations that the United States is alleging is a lack of uniform administration on *the EC's* part and, in the case of processing under customs control, the lack of uniformity is evident on the face of divergent guidance from two different member States.

(b) Penalties

4.898 With respect to penalties, the EC first asserts that the GATT Article X:3(a) obligation of uniform administration does not apply to penalties because penalties "are not among the matters referred to in Article X:1 GATT". Contrary to the EC's claim, the United States does not concede this point. On the contrary, the terms of Article X:1 plainly encompass penalty provisions. For example, a law imposing a penalty for negligence in mis-declaring a good's classification or valuation certainly "pertain[s] to the classification or valuation of products for customs purposes". A penalty also may be considered an "other charge[] . . . on imports". Or, considered as a consequence for failing to make a truthful declaration, for example, a penalty pertains to "requirements . . . on imports".

4.899 A key flaw in the EC's argument is that it assumes that a law or regulation must either be the thing being administered or a tool of administration. But, according to the EC, it cannot have one aspect or the other, depending on one's perspective. That contention is groundless.

4.900 Further, although the EC appears to admit that penalties "ensur[e] compliance with EC law", which is another way of saying that they administer EC law by giving effect to that law, the EC goes on to avoid the US argument, which is that the diversity of member State penalty laws for giving effect to EC customs law is an important instance of non-uniform administration of EC customs law. Instead, the EC responds to an argument that the United States does not make. It contends that "Article X:3(a) GATT does not create an obligation to harmonize laws which may exist within a WTO Member at the sub-federal level". The US asserts no such generic requirement. It simply argues that Article X:3(a) requires that the EC's customs law be administered uniformly. Since different member States deploy different tools – that is, different penalty provisions – to give effect to EC customs law, the EC does not administer its customs law uniformly.

4.901 Additionally, the EC errs in arguing that penalties are outside the scope of Article X:3(a) because they apply to actions that violate customs laws. Article X:3(a) does not make the distinction between "illegitimate actions" and "legitimate trade" that the EC posits. In any event, contrary to the EC's assertion, penalty provisions *do* "establish the conditions for legal trade." In a system that relies heavily on the actions of traders at every step of the way, penalty provisions administer the customs laws – that is, they give effect to those laws – by setting consequences for the breach of those laws.

The problem is that in the EC those consequences vary dramatically from member State to member State.

4.902 The EC argues in the alternative that while penalty provisions vary from member State to member State, this does not mean that there is a lack of uniform administration. Its basis for this statement is the proposition that to the extent member State penalty laws must meet the test of being "dissuasive and effective," pursuant to ECJ "guidelines," they administer EC customs law uniformly, regardless of differences among them. The EC's theory seems to be that as long as two different penalty provisions both secure compliance with EC customs laws, any differences between them simply are irrelevant.

4.903 But, the possibility that traders generally comply with the customs laws in two different member States, despite differences in penalties, is beside the point. It does not change the fact that a trader must take such difference into account, much the same way that it takes into account the likelihood that an authority will interpret classification or valuation rules in a favorable way.

8. Member State courts, whose decisions govern only the customs authorities in their respective territories, do not fulfil the EC's obligation under Article X:3(b) of the GATT 1994

4.904 The EC fails to meet its Article X:3(b) obligation, because the decisions of member State courts "govern the practice" of only a subset of the agencies entrusted with enforcement of EC customs laws, and because the fragmentation of review is inconsistent with the context of Article X:3(b), which includes the requirement of uniform administration of EC customs law.

4.905 The EC argues that "govern the practice" means nothing more than "implement in fair terms". However, Article X:3(b) already contains a separate requirement that agencies "implement[]" the decisions of review tribunals or procedures. The EC's construction of "govern the practice" would make it redundant with the separate "implement[]" requirement.

4.906 The decisions of an EC member State court govern the practice only of agencies within that member State. Even where a court is presented with a clear divergence between practice within its member State and practice in other member States – as was the case in *Intermodal Transport* and the French cases on CCC Article 221(3) – there is no obligation to make a reference to the ECJ. Moreover, as the EC has acknowledged, there is no mechanism in the EC for courts to be kept apprised of customs review decisions of other member State courts, much less a mechanism for customs authorities to be kept apprised of the decisions of courts other than those in their respective member States.

4.907 The EC also argues incorrectly that Article X:3(b) should not be read in the light of Article X:3(a) as context. In the EC's view, the absence of an "explicit link" or a "chapeau" means the latter is not context for the former, even though the two provisions are adjoining subparagraphs. This position is in stark contrast to the EC's invocation of Article XXIV:12 as context for the interpretation of Article X:3(a). And, while no rule of treaty interpretation requires an "explicit link" or a "chapeau" for one provision to constitute context for the interpretation of another, there is in fact an explicit link between the provisions at issue here.

4.908 Article X:3(a) requires a Member to administer its customs laws in a uniform manner. Article X:3(b) requires that the decisions of review tribunals or procedures "govern the practice" of the agencies entrusted with administrative enforcement. The "govern the practice" requirement means that review court decisions must control the way agencies administer the customs laws. In this sense, the two provisions are linked.

4.909 The EC rejects the proposition that review of customs decisions by member State courts whose decisions govern only certain customs agencies is inconsistent with the obligation of uniform administration. However, its argument in this respect is in conflict with its Article X:3(a) argument. It states that review by member State courts "is perfectly compatible with the obligation of uniform administration, *provided that the latter is ensured by other means that are appropriate to this aim*." Yet, in its Article X:3(a) argument the EC itself contends that review by member State courts is a key means to achieving the aim of uniform administration. Now it is arguing that that aim must be achieved by "other means" and that review by member State courts is merely "compatible" with that aim.

4.910 Additionally, the EC wrongly purports to draw from the US argument an implicit requirement for "the establishment of a central court of first instance with jurisdiction over the whole territory of any WTO Member". However, that is not the logical implication of the US argument. The logical implication of the US argument is that under Article X:3(b), every WTO Member must give effect throughout its territory to the decisions of its review tribunals. Where a Member has a single customs administration it may well be able to do this even though it provides for multiple regional customs courts. In the EC, perhaps uniquely, fragmented administration is coupled with fragmented review, and the result is inconsistent with Article X:3(b).

4.911 The EC also wrongly accuses the United States of "interpreting Article X:3(b) through the glass of its own legal system". Ironically, in the very next breath the EC urges an interpretation of Article X:3(b) through the glass of *its* own legal system. It asserts that establishing an EC customs court – assuming that this would be the only way for the EC to comply with its Article X:3(b) obligation – would "run[] contrary to one of [the EC's] fundamental constitutional principles" .

4.912 Finally, while the EC has consistently professed that creating an EC customs court would breach "fundamental constitutional principles", it should be noted that the Treaty of Nice (inserting Article 225a into the EC Treaty) in fact laid the groundwork for the establishment of new EC courts. Also, its amendment of EC Treaty Article 220 contemplates that "judicial panels may be attached to the Court of First Instance under the conditions laid down in Article 225a". In light of the authority to create special courts established by the Treaty of Nice, it seems that establishment of a court as one option that would bring the EC into compliance with its GATT Article X:3(b) obligation would not breach "fundamental constitutional principles".

9. Closing statement

4.913 The manner in which the EC has argued this dispute gives the impression that the issues are far more complicated than they actually are. At times, the EC has contended that the dispute is about larger philosophical questions, such as differences in the doctrines undergirding federalism in the United States and in the EC. At other times, the EC has contended that the dispute is about the minutiae of whether one or another EC customs authority decided a particular question correctly. It is easy to get lost in the back-and-forth between political theory and technical arcana. But when the arguments on questions that have no bearing on this dispute are cleared away, the case is in fact very simple.

4.914 With respect to Article X:3(a), the EC has an obligation to administer its customs laws in a uniform manner. In practice, it administers its laws through 25 different authorities in different parts of its territory. The decisions of any one authority do not bind any of the other authorities. If the EC authority in Spain issues binding tariff information classifying a good in a particular way, the EC authority in Germany is under no obligation to give any weight at all to that decision (other than in the very limited case in which the BTI is invoked by its holder). If a third party urges the EC authority in Germany to follow the classification decision of the EC authority in Spain, even if that third party is an affiliate of the holder, the EC authority in Germany is under no obligation to do so. In short, one

part of the EC customs administration apparatus is under no obligation to act consistently with other parts of the EC customs administration apparatus.

4.915 The EC states that this is not so. It states that processes and institutions are in place to ensure that different parts of the EC customs administration apparatus act uniformly. But this assertion does not withstand scrutiny. With one exception (appeals to member State courts), the processes and institutions are general obligations, non-binding guidance, and discretionary mechanisms. This point was well illustrated in the EC's preliminary response to the Panel's question 164(a). When asked to comment on the observation that the EC refers to no measures making EC Treaty Article 10 – the general duty of member State cooperation – operational in the context of customs administration, the EC still referred to no specific measures. It stated simply that the duty of cooperation in Article 10 is a binding legal obligation, which can be enforced through infringement proceedings. Repeatedly, the EC states that matters may get referred to the Customs Code Committee, that infringement actions may be brought, that member States may give deference to the decisions of other member States. But, the constant theme is that all of these so-called tools are discretionary.

4.916 In the absence of any processes or institutions that obligate different parts of the EC customs administration apparatus to act uniformly, the design and structure of the EC customs administration system is such as to necessarily result in non-uniform administration. Even the one binding instrument to which the EC has alluded does not cure this problem. Even when confronted with direct evidence of a divergence in member State administration of customs law, a member State court is under no obligation to refer a question to the ECJ.

4.917 In its opening statement at this Panel meeting, in discussing a point pertaining to classification, the EC stated that "[a]t any given moment, there is only one correct classification for a particular product". The United States does not disagree. But, the question is: Who decides what that correct classification is? In the EC, each of the 25 different customs authorities decides, each only with respect to a particular territory, and none with the power to bind the others. The processes and institutions to which the EC refers do not change this. For this reason, the EC does not comply with its obligation under GATT Article X:3(a).

4.918 With respect to Article X:3(b), the EC has an obligation to provide tribunals or procedures for the prompt review and correction of administrative action relating to customs matters, and the decisions of such tribunals or procedures must be implemented by and govern the practice of the agencies entrusted with administrative enforcement. The tribunals that the EC points to as providing for the review and correction of administrative action relating to customs matters are the member State courts. The decisions of each member State court apply only within the territory of that member State. The EC customs authority in France is not required to follow the decisions of UK courts. Indeed, there is not even a mechanism to make member State courts aware of customs review decisions by other member State courts.

4.919 Under the foregoing structure, the decisions of the tribunals that the EC provides do not govern the practice of the EC's agencies entrusted with administrative enforcement. Each court's decisions govern the practice only of a discrete subset of such agencies. Not only is this inconsistent with the text of Article X:3(b), but it also is inconsistent with the context provided by Article X:3(a), which indicates that the obligation to provide review tribunals should be read in a manner consistent with the obligation to administer customs laws uniformly. The EC's only response is to argue that the phrase "govern the practice" really means "implement in fair terms". (Second Submission, para. 230). As this interpretation would render the separate "implement" requirement in Article X:3(b) superfluous, it should be rejected. Accordingly, the EC fails to meet its obligation to provide review tribunals consistent with Article X:3(b).

4.920 The second point the United States makes in closing is that the Panel should not be distracted by the EC's constant reference to dire consequences that supposedly would flow from making the findings the United States requests. Not only are the EC's predictions not relevant, but they are not accurate.

4.921 The first 19 paragraphs of the EC's Oral Statement at this meeting were devoted to recasting the US claims incorrectly as claims that GATT Article X:3(a) requires the EC "to set up a centralized customs agency and a customs court". (Second Oral Statement, para. 3). Having thus misstated the U.S. claims, the EC went on to accuse the United States of seeking to change "a fundamental characteristic of the EC" and to bring about "a radical shift in the federal balance within the EC".

4.922 Moreover, the cataclysmic scenario the EC predicts is not confined to its own system. It contends that the findings the United States seeks "would make the involvement of sub-federal entities in the execution of federal laws generally impossible in large areas of economic regulation". It claims that "[t]his is of considerable concern to the entire WTO membership".

4.923 These themes have been echoed throughout the EC's submissions and interventions. The EC is trying to dissuade the Panel from drawing the obvious conclusions that the facts and the law compel by resorting to scare tactics. In effect, the EC is saying that its obligations under Article X:3 should be interpreted in light of the consequences that any given interpretation would have. This was evident when the EC said at one and the same time that GATT Article XXIV:12 is not relevant to interpretation of GATT Article X:3(a), but that it would be relevant to interpretation of Article X:3(a) if it were found that Article X:3(a) requires the EC to create a centralized customs agency and customs court. (EC provisional response to Panel Provisional Question No. 155).

4.924 In the EC's view, an interpretation should be rejected if, for example, it would require a radical shift in the federal balance within the EC. But this is simply backwards. Relative difficulty of compliance is not a basis for adopting or rejecting a given interpretation of a treaty provision. Moreover, under customary international law, as reflected in Article 27 of the Vienna Convention on the Law of Treaties, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

4.925 At paragraph 12 of the EC's Opening Statement at this Panel meeting, the EC reminded the Panel that "the EC is an original Member of the WTO", and that when the Contracting Parties agreed that the EC should become an original Member, they did so with knowledge of the EC's "system of customs administration and judicial review". The EC reasons that in light of this knowledge, it cannot be argued that the EC's system is inconsistent with GATT Article X:3. But, again, the EC has it exactly backwards. It is not the case that the other original Members of the WTO must be considered to have acquiesced in the EC's breach of a GATT obligation by having agreed that the EC should become an original Member. Rather, the EC had to have considered and accepted the consequences of Article X:3 when it decided to become a Member of the WTO in its own right. The EC is not now free to argue that it does not like those consequences and so should be relieved of the obligations it freely accepted.

4.926 In short, the picture that the EC portrays of the institutional changes that would have to be made in the EC if the Panel were to make the findings the United States requests is pure hyperbole, with no bearing at all on the issue at hand. The Panel should decline the EC's invitation to interpret Article X:3 in light of the EC's prediction of what it would take for the EC to come into compliance with its obligations. It also should give no credit to the proposition that the US claims will have dire consequences for other WTO Members. The US claims are directed at a problem unique to the EC, given its unique combination of geographically fragmented administration and geographically fragmented review.