BEFORE THE

WORLD TRADE ORGANIZATION

EUROPEAN COMMUNITIES - SELECTED CUSTOMS MATTERS

(WT/DS315)

ANSWERS OF THE UNITED STATES OF AMERICA TO THE PANEL'S QUESTIONS IN CONNECTION WITH THE FIRST SUBSTANTIVE MEETING

September 23, 2005

QUESTION 1: *Please respond to the assertion by the European Communities in paragraph 14 of its first written submission that the measure at issue in this dispute is "the manner in which the EC administers" customs laws.*

1. In this dispute, the United States is challenging the manner in which EC customs law is administered (as well as the absence of EC tribunals or procedures for the prompt review and correction of customs administrative decisions, as required by Article X:3(b) of the GATT 1994). In particular, we are challenging the absence of uniformity in the administration of EC customs law. The manner in which the EC administers its customs law – that is, the lack of uniformity in such administration – may not itself be a "measure." The "specific measures at issue" for purposes of Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") are the laws, regulations, decisions and rulings that make up EC customs law, though in some cases these are being administered through laws and regulations which are themselves measures. These measures are identified in the first paragraph of the U.S. request for the establishment of a panel (and are set out again in Question 3 of the Panel's consolidated questions). The United States does not challenge the substance of these measures but, rather, the lack of uniformity in their administration.

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

in the administration of EC customs law.

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

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

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

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

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

> **QUESTION 3**: *Please identify what the United States is challenging under Article X:3(a) of the GATT 1994 regarding:*
>
> *(a) Council Regulation (EEC) No. 2913/92 of 12 October 1992; Commission Regulation (EEC) No. 2454/93 of 2 July 1993; and the Integrated Tariff of the European Communities established by Council Regulation (EEC) No. 2658/87 of 23 July 1987;*
>
> *(b) the "related measures" referred to in paragraph 3 of the United States' first written submission; and*
>
> *(c) EC rules on customs classification, customs valuation and customs procedures.*

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

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

supplemented by miscellaneous Commission regulations and other measures pertaining to customs classification and valuation and customs procedures.

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

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

9. The United States is, indeed, challenging the absence of uniformity overall with respect to the administration of the EC customs system. In our first written submission and at the first panel meeting, we supported this challenge by providing evidence of how the system of customs law administration operates. In particular, we demonstrated that EC customs law is administered by 25 separate member State customs authorities, and that the instruments the EC holds out as reconciling the divergences that occur among those separate authorities do not do so, so as to achieve the uniform administration that GATT Article X:3(a) requires. In response, the EC described various principles of EC law, as well as instruments and institutions that, in its view,

reconcile divergences and bring about uniformity of administration. However, as the United States showed, none of these principles, instruments, and institutions reconciles the divergences in member State administration. They amount to a loose network of non-binding guidance to member State authorities, general duties of cooperation, and discretion for Commission and member State officials to refer matters to the Customs Code Committee. The only aspect of this network that may be brought to bear systematically is the opportunity for a trader to appeal action by a particular member State customs authority through the courts of that member State. However, for reasons we discussed in our opening statement at the first Panel meeting, the availability of that opportunity does not discharge the EC's obligation under Article X:3(a).

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

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

good at issue under subheading 3921, whereas other member State authorities had consistently classified blackout drapery lining under subheading 5907.

12. The German authority made no attempt to reconcile its classification decision with the classification decisions reflected in binding tariff information ("BTI") issued by other member States' customs authorities that were brought to its attention. Moreover, the German authority relied on a rationale that plainly is not compelled by the Common Customs Tariff and that the Commission nevertheless declined to identify as a non-uniformity. In particular, the German authority found that the presence of plastic coating made the blackout drapery lining ineligible for classification under Tariff subheading 5907 (contrary to the Harmonized System explanatory note on subheading 5907[2]), and the German authority relied on an interpretive aid specific to Germany – concerning the fineness of the lining's web – which the EC claims was developed by analogy to a Commission regulation pertaining to the classification of ski trousers.[3]

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

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

[3]EC First Written Submission, para. 343; Exh. EC-78, p. 14.

exists[4] underscores the problem.

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

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

[4]EC First Written Submission, para. 346.

[5]EC First Written Submission, para. 360.

area.

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

17. *Court of Auditors Valuation Report*: The Court of Auditors valuation report (Exh. US-14) discusses a number of divergences in member State administration of EC customs valuation rules. The first written submission of the United States drew attention to highlights from this report. Like the classification examples, the cases referred to here all exhibit inconsistencies in member State administration, coupled with failure by EC institutions to systematically cure the inconsistencies. The one example of inconsistent administration of valuation rules where the EC states that it took action in response to the Court of Auditors report concerns vehicle repair costs covered by a seller under warranty.[7] Yet, as the report explains at paragraph 73, the Commission was first made aware of inconsistent member State practice in this area in a 1990 report. The

[6]U.S. Opening Statement, First Panel Meeting, para. 28.

[7]EC First Written Submission, paras. 397-98.

fact that an instance of non-uniform administration first called to the Commission's attention in 1990 was resolved by a regulation adopted in 2002 hardly demonstrates that the system works in a manner consistent with the obligation of uniform administration set forth in GATT Article X:3(a).

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

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

20. The Reebok case supports the U.S. claim by showing a particular manifestation of non-uniform administration in the valuation area. Tellingly, while the EC characterizes the case as

[8]EC First Written Submission, para. 393.

[9]EC First Written Submission, para. 396.

[10]EC First Written Submission, para. 400.

"relatively complex,"[11] it does not contradict the essential facts as described in the U.S. first written submission.

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

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

23. *Local clearance procedures*: The United States referred to local clearance procedures as a second illustration of member States diverging in the administration of EC law with respect to

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

[12]EC First Written Submission, para. 415.

customs procedures. In particular, we showed that different member States impose different requirements for carrying out local clearance procedures. The EC counters that the U.S. description blends certain discrete procedural steps and mistakes certain details with respect to particular member States. However, the EC does not dispute the existence of divergences in the administration of local clearance procedures.

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

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

26. Moreover, the EC's argument that differences in penalty laws are differences of substance rather than differences of administration mistakenly assumes that a law (or other

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

measure) cannot be administrative in nature. Plainly, penalty laws are administrative in nature, inasmuch as they presume the existence of other laws and prescribe consequences for the violation of those laws.

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

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

29. Collectively, the various instances of non-uniform administration that we have summarized in response to this question underline that the systemic problem at the heart of the present dispute manifests itself in three principal areas of customs administration. Precisely because the problem is systemic, it is not confined to classification, valuation, or procedures. Non-uniformity of administration is an essential feature of all three areas. The chief evidence of non-uniform administration is the demonstration that the instruments the EC holds out as

reconciling the divergences that occur among the 25 different member State customs authorities do not do so, so as to achieve the uniform administration that GATT Article X:3(a) requires. The illustrations show how the EC's administration of its customs laws allows non-uniform administration to persist in three discrete areas.

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

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

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

31. The United States refers to its response to Question 5. As indicated in the response to

that question, what the United States is challenging is the EC's failure to provide the uniform administration required by GATT Article X:3(a). That failure is not confined to any particular customs rule or group of rules. It is an overarching feature of customs law administration in the EC. It is an essential aspect of the administration of all EC customs laws. The EC customs rules alluded to in this question are illustrations of areas in which the lack of uniform administration manifests itself.

> **QUESTION 7**: *Please clarify what is meant by "treatment" in respect of each of the following references:*
>
> *(a) In paragraph 20 of its first written submission, the United States submits that "a Member does not administer its law in a uniform manner if identical products or identical transactions receive different treatment in different geographical regions and the Member provides no mechanism for the systematic reconciliation of such differences."*
>
> *(b) In paragraph 84 of its first written submission, the United States submits that "as detailed as the Code and the Implementing Regulation are, they do not ensure uniform administration in the sense that similar transactions will be treated similarly throughout the territory of the EC".*

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

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

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

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

35. The EC's characterization of Article X:3(a) as a minimum standards provision is based

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

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

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

36. The EC's assertion that a pattern of non-uniformity is needed to prove a violation under GATT Article X:3(a) comes from an isolated statement in the panel report in *US - Hot-Rolled*

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

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

Steel.[17] There, Japan alleged that the application of U.S. anti-dumping law in a particular investigation violated the obligation of uniform, impartial and reasonable administration. The panel found that Japan had not even alleged (let alone established) "a pattern of decision-making" that would support its claim.[18]

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

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

39. How non-uniformity of administration can be shown where the nature of the non-uniformity being alleged is geographical non-uniformity will depend on the circumstances of the allegation. In the present dispute, the allegation is that the EC does not reconcile divergences

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

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

among the member State authorities when they occur and that the EC, therefore, fails to uniformly administer its customs law as Article X:3(a) requires. To prove this allegation, what is needed is to provide evidence of the mechanisms that the EC does have in place and to demonstrate how these fail to perform the role of reconciling inconsistencies of administration among 25 different member State agencies. The United States submits that this is what it has done in its first written submission and that, for the reasons discussed in its opening statement and interventions at the first Panel meeting, the EC has failed to rebut that evidence.

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

41. It is illogical for the EC to suggest that where non-uniform administration evidences itself in neat patterns – presumably, consistent differences between member States that go unreconciled – the particular non-uniformities may be challenged under Article X:3(a), but where the system as a whole fails to achieve uniform administration, there is no basis for challenge. To put it another way, by the EC's reasoning, for non-uniform administration to be susceptible to challenge under Article X:3(a) there must be a uniformity – *i.e.*, a pattern – to the non-uniform administration. But, by this same reasoning, where non-uniform administration manifests itself in various and unpredictable ways in diverse areas of customs law, due to the

overall way in which the system operates, such non-uniform administration is not susceptible to challenge. This result is inconsistent with Article X's focus on fairness to traders[19] and should be rejected.

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

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

43. Having said that, in answering this question it is useful to consider different approaches to customs administration along a spectrum. At one end of the spectrum is the status quo, which fails to achieve the uniformity of administration required by GATT Article X:3(a). At the other end of the spectrum is an approach to customs administration that relies on a single EC customs agency authorized to ensure uniformity of administration across the territory of the EC. Creation of such an agency appears to the United States to be an obvious option for achieving the

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

systematic reconciliation of divergences among member State authorities to ensure uniform administration of the EC's customs laws within the meaning of Article X:3(a). We understand this to be the principal means of achieving uniform administration of customs law in the territory of virtually every other WTO Member, and we are aware of no constitutional impediment to the EC's taking the same approach. At the same time, we do not rule out the possibility that somewhere along the spectrum between the status quo and the establishment of a single EC customs agency other options exist that would enable the EC to satisfy its obligation of uniform administration under Article X:3(a).

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

44. First, it should be noted that the centralized EC authority proposed in the 22 December 2004 document (included herewith as Exhibit US-49) was one element of a multi-part package that the United States proposed to the EC in the interest of reaching a mutually agreeable solution to the present dispute. With that objective in view, the United States did not insist on the most obvious and comprehensive approach to addressing lack of uniform administration of customs law in the EC which, as discussed in response to Question 10, would have entailed the establishment of a centralized authority for all aspects of the administration of customs law.

45. The United States focused on a centralized authority for the issuance of binding advance rulings (with respect to classification, valuation, and origin) because having in place an effective system of binding advance rulings would represent substantial progress toward achieving uniform administration more generally. Having a single, centralized entity issue advance rulings

would eliminate the risk of divergent administration that exists when 25 different authorities perform that function and no central authority routinely detects and steps in to cure inconsistencies.

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

47. With respect to classification, neither the Customs Code Committee nor the EBTI database brings uniformity of administration to the BTI system. As discussed in the first written submission of the United States, institutional impediments, including the fact that matters get referred to the Committee only at the discretion of Commission or member State representatives, make the Committee an ineffective arrangement for systematically achieving uniformity in the BTI system. The EBTI database also is not an effective tool for achieving that objective. Unless a good is described in exactly the same way to the authority consulting the database as it had been described to the authorities that previously issued BTI that may be relevant, a search of the database will be of limited value. Even where descriptions are the same or similar, the database

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

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

does not reveal in any detail the rationale applied by different authorities in classifying a particular good in a particular way. It may indicate a citation to the general interpretive rule that the authorities relied on, but provides no narrative explanation for the classification. Thus, an authority trying to decide how to classify a good pursuant to an application for BTI would gain little insight into the rationale of other member State authorities simply by consulting the EBTI database.[22]

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

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

49. Article X:3(a) requires administration of measures of the kind referred to in Article X:1 to be uniform. The tools of administration can take a variety of forms. "Decisions" are tools of administration. Accordingly, when an EC member State customs authority decides to classify a good in a particular way it is administering the Common Customs Tariff. When a member State

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

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

> **QUESTION 13**: *Please provide evidence of specific examples to prove the assertion made in paragraph 47 of the United States' first written submission that, in reality, member States do not always treat binding tariff information issued by other member States as binding.*

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

51. We also refer the Panel to the report of the panel in the dispute *European Communities - Customs Classification of Frozen Boneless Chicken Cuts (Complaints by Brazil and Thailand)*. At issue there was whether a certain product should be classified under Tariff heading 0210 or 0207. The complaining parties relied on issuance of BTI by several EC member States consistently classifying the product under heading 0210. In response, the EC asserted that "this

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

interpretation was not followed in other EC customs offices."[24]

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

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

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

53. The United States does not suggest that Article X:3(a) of the GATT 1994 requires WTO Members to establish a central customs authority to reconcile divergences that may arise among customs authorities throughout that Member. As discussed in response to Question 10, *supra*, establishment of such an authority appears to be an obvious way for a WTO Member to comply with its obligation of uniform administration under Article X:3(a). We are not aware of any WTO Member other than the EC that does not have such an authority. At the same time, we do not rule out the possibility that there may be other ways to achieve uniform administration.

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

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

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

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

56. We also refer the Panel (as in our response to Question 13, *supra*), to the EC's admission in the context of the *EC - Chicken* dispute. There, the EC asserted that customs authorities in certain member States classified the product at issue differently from customs authorities in other member States, despite BTI issued by the latter.

57. Finally, we refer the Panel to footnote 33 of the first written submission of the United States. There, we refer to a case in which customs authorities in France and Spain differed over whether a drip irrigation product should be classified as an irrigation system or a pipe. In fact, France had issued BTI for this product in 1999, classifying it as an irrigation system under Tariff

[25]FTA Questionnaire, p. 4 (Exh. US-30).

heading 8424 (which carried an *ad valorem* duty rate of 1.7%). In December 2000, when an importer of this same product attempted to enter the product through Spain, the Spanish customs authorities disregarded the French BTI and classified the product as pipe, under Tariff heading 3717 (which carried an *ad valorem* duty rate of 6.4%). The EC states that this matter ultimately was resolved through the Commission's adoption of a classification regulation.[26] But, this does not change the fact that for a year-and-a-half, when a trader should have been able to rely throughout the territory of the EC on BTI issued by a given member State's customs authority, it was not able to do so.

> **QUESTION 16**: *With respect to tariff classification, the United States refers to non-uniform administration with respect to blackout drapery lining, liquid crystal display flat monitors with digital video interface, network cards for personal computers, drip irrigation products and unisex articles or shorts, which examples it says are illustrative of non-uniform administration of EC customs rules.*
>
> *(a) Please provide all relevant statistical evidence and/or other information to show the incidence of non-uniform administration in the context of the overall administration of the EC customs regime with respect to tariff classification.*
>
> *(b) To what degree are the tariff classification cases involving blackout drapery lining, liquid crystal display flat monitors with digital video interface, network cards for personal computers, drip irrigation products and unisex articles or shorts: (i) representative of; (ii) significant for; and (iii) have an impact on the administration of the EC rules on tariff classification as a whole?*

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

[26]EC First Written Submission, para. 364 n.177.

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

60. In any event, it is the EC, rather than the United States, that is likely to have the information sought in this question. While the United States does not believe that the information at issue is necessary for the Panel to find that the EC is not in compliance with its obligation of uniform administration, the United States requests that the Panel exercise its authority under Article 13 of the DSU to seek relevant information from the EC. For example, the Panel might seek from the EC a statistically significant sample of BTI and other classification decisions from various member States (including explanations of the bases for those decisions) in order to determine the frequency of divergent administration. Additionally, the United States calls to the Panel's attention Exhibit US-33, which is the EC's draft Modernized Customs Code. At page 4 of that document, the EC states, by way of introduction,

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

that "[a]n external study in 2003 has allowed the Commission to gain a clearer understanding of the current situation in the member States and of the potential cost and benefits."[28] The United States requested a copy of this study during consultations, but the EC declined to provide it. The United States also suggests that the Panel request a copy of this study or draw an inference from the EC's refusal to provide it.

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

> **QUESTION 17**: *Please comment on the following arguments made by the European Communities:*
>
> *(a) In paragraph 331 et seq of its first written submission, the European Communities argues that the case of blackout drapery lining does not reveal any lack of uniformity in the European Communities' classification practice.*

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

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

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

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

63. Second, the EC simply ignores the statement by the German customs authority that "[a]ssignment of the goods to class 5907 could only be considered if, in accordance with the label of that class: 'other webs,' the goods were not plastic-coated as per class 3921."[32] That statement was plainly erroneous, as is evident from the Harmonized System explanatory note that accompanies subheading 5907. According to that note, "The fabrics covered [under

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

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

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

subheading 5907] include . . . [f]abric, the surface of which is coated with glue (rubber glue or other), *plastics*, rubber or other materials and sprinkled with a fine layer of other material such as . . . textile flock or dust to produce imitation suedes. . . ."[33]

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

65. More fundamentally, the EC states that "the criterion that the web is not fine was developed in analogy to another EC classification regulation and is a relevant factor to determine whether the textile fabric is present merely for reinforcing purposes."[37] The classification regulation to which the EC refers (Exhibit EC-78) is a regulation pertaining to the classification

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

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

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

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

[37]EC First Written Submission, para. 343.

of ski trousers, which are classifiable under Chapter 62 of the Tariff. The interpretive rules referred to in that regulation are relevant to classification of an apparel item, but make no sense when applied for a product such as blackout drapery lining. For example, the rules take account of whether the fabric forms the inside or outside of the product, a criterion that is relevant to apparel but not to a product, such as lining, that has no inside or outside.

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

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

68. With respect to liquid crystal display ("LCD") monitors with digital video interface

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

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

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

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

[38]EC First Written Submission, para. 356.

[39]EC First Written Submission, para. 361.

an ADP machine" in order to have it classified under heading 8471.

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

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

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

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

75. Pursuant to Customs Regulations (19 CFR 177.1), a ruling was requested regarding the

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

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

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

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

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

79. In HQ 966508, dated March 17, 2004, HQ 965343 and NY H81427 were revoked pursuant to Customs Regulations (19 CFR 177.12). Sixty calendar days after the final notice was issued, the revocations became effective. The BDL was reclassified in heading 5907, HTS.

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

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

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

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

"principal use."

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

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

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

85. With respect to both the network cards example and the drip irrigation products example, the EC's comment is that the matter was resolved. In the first case, it was resolved through litigation that ultimately led to an ECJ decision, and in the second case it was resolved through the adoption of a Commission regulation. However, these observations obscure the fact that in

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

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

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

87. A simple search of the EBTI database also strongly suggests the occurrence of picking

[41]Panel Report, *EC - Chicken*, para. 7.261 (citing EC's second written submission, para. 51; EC's reply to Panel question No. 117).

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

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

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

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

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

---

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

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

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

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

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

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

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

91. The specific terms of Article X:3(a) at issue are "administer" and "uniform." We discuss the meaning of these terms at paragraphs 32 to 38 of our first written submission. In particular,

the ordinary meaning of "administer" is "carry on or execute (an office, affairs, etc.)," and the ordinary meaning of the term "uniform" is "of one unchanging form, character, or kind; that stays the same in different places or circumstances, or at different times." In each of the foregoing cases, EC law on valuation was "executed" – in the sense that measures of general application were applied to particular persons – in a manner that did not "stay[] the same in different places." Rather, it varied by member State.

> **QUESTION 24**: *With respect to the four aspects of the EC customs regime on valuation that the United States alleges are illustrative of the fact that EC customs rules are not administered uniformly in the European Communities (namely, related parties; royalty payments; valuation on a basis other than the transaction of last sale; and vehicle repair costs covered under warranty):*
>
> *(a) Please provide all relevant statistical evidence and/or other information to show the incidence of non-uniform administration in the context of the overall administration of the EC customs regime with respect to customs valuation.*
>
> *(b) To what degree are the examples specifically referred to by the United States in its first written submission (concerning related parties; royalty payments; valuation on a basis other than the transaction of last sale; and vehicle repair costs covered under warranty): (i) representative of; (ii) significant for; and (iii) have an impact on the administration of the EC rules on customs valuation as a whole?*

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

93. For purposes of the U.S. claim, what is relevant is *the fact* that divergences occur and are not reconciled, *not the frequency* of particular types of divergences. The EC itself acknowledges

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

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

95. The United States recalls that in evaluating the incidence of non-uniform administration with respect to valuation rules, the Court of Auditors had access to "documents handled in the Customs Valuation Committee, customs authority valuation audit files, written valuation rulings, decisions of appeal tribunals and the actual customs declarations" for more than 200 companies

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

and groups of companies.[45] The United States has not had the benefit of such access with respect to any of the matters at issue in this dispute. Therefore, it is difficult to respond directly to the Panel's question. If the Panel were to exercise its authority under Article 13 of the DSU, it might seek information of the type that was made available to the Court of Auditors in preparing its report on valuation.

96. Additionally, the United States calls to the Panel's attention Exhibit US-33, which is the EC's draft Modernized Customs Code. At page 4 of that document, the EC states, by way of introduction, that "[a]n external study in 2003 has allowed the Commission to gain a clearer understanding of the current situation in the member States and of the potential cost and benefits."[46] The United States requested a copy of this study during consultations, but the EC declined to provide it. The United States also suggests that the Panel request a copy of this study or draw an inference from the EC's refusal to provide it. However, for the reasons discussed above, the Panel should not need the information sought by this question in order to conclude that the EC fails to comply with its obligation of uniform administration of customs laws.

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

97. While the regulation cited by the EC does appear to address the issue of treatment of repair costs covered by warranty, what is remarkable is that it took the EC 12 years to resolve this matter. The Court of Auditors report notes that the inconsistency at issue was first brought

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

[46]*Draft Modernized Customs Code*, p. 4 (Exh. US-33).

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

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

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

99. However, a Decision of the European Ombudsman (Exhibit US-52) confirms the description of the non-uniform administration of EC laws on valuation as set forth in the referenced paragraphs of the first written submission of the United States. The importer at issue confirms that it is the company described in that Decision. The importer's complaint concerning

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

lack of uniform administration of EC customs valuation rules by Spanish customs authorities and Netherlands customs authorities is summarized, beginning at page 2.

100. What is especially revealing in this summary is the description of how the Commission dealt with the company's complaint when it was brought to the Commission's attention in September 2000. Rather than refer the matter to the Customs Code Committee, the Commission replied three months later "that the interpretation issues raised by the complainant were a matter for the national customs authorities, and that [the Commission] has no responsibility to undertake a detailed examination of very specific individual cases, this being the task of national administrations."[48] When the company expressly requested referral to the Committee a year later, the Commission "rejected the idea."[49] The company renewed its request in January 2002 and over two years later still had not received a reply from the Commission. The Ombudsman's Decision indicates that following a meeting between agents for the company and officials of the Commission's Directorate for Taxation and Customs Union in May 2004, the complainant stated that "he no longer wished to pursue the complaint."[50] However, it does *not* indicate that the underlying lack of uniformity actually was resolved. The fact that the company is continuing to pursue its appeal through the Spanish courts indicates that, in fact, it has not been resolved.

101. Finally, it is notable that while the EC characterizes the matter as "relatively complex,"[51]

---

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

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

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

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

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

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

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

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

explain how member States administer the EC regulations on processing under customs control.

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

105. To illustrate this non-uniformity, we contrasted United Kingdom guidance on application of the economic conditions test with French guidance.[52] We demonstrated that under the UK guidance, an applicant must show evidence of both impact on its business and "impact upon any other community producers of the imported goods."[53] By contrast, under the French guidance, an applicant need only present evidence of the creation or maintenance of processing within the EC.[54]

106. The EC states that the French guidance "also refers to the test relating to the absence of

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

[53]U.S. First Written Submission, para. 105.

[54]U.S. First Written Submission, para. 107.

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

> **QUESTION 28**: *In paragraph 400 of its first written submission, the European Communities submits that questions of auditing are not part of customs procedures. Please comment.*

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

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

[55]EC First Written Submission, para. 415.

including . . . company audit methods. . . ."[56]

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

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

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

[56]U.S. Opening Statement, First Panel Meeting, para. 53.

[57]EC First Written Submission, para. 400.

[58]U.S. First Written Submission, para. 97 (quoting from Exh. US-14).

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

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

112. In *de Andrade*, an importer failed to carry out the formalities necessary for goods to be assigned a customs-approved treatment or use within the applicable time prescribed by Article 49 of the Code. Accordingly, the Portugese customs authority administered Article 53(1) – that

---

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

[60]Council Resolution of 29 June 1995 on the effective and uniform application of Community law and on the penalties applicable for breaches of Community law in the internal market, p. 1 (Exh. EC-41).

[61]U.S. First Written Submission, para. 100.

is, it took measures necessary to regularize the situation – by imposing a penalty provided for under Portugese law. Through application of the penalty provision, the Portugese authority carried out Article 53(1) of the Community Customs Code.

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

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

> **QUESTION 30**: *Please explain step-by-step the United States' understanding of procedures applicable in the European Communities for:*
>
> *(a) Clearance of goods for free circulation or otherwise using local clearance procedures; and*
>
> *(b) Clearance of goods for free circulation not using local clearance procedures.*

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

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

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

Step 1: Goods are presented to customs. (CCC Art. 40) This usually is the responsibility of the carrier and applies to all goods, irrespective of clearance method.

Step 2: A summary declaration is presented to customs. (CCC Art. 43) This can be the responsibility of the carrier, port or facility operator, or other person and takes the form of the shipment-level detail manifest. Again, this applies to all goods, irrespective of clearance method. Goods now have the status of being in temporary storage. (CCC Art. 50)

Step 3: Goods are assigned a customs approved treatment or use. (CCC Art. 48) This is effected by making a declaration to place the goods under a customs procedure. The customs procedure may be either a "normal procedure" (CCC Arts. 62-75) or a "simplified procedure" (CCC Art. 76) Simplified procedures are further separated into three categories: local clearance procedure (CCCIR Arts. 263-267), warehousing (CCCIR Art. 268), and simplified declaration procedure. (CCCIR Arts. 269-271)

116. In sum, the procedures applicable for normal clearance and clearance using local clearance procedures are the same in the first two steps. At the third step, there is a separation. Where normal procedures apply, the importer must make a full declaration, including supporting documents, and afford the customs authorities the opportunity to examine the goods and take samples prior to release for free circulation. (CCCIR, Arts. 239-252) Where local clearance procedures apply, the importer notifies the customs authorities of arrival of the goods and enters

the goods in its records, whereupon they normally may be released for free circulation. (CCCIR, Art. 266). Under local clearance procedures, a supplementary declaration is made after release. As described at paragraphs 109 to 116 of the first written submission of the United States, different member States administer the local clearance procedures differently, including with respect to involvement of customs authorities prior to release of goods, post-release requirements, and document retention requirements.

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

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

> **QUESTION 32**: *In paragraphs 220-221 of its first written submission, the European Communities submits that, where sub-federal laws exist in a particular WTO Member, it is the administration of those laws to which Article X:3(a) of the GATT 1994 refers.*
>
> *(a) Does Article X:3(a) apply to penal laws?*
>
> *(b) If so, would the Panel be authorised to consider the administration of member States' penal laws in respect of the United States' claim under Article X:3(a)?*

118. We refer to our response to Question 29. As discussed there, penal laws for the violation of customs laws are tools for the administration of those customs laws. They induce compliance with the customs laws. To the extent different EC member States apply different penal laws to

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

119. With respect to the second part of the Panel's question, it is important to distinguish between the administration of penal laws and the application of penal laws to administer customs laws of the type described in Article X:1. For the reasons discussed in the preceding paragraph and in our response to Question 29, the Panel is authorized to consider penal laws as tools in the administration of EC customs law in respect of the United States' claim under Article X:3(a). It is the fact that different member States have different penal laws and therefore administer the underlying EC customs law non-uniformly that is relevant to the United States' claim under Article X:3(a). Whether each individual member State administers its own penal law uniformly within its own territory is not relevant to our claim.

120. The EC confuses this distinction by rejecting the proposition that laws may themselves be administrative in nature. In its view, there is no such thing as a law that is administrative in nature. Thus it states, "Where subfederal laws exist in a particular WTO Member, it is therefore to the administration of those laws that Article X:3(a) GATT refers."[64] It dismisses the possibility that laws at the subfederal level may be tools for administering laws at the federal level. Yet, that is precisely what customs penalty provisions are. By suggesting that laws at the subfederal level can never be evaluated for Article X:3(a) purposes as tools for administering laws at the federal level, the EC reads Article X:3(a) in a way that dramatically diminishes its

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

effectiveness. By this logic, where federal level customs laws are administered by sub-federal authorities, almost any instance of non-uniform administration at the federal level could be re-cast as a difference in substantive measures prescribed at the sub-federal level, thereby enabling the federally organized WTO Member to avoid its obligation of uniform administration. Such a reading of Article X:3(a), which deprives it of almost all utility with respect to federal States, is contrary to customary rules of treaty interpretation of public international law and must be rejected.

> **QUESTION 33**: *With respect to the four types of "customs procedures" that the United States alleges are illustrative that EC customs rules are not administered uniformly in the European Communities (namely, audit following release for free circulation; penalties for infringements of EC customs laws; processing under customs control; and local clearance procedures):*
>
> *(a) Please provide all relevant statistical evidence and/or other information to show the incidence of non-uniform administration in the context of the overall administration of the EC customs regime with respect to customs procedures.*
>
> *(b) To what degree are the examples specifically referred to by the United States in its first written submission (concerning audit following release for free circulation; penalties for infringements of EC customs laws; processing under customs control; and local clearance procedures): (i) representative of; (ii) significant for; and (iii) have an impact on the administration of the EC rules on customs procedures as a whole?*

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

122. For purposes of the U.S. claim, what is relevant is *the fact* that divergences occur and are

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

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

124. The United States recalls that in evaluating the incidence of non-uniform administration with respect to valuation rules, the EC's Court of Auditors had access to "documents handled in the Customs Valuation Committee, customs authority valuation audit files, written valuation rulings, decisions of appeal tribunals and the actual customs declarations" for more than 200 companies and groups of companies.[66] The United States has not had the benefit of such access

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

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

with respect to any of the matters at issue in this dispute. Therefore, it is difficult to respond directly to the Panel's question. If the Panel were to exercise its authority under Article 13 of the DSU, it might seek information of the type that was made available to the Court of Auditors in preparing its report on valuation.

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

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

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

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

[67] *Draft Modernized Customs Code*, p. 4 (Exh. US-33).

inconsistent first-instance decisions.

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

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

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

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

132. When CBP becomes aware of inconsistent decisions, it may correct any rulings less than 60 days old by simple notice to the recipient. More detailed procedures govern the modification

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

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

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

> **QUESTION 35**: *Please specifically identify what the United States is challenging/alleging under Article X:3(b) of the GATT 1994 regarding:*
>
> *(a) The level of bodies established to review customs decisions and the geographical effect of their decisions (See paragraph 4 of the United States' first written submission where it submits that appeals from customs decisions are a matter for each member States and that, currently in the European Communities, there are 25 different appellate regimes, none of which can yield a decision with EC-wide effect);*
>
> *(b) The procedures in member States regarding appeal mechanisms for review of*

customs decisions (See paragraph 133 of the United States' first written submission, where it notes that the "appellate mechanism in each member State is different" and in paragraph 143 where it states that "appellate procedures vary from member State to member State"); and

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

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

136. The foregoing interpretation of Article X:3(b) is supported by the second sentence of that provision, which states that the tribunals or procedures that a Member provides "shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, *and shall govern the practice of, such agencies*. . . ." (Emphasis added.) The phrase "shall govern the practice of such agencies" requires that enforcement agencies of a Member (here, the EC) follow the reviewing tribunal's decisions. That is, that reviewing tribunal's decisions must be effective with respect to the Member's enforcement agencies, and

not just some of them.

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

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

139. With respect to access on the part of traders to the European Court of Justice, our allegation is that the access the EC provides to this forum does not discharge the EC's obligation

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

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

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

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

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

142. The bodies in place in the United States to discharge its obligations under Article X:3(b) are the Office of Regulations and Rulings within U.S. Customs and Border Protection and the U.S. Court of International Trade (CIT). In general, a trader seeking review and correction of a customs decision made at a port of entry may pursue one of two options. The first option is to

seek review by the Office of Regulations and Rulings, through a process known as further review by Headquarters of determinations on protests. Under this process, the Office of Regulations and Rulings provides objective and impartial review of decisions made at the ports of entry. Its decisions are, in turn, appealable to the CIT. The second option, as discussed in response to Question 34, is to request accelerated administrative disposition of a protest by CBP, which permits the trader to begin a CIT proceeding 30 days after making such a request if the protest is denied or merely not acted upon by the port.

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

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

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

unable to amend that decision.

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

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

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

requirement that the decisions of tribunals or procedures for the review and correction of customs administrative action govern the practice of "the agencies entrusted with administrative enforcement."

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

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

148. Preliminarily, the proposition for which the EC cited the USCIT cases at issue is based on the incorrect premise that the United States is challenging the promptness (or lack of

promptness) of review and correction provided by EC member State tribunals. As discussed in response to Question 35, *supra*, the United States is not claiming that the EC would fulfill its obligation under GATT Article X:3(b) but for the fact that the review provided by member State tribunals is not prompt. Accordingly, the point that the EC is trying to make by referring to the time for disposition of cases by the USCIT is entirely irrelevant.

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

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

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

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

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

153. From a practical point of view, it should not be necessary for this Panel to determine the precise point at which review and correction ceases to be prompt. As discussed in response to Question 35, it is not the claim of the United States that the EC would be in compliance with Article X:3(b) but for the fact that the review and correction provided by member State tribunals is not prompt. Rather, our claim is that given the fact that the decisions of member State tribunals do not govern the practice of EC customs agencies in general, but only particular agencies in that member State, the existence of these tribunals does not discharge the obligation of the EC under Article X:3(b).

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

QUESTION 89: *Could a system in which it is primarily incumbent upon a trader to*

assert its rights to achieve uniform administration on the part of the customs authorities in a particular WTO Member (for example, by instituting appeals to complain about the decisions/treatment of those customs authorities) comply with the obligations contained in Article X:3(a) of the GATT 1994?

155. It is difficult to answer this question without knowing about other features of the system hypothesized. Depending on the mechanisms through which traders asserted their rights, such a system might comply with Article X:3(a). For example, a system in which a trader, upon encountering a case of non-uniform administration, could appeal as a matter of right to a central authority and obtain a resolution of the matter within a relatively brief, set period of time might comply with that obligation. We would contrast this to a system in which the only way to reconcile a non-uniformity as a matter of right is through protracted judicial review of each instance of non-uniform administration separately. That system would not fulfil a Member's obligation under Article X:3(a).

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

156. The United States understands the quoted statement from *Argentina - Hides* to make clear that the fact that the tools for the administration of laws, regulations, decisions and rulings of the kind described in paragraph 1 of Article X may take the form of measures does not put them outside the scope of Article X:3(a). That article requires that certain specified measures of general application be administered in a uniform manner. The obligation does not concern the

substance of the measures being administered but, rather, the manner in which they are administered. Thus, a Member may (as is the case for a part of the U.S. claims under Article X:3(a) in this dispute) challenge the *administration* of a measure without challenging its *substance* (to use the terms in the *Argentina – Hides* report).

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

158. The definition of "administrative" is "[p]ertaining to management of affairs; executive."[69] "Executive," in turn, means "[p]ertaining to execution; having the function of putting something into effect. . . ."[70] Thus, a measure is administrative in nature where it has the function of putting something into effect. In other words, it presumes the existence of a distinct law, rule or other measure and serves to execute or carry out that underlying law, rule or other measure. Again, a

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

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

penalty measure is a good example. A penalty measure necessarily presumes the existence of some underlying measure. It makes no sense to speak of a penalty measure in the abstract, unconnected to a particular measure that is sought to be enforced. A penalty measure has the function of putting into effect underlying measures, such as customs laws.

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

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

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

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

> **QUESTION 92**: *Please comment on paragraph 7 of its third party submission where the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu argues that the test of "minor administrative variations" under Article X:3(a) of the GATT 1994 referred to by the GATT panel in EC– Dessert Apples is not relevant for the present case. Does the applicability of this test depend upon the existence of certain factual/other*

circumstances? If so, please explain and justify making reference to the specific terms of Article X:3(a).

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

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

(a) Please comment.

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

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

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

163. With respect to part (a) of this question, we refer the Panel to our responses to Questions

32 and 90.

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

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

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

member State administer its own penalty provisions and audit procedures uniformly within its own territory.

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

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

169. The principal flaw in the EC argument remains its disregard of the distinction between measures that are objects of administration and measures that serve in the administration of other measures. The matters other than customs matters described in Article X:1 – such as measures of general application affecting the sale, distribution, transportation, and insurance of imports – are distinguishable from penalty provisions and audit procedures inasmuch as they are objects of administration rather than measures that serve an administrative function. As explained in responses to Questions 29, 32, and 90, *supra*, penalty provisions and audit procedures

necessarily presume the existence of some underlying set of laws or rules and serve to carry out that set of laws or rules. This is what makes them administrative in nature. On the other hand, Article X:3(a) requires that measures affecting the sale, distribution, transportation, and insurance of imports themselves be administered in a uniform manner over whatever region within the territory of a WTO Member they apply. Therefore, accepting the U.S. argument concerning penalty provisions and audit procedures would not have the dramatic consequence that the EC suggests of compelling harmonization in a wide array of non-customs areas.

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

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

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

171. Interpretation of the term “administer” is discussed at paragraphs 32 to 39 of the first

written submission of the United States. We also refer the Panel to our answers to Questions 1, 12, and 23, *supra*. Finally, we refer the Panel to our answer to Question 90, in which we discuss the meaning of the related term "administrative."

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

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

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

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

treaty interpretation, as consistently recognized by the Appellate Body.[71]

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

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

---

[71]*See, e.g.*, Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, para. 88 (adopted Jan. 12, 2000); Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 12 (adopted Nov. 1, 1996); Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, p. 23 (adopted May 20, 1996).

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

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

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

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

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

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

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

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

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

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

their context and in the light of the object and purpose of the treaty.[78] The text and context of Articles X:3(a) and X:3(b) indicates that the focus of Article X as a whole is on fairness to traders. Thus, for example, Article X:1 requires Members to publish certain measures of general application "promptly in such a manner as to enable governments *and traders* to become acquainted with them." (Emphasis added.) As the panel in *Argentina - Hides* observed, "While it is normal that the GATT 1994 should require this sort of transparency between Members, it is significant that Article X:1 goes further and specifically references the importance of transparency to individual traders. . . . Thus, it can be seen that Article X:3(a) requires an examination of the real effect that a measure might have on traders operating in the commercial world."[79]

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

179. Moreover, it is notable that the second sentence of Article X:3(b) requires that the practice of agencies entrusted with the administrative enforcement of customs matters be governed by the decisions of reviewing tribunals or procedures "unless an appeal is lodged with

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

[79]Panel Report, *Argentina - Hides*, paras. 11.76 to 11.77.

[80]Appellate Body Report, *US - Shrimp*, para. 183.

a court or tribunal of superior jurisdiction *within the time prescribed for appeals to be lodged by importers*" (emphasis added). In other words, a customs agency may appeal a tribunal's decision, and the tribunal's decision need not govern the agency's practice during the pendency of the appeal, but the agency may not be allowed more time to lodge its appeal than importers would be allowed to lodge their appeals. The reference to the time prescribed for appeals to be lodged by importers as a benchmark is further evidence that the text and context of Articles X:3(a) and X:3(b) supports a focus on traders.

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

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

181. For the reasons set forth in our answers to Questions 16, 24, and 33, *supra*, it is not necessary to identify a practical/numerical threshold and/or benchmark for demonstrating that Article X:3(a) has been violated. What the United States has demonstrated is that the system of customs law administration in the EC – consisting of 25 independent authorities, with no central agency or other mechanism to reconcile inconsistencies in administration among those authorities – is such that it does not achieve the uniform administration that Article X:3(a)

requires. As it is evidence of how this system is designed and operates that shows the EC's failure to meet its obligation, what is relevant is *the fact* that divergences occur and are not reconciled, *not the frequency* of particular types of divergences.

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

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

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

183. We refer the Panel to our response to Question 94, *supra*.

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

of Article X:3(a).

184. We refer the Panel to our response to Question 9, *supra*.

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

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

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

QUESTION 119: *Do penalty laws/provisions applicable to violations of customs laws fall within the scope of the measures referred to in Article X:1 of the GATT 1994? If so,*

---

[81] *The New Shorter Oxford English Dictionary*, Vol. II, p. 2173 (1993) (Exh. US-56).

[82] *The New Shorter Oxford English Dictionary*, Vol. I, p. 35 (1993) (Exh. US-57).

please explain making reference to the relevant terms of Article X:1.

187. We refer the Panel to our responses to Questions 29 and 32, *supra*.

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

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

QUESTION 121: *Making reference to the specific terms of Article X:3(b) of the GATT*

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

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

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

1994, please explain whether or not the obligation to ensure prompt review and correction of administrative action is confined to first instance reviews by administering authorities.

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

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

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

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

191. Articles X:3(a) and X:3(b) each provide obligations concerning transparency and procedural fairness to traders. As a legal matter, each subparagraph provides context for the

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

interpretation of the other in accordance with the customary rules of treaty interpretation reflected in Article 31(1) of the Vienna Convention.