**BEFORE THE**

**WORLD TRADE ORGANIZATION**

# *EUROPEAN COMMUNITIES - SELECTED CUSTOMS MATTERS*

***(WT/DS315)***

## ANSWERS OF THE UNITED STATES OF AMERICA TO THE PANEL'S SUPPLEMENTARY LIST OF QUESTIONS REGARDING PART III OF THE U.S. SECOND ORAL STATEMENT

**December 22, 2005**

**QUESTION 177**: *Please explain why the United States did not refer to evidence contained in section III of its oral statement at the second substantive meeting, prior to the second substantive meeting?*

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

2. As the United States became aware of instances of non-uniform administration, it identified particular cases that highlighted issues that had been developed at earlier stages in the dispute and that would aid the Panel in examining those issues. Not surprisingly, in identifying examples of the non-uniform administration of EC customs law, the United States focused, in particular, on information from businesses and their representatives who actually have had direct experience with the EC's customs administration system. Obtaining information from such sources has not always been easy, as persons who have to deal with the Commission and with the EC's 25 independent, geographically limited customs offices on a routine basis often (and understandably) are reluctant to openly criticize the EC system. As the EC's pointed critique of

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

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

Mr. De Baere's presentation in its response to the Panel's Question 172 shows, those concerns are not unfounded.[3]

3. The illustrative cases discussed in section III of the U.S. oral statement at the second substantive meeting all involve relatively recent events. This helps to explain the timing of the discussion of those cases in this dispute and contradicts the EC's groundless accusation that "the United States has been deliberately withholding the evidence until the last possible stage."[4] For example, in the camcorders case, it was only in November 2005 that the customs authority in France informed the French importer that it intended to collect additional duties on past imports of certain camcorder models, notwithstanding BTI issued to the French company's Spanish affiliate classifying those models under heading 8525.40.91.[5] In the Sony PlayStation2 case, it was only at the end of July 2005 that the UK High Court of Justice issued its decision declining to refer to the ECJ a question concerning the extent of a customs authority's power and

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

[4]EC Additional Submission, para. 14.

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

(following the ECJ's *Timmermans* decision) affirming the power of that authority to keep BTI revoked notwithstanding the annulment of the EC regulation that had led to its revocation in the first place.[6] Finally, the ECJ's decision in *Intermodal Transports* (Exh. US-71) was not issued until mid-September 2005 (in fact, at the same time the first substantive meeting in the present dispute was taking place).

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

5. The camcorders case, for example, showed the non-uniformity of administration resulting from issuance of an explanatory note, with some member States revisiting the classification of past imports in light of the note (and, accordingly, collecting additional duty) and others giving the note prospective effect only.[8] The case also showed an important limitation of BTI as a supposed tool of ensuring uniform administration. Thus, in an audit of a company in France, the

---

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

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

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

customs authority was able to disregard the classification of goods set forth in BTI issued to an affiliated company by the customs authority in Spain.[9] Finally, the case showed an important limitation on ECJ decisions as tools that allegedly could ensure uniform administration. Thus, France's highest court simply declined to refer a question to the ECJ (concerning the circumstances under which the three-year period for communication of the customs debt to the debtor provided for in the Community Customs Code may be suspended), notwithstanding divergence in administration among different customs authorities in the EC.[10]

6. The Sony PlayStation2 case is another illustrative case that serves to rebut two arguments advanced by the EC. The EC has tried to argue that the ECJ's *Timmermans* decision of January 2004, promotes rather than detracts from uniform administration.[11] *Timmermans* is the decision that permits each of the EC's 25 independent, geographically limited customs offices to revoke or amend BTI on its own initiative and regardless of the effect that other customs offices in the EC have given to that BTI. The United States rebutted the EC's characterization of *Timmermans* as a uniformity-promoting decision by, among other things, calling attention to the Sony PlayStation2 case.[12] The Sony PlayStation2 case also helps rebut the EC's portrayal of the

---

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

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

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

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

preliminary reference mechanism as a tool that allegedly could ensure uniform administration, given the adherence of member State courts (such as the UK court in this case) to the EC Advocate-General's call for self-restraint in use of that mechanism in the customs area, as set forth in his opinion in *Wiener*.[13]

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

8. In sum, each of the illustrative cases discussed in section III of the U.S. oral statement at the second Panel meeting helped to rebut arguments the EC had made in its prior submissions. Far from engaging in "a game of litigation tactics,"[16] the United States used the illustrative cases

---

customs office has issued BTI, supposedly bringing a limited degree of uniformity to the classification of the good concerned (at least for the holder of the BTI), *Timmermans* empowers the customs office to modify or revoke the BTI for its own, independent reasons, in a way that completely undermines uniform administration.

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

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

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

[16]EC Additional Submission, para. 17.

in section III of its oral statement precisely as contemplated by paragraph 12 of the Panel's working procedures – *i.e.*, "for purposes of rebuttals." Its introduction of rebuttal evidence at this stage in the proceeding is not at all remarkable in WTO dispute settlement. Indeed, in this very proceeding, the EC introduced six new exhibits in connection with its comments on the U.S. answers to the Panel's questions following the second Panel meeting. Given that two of those exhibits (Exhs. EC-161 and EC-162) relate to U.S. customs administration, which is not even at issue in this dispute, it is difficult to see how they meet the standard of being "necessary for the purposes of rebuttal." In other disputes, as well, the EC commonly has introduced evidence (ostensibly for rebuttal purposes) at the second Panel meeting or later.[17]

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

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

[17]In the dispute *EC - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (DS174 and DS290), the EC introduced 31 new exhibits, totaling 108 pages, in connection with its answers to questions following the second substantive meeting with the panel. In that same dispute, the EC filed an additional five exhibits, totaling 93 pages, in connection with its comments on the complainants' answers to questions. Although that dispute concerned EC measures, some of the exhibits the EC submitted at that stage of the proceeding concerned agreements to which the EC is not party (*i.e.*, the North American Free Trade Agreement) and municipal law of the complaining parties. In the dispute *EC - Trade Description of Sardines*, the EC even attempted to introduce new evidence at the interim review stage of the panel proceeding. *See* Appellate Body Report, *European Communities - Trade Description of Sardines*, WT/DS231/AB/R, para. 301 (adopted Oct. 23, 2002). The Appellate Body concluded that the interim review stage was not an appropriate time to submit further (alleged) rebuttal evidence.

forth the claims of the complaining party, but need not set forth its arguments.[18]

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

11. The third paragraph of the panel request lists examples of some important ways in which the lack of uniform administration of EC customs law manifests itself. That this is not an exhaustive list is plain from the introductory phrase "including but not limited to." In its reply to the Panel's Question 172, the EC argues that this phrase should not be read to encompass the area of customs administration related to CCC Article 221(3) (*i.e.*, communication of the customs debt).[19]

12. In making this argument, the EC is treating the illustrations set forth in the third

---

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

[19]EC Additional Submission, para. 32.

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

13. The United States discussed CCC Article 221(3) – a provision of a measure identified in the U.S. panel request as not being administered by the EC in a uniform manner – in its oral statement at the second Panel meeting as part of a rebuttal of the EC assertion that certain instruments – *i.e.*, explanatory notes, BTI, and ECJ judgments – ensure uniform administration. As noted in response to Question 177, above, the divergent administration of Article 221(3) in the camcorders case highlights that these tools do *not* ensure uniform administration. Thus, for example, although different EC customs offices take different approaches to circumstances warranting suspension of the three-year period for communication of the customs debt provided for in Article 221(3) – a clear example that the EC fails to administer its customs laws uniformly – at least one member State court of last resort has consistently declined to refer to the ECJ a

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

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

question that might lead to resolution of that divergence.[22] Under the EC system of customs law administration, the existence of such a divergence within the EC does not itself compel a member State court to refer a question to the ECJ.

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

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

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

16. Question 124 did not ask the United States to list every illustration supporting its claim that the EC's failure to administer its customs laws uniformly breaches the EC's obligation under GATT 1994 Article X:3(a). Rather, the United States understood Question 124 to seek confirmation that the principal finding requested by the United States is a finding that the EC is

[22]U.S. Second Oral Statement, para. 31.

[23]DSU, Art. 6.2.

in breach of its obligation under Article X:3(a) as a result of the absence of uniformity in the administration of EC customs laws as a whole. The United States confirmed that this is the principal finding that it seeks with respect to its Article X:3(a) claim. In its response to Question 124 and in its responses to other questions (notably, Question 126), the United States showed that un-rebutted evidence of the design and structure of the EC's system of customs administration supports that finding. The United States then added (in its response to Question 124) that evidence of non-uniform administration in specific areas corroborates the finding that non-uniform administration necessarily results from the design and structure of the EC's system. As noted, the United States listed areas of non-uniform administration demonstrated by the evidence.

17. Article 221 is a further example to those in the list. Like the other examples set forth in the list, the evidence plainly shows that Article 221 is administered in a non-uniform manner, contrary to Article X:3(a). As discussed in the U.S. oral statement at the second Panel meeting, CCC Article 221(3) prescribes a three-year period following the incurrence of a customs debt during which liability for the debt may be communicated to the debtor.[24] It also provides for suspension of the three-year period during the pendency of an appeal. It does not provide any other circumstance under which the three-year period may be suspended. Nevertheless, the EC customs office in France has taken the position (since confirmed by an amendment to the French customs code) that the three-year period may be suspended by the institution of any administrative proceeding (procès-verbal) investigating a possible customs infraction, even if that

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

proceeding does not result in the imposition of any penalty against the debtor.[25] Customs authorities in other parts of the EC do not take the same position. That is, they do not administer CCC Article 221(3) in the same manner as the customs authority in France.

18. In fact, the EC effectively concedes that Article 221 is administered in a non-uniform manner (albeit for reasons different from those discussed by the United States) and, therefore, would have been an appropriate illustration to include in the U.S. response to Question 124. The EC points out that under paragraph 4 of Article 221, liability for a customs debt may be communicated to the debtor after the three-year period set out in paragraph 3, "[w]here the customs debt is the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings." It explains that each member State may decide for itself what constitutes an act liable to give rise to criminal court proceedings, as well as "the length of the period during which the debt can be communicated" where the customs debt is the result of such an act.[26] Thus, if a given act resulting in a customs debt (for example, negligent mis-classification of merchandise) is subject only to administrative penalties in one member State, but is subject to criminal penalties in another, the customs authority in the first member State is subject to the three-year limitation on communication of the customs debt, while the customs authority in the second member State is subject only to the limitation (if any) set forth in its

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

[26]EC Additional Submission, para. 44.

national law.[27] This is a clear example of how the EC, through its customs offices in the different member States, fails to administer its customs law uniformly.

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

19. The EC's characterization of the purpose for which the United States used the camcorders example is not correct. The United States used the camcorders example to illustrate four distinct points. First, the example illustrates that, contrary to the EC's argument, explanatory notes are not effective tools for ensuring the uniform administration of EC customs law. This is demonstrated by the fact that customs authorities in at least two member States (France and Spain) decided to give retrospective effect to the camcorders explanatory note (Exh. US-61). That is, in view of the explanatory note, they revised the classification of merchandise that had already been imported, and they collected additional customs duties accordingly. By contrast, customs authorities in other member States refrained from giving retrospective effect to the explanatory note because the note effectively established a new substantive rule (*i.e.*, it made susceptibility of camcorders to modification of use following importation a criterion for their classification). This was evidenced, for example, by the announcement of the explanatory note

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

by the customs authority in the United Kingdom, in which it indicated that the note "does involve a change in practice for [the] United Kingdom."[28] Thus, different EC customs offices took the same explanatory note and applied it to the same situation differently, demonstrating that the EC fails to administer its customs law uniformly.

20. Second, the camcorders example illustrates that, contrary to the EC's argument, BTI is not an effective tool of ensuring uniform administration of classification rules. In this case, one EC customs office (in Spain) had issued BTI classifying 19 camcorder models (Exh. US-65). The French affiliate of the holder of the BTI informed another EC customs office (in France) of the BTI's existence during the course of an audit by that office. Nevertheless, the EC customs office in France informed the company that it intended not to follow the classification set forth in the BTI, but instead, to collect duty based on its own determination of the correct classification of

[28]HM Customs & Excise, Tariff Notice 19/01 (July 2001) (Exh. US-63); *see also* Vorschriftensammlung Bundesfinanzverwaltung, VSF-Nachrichten N 46 2003, sec. I(3) (Aug. 5, 2003) (German customs notice on application of the EC provisions on reimbursement/remission and recovery of import duties, together with unofficial English translation) (Exh. US-64) (noting that where an explanatory note effectuates a change in substance it will not be applied retroactively). In its reply to the Panel's Question 172, the EC misstates the purpose for which the United States referred to the administrative guideline issued by Germany and set forth in Exhibit US-64. Contrary to the EC's assertion (*see* EC Additional Submission, para. 43), the United States cited this guideline not to illustrate a point regarding CCC Article 221, but rather, to underscore the divergence in the treatment of explanatory notes between certain customs offices (notably, in France and Spain), on the one hand, and other customs offices (notably, in Germany and the United Kingdom), on the other.

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

the camcorder models at issue. The EC incorrectly characterizes this as a "question . . . of post-clearance recovery of customs duties, and not one of tariff classification."[29] It is true that the context in which this matter emerged involved the post-clearance recovery of duties. However, determining the amount of duties to be recovered requires a determination of classification. The EC readily acknowledges that "[t]he BTI issued by the Spanish authorities submitted as **Exhibit US-65** are all in full accordance with EC classification rules."[30] It is, therefore, all the more surprising that a second EC customs office has indicated its intent not to follow the classification set forth in that BTI. Its decision not to do so illustrates that BTI does not ensure uniform administration of EC customs law by the EC's 25 independent, geographically limited customs offices.

21. Third, the camcorders example illustrates the non-uniform administration of CCC Article 221(3), as discussed in response to Question 179, above. Not only does the EC customs office in France take the position (unlike customs offices in other parts of the EC) that the camcorders explanatory note can be applied to imports pre-dating the note but, additionally, it takes the position (also unlike customs offices in other parts of the EC) that the note can be applied to imports even if the customs debt attributable to those imports arose more than three years in the past. Thus, the camcorders importer in France remains vulnerable for additional duty collections on imports made in 1999, even though customs offices in other parts of the EC would consider

[29]EC Additional Submission, para. 40.

[30]EC Additional Submission, para. 40.

such additional collection to be time-barred.[31]

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

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

23. In paragraph 31 of its oral statement at the second substantive meeting, the United States alleges that the EC fails to administer Article 221(3) of the CCC in a uniform manner. That article states that "[c]ommunication to the debtor shall not take place after the expiry of a period

[31]In its oral statement at the second Panel meeting, the United States described this aspect of the camcorders example as non-uniform administration with respect to "the period following importation during which a customs debt may be collected." In its response to Question 172, the EC clarifies that Article 221(3) concerns "the period during which a customs debt may be communicated to the debtor." The United States agrees with this statement of the subject of Article 221(3). However, the United States disagrees with the implication that this has nothing to do with collection of the customs debt. The period during which the customs debt may be communicated to the debtor is obviously essential to collection of the debt. For, if the period for such communication has expired, then so has the possibility of collecting any debt not previously communicated.

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

of three years from the date on which the customs debt was incurred." It identifies only one circumstance under which the three-year period may be suspended: the lodging of an appeal. Nevertheless, one EC customs office (in France) administers Article 221(3) by suspending the three-year period upon the institution of any administrative proceeding (procès-verbal) investigating a possible customs infraction, regardless of whether a customs penalty ever is imposed against a party being investigated. Other EC customs offices do not administer Article 221(3) in this manner. That is, they do not treat the three-year period provided for in Article 221(3) as suspended upon the initiation of any administrative proceeding (procès-verbal) investigating a possible customs infraction. Thus, as the camcorders example shows, a camcorders importer in one part of the EC (France) remains vulnerable in 2005 for additional duty collections on imports made in 1999, even though EC customs offices in other parts of the EC would consider such additional collection to be time-barred. Therefore, the administration of Article 221(3) is a glaring example of non-uniform administration of EC customs law in breach of GATT 1994 Article X:3(a).[33]

24. Separately, also in paragraph 31 of its oral statement at the second substantive meeting, the United States called attention to the refusal of France's highest court to refer to the ECJ the question of whether an administrative investigation may suspend the three-year period under Article 221(3). The United States submitted that where the highest court of a member State can

[33]As noted in response to Question 179, above, the EC's response to Question 172 highlights an additional way in which CCC Article 221 is administered in a non-uniform manner. Specifically, with respect to paragraph 4 of Article 221, the length of the period during which the customs debt may be communicated to the debtor may vary from customs office to customs office within the EC in the circumstance where a customs office determines (according to its own, national criteria) that an act resulting in a customs debt is an act that "*may* give rise to criminal proceedings" (regardless of whether it actually *does* give rise to criminal proceedings). EC Additional Submission, para. 44 (emphasis added).

decline to refer a question to the ECJ, even in the face of clear evidence that the EC customs office in that member State is administering EC customs law differently than the EC customs offices in other member States, this rebuts the EC's assertion that the preliminary reference mechanism ensures uniform administration.

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

25. In answering Question 184, it is important to distinguish between the hypothetical situation the question posits, the known facts of the Sony PlayStation2 ("PS2") case, and the broader significance of the PS2 case. First, as to the hypothetical the question posits, it is indeed possible that BTI issued by one EC customs office classifying a good one way, where the customs office knows that an EC-wide regulation classifying the good differently is forthcoming, could be evidence supporting an allegation of non-uniform administration within the meaning of GATT 1994 Article X:3(a). Article X:3(a) requires a Member to "administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article." It is undisputed that EC classification rules (the subject of BTI) are laws or regulations of the kind described in paragraph 1 of Article X. Further, the ordinary meaning of "administer," as relevant here, is, "carry on or execute (an office, affairs, etc.)."[34] The ordinary meaning of "uniform," as relevant here, is, "[o]f one unchanging form,

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

character, or kind; that is or stays the same in different places or circumstances, or at different times."[35] By issuing BTI, an EC customs office "administers" the EC's classification rules within the ordinary meaning of that term. That is, through BTI, an EC customs office determines the Common Customs Tariff heading under which a particular good is to be classified by applying general rules on interpretation of the Tariff.

26. The question then is whether administration of the classification rules through BTI stays the same in different places under the scenario posited. If the classification set forth in BTI issued by one EC customs office "will certainly become inconsistent with [EC customs] law (e.g. once an inconsistent regulation comes into effect)," one must consider what has prompted adoption of the forthcoming inconsistent regulation. Notably, it is quite possible that other EC customs offices have been classifying the good at issue in the manner set forth in the anticipated regulation, and that these EC customs offices urged adoption of an EC-wide regulation in view of the inconsistent action by the EC customs office whose BTI is in question. This possibility is supported by the critical role that the Customs Code Committee plays in the process of adopting classification regulations,[36] and the fact that the Committee consists of representatives of all 25 EC member States. Put another way, if the anticipated regulation classified the good at issue in a manner contrary to the classification applied in several member States, it would seem difficult to generate Committee support for the regulation, which would necessitate referral of the regulation

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

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

to the Council of the European Union (which ultimately could reject the regulation).[37] If, in fact, development of the EC regulation reflects the emergence of a plurality view among EC customs offices on how the good at issue should be classified, then the issuance of inconsistent BTI by a single EC customs office would demonstrate administration of the classification rules through BTI that is *different* in different places – *i.e.*, that is not "uniform" within the ordinary meaning of that term as used in Article X:3(a).

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

---

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

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

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

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

28. Finally, and most fundamentally, the foregoing response should not be confused with the broader significance of the PS2 case and the rationale for discussing it in the U.S. oral statement at the second Panel meeting. The main point to be gleaned from the PS2 case does *not* concern the correct classification of the PS2. Contrary to the EC's assertion, the United States is not making itself "the advocate for behaviour which would manifestly detract from the uniform application of EC law."[39] It is not arguing that the June 2001 BTI issued by the customs office in the United Kingdom should have been restored upon annulment of the EC classification regulation because the BTI classified the PS2 correctly.

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

30. When the EC regulation was annulled by the September 2003 Court of First Instance judgment, one might have expected the June 2001 BTI to be restored, which (again, under the

[39]EC Additional Submission, para. 56.

EC's view of BTI) would have continued the uniformity of administration of the classification rules with respect to the PS2. In fact, prior to the ECJ's January 2004 judgment in *Timmermans*, the customs authority in the United Kingdom evidently believed that it was required to restore the BTI, and that, in view of the Advocate-General's September 2003 opinion in *Timmermans*, it could not amend the BTI based on its own, independent reinterpretation of the applicable classification rules.[40]

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

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

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

and the more general significance of the PS2 case.

33. In short, the PS2 example (like the other examples discussed in part III of the U.S. oral statement at the second Panel meeting) confirms the main point of the U.S. claim with respect to GATT 1994 Article X:3(a): The design and structure of the EC's system of customs administration necessarily results in the non-uniform administration of EC customs law, in breach of Article X:3(a). In particular, the fact that the EC administers its customs laws through 25 independent, regionally limited offices, without any institution or procedure that ensures that divergences of administration do not occur or that promptly reconciles them as a matter of course when they do occur, necessarily results in non-uniform administration in breach of GATT 1994 Article X:3(a). Neither BTI, nor explanatory notes, nor the ECJ preliminary reference procedure alters this conclusion.