V. ARGUMENTS OF THE THIRD PARTIES[44]

5.1 The arguments of those third parties who made written and/or oral statements to the Panel are summarized in this section. The summaries are based on the executive summaries submitted by those third parties. Where a third party has provided written responses to questions posed by the Panel, these responses are set out in Annex A. (See list of Annexes at page xvi).

A. THIRD PARTY WRITTEN SUBMISSION OF CHINA

5.2 China believes that it has substantial interests in the matter before this panel whether European Communities' ("EC") administration of customs law is in a uniform manner, as required by Article X:3(a) of the General Agreement on Tariffs and Trade 1994 ("the GATT 1994"), and the requirements of prompt review and correction of administrative actions relating to customs matters by Article X:3(b) of the GATT 1994 have been met by the EC .

1. Issues relating to interpretation and application of Article X:3(a)

(a) The scope of application of Article X:3(a) of the GATT 1994

5.3 Article X:3(a) of GATT 1994 concerns the administration of customs laws, not the customs laws themselves. The EC seems concerned with whether Article X:3(a) GATT applies to the administration of customs laws at the local level as well as at the central level.

5.4 Based on Article XXIV:12 of the GATT 1994 and the GATT Panel report in *Canada – Gold Coins*, the EC drew its conclusion that "Article X:3(a) GATT does not require that customs laws be regulated at the central level of each WTO Member"[45].

5.5 Taking no position on this EC assertion, however, China does not think Article XXIV:12 of the GATT 1994 and the GATT Panel report in *Canada – Gold Coins* are proper in supporting EC's argument.

5.6 Article XXIV:12 requires that the provisions of GATT be observed by both the central government and the regional or local authorities of a Contracting Party, and that the central government take the responsibility for ensuring the observance of the provisions of GATT by its local authorities. So, if there are any difficulties, encountered by the federal government of a Contracting Party because of its particular administrative or legal structures, in ensuring the observance of the provisions of GATT by its local authorities, the federal government shall still seek such reasonable measures as are available to it to secure the observance of the provisions of GATT by its local authorities in accordance with Article XXIV:12 until the actions or measures inconsistent with any provisions of GATT by its local authorities are removed. The federal government of such a Contracting Party shall compensate, because of such actions or measures by its local authorities, for any nullified or impaired benefits accruing to other Contracting Parties under the provisions of the GATT.[46]

5.7 According to the GATT panel in *Canada – Gold Coins*, Article XXIV:12 applies to those measures taken by the local level authority of contracting parties with federal regimes when administering their laws or regulations of local level.[47] The present dispute does not concern a

[44] The texts of the footnotes in sections V:A – V:I are the original texts of the footnotes in the third parties' submissions.
[45] EC First Written Submission, para. 221.
[46] GATT Panel Report, *Canada – Gold Coins*, para. 65.
[47] GATT Panel Report, *Canada – Gold Coins*, para. 56.

measure taken by the local authority when administering their laws or regulations of local level, but concerns whether the EC customs laws (i.e. laws of central level) can be administered by the EC member States (i.e. local level authority) and whether such administration is in a uniform manner.

5.8 The GATT panel in *Canada – Gold Coins* further stated that Article XXIV:12 does not change the scope of application of the provisions of the GATT.[48] China agrees with the EC that "Article X:3(a) GATT does not prescribe the specific way in which WTO Members should administer their customs laws"[49]. However, the obligation of uniform administration of customs laws should not be varied.

(b) The meaning of "uniform" as used in Article X:3(a) of the GATT 1994

5.9 The ordinary meaning of "uniform", as relevant here, is "of one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times"[50].

5.10 The panel in *Argentina – Hides and Leather* stated: "Customs laws should not vary, that every exporter and importer should be able to expect treatment of the same kind, in the same manner both over time and in different places and with respect to other persons. Uniform administration requires that Members ensure that their laws are applied consistently and predictably. This is a requirement of uniform administration of Customs laws and procedures between individual shippers and even with respect to the same person at different times and different places"[51].

5.11 China considers that the interpretation clarified by the panel in *Argentina – Hides and Leather* of the word "uniform" as used in Article X:3(a) is of the same substance with this ordinary meaning of "uniform".

5.12 China believes that when addressing the meaning of the word "uniform" reference should be made to the interpretation given by the panel in *Argentina – Hides and Leather.*

(c) The standard of uniformity required by Article X:3(a) of the GATT 1994

5.13 The EC argues that "Article X:3(a) GATT only lays down minimum standards"[52]. The EC referred to the Appellate Body report in *US – Shrimp* to support its argument. The paragraph referred to by the EC of the Appellate Body report in *US – Shrimp* reads:

> "It is also clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards *for transparency and procedural fairness in the administration of trade regulations* which, in our view, are not met here. ……"[53] (emphasis added by China).

5.14 The minimum standards articulated by the Appellate Body are for transparency and procedural fairness in the administration of trade regulations, not for directly the uniformity requirement of the administration of customs law.

5.15 The EC also referred to the Panel report in *Argentina – Hides and Leather* to support its argument. However, the paragraphs referred to by the EC address the meaning of the word "uniform", and do not directly concern the standard of the uniformity.

[48] GATT Panel Report, *Canada – Gold Coins*, para. 63.
[49] EC First Written Submission, para. 222.
[50] *The New Shorter Oxford English Dictionary*, Vol. II at 3488 (1993) (Exhibit US-4).
[51] Panel Report, *Argentina – Hides and Leather*, WT/DS155/R, para. 11.83.
[52] EC First Written Submission, para. 231.
[53] Appellate Body Report, *US – Shrimp*, para. 183.

2. Conclusion

5.16 China thanks the Panel to provide an opportunity to comment on the issues involved in this proceedings, and hopes that its comments will prove to be helpful.

B. THIRD PARTY WRITTEN SUBMISSION OF JAPAN

1. Introduction

5.17 Japan participates in this dispute based on its systemic interests in the correct interpretation and application of Articles X:3(a) and (b) of the General Agreement on Tariffs and Trade 1994 ("the GATT 1994").

2. Consistency of the challenged measures with Article X:3(a) of the GATT

(a) The meaning of the term "uniform" administration in Article X:3(a) of the GATT 1994

5.18 As a premise, Japan agrees with the United States that the EC, as a Contracting Party, is responsible for ensuring a uniform administration of customs matters throughout its territory[54], and that the term "general application" in Article X:1 GATT would in EC's case mean the general application within the EC as a whole.

5.19 The United States claims 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 systemic reconciliation of such divergences."[55] The United States elaborates that such divergences and the lack of systemic reconciliation of the divergences occur in customs classification, customs valuation and customs procedures of the EC member States.[56]

5.20 In determining the meaning of the term "uniform" required under Article X:3(a) GATT, it is useful to first recall the Panel's finding in *US – Hot-Rolled Steel.* The Panel held that, for a Member's measure to be inconsistent with GATT X:3(a) GATT, it would have to have a significant impact on the overall administration of that Member's law and not simply on an impact on the outcome in the single case in question. The Panel found:

> While it is not inconceivable that a Member's actions in a single instance might be evidence of lack of uniform, impartial, and reasonable administration of its laws, regulations, decisions and rulings, we consider that the actions in question would have to have a significant impact on the overall administration of the law, and not simply on the outcome in the single case in question. Moreover, we consider it unlikely that such a conclusion could be reached where actions in the single case in question were, themselves, consistent with more specific obligations under other WTO Agreements.[57]

5.21 The panel's finding in *Argentina – Hides and Leather* is also relevant. The Panel found that:

> We are of the view that this provision should not be read as a broad anti-discrimination provision. We do not think this provision should be interpreted to require all products be treated identically. That would be reading far too much into this paragraph which focuses on the day to day application of Customs laws, rules

[54] US First Written Submission, paras. 29 and 36.
[55] US First Written Submission, para 19.
[56] US First Written Submission paras. 24-26, 40ff.
[57] Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001, para. 7.268.

> and regulations. There are many variations in products which might require differential treatment and we do not think this provisions should be read as a general invitation for a panel to make such distinctions.[58]

5.22 The GATT Panel in *EEC – Dessert Apples*, has also made a finding regarding Article X:3(a) of the GATT that minimal differences do not constitute a breach thereof, as follows:[59]

> The Panel further noted that the EEC Commission Regulations in question were directly applicable in all of the ten member States concerned in a substantially uniform manner, although there were some minor administrative variations, e.g., concerning the form in which licence applications could be made and the requirement of pro-forma invoices. The Panel found that these differences were minimal and did not in themselves establish a breach of Article X:3.

5.23 In light of the above findings as well as the complex nature and vast amount of imports that customs authorities handle, Japan shares the EC's view that "Article X:3(a) lays down minimum standards"[60] to ensure the impartial administration of trade related laws. The Panel should consider the nature of customs administration which often times involve a vast number of imports and numerous different products which are complicated to classify, reflecting realities such as the speed of technological advances and the resulting production of new products. Therefore, the fact that divergences between individual decisions of various customs authorities may exist in itself is not inconsistent with Article X:3(a) of the GATT, as both the United States and the EC confirm.[61] In this context, it is necessary 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) GATT in light of the particular customs system as a whole.

(b) Article X:3(a) of the GATT does not prescribe the specific means a Member must employ in order to ensure a uniform administration of customs laws; such uniformity should be determined in respect of the particular customs system as a whole

5.24 In respect of the United States' claim that the EC does not provide a systematic reconciliation of divergences, Article X:3(a) GATT "do[es] not concern the customs laws themselves, but only their administration"[62] and "does not prescribe the specific means a Member must employ in order to ensure a uniform administration of customs laws", as stated by the EC.[63] This is also in line with Japan's above-mentioned view that the issue is whether or not the results of applying a specific means of a Member ensure a uniform administration as a whole**.**

5.25 While Japan hopes that, where appropriate, Members further harmonize their customs administration within their respective territories in the future, Japan is of the view that the specific means to ensure a uniform administration of customs laws is one of the matters which should be addressed through the Doha Negotiations on Trade Facilitation which aims "to clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994…"

5.26 In respect of the BTI system or the function of the Customs Code Committee (CCC), it is useful to recall that the BTI and the CCC are each individual means that the EC provides to ensure a

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[58] Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001, para. 11.84.

[59] GATT Panel Report, *EEC – Restrictions on Imports of Dessert Apples* (L/6491-36S/93), adopted on 22 June 1989, para.12.30.

[60] EC First Written Submission, para. 231.

[61] US First Written Submission para. 25; EC First Written Submission para. 238.

[62] EC First Written Submission, para. 216.

[63] EC First Written Submission, para. 303.

uniform administration of customs matters, and not each the only means. It is necessary to analyze other means such as classification regulations, the HS explanatory notes and opinions, and the EC explanatory notes to determine whether the EC's customs system as a whole ensures a uniform administration consistent with Article X:3(a) GATT.

3. Consistency of the challenged measures with Article X:3(b) of the GATT

(a) The measure in question

5.27 The United States claims that the EC does not provide tribunals or procedures for the prompt review and correction of administrative actions relating to customs matters, as required by Article X:3(b) GATT.[64] Japan agrees with the United States that as the EC is the responsible entity in administering regulation of customs matters, the EC should provide tribunals or procedures for the prompt review and correction.

5.28 The United States claims that the EC does not provide an opportunity to review and correct administration of customs matters because, for example, the "Community Customs Code says little on the question of appeal"[65] and "in fact, the time periods for first instance reviews conducted by Member State customs authorities can vary widely…with the exception of courts of last resort, referral of questions by Member State courts [to the ECJ] is discretionary."[66]

(b) The consistency of the challenged measure with Article X:3(b) of the GATT

5.29 In respect of the United States' challenge that the EC does not provide an opportunity to review and correct administration of customs matters due to a lack of a common appeals procedure, Japan would like to point out that although a central court or procedure would likely ensure this result, again, this may not be the only means to realize an opportunity to review and to correct by the EC, especially in light of the principles of supremacy and of direct effect of Community law binding the national courts of the EC's member States.[67] As explained by the EC, the national courts could "assume the status of Community courts of general competence."[68]

5.30 Japan shares the view of the EC that Article X:3(b) of the GATT "does not require a central court or procedure to appeal administrative decisions in customs matters. There is no obligation under the GATT for WTO Members to establish a court similar to the United States Court of International Trade."[69]

5.31 As each Member is obliged to administer in a uniform manner all its customs matters pursuant to Article X:3(a) GATT, it is reasonable to deduce that the *results* of the tribunals or procedures of a prompt review pursuant to Article X:3(b) GATT shall ensure uniform administration of customs matters. However, this would be an issue of Article X:3(a) GATT.

5.32 In respect of the United States' challenge that "in fact, the time periods for first instance reviews conducted by member State customs authorities can vary widely"[70], the EC refers to the meaning of the word "prompt" as "without delay", while "delay" is "(a period of) time lost by inaction or inability to proceed."[71] Japan agrees that the GATT does not provide any specific standard for a

[64] US First Written Submission, Section V, sub-section D.
[65] US First Written Submission, paras. 141-143.
[66] US First Written Submission, paras. 146-149.
[67] EC First Written Submission, Section III.A.3.
[68] EC First Written Submission, para. 166.
[69] EC First Written Submission, para. 465.
[70] US First Written Submission, paras. 146-149.
[71] EC First Written Submission, para. 459.

"prompt" review and correction that should be taken, and refrains at this juncture from delving into factual issues. However, if one sees two different systems within the EC – whereas in one member State such review or correction can take up to one year, in another member State it is limited to 30 days – it seems to suggest that the former member State whose review or correction takes one year is not providing a "prompt review or correction" in a reasonably short term.

4. Conclusion

5.33 As set out at the beginning, based on its systemic interests in the correct interpretation and application of Articles X:3(a) and (b) of the GATT, Japan respectfully looks forward to the Panel's deliberation on issues concerning these provisions brought forward by the United States in this dispute.

C. THIRD PARTY WRITTEN SUBMISSION OF THE REPUBLIC OF KOREA

1. Introduction

5.34 Korea believes that certain aspects of the EC's customs system fails to be administered in an uniform manner, as required by the relevant provisions of GATT 1994. Rather than reiterating all the arguments, however, Korea will address in this submission certain critical issues.

2. Legal arguments

(a) The EC's non-uniform administration of laws and regulations concerning customs classification, valuation and other procedures violate Article X:3(a) of GATT 1994

5.35 The key issue in this dispute is whether, taken together, the EC's customs system provides uniformity in terms of administration of customs laws and regulations.

5.36 Korea does not dispute the fact that, by nature, customs laws and regulations involve discretion on the part of customs authorities of WTO Members.[72] Discretion, however, does not mean that the Customs authorities have the flexibility to administer customs laws and regulations in a non-uniform, partial or unreasonable manner. If such administration occurs, it is not an instance of exercising discretion; rather it is simply a deviation from the explicit obligation imposed by Article X:3(a) of GATT 1994.

5.37 In the area of customs control, the EC does have "uniform" laws and regulations. However, what Article X:3(a) requires and what the United States challenges here (and thus what causes Korea's concern as a third party participant) are not the laws and regulations themselves. Rather, the core of the challenge in this dispute is the fact that these EC laws and regulations are administered individually by 25 member States in a non-uniform manner. The 25 member States have their own customs authorities that administer customs laws and regulations in a way they see fit, in terms of classification, valuation and customs procedures.

5.38 Korea duly recognizes and respects the unique characteristics of the EC where all 25 member States individually exercise their authorities in the customs area. The unique characteristics, however, should not be referred to as a pretext to deviate from otherwise applicable WTO obligations, including GATT 1994. As a Member of the WTO in its own right, separate from its constituent member States, the EC has an obligation to make sure there are mechanisms in place which produce the effect of a

[72] EC First Written Submission, dated 16 August 2005, at 60 ("A further important point is that Article X:3(a) [of] GATT does not prescribe the specific way in which WTO Members should administer customs laws in a uniform manner").

uniform administration of its customs laws and regulations. Even if all its member States preserve individual customs authorities under the constituent legal document, the EC, at least, should have known that divergent customs regulations and practices among member States would be rampant, and thus established a mechanism through which such divergent regulations and practices are harmonized and reconciled.

5.39 From Korea's perspective, this problem caused by the EC's unique customs system will be aggravated as time passes by. Given the continued technological development and advent of new or hybrid products, customs control and regulation becomes increasingly complicated.

5.40 The EC's effort to downplay this widely known confusion and inconsistency simply falls apart when one looks at what is happening "in the field." Korea stresses that what is important in examining Article X:3(a) is the reality foreign exporters have to face at the border. The panel in *Argentina – Hides and Leather* pointed out that "Article X:3(a) requires an examination of the 'real effect' that a measure might have on traders operating in the commercial world."[73] Under the current system of disarray in the EC, it is simply impossible for "[e]very exporter and importer…to expect treatment of the same kind, in the same manner both over time and in different places…"[74]

5.41 Particularly with respect to the classification, the so-called Binding Tariff Information ("BTI") system of the EC simply further complicates the situation rather than alleviates the current problem because of its non-universal binding effect and the possibility of 'BTI shopping'.

5.42 Having 25 different manners as to how customs laws and regulations are administered is by no means "uniform" in the ordinary meaning of the term.[75] Korea believes that "uniformity" is only to be attained through an identical way of administration (or something comparable to such identical administration) of customs laws and regulation throughout the entire territory of a WTO member; in this case the territories of the 25 member States of the EC.[76] No matter how the EC attempts to justify it, the fact of the matter is the EC customs administration, as it currently stands, guarantees neither consistency nor predictability in classification, valuation or other customs procedures. This is exactly the situation the *Argentina – Hides and Leather* panel warned against.[77]

5.43 Korean exporters have had to deal with each customs agency of each member State on an *ad hoc* basis without any guarantee that other members of the EC would render the same or a similar conclusion for the same or similar issue.

5.44 Taking all these into account, by failing to administer customs laws and regulations in a "uniform" manner, the EC violates its obligation under Article X:3(a) of GATT 1994.

(b) EC judicial system's failure to provide a viable mechanism to promptly review customs related administrative actions violate Article X:3(b) of GATT 1994

5.45 In addition, a WTO Member is also obligated to provide an aggrieved trader with "prompt" judicial review of an administrative decision rendered by its customs authorities. It should be noted that the obligation for a WTO Member is not simply to provide a review, but a "prompt" review. The EC's judicial system, however, is far from providing a "prompt" judicial review with respect to administrative decisions and actions by the customs authorities of its member States. In fact, traders

[73] *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, Report of the Panel, adopted 16 February 2001 ("*Argentina – Hides and Leather*"), at para. 11.77 (emphasis added).

[74] *Argentina – Hides and Leather*, at para. 11.83.

[75] Article 31(1) of the Vienna Convention on the Law of Treaties.

[76] *Argentina – Hides and Leather*, at para. 11.83.

[77] *Id.*

are forced to deal with one more layer of complication due to the slow-moving, inconclusive judicial review in the EC.

5.46 The unique characteristics and structural organization of the EC should not be referred to as a pretext to violate otherwise applicable provisions of GATT 1994.

5.47 As noted above, each EC member State operates its own customs agency, which renders administrative decisions independent of each other. Needless to say, among EC member States there is frequent discrepancy in customs administrative decisions on the same issues. This discrepancy is further complicated by yet another layer of divergence: the administrative decision is then appealed to the courts of each member State, which has the authority to pronounce and apply the legal standard in the customs issue being appealed, yet again independent of national courts of another member. As such, each member State has wide discretion in conducting judicial review of customs administrative actions "in its own way." For example, there is no common rule for the timeframe of the review.[78] As a result, the judicial review by member States usually exacerbates the already laden confusion and inconsistency caused by non-uniform administration of customs laws and regulations, as explained in the Section 2(a) above, rather than provides reliable finality.

5.48 Only after going through the judicial review by national courts does a foreign trader have a chance to pursue judicial review by an EC court that has jurisdiction in the entire EC territory: the ECJ. In short, in the EC the traders have to go through one more process, and a lengthy one at that, before they get a viable judicial review by an EC court than they would have to do with other WTO members.

5.49 The EC argues that the ECJ fulfills its obligation under Article X:3(b) of GATT 1994.[79] But, given the fact that an aggrieved trader can reach the ECJ only upon the completion of judicial review at the member States, the ECJ is not a viable forum that provides "prompt" review of the challenged action. Furthermore, even if the ECJ renders its decision at long last, what basically follows from such a decision is yet another "back and forth" between the ECJ and national courts rather than an immediate finality of the dispute.[80] Under these circumstances, Korea does not believe that this is a "prompt" judicial review.

5.50 The EC's effort to justify the situation by repeating the unique structural aspects of the EC cannot be sustained either.[81] As a single economic entity, the EC, in its own right, assumes both rights and obligations under the WTO as a single package. It cannot simply claim the benefit as a single economic entity while disregarding obligations flowing from it, particularly so if such disregard creates unreasonable burden on its trading partners.

5.51 In the light of the foregoing reasons, Korea submits that the EC does not provide a judicial forum for a prompt review of customs related administrative actions, and thus violates its obligation under Article X:3(b) of GATT 1994.

3. Conclusion

5.52 For the reasons set forth above, the EC fails to fulfill its obligation under Articles X:3(a) and X:3(b) of GATT 1994. Korea respectfully submits that the Panel should hold that the EC's customs system as identified above is inconsistent with Articles X:3(a) and X:3(b) of GATT 1994.

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[78] US First Written Submission, at 106-107.
[79] EC First Written Submission, at 127-128.
[80] US First Written Submission, at 109-110.
[81] *See* generally, EC First Written Submission, at Section III.

D. THIRD PARTY WRITTEN SUBMISSION OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

1. Introduction

5.53 The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu welcomes the opportunity to present its views in this dispute given its substantial systemic and trade interest in the outcome of this case, and also given the fact that the European Communities (EC) is one of the major trading powers in the world. As such, it is imperative that the EC, as a WTO Member in its own right, adheres to the obligations of uniform administration of its customs laws and regulations as stated in Article X:3(a) and (b) of GATT 1994, without exception.

2. Arguments

5.54 The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu finds much of the arguments by the EC to be either irrelevant or misleading, especially with regard to the characterization of the arguments made by the United States. At the outset, it is important to point out that the EC itself is a full Member of the WTO, and conducts its affairs as such, despite having 25 separate member States who are themselves Members of the WTO. Therefore, the EC, like any other WTO Member, has the obligation to observe the rules set forth in Article X:3 of GATT 1994.

5.55 With regard to the interpretation of Article X:3(a), the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu is puzzled by the deliberate effort of the EC to emphasize the reference to the *administration* of laws, regulations, decisions and rulings, as if that were not the challenge brought by the United States. We do not wish to dispute that Article X:3(a) applies to the administration of rather than the laws, regulations, decisions and rulings themselves, and that the Appellate Body in *EC – Bananas* has drawn precisely such a distinction.[82] However, this reading of Article X:3(a) does not negate the fact that the EC, as a WTO Member, does have the obligation to *administer* its laws and regulations in a *uniform* manner. This, in our view, is precisely what the United States claims that the EC violates. The EC has not presented any relevant arguments to the contrary.

5.56 The EC suggests that the way it has administered its customs laws, regulations, decisions and rulings is a result of its executive federalism, which is a fundamental and legitimate constitutional choice of government and should be afforded the same respect as those of the United States.[83] Neither the EC's constitutional choice nor that of the United States, in our view, seems to be relevant to this dispute. The United States, in our view, is not challenging the structure of the EC's government, nor is it seeking to interpret Article X:3(a) to require the formation of a single customs authority. It is true that the WTO does not dictate how a Member should organize its government, much like Article X:3(a) of GATT does not "prejudge the question of how the customs authorities in a WTO Member are structured and organized," as the EC states.[84] However, it is equally true that the structure and organization of a Member's government should not diminish in any way a Member's obligations under the WTO. After all, the same government agreed to the set of obligations under the WTO. Regardless of the constitutional choice by the EC, the issue in this case comes down to whether the EC has fulfilled its obligations.

5.57 The EC also speculates that political consideration to influence the Doha Round negotiations on trade facilitation played into the decision by the United States to bring this dispute.[85] This, again,

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[82] *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Appellate Body Report, WT/DS27/AB/R, para. 200.

[83] EC First Written Submission, para. 204.

[84] *Id.*, para. 252.

[85] *Id.*, paras. 229, 230.

is irrelevant, as speculation into the motivation behind a Member's decision to bring a challenge to the WTO by the Panel is neither constructive nor relevant to resolving the dispute. The Panel is tasked to decide whether the allegations of the United States are supported by the provisions of Article X:3(a) and (b) of the GATT and the relevant facts. Thus, a decision in favour of the United States does not mean that the Panel has yielded to political considerations, merely that the EC has not properly adhered to its obligations under the relevant provisions.

5.58 The EC cites the Panel in *Argentina – Hides and Leather* and GATT Panel in *EC – Dessert Apples* to support its argument that differential treatment and minor variations between EC member States in the administration of customs laws do not constitute a breach of Article X:3(a) of the GATT.[86] This is a mischaracterization of the precedents and the facts at issue. The quotation from *Argentina – Hides and Leather* cited in the EC First Written Submission speaks to the "many variations in products which might require differential treatment."[87] This is not the issue in the current dispute. The current dispute concerns the *same products* that are required to be treated in a "uniform…manner," in different ports of entry at different times. The quotation, therefore, does not support EC's argument.

5.59 Turning to *EC – Dessert Apples*, the "minor administrative variations" concerns the form in which licence applications could be made and the requirement of pro-forma invoices. In the present dispute, the differential treatments are the result of classification, valuation, and customs procedures. The divergences in the areas of classifications, valuation and customs procedures (regarding penalties and processing under customs control) go directly to the heart of the work of customs authorities, have enormous impact on trade, and cannot be compared to the minor variations in the form of licence applications and the requirement of pro-forma invoices mentioned in *EC – Dessert Apples*. Customs classifications, valuations and procedures at issue in this dispute cannot be characterized as minor administrative variations. If that were so, Article X:3(a) would be rendered completely meaningless.

5.60 On the sufficiency of evidence, the EC's argument that the United States has failed to discharge its burden of proof is again without merit. The United States cites "blackout drapery lining"[88] and DVI and LCD[89] as examples to support its complaint about non-uniform administration of EC customs classification law. On non-uniform administration of EC law on customs valuation, the US cites the discussion by the EC Court of Auditors on different member States having taken different positions on whether the costs of automobile repair that are covered by a seller's warranty should be deducted from customs value.[90] In one illustration, the United States notes that different member States of the EC have taken different positions on whether an importer is related to the non-EC companies that manufacture its products and on how those products should be valued.[91] And with regard to customs procedures, the United States cites a decision by the European Court of Justice that, as a matter of EC law, different member States are entitled to impose, and do impose, different sanctions.[92] Concerning the procedure known as "processing under customs control," the United States points out that different member States apply these tests differently, which can have a significant commercial impact.[93] As the United States demonstrates, the actual requirements that users of "local clearance procedures" must meet vary significantly from member State to member

[86] *Id.*, paras. 232, 233.
[87] *Id.*, para. 232.
[88] US First Written Submission, para. 67.
[89] *Id.*, para. 74.
[90] *See* Court of Auditors, Special Report No 23/2000 concerning valuation of imported goods for customs purposes (customs valuation), together with the Commission's replies, reprinted in the *Official Journal of the European Communities* C84, paras. 73-74 (14 March 2001) ("Court of Auditors Valuation Report") (Exhibit US-14); US First Written Submission, paras. 78-96.
[91] US First Written Submission, para. 91.
[92] *Id.*, para. 101.
[93] *Id.*, paras. 106-108.

State, with the process being significantly more burdensome in some member States than others.[94] As illustrated above, the United States does not rely merely on an argument that the EC's customs laws being administered by 25 different authorities, among which divergences inevitably occur.[95] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu believes that the United States has sufficiently discharged its initial burden of proof. It is the EC who has so far failed to rebut the *prima facie* case presented by the United States.

5.61 Finally, with regard to Article X:3(b), the provision requires Members to "maintain…judicial, arbitral or administrative tribunals or procedures for the purpose…of the *prompt review and correction* of administrative action relating to customs matters." (emphasis added). The EC argues that it is possible to fulfill this requirement by maintaining several tribunals, each of them covering a part of the territory of the Member.[96] However, it is difficult to see how the stated purpose of prompt review and correction of administrative action can be met unless the Member establishes a procedure where the decisions and rulings of the tribunals ultimately have authority throughout the entire territory of the Member. It is unclear how the decisions and rulings of one tribunal on an administrative action relating to customs matters in an EC member State can be accepted and executed by the customs authority located within another EC member State. In addition, the length of time it takes to obtain a decision or ruling by the various tribunals may vary a great deal among different member States. It is also unclear how the EC can ensure the promptness of the review and correction by the various tribunals located in different member States.

3. Conclusion

5.62 The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu respectfully requests that the Panel take the above views into careful consideration.

E. THIRD PARTY ORAL STATEMENT OF ARGENTINA

1. Introduction

5.63 Argentina's attention focuses on the fact that interpretation of Article X:3(b) establishes the obligation to institute or maintain functional tribunals or procedures for the object and purpose of Article X:3 of the GATT 1994; in other words, to ensure the "prompt" review and uniform correction of the trade regulations in the EC as a whole.

2. The link between subparagraph (b) and subparagraph (a) of Article X:3 of the GATT 1994

5.64 Argentina agrees with the United States that subparagraph (a) of Article X:3 is the immediate and relevant context for interpreting the meaning and scope of the obligation laid down in subparagraph (b) of Article X:3 of the GATT 1994 as it is precisely within the context of the obligation to apply trade regulations in a uniform manner that each WTO Member's obligation to institute or maintain tribunals or procedures for the purpose of reviewing or correcting trade regulations is situated.

5.65 Argentina considers that – irrespective of the different nature that the obligations laid down in subparagraphs (a) and (b) of Article X:3 of the GATT 1994 may have – there is a clear link between them, inasmuch as Article X:3 as a whole should be read and interpreted as a coherent ensemble without any internal contradictions so that compliance with one obligation does not alter or diminish

[94] *Id.*, paras. 110-118.
[95] *Id.*, para. 20.
[96] EC First Written Submission, para. 454.

compliance with another (the principle of effectiveness). It should also be borne in mind that, in addition, this link arises from the fact that the legislator placed these obligations in different subparagraphs of the same paragraph.

5.66 Consequently, according to subparagraph (a) of Article X:3, every WTO Member must apply its laws, regulations, judicial decisions and administrative provisions in a uniform impartial and reasonable manner. Moreover, according to subparagraph (b) of Article X:3, every WTO Member must institute judicial, arbitral or administrative procedures for reviewing or correcting administrative action if it is applied in a non-uniform, partial or unreasonable manner. The procedures referred to in subparagraph (b) of Article X:3 should, therefore, ensure, *inter alia*, the uniform application of trade regulations in accordance with subparagraph (a) of Article X:3 of the GATT 1994.

5.67 For the foregoing reasons, Argentina does not question the *sui generis* nature of the EC nor the fact that the WTO's Members retain a certain degree of discretion when complying with obligations under Article X as a result of the specific wording of the Article. Nevertheless, Argentina considers that this should not constitute an obstacle and – being a WTO Member distinct from the member States belonging to it – the EC is subject to the obligations laid down in subparagraphs (a) and (b) of Article X:3 and, as such, should institute or maintain tribunals or procedures for review and correction that ensure uniform application of trade regulations throughout the EC.

3. "Promptness" as an obligation in Article X:3(b)

5.68 Argentina agrees with the parties to this dispute that the obligation laid down in subparagraph (b) of Article X:3 of the GATT 1994 is not confined solely to instituting or maintaining tribunals or procedures for reviewing or correcting administrative action but also means that these procedures must be instituted in such a way as to allow "*prompt*" review and correction of decisions by the customs authorities.

5.69 Argentina agrees with the EC regarding the meaning of the term "prompt" namely that the review or correction of the decision by the customs authority should occur within a "reasonably short period of time".

5.70 In order to determine when the period is "reasonably short", Article X:3 of the GATT 1994 is primarily addressed to importers and exporters. Its object and purpose is to preserve certain competitive situations, as pointed out by the Panel in the *Argentina – Hides and Leather* case.

5.71 Argentina therefore considers that Article X:3(b) is violated if the judicial, arbitral or administrative procedures do not allow review or correction of administrative action within a "reasonably short" period (promptly) so as to preserve the legitimate competitive prospects of exporters and importers.

5.72 Argentina wishes to emphasize that both paragraphs 1 and 3 of Article X of the GATT 1994 and WTO case law make exporters and importers the main beneficiaries of the obligations laid down in this Article.

5.73 Argentina therefore considers that the *sui generis* situation of the EC does not contradict the fact that – as a WTO Member independently of the States making up the EC – according to Article X:3(b), the European Communities should not only ensure that there are mechanisms for review and correction but also that such review and correction of decisions by the customs authorities of the EC member States as a whole should be "prompt".

5.74 In this regard, notwithstanding the degree of discretion given by the EC to its member States (as regards procedures for reviewing and correcting decisions by the customs authorities), the absence

of any specific reference in Community legislation to the time-limits for such reviews and correction implies that the EC does not in any case guarantee to the other Members of the WTO that review and correction will be "prompt" throughout the Community, as required by subparagraph (b) of Article X:3.

F. THIRD PARTY ORAL STATEMENT OF AUSTRALIA

5.75 Australia joined this dispute as a third party in view of its systemic interests in the questions under consideration by the Panel. Australia therefore refrains at this stage from taking a position on the facts of this particular dispute.

5.76 The European Communities as a WTO Member in its own right has the obligation to comply with Article X:3(a) of the GATT 1994 by ensuring its customs system operates in a uniform, impartial and reasonable manner.

5.77 Australia agrees that Article X:3(a) is not prescriptive and is concerned with the administration of customs laws and not the laws themselves. It is clear that WTO Members retain discretion as to their administrative system provided it is uniform, impartial and reasonable.

5.78 Australia also acknowledges that, given the complex nature of customs systems, some divergences may occur from time to time, but these should not be so widespread or frequent as to render the customs administration inconsistent with Article X:3(a).

5.79 The question for the panel is whether the alleged divergences resulting from the European Communities' particular system (that is, reliance on the national systems of its member States) fall into this category.

5.80 As with Article X:3(a), the European Communities as a WTO Member in its own right has an obligation to comply with Article X:3(b) of the GATT 1994 by ensuring there exist tribunals or procedures for prompt review and correction of administrative action relating to customs matters.

5.81 Australia would argue that Article X:3(b) is not a prescriptive Article and includes no obligation to have a central court. However, Australia does support the view that the decisions and rulings of the review bodies should be applied consistently and be available equally throughout the territory of the WTO Member. The question for the Panel is whether the European Communities' system for review of customs matters achieves this result.

5.82 With regard to the requirement of prompt review, Australia would see it as desirable that the timeframe for review should be reasonably comparable from wherever review is sought within the territory of the member. This prevents, among other things, traders from seeking review in the forum they expect to produce the quickest outcome and contributes to a uniform approach (consistent with Article X:3(a)).

G. THIRD PARTY ORAL STATEMENT OF CHINA

1. The scope of application of Article X:3(a) of the GATT 1994

5.83 China considers that Article X:3(a) of GATT 1994 concerns the administration of customs laws, not the customs laws themselves. The EC seems concerned with whether Article X:3(a) GATT applies to the administration of customs laws at the local level as well as at the central level.

5.84 Based on Article XXIV:12 of the GATT 1994 and the GATT Panel report in *Canada – Gold Coins*, the EC drew its conclusion that "Article X:3(a) GATT does not require that customs laws be regulated at the central level of each WTO Member".

5.85 Taking no position on this EC assertion, however, China does not think Article XXIV:12 of the GATT 1994 and the GATT Panel report in *Canada – Gold Coins* are proper in supporting the EC's argument.

5.86 Article XXIV:12 requires that the provisions of GATT be observed by both the central government and the regional or local authorities of a Contracting Party, and that the central government take the responsibility for ensuring the observance of the provisions of GATT by its local authorities. So, if there are any difficulties, encountered by the federal government of a Contracting Party because of its particular administrative or legal structures, in ensuring the observance of the provisions of GATT by its local authorities, the federal government shall still seek such reasonable measures as are available to it to secure the observance of the provisions of GATT by its local authorities in accordance with Article XXIV:12 until the actions or measures inconsistent with any provisions of GATT by its local authorities are removed. The federal government of such a Contracting Party shall compensate, because of such actions or measures by its local authorities, for any nullified or impaired benefits accruing to other Contracting Parties under the provisions of the GATT.

5.87 According to the GATT panel in *Canada – Gold Coins*, Article XXIV:12 applies to those measures taken by the local authority of Contracting Parties with federal regimes when administering their laws or regulations of local level. The present dispute does not concern a measure taken by the local authority when administering their laws or regulations of local level, but concerns whether the EC customs laws (i.e. laws of central level) can be administered by only the EC member States (i.e. local level authority) and whether such administration is in a uniform manner.

5.88 The GATT panel in *Canada – Gold Coins* further stated that Article XXIV:12 does not change the scope of application of the provisions of the GATT. China agrees with the EC that "Article X:3(a) GATT does not prescribe the specific way in which WTO Members should administer their customs laws". However, the obligation of uniform administration of customs laws should not be varied.

2. The meaning of "uniform" as used in Article X:3(a) of the GATT 1994

5.89 The ordinary meaning of "uniform", as relevant here, is "of one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times."[97]

5.90 The panel in *Argentina – Hides and Leather* stated: "Customs laws should not vary, that every exporter and importer should be able to expect treatment of the same kind, in the same manner both over time and in different places and with respect to other persons. Uniform administration requires that Members ensure that their laws are applied consistently and predictably. This is a requirement of uniform administration of Customs laws and procedures between individual shippers and even with respect to the same person at different times and different places."

5.91 China considers that the interpretation clarified by the panel in *Argentina – Hides and Leather* of the word "uniform" as used in Article X:3(a) is of the same substance with this ordinary meaning of "uniform".

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

5.92 China believes that when addressing the meaning of the word "uniform" reference should be made to the interpretation given by the panel in *Argentina – Hides and Leather.*

3. The standard of uniformity required by Article X:3(a) of the GATT 1994

5.93 The EC argues that "Article X:3(a) GATT only lays down minimum standards". The EC referred to the Appellate Body report in *US – Shrimp* to support its argument. The paragraph referred to by the EC of the Appellate Body report in *US – Shrimp* reads:

> "It is also clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards *for transparency and procedural fairness in the administration of trade regulations* which, in our view, are not met here. ……" (emphasis added by China)

5.94 The minimum standards articulated by the Appellate Body are for transparency and procedural fairness in the administration of trade regulations, not for directly the uniformity requirement of the administration of customs law.

5.95 The EC also referred to the Panel report in *Argentina – Hides and Leather* to support its argument. However, the paragraphs referred to by the EC address the meaning of the word "uniform", and do not directly concern the standard of the uniformity.

H. THIRD PARTY ORAL STATEMENT OF JAPAN

1. Arguments relating to the consistency of the challenged measures with Article X:3(a) of the GATT

5.96 Japan would like to add, as a basis for our argument that "Article X:3(a) lays down minimum standards"[98], the Appellate Body's finding in *US – Shrimp* that "[i]t is clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations"[99]. China has pointed out that this finding does not directly concern the requirement of uniformity. Article X:3(a) does not stipulate the "transparency and procedural fairness" of administration, but rather the "uniform, impartial and reasonable manner" in which trade regulations shall be implemented. The Appellate Body in *US – Shrimp*, however, characterized the requirements under Article X:3(a) as "transparency and procedural fairness." This is indeed apparent from the meanings of the terms "uniform", "transparent" and "fair." "Uniformity" in an administration would ensure an application which is of an unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times."[100]. A "fair" administration would be implemented in a "just, unbiased, equitable, impartial…"[101] manner. As "transparency" is the "quality or condition of being transparent"[102], a "transparent" administration would be "easily discerned; evident; …open" as well as "extrapolated from every occurrence of the phenomenon; to which there are no exceptions"[103], "not subject to … more than one interpretation"[104]. An administration of regulations lacking "uniformity" would in general terms be unjust, biased,

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[98] Japan, Third Party Submission, para. 8.

[99] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 183.

[100] Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001, para. 11.80 (quoting *The New Shorter Oxford English Dictionary*, Vol. II at 3488 (1993)).

[101] *The New Shorter Oxford English Dictionary*, Vol. I at 907 (1993).

[102] *Id.*, at 3373.

[103] *Id.*

[104] *Merriam-Webster Online Thesaurus*:
http://www.m-w.com/cgi-bin/thesaurus?book=Thesaurus&va=transparent&x=13&y=16.

inequitable, partial and opaque – in other words, unfair and nontransparent. Therefore, uniformity is an element of a transparent and fair administration, or procedural fairness, and the above finding by the Appellate Body would be relevant in interpreting the uniformity required under Article X:3(a) of the GATT.

5.97 Japan agrees with the statement of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu which had correctly pointed out that while the Panel in *Argentina – Hides and Leather* determined that "many variations in products which might require differential treatment,[…] [t]he current dispute concerns the same products that are required to be treated in a 'uniform…manner'".[105] However, we view that this Panel's finding in *Argentina – Hides and Leather* is still relevant to the present case. It demonstrates that the scope and level of "uniformity" required by Article X:3(a) of the GATT, which had been determined by the Panel in *Argentina – Hides and Leather* to mean an administration applied in an unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times"[106], is subject to interpretation. It also indicates that Article X:3(a) "focuses on the day to day application of Customs laws, rules and regulation"[107], providing a context in which this provision should be interpreted.

5.98 Japan agrees with the United States and other third parties that the EC, as a Contracting Party, is responsible for ensuring a uniform administration of customs matters throughout its territory, irrespective of the number of customs authorities within its territory. Japan also agrees that a central function within the government which has the primary responsibility to interpret trade regulations such as those relating to customs classification or customs valuation is desirable. However, Article X:3(a) of the GATT does not prescribe a specific means a Member must employ, and such specific means to ensure a uniform administration of customs laws is one of the matters which should be addressed through the Doha Negotiations on Trade Facilitation which aims "to clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994…" [108]. Japan would like to draw the Panel's attention to the fact that it is because such means are not specifically provided under the current GATT, that Japan has, together with Mongolia, Pakistan, Peru and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, made a proposal on this matter.[109] Therefore, the issue before the Panel is whether the EC's administration of customs regulation as a whole ensures a uniform administration consistent with Article X:3(a) of the GATT, not whether the EC provides a specific means to achieve uniformity.

5.99 Furthermore, even if divergences exist in light of the particular customs system as a whole, the issue of whether the "degree" of such divergences is inconsistent with Article X:3(a) of the GATT would arise. In regard to this point, Japan recalls the Panel's finding in *US – Hot-Rolled Steel* which held that, for a Member's measure to be in consistent with Article X:3(a) of the GATT, "it would have to have a significant impact on the overall administration of that Member's law as opposed to a mere impact on the outcome in the individual case in question"[110]. In addition, the panel in *Argentina – Hides and Leather* pointed out that "Article X:3(a) requires an examination of the 'real effect' that a measure might have on traders operating in the commercial world" and that the examination of such real effect "can involve the examination of whether there is a possible impact on the competitive situation"[111]. Therefore, if the Panel considers the cases referred to by the United States as

[105] Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Third Party Written Submission, para. 6.

[106] *Supra* footnote 100.

[107] *Supra* footnote 100, para. 11.84.

[108] WT/L/579, Annex D, para. 1.

[109] TN/TF/W/8, page 5, TN/TF/W/8/Add.1.

[110] Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001, as modified by the Appellate Body Report, WT/DS184/AB/R, para. 7.268.

[111] *Supra* note 3, para. 11.77.

divergences, then further examination is necessary to determine whether the EC's administration lacks uniformity to the "degree" that would be inconsistent with Article X:3(a) of the GATT. Such a determination should be based on whether the cases mentioned by the United States are individual outcomes of the EC's customs administration, or evidences of the non-uniformity of the overall administration of the EC's customs regulation that may have a significant impact on the competitive situation.

I. THIRD PARTY ORAL STATEMENT OF THE REPUBLIC OF KOREA

5.100 Korea supports the arguments raised by the United States in its First Written Submission dated 12 July 2005. Korea believes that certain aspects of the EC's customs system in general and laws and regulations in particular are inconsistent with the relevant provisions of GATT 1994. With this in mind, Korea offers its position on the following issues.

1. The EC's non-uniform administration of laws and regulations concerning customs classification, valuation and other procedures violate Article X:3(a) of GATT 1994

5.101 As a Member of the WTO in its own right, the EC assumes the obligation to administer its customs laws and regulations in a "uniform, impartial and reasonable manner" in accordance with Article X:3(a) of GATT 1994. The EC, however, fails to abide by this important obligation. The EC laws and regulations are administered individually and separately by the 25 member States in a non-uniform manner. In terms of classification, valuation and customs procedures, the 25 member States have their own customs authorities that administer customs laws and regulations in the way they see fit. Like other traders from outside the bloc, Korean exporters have had to deal with these 25 different customs authorities and their varying procedures for entry of the same or similar products into the EC.

5.102 Having 25 different manners of customs administration is by no means "uniform" in the ordinary meaning of the term. Korea believes that "uniformity" is only to be attained through identical administration (or something comparable to such identical administration) of customs laws and regulation throughout the entire territory of a WTO Member; in this case the territories of the 25 member States of the EC. No matter how the EC attempts to justify it, the fact of the matter is the EC customs administration, as it currently stands, guarantees neither consistency nor predictability in classification, valuation or other customs procedures. This is exactly the situation the *Argentina – Hides and Leather* panel warned against.

5.103 Korea duly recognizes and respects the unique characteristics of the EC where all 25 member States individually exercise their authorities in the customs area. The unique characteristics, however, should not become a pretext for deviating from otherwise applicable WTO obligations, including GATT 1994. Taking all these into account, by failing to administer customs laws and regulations in a "uniform" manner, the EC violates its obligation under Article X:3(a) of GATT 1994.

2. The EC judicial system's failure to provide a viable mechanism to promptly review customs related administrative actions violates Article X:3(b) of GATT 1994

5.104 Furthermore, each member State has wide discretion in conducting judicial reviews of customs administrative actions "in its own way." For example, there is no common rule for the timeframe of the review. As a result, the variety of approaches to judicial review by member States exacerbates the already wide-spread confusion and inconsistency caused by customs agencies' non-uniform administration of customs laws and regulations, as explained above.

5.105 Only after going through this lengthy, unpredictable and inconsistent judicial review by national courts does a foreign trader have a chance to pursue judicial review by an EC court that has jurisdiction in the entire EC territory: namely, the ECJ. The EC argues that the ECJ fulfills its

obligation under Article X:3(b) of GATT 1994. Given the fact that an aggrieved trader can reach the ECJ only upon the completion of a judicial review at the level of the member States, the ECJ is not a viable forum for providing "prompt" review of the challenged action.

5.106 To provide a prompt review of customs decisions, the EC should have introduced and maintained a judicial forum that has jurisdiction throughout the territory of the EC. The EC, however, fails to provide a judicial forum for a prompt review of customs related administrative actions, and thus violates its obligation under Article X:3(b) of GATT 1994.

VI. INTERIM REVIEW

6.1 The Panel's Interim Report was issued to the parties on 10 February 2006. Pursuant to Article 15.2 of the DSU and paragraph 16 of the Panel's Working Procedures, the United States and the European Communities submitted written requests for review of the Interim Report on 24 February 2006. On 3 March 2006, the United States and the European Communities submitted further written comments on the comments that had been provided by the parties on 24 February 2006.

6.2 Pursuant to Article 15.3 of the DSU, this section of the Panel Report contains the Panel's response to the comments made by the parties in relation to the Interim Report, to the extent that an explanation is necessary. The Panel has modified aspects of its report in light of the parties' comments where it considered appropriate, as explained below. The Panel has also made certain revisions and editorial corrections for the purposes of clarity and accuracy. References to sections, paragraph numbers and footnotes in this Section VI relate to the Interim Report.

A. NEW EVIDENCE REFERRED TO IN COMMENTS DURING THE INTERIM REVIEW STAGE

6.3 In its comments on the Interim Report, the **European Communities** referred to a number of exhibits that it had not relied upon previously in the Panel proceedings. In particular, the European Communities referred to: (a) Commission Regulation (EC) No. 2171/2005 concerning the tariff classification of certain LCD monitors (Exhibit EC-167); (b) Dutch Ministry of Finance, Telefaxbericht BCPP 2006/389 M (Exhibit EC-168); (c) an extract from the EBTI database concerning expired BTI DE M/2975/05-1 (Exhibit EC-169); (d) replies of customs authorities of member States concerning the alleged requirement of prior approval for valuation on a basis other than the last sale (Exhibit EC-170); (e) Greek Presidential decree No. 203 (Exhibit EC-171); and (f) Opinion 1/94 of the ECJ concerning accession to the WTO (Exhibit EC-172).

6.4 The **United States** objected to the European Communities' reference to and reliance upon Exhibits EC-167 – EC-172. More specifically, the United States submitted that the introduction of new evidence during the interim review stage of the Panel's proceedings is entirely impermissible and the Panel should give no consideration to that evidence. In support, the United States relied upon the Appellate Body's decision in *EC – Sardines*, which the United States argued stands for the proposition that, pursuant to Article 15 of the DSU, the interim review stage cannot include an assessment of new and unanswered evidence.

6.5 The **Panel** notes that Article 15.2 of the DSU, which governs the interim review stage of panel proceedings, provides in relevant part that:

> "Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members. ..."

6.6 In the Panel's view, Article 15.2 of the DSU clearly indicates that the purpose of the interim review stage of the Panel's proceedings is to review "precise aspects" of the Interim Report that was issued to parties on 10 February 2006. We consider that the terms of Article 15.2 preclude us from taking into consideration evidence which is not reflected in the Interim Report.[112] Therefore, the Panel declines to consider Exhibits EC-167 – EC-172.

B. PANEL'S TERMS OF REFERENCE

1. Manner of administration

6.7 The **United States** requested the Panel to reconsider its finding in Section VII.B that the "measure at issue" for the purposes of a claim under Article X:3(a) of the GATT 1994 is the "manner of administration" of laws, regulations, decisions and rulings of the kind described in Article X:1 of the GATT 1994.

6.8 The **European Communities** submitted that it agreed with the Panel's analysis in Section VII.B in this regard and that, therefore, the United States' request should be rejected.

6.9 The **Panel** has taken careful note of the arguments advanced by the United States but has decided not to accept the United States' request. The Panel fully explained its reasoning for concluding that, for the purposes of a claim under Article X:3(a) of the GATT 1994, the measure at issue is the manner of administration that is allegedly non-uniform, partial and/or unreasonable in paragraphs 7.18 – 7.22. The United States has not convinced the Panel that its reasoning should be revised and, therefore, the Panel has retained these paragraphs in its Final Report.

2. Challenge of the EC system as a whole/overall

6.10 The **United States** questioned whether the Panel properly considered the United States' request for establishment of a panel as a whole in Section VII.B when it concluded that its terms of reference did not include the United States' challenge of the EC system of customs administration as a whole or overall. The United States further submitted that a claim that a Member is in breach of a WTO obligation in a request for establishment of a panel is sufficient to put that Member on notice as to the obligation that has allegedly been violated and the measure at issue. According to the United States, it is not necessary to specifically identify whether the challenge is "overall" or "as a whole" or, rather, whether the challenge relates to specific instances of violation.

6.11 The **European Communities** submitted that the United States' request for reconsideration of the Panel's analysis in Section VII.B should be rejected. According to the European Communities, the Panel's approach is consistent with relevant Appellate Body jurisprudence, which merely requires that requests for establishment of a panel be read as a whole.

6.12 The **Panel** notes that, in paragraphs 7.24 – 7.32 and 7.42 – 7.46, the Panel referred to and discussed all relevant aspects of the United States' request for establishment of a panel. Further, in paragraph 7.40, we emphasised that a challenge of a system as a whole or overall must meet the important due process requirements contained in Article 6.2 of the DSU. We have modified paragraph 7.46 to make it clear that, when considered as a whole, the various elements of the United States' request for establishment of a panel preclude a challenge of the EC system of customs administration overall or as a whole.

[112] We find support for this view in the Appellate Body Report, *EC – Sardines*, para. 301.

3. Administration by "national customs authorities of EC member States" of "laws, regulations, handbooks, manuals and administrative practices"

6.13 The **United States** requested the Panel to delete the reference to administration by "national customs authorities of EC member States" in paragraphs 7.25, 7.33, 7.50 and 7.55. The United States submitted that, if this reference were to be retained, it would create the false impression that administration in the European Communities may be undertaken other than through the national customs authorities. The United States also requested modification of paragraph 7.25 to make it clear that it does not allege that the "laws, regulations, handbooks, manuals, and administrative practices" to which it refers in its request for establishment of a panel are themselves in violation of Article X:3(a) of the GATT 1994 but, rather, that they evidence such violation.

6.14 The **Panel** has decided to retain the reference to administration by "national customs authorities of EC member States" in paragraphs 7.25, 7.33, 7.50 and 7.55 given that, *inter alia*, this reference is drawn directly from the United States' own request for establishment of a panel. With respect to the reference to "laws, regulations, handbooks, manuals, and administrative practices", the Panel has modified paragraph 7.25 to clarify that the United States' request for establishment of a panel indicates that the specific forms of administration "challenged" by the United States under Article X:3(a) of the GATT 1994 include, *inter alia*, "laws, regulations, handbooks, manuals, and administrative practices".

4. Temporal issues

(a) Expired measures or measures not yet in existence at the time of panel establishment

6.15 The **United States** requested deletion of the statement in the last sentence of paragraph 7.28 that measures that amend, implement or are related to the Community Customs Code, the Implementing Regulation, the Common Customs Tariff or the TARIC are within the Panel's terms of reference, "to the extent that they do not change the essence of the measures being amended or implemented and/or do not change the essential nature of the United States' case under Article X.3(a) of the GATT 1994".

6.16 The **European Communities** submitted that it could accept the United States' request provided that the Panel agreed to the European Communities' request regarding paragraphs 7.90 – 7.92. More specifically, the European Communities requested that these paragraphs be moved to the section dealing with the Panel's terms of reference.

6.17 The **Panel** has decided to accede to the requests of both the United States and the European Communities. In particular, we deleted the statement in the last sentence of paragraph 7.28 to which the United States objected and we inserted paragraphs 7.90 – 7.92 in a new section entitled "Temporal matters concerning the Panel's terms of reference" following the section dealing with "The measure(s) at issue" in accordance with the European Communities' request.

6.18 The **European Communities** requested the Panel to reconsider its reasoning in paragraph 7.91 regarding expired measures and measures not yet in existence. The European Communities argued that the test formulated by the Panel in those paragraphs was excessively wide. In this regard, the European Communities noted that, pursuant to Article 3.7 of the DSU, the aim of dispute settlement is to secure a positive solution to a dispute. However, the European Communities argued that, with regard to measures no longer in existence at the time of establishment of a panel, the responding Member cannot bring them into conformity. Regarding measures that are not yet in existence at the time of establishment of a panel, the European Communities submitted that these could not be "covered" by a request for establishment.

6.19 The **United States** submitted that the European Communities' request should be rejected. The United States argued that evidence of instances of administration that pre-date or post-date establishment of a panel remain relevant to a panel's analysis inasmuch as they provide context for the examination of particular instances of alleged violations of Article X:3(a) of the GATT 1994. The United States further argued that circumstances that lead to a particular manner of administration in one instance may be the same circumstances affecting administration in other instances.

6.20 The **Panel** has carefully considered the parties' arguments regarding its reasoning in paragraph 7.91 (which, as noted in paragraph 6.17 above, is now contained in the section dealing with the Panel's terms of reference in the Final Report). At the outset, the Panel recalls its statement in paragraph 7.91 that, as a general principle, a panel is competent to make findings and recommendations on measures in existence at the time of establishment of a panel. In other words, from a temporal perspective, the time of establishment of a panel is of critical importance because it is at that time that the panel must focus its attention to determine whether or not a violation of the covered agreements exists. We disagree with the United States' argument that evidence of instances of administration that pre-date and post-date establishment of a panel remain relevant to a panel's analysis insofar as the United States suggests that anything that occurs before or after the establishment of panel, however remote in temporal terms from panel establishment, may have a bearing on a panel's analysis at the time of establishment. Rather, as the Panel clearly stated in paragraph 7.91, expired measures may properly be the subject of findings and recommendations by a panel *only to the extent that they affect the operation of a covered agreement at the time of establishment of a panel*. Further, a request for establishment of a panel may be drafted in such a way that anticipates measures not yet in existence at the time of panel establishment. As stated in paragraph 7.91, the Panel considers that, in such cases, the "future" measures which have come into existence since the establishment of a panel, may fall within the scope of a panel's terms of reference *only if they do not change the essential nature of the complaining Member's case as reflected in its request for establishment of a panel*. In light of the foregoing, the Panel does not consider it necessary to modify its reasoning in paragraph 7.91.

(b) The temporal scope of "administration"

6.21 The **European Communities** requested the Panel to reconsider its reasoning in paragraph 7.92. In particular, the European Communities argued that the statement by the Panel in that paragraph that the manner of administration may not have a clear starting point or ending point would make it impossible for a responding Member found in violation of Article X:3(a) of the GATT 1994 to prove that the violation had ended.

6.22 The **United States** submitted that, given the interlinked nature of "administration", findings about administration that pre-dates or post-dates the establishment of a panel could well shed light on administration that was indisputably in existence at the time of establishment. Additionally, the United States noted that it does not object to the Panel's reasoning in paragraph 7.92 but suggests that the Panel frame its reasoning not as a matter concerning the Panel's terms of reference but, rather, as context that will shed light on instances of administration that were indisputably in existence at the time of panel establishment. The United States also argued that the findings about past instances of non-uniform administration are evidence regarding the EC system of customs administration as a whole.

6.23 The **Panel** has taken note of the parties' comments regarding paragraph 7.92. In light of those comments, the Panel has decided to modify its reasoning in that paragraph (which, as noted in paragraph 6.17 above, is now contained in the section dealing with the Panel's terms of reference in the Final Report). The modifications make it clear that the Panel does not wish to suggest that administration that has occurred before or may occur after the establishment of a panel may be the subject of findings and recommendations of a panel in the context of a claim made under

Article X:3(a) of the GATT 1994. Rather, the nature of administration is such that it may not be possible to clearly identify the point in time at which the administration exists. As we stated in paragraph 7.92, administration "may not have a clear starting point or end point. More particularly, administration may be part of an ongoing series of interlinked acts or measures, which could thereby, implicate acts or measures that no longer existed or did not exist at the time of establishment of the panel." The Panel has amended paragraph 7.92 to clarify that administration may comprise a continuum of steps and acts, some of which may pre-date or post-date the step or act that forms part of the administration that is considered by a panel at the time of establishment of that panel. The steps and acts pre-dating or post-dating the administration that is the subject of consideration may be relevant to determining whether or not a violation of Article X:3(a) of the GATT 1994 exists at the time of establishment of a panel.

6.24 By way of example, the Panel refers to paragraph 7.294 of its Interim Report. In respect of that paragraph, the **European Communities** argued that some of the evidence adduced by the United States to prove divergent classification of LCD monitors entails measures that post-date establishment of the Panel (namely, Exhibits US-76, 77 and 78) and that, therefore, they are outside the Panel's terms of reference.

6.25 The **United States** countered that the European Communities' objections should be rejected because they assume that the non-uniform administration evidenced by the exhibits in question only came into existence when those documents were issued and not before. According to the United States, the non-uniform administration reflected in those documents is simply a continuation of "an ongoing series of interlinked acts or measures" that existed at the time of establishment of the Panel.

6.26 The **Panel** considers that it is clear from its reasoning in paragraph 7.294, particularly when read in the light of paragraphs 7.91 – 7.92 and 7.295, that the Panel did not rely upon Exhibits US-76, 77 and 78 as proof of the existence of non-uniform administration at the time of the Panel's establishment. Rather, the Panel made reference to those exhibits because they contained evidence of the continuum of steps and acts comprising the administration of the Common Customs Tariff concerning the tariff classification of LCD monitors and illustrated that, at the time of establishment of the Panel, the European Communities was not administering the Common Customs Tariff in a uniform manner.

(c) "Currently"

6.27 The **European Communities** requested deletion of the word "currently" in paragraphs 7.207 and 7.448 and in the paragraphs containing conclusions drawn from the findings in those paragraphs. The European Communities reasoned that the inclusion of this word incorrectly suggests that a distinction should be drawn between cases where there never was a violation under Article X:3(a) of the GATT 1994 and cases where there once was a violation which has since been removed. The European Communities also argued that the use of the word "currently" suggests that there is a risk of recurrence of the violation in question.

6.28 The **United States** argued that the European Communities' requests should be rejected because circumstances that lead to a particular manner of administration in one instance may be the same circumstances affecting administration in other instances.

6.29 The **Panel** notes that, by using the term "currently" in those paragraphs, the Panel intends merely to highlight that, at one point in time, the act or measure in question amounted to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994 but that, at the time of establishment of the Panel, such non-uniformity did not exist.

5. Retroactive recovery of customs duties

6.30 The **European Communities** requested deletion of paragraphs 7.375 – 7.385. According to the European Communities, those paragraphs concern the retroactive recovery of customs duties following adoption of an explanatory note, which is not within the Panel's terms of reference.

6.31 The **United States** submitted that the European Communities' request should be rejected. The United States noted that, if an EC customs authority views an explanatory note as a mere clarification of the Common Customs Tariff and, therefore, applies it retrospectively, it is administering the Common Customs Tariff differently from another EC customs authority that views the note as being more akin to an amendment and only applies it prospectively. The United States submitted that this cannot be understood as anything other than a divergence in administration of the tariff classification rules in the European Communities.

6.32 The **Panel** considers that paragraph 7.381 makes it clear that, in paragraphs 7.375 – 7.385, the Panel is dealing with alleged differences in the interpretation and application of explanatory notes by customs authorities in the member States (a matter which is clearly within the Panel's terms of reference) rather than the retroactive recovery of customs duties. Therefore, the Panel sees no need to delete paragraphs 7.375 – 7.385.

C. INTERPRETATION OF ARTICLE X:3(A) OF THE GATT 1994

1. "Object and purpose"

6.33 The **United States** requested deletion of paragraph 7.109. It argued that, with respect to the reference to "object and purpose" in Article 31(1) of the *Vienna Convention*, WTO jurisprudence does not indicate that an object and purpose of the WTO Agreement is to ensure security and predictability. Rather, the reference to security and predictability in such jurisprudence derives from Article 3.2 of the DSU, which concerns the aim of WTO dispute settlement.

6.34 The **Panel** considers that the architecture of the WTO system, which is a rules-based system, implies that security and predictability is an object and purpose of the WTO Agreement. In the Panel's view, this is implicit in Article 3.2 of the DSU which states, *inter alia*, that "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system". In our view, this provision indicates that security and predictability is an object and purpose not only of the DSU but also of the entire multilateral trading system, of which the DSU is a part. Nevertheless, since the Panel's findings in paragraph 7.109 are not essential for its interpretation of the term "administer" in Article X:3(a) of the GATT 1994, the Panel has decided to delete paragraphs 7.108 – 7.109.

2. "Supplementary means of interpretation"

6.35 The **United States** requested the Panel to delete its reference to the "factual context" under Article 32 of the *Vienna Convention* as "supplementary means of interpretation" in paragraphs 7.131 – 7.136. The United States suggested that the Panel's discussion of the factual context should be substituted for a discussion of the relationship between Articles X:3(a) and X:3(b) of the GATT 1994.

6.36 The **European Communities** submitted that the United States' request should be rejected. In support, the European Communities referred to the Appellate Body's decision in the *EC – Chicken Cuts* case, which its says confirms the inclusive nature of Article 32 of the *Vienna Convention*.

6.37 The **Panel** notes that the United States does not appear to dispute the Panel's reference to the "factual context". Rather, its primary concern appears to be the legal basis upon which the Panel

made such reference. In this regard, the Panel recalls its observation in footnote 262 of the Interim Report that, in the *EC – Chicken Cuts* case, the Appellate Body affirmed the panel's reliance upon the "factual context" when interpreting the ordinary meaning of a treaty term pursuant to Article 31 of the *Vienna Convention*. The Panel also stated in footnote 262 that the Appellate Body' approval of the use of "factual context" under Article 31 of the *Vienna Convention* indicates that it may alternatively/additionally be taken into consideration under Article 32 of the *Vienna Convention*. We find support for this view in *EC – Chicken Cuts*, where the Appellate Body stated that: "We stress, moreover, that Article 32 does not define exhaustively the supplementary means of interpretation to which an interpreter may have recourse. It states only that they *include* the preparatory work of the treaty and the circumstances of its conclusion. Thus, an interpreter has a certain flexibility in considering relevant supplementary means in a given case so as to assist in ascertaining the common intentions of the parties."[113] In the light of the foregoing, the Panel has decided not to delete reference to the "factual context" under Article 32 of the *Vienna Convention* as "supplementary means of interpretation" in paragraphs 7.131 – 7.136 but has amended footnote 262 to reflect additional support for the Panel's approach.

6.38 Regarding the United States' suggestion that the Panel's discussion of the "factual context" should be replaced with a discussion of the relationship between Articles X:3(a) and X:3(b) of the GATT 1994, the Panel notes that the United States made no reference to such a relationship when demonstrating its claim under Article X:3(a) of the GATT 1994. In any case, the Panel considers that it is far from clear that the requirement to provide for prompt review and correction of administrative decisions by domestic tribunals and procedures under Article X:3(b) of the GATT 1994 supports the view that the obligation of uniformity in Article X:3(a) of the GATT 1994 should be interpreted flexibly, as has been suggested by the United States in its comments.

3. "Minimum standards"

6.39 The **United States** requested the Panel to delete its reference to "minimum standards of due process" in paragraph 7.135. The United States reasoned that such a reference could be misread as adding to the text of Article X:3(a) of the GATT 1994.

6.40 The **Panel** accepts that there is no explicit reference to "minimum standards of due process" in Article X:3(a) of the GATT 1994. Nevertheless, the Panel considers that such a notion is implicit in Article X:3(a) of the GATT 1994 in light of the immediate context of that provision, which was considered by the Panel in paragraphs 7.126 – 7.130. Furthermore, the Panel recalls its observation in footnote 264 that the Appellate Body stated in *US – Shrimp* that "[i]t is also clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations".[114] Therefore, the Panel declines to accept the United States' request with respect to paragraph 7.135.

4. "Uniform"

(a) Nature of the challenge

6.41 The **United States** submitted that the Panel's discussion of the term "uniform" in paragraph 7.136 implies that different standards apply depending upon the scope of the challenge that is being made under Article X:3(a) of the GATT 1994. The United States argued that this could be misread to imply that, for example, in the context of a narrow challenge, the same product would need to be classified under the same tariff heading by a Member, but that, in the context of a broader challenge, the same product could be classified under different tariff headings and the Member's tariff

[113] Appellate Body Report, *EC – Chicken Cuts*, para. 283.
[114] Appellate Body Report, *US – Shrimp*, para. 183.

classification would be considered "uniform" for the purposes of Article X:3(a) of the GATT. The United States requested the Panel to clarify whether its finding is that the nature of the obligation of uniform administration of measures would vary depending on how broadly a Member has framed its panel request.

6.42 The **Panel** considers that the response to the question in respect of which clarification is sought by the United States is already provided in paragraph 7.136. In particular, in that paragraph, the Panel stated that the form, nature and scale of the alleged non-uniform administration and the laws, regulations, judicial decisions and rulings that are allegedly being administered in a non-uniform manner should be taken into consideration when interpreting the term "uniform" in Article X:3(a) of the GATT 1994 in the context of a particular case. The Panel further stated that the narrower the challenge both in terms of the administration that is being challenged and the laws, regulations, decisions and rulings which are alleged to be administered in a non-uniform manner in a particular case, the more demanding the requirement of uniformity. The broader and more wide-ranging the challenge both in terms of the nature of administration that is being challenged and the specific laws, regulations, decisions and rulings or provisions thereof that are alleged to be administered in a non-uniform manner in a particular case, a less exacting standard of uniformity should be applied. Accordingly, the Panel sees no reason to further clarify paragraph 7.136.

(b) "Reasonable period of time"

6.43 The **United States** requested the Panel to amend paragraph 7.136 where the Panel states that, for the purposes of Article X:3(a) of the GATT 1994, uniformity must be attained within a reasonable period of time. The United States submitted that the obligation under Article X:3(a) of the GATT 1994 is to administer in a uniform manner currently. Further, the United States argued that the reference to a "reasonable period of time" could be confused with the reference to the same term in Article 21.3 of the DSU.

6.44 The **European Communities** argued that the United States' request should be rejected. According to the European Communities, the obligation of uniform administration under Article X:3(a) of the GATT 1994 applies at all times, not just currently, but compliance with Article X:3(a) of the GATT 1994 should be assessed at the time of the Panel's establishment. The European Communities also argued that the context of paragraph 7.136 makes it clear that the Panel is not referring to a "reasonable period of time" for the purposes of Article 21.3 of the DSU.

6.45 The **Panel** has taken note of the parties comments and has decided to clarify paragraph 7.133 upon which the summary in paragraph 7.136 is based. Specifically, in order to avoid a finding of non-uniform administration under Article X:3(a) of the GATT 1994, it must be clear at the time of establishment of the panel that any non-uniformity that may have existed was remedied within a period of time that is reasonable.

D. PANEL'S OBSERVATIONS REGARDING THE EC SYSTEM OF CUSTOMS ADMINISTRATION

6.46 The **European Communities** agreed that its system of customs administration is relevant context for the consideration of the United States' specific claims of violation of Article X:3(a) of the GATT 1994. Nevertheless, the European Communities requested that paragraphs 7.156 – 7.191, describing relevant aspects of the EC system of customs administration be deleted. The European Communities made similar but more specific comments regarding paragraphs 7.165, 7.168, 7.169, 7.272 and 7.534. The European Communities argued that those paragraphs overlap with the description of the EC system in the Descriptive Part of the Panel's report; they follow a different structure to that adopted in the Descriptive Part, which could lead to confusion; they contain errors; and/or concern matters outside the Panel's terms of reference.

6.47 The **United States** submitted that the Panel should reject the European Communities' request regarding paragraphs 7.156 – 7.191, 7.272 and 7.534. In this regard, the United States argued that the discussion of the EC system in the Descriptive Part is inadequate because it is merely factual and does not contain any analysis. Nevertheless, the United States submitted that all but the first sentence of paragraph 7.535 (which is linked to paragraphs 7.156 – 7.191 and 7.534) should be deleted given that the text in question concerns matters outside the Panel's terms of reference.

6.48 The **Panel** has taken careful note of the parties' comments regarding paragraphs 7.156 – 7.191, 7.272 and 7.534 – 7.535. The Panel has decided to retain those paragraphs because, as stated in paragraph 7.156, they explain the Panel's understanding of certain aspects of the manner in which the EC system of customs administration functions, which have been raised in the context of the particular instances of violations of Article X:3(a) of the GATT 1994 alleged by the United States. In the section of the Panel's report dealing with the particular instances of alleged violations, we have included cross-references to the general description of the EC system, which illustrates this point. The Panel does not consider that any overlap between the description of the EC system of customs administration in the Descriptive Part and in paragraphs 7.156 – 7.191 and 7.534 – 7.535 leads to any confusion. On the contrary, we consider that the elaboration provided in paragraphs 7.156 – 7.191, 7.272 and 7.534 – 7.535 ensures that the reader has a clear and complete picture of the way the EC system of customs administration works. In retaining paragraphs 7.156 – 7.191, 7.272 and 7.534 – 7.535, the Panel emphasizes that those paragraphs merely contain the Panel's observations about aspects of the EC system that arise in the context of the particular instances of violations of Article X:3(a) of the GATT 1994 alleged by the United States.

E. SPECIFIC INSTANCES OF ALLEGED VIOLATION OF ARTICLE X:3(A) OF THE GATT 1994

1. Tariff classification of blackout drapery lining

6.49 The **European Communities** requested deletion of paragraphs 7.265 – 7.276 because, according to the European Communities, those paragraphs reflect a logical inconsistency. In this regard, the European Communities implied that it is impossible to find that non-uniformity associated with an administrative process is in violation of Article X:3(a) of the GATT 1994 unless the result of the administrative process has also been found to be non-uniform in violation of that provision.

6.50 The **United States** submitted that the European Communities' request should be rejected. The United States noted in this regard that the Panel did not find that the tariff classification of blackout drapery lining was uniform in the European Communities. Rather, on the basis of the evidence presented to it, the Panel found that it could not conclude that the products before the various EC customs authorities were materially identical. The United States submitted that, accordingly, that finding does not preclude a finding of non-uniform administration with respect to the administrative process leading to the classification of blackout drapery lining.

6.51 The **Panel** has carefully considered the parties' comments and has decided not to delete paragraphs 7.265 – 7.276. The Panel recalls its finding in paragraph 7.264 that, on the basis of the limited evidence before it, it could only assume that the products in question were not identical. It was for that reason that the Panel was obliged to conclude that the tariff classification of the products before the German customs authorities, on the one hand, and those before customs authorities of the United Kingdom, Ireland, the Netherlands and Belgium, on the other, was not non-uniform for the purposes of Article X:3(a) of the GATT 1994. In any case, the Panel considers that non-uniform administrative processes may lead to a violation of Article X:3(a) of the GATT 1994 even though the results of those processes are uniform. Indeed, the Panel is of the view that, irrespective of the substantive outcome of an administrative process, non-uniformity in the process itself may have the effect of dissuading traders from importing into a particular part of Member. In particular, this could

be the case where the administrative processes applied in one part of a Member are more burdensome or onerous as compared to the administrative processes applied in another part of that Member.

6.52 The **European Communities** also requested amendment of paragraph 7.274 to the extent that it indicates that the Main Customs Office of Bremen did not properly take into account classification decisions by other customs authorities. The European Communities argued that such a statement is not justified because the products that were the subject of classification by the Main Customs Office of Bremen were different from the products that were the subject of classification by the customs authorities of the United Kingdom, Ireland, the Netherlands and Belgium.

6.53 The **United States** submitted that the European Communities' request should be rejected because it was based on a misunderstanding of the facts.

6.54 The **Panel** has considered the parties' comments and has decided not to modify paragraph 7.274. In the Panel's view, even if the Main Customs Office of Bremen considered that the products in question were different, it should have had regard to the classification decisions of other customs authorities. It was incumbent upon the Main Customs Office of Bremen to do so in light of the numerous complaints made by the trader requesting reclassification and given that the Main Customs Office of Bremen was aware of the existence of classification decisions of other customs authorities for "comparable goods".

6.55 Additionally, the **European Communities** requested inclusion in paragraph 7.253 of a reference to the statement made by the Hamburg ZPLA in the case of the Ornata protest, asking the trader in question to provide "further information and receipts to show that identical merchandise was treated differently in other EU countries".

6.56 The **United States** submitted that the European Communities' request should be rejected because paragraph 7.253 merely contains a description of the products that were the subject of classification by the Hamburg ZPLA.

6.57 The **Panel** considers that it is not necessary to include a reference in paragraph 7.253 to the statement referred to by the European Communities because the statement in question is already fully excerpted in footnote 501.

6.58 The **European Communities** requested deletion from paragraph 7.275 of the statement that "the apparent failure on the part of the German customs authorities may have had an impact and may continue to have an impact in the future upon the tariff classification of blackout drapery lining in the European Communities". The European Communities questioned the "impact" that the alleged failure may have.

6.59 The **United States** submitted that the European Communities' request should be rejected. According to the United States, the potential impact is clear. In particular, the United States argued that, to the extent that traders can expect the German customs authorities to administer EC classification rules with respect to blackout drapery lining by using its own national interpretative aid and by not seriously considering the decisions of other customs authorities, the exports of that trader may be diverted.

6.60 In light of the parties' comments, the **Panel** has decided to clarify the nature of the impact that it had in mind in paragraph 7.275.

6.61 The **European Communities** requested deletion of the statement in paragraph 7.276 that the EC system does not require German customs authorities to make reference to the classification decisions of other customs authorities. The European Communities noted that implementation of this

finding would require changes to the EC system of customs administration, which is a matter outside the Panel's terms of reference.

6.62 The **United States** submitted that the European Communities' request should be rejected. The United States reasoned that the Panel's findings should not be dictated by what the European Communities consider it will or will not have to do for implementation purposes.

6.63 The **Panel** has carefully considered the parties' comments and has modified paragraph 7.276 to make it clear that the acts of the German customs authorities regarding the administrative process leading to the tariff classification of blackout drapery lining, rather than the EC system itself, resulted in the Panel's finding of violation of Article X:3(a) of the GATT 1994.

2. Tariff classification of liquid crystal display flat monitors with digital video interface

6.64 The **European Communities** requested deletion of the statement in paragraph 7.294 that the European Communities does not appear to dispute that, in 2004, a divergence in the tariff classification of LCD monitors occurred. The European Communities submitted that, while it has recognised in its submissions that the classification of LCD monitors was a complex issue involving the classification of numerous products, it has not recognised that there was any lack of uniformity in its classification practice concerning LCD monitors at the time of the Panel's establishment.

6.65 The **Panel** acknowledges that the European Communities did not *explicitly* state in its submissions that it agreed that divergence in tariff classification of LCD monitors existed at the relevant point in time. Nevertheless, the Panel considers that the European Communities *implicitly* conceded the existence of such divergence in the various paragraphs of its submissions cited in footnote 540. We have expanded this footnote to further substantiate this point. Further, in the same footnote, we have elaborated on our discussion of the Press Release issued by Greenberg Traurig, 24 May 2005, contained in Exhibit US-29, which tends to confirm that, in 2004, divergent tariff classification of LCD monitors with DVI existed between, on the one hand, Dutch customs authorities and, on the other hand, customs authorities in the other member States.

3. Revocation of BTI concerning candlesticks and preserved fruits and nuts in the context of the *Timmermans* case

6.66 The **European Communities** requested that paragraphs 7.347 – 7.360 be deleted because the United States did not make a claim of non-uniformity regarding candlesticks and preserved fruits and nuts. Further, the European Communities submitted that these paragraphs should be deleted because they concern the United States' challenge of the EC system of customs administration "as such", a matter which is outside the Panel's terms of reference.

6.67 The **United States** submitted that it could accept the European Communities request provided that paragraphs 7.357 and 7.358 are retained in Section VII.D.6(a).

6.68 In light of the parties' comments, the **Panel** has decided to delete paragraphs 7.347 – 7.360, except for paragraphs 7.357 and 7.358 which have been retained in Section VII.D.6(a).

4. Penalties against infringements of EC customs legislation

6.69 The **European Communities** requested deletion of paragraph 7.490 on the ground that the United States did not allege a violation of Article X:3(a) of the GATT 1994 in the manner formulated by the Panel in that paragraph. Further, the European Communities argued that the Panel's statements in these paragraphs are inconsistent with its reasoning that substantive penalty laws cannot be regarded as acts of administration.

6.70 The **United States** submitted that the European Communities' request should be rejected. The United States acknowledged that it did not frame its claim with respect to penalties in the manner adopted by the Panel in paragraph 7.490. However, the United States argued that it is not the case that the United States did not allege a violation in this regard. Further, the United States submitted that there is no inconsistency between the Panel's reasoning in para. 7.490 and the Panel's other findings regarding penalties. According to the United States, the issue in para. 7.490 is not whether individual penalty laws can be regarded as acts of administration. Rather, the issue is whether the *Andrade* decision and the EC Council Regulation in question are EC customs laws susceptible to administration within the meaning of Article X:3(a) of the GATT 1994.

6.71 The **Panel** has decided not to modify paragraph 7.490. First, the Panel notes that there is nothing to prevent it from making observations, even if they are not based on allegations that were specifically made by the parties during the Panel proceedings. Further, as stated in the first sentence of paragraph 7.490, the Panel's observations in that paragraph relate to the *application* of the ECJ's judicial decision in *Jose Teodoro de Andrade* v. *Director da Alfândega de Leixões* and EC Council Resolution of 29 June 1995, on the effective uniform application of Community law and on the penalties applicable for breaches of Community law in the internal market. The Panel's observations do not concern substantive differences in laws, regulations or other measures.

F. EC AND MEMBER STATE OBLIGATIONS

6.72 The **European Communities** requested amendment of paragraph 7.593 to make it clear that the European Communities and not the member States have exclusive competence for matters concerning the WTO Agreements regarding trade in goods.

6.73 The **United States** submitted that the European Communities' request should be rejected. In support, the United States argued that, through its request, the European Communities introduces an issue that was never discussed before in this dispute, attempts to support its argument with evidence that it adduced for the first time during the interim review stage and asks the Panel to make a statement about the relative competence of the European Communities and its member States that has implications that go well beyond this dispute and is wrong as a matter of law.

6.74 The **Panel** has taken careful note of the parties' comments and has decided not to accept the European Communities' request regarding paragraph 7.593. The Panel notes that the statement to which the European Communities objects concerns the obligations of the European Communities and its member States under the WTO agreements *as a matter of international law*. However, the arguments made by the European Communities in support of the proposed amendment of paragraph 7.593 relate to the relative competence of the European Communities and its member States *as a matter of domestic law*, which have no bearing on the statement in question.

G. OTHER REQUESTS FOR REVIEW

6.75 The United States and the European Communities requested certain changes to the representation of their respective arguments in the following paragraphs of the Interim Report: 7.73, 7.98, 7.99, 7.115, 7.116, 7.119, 7.254, 7.280, 7.526, 7.546 and 7.595. The Panel accepted those changes to the extent that they were consistent with what the parties stated in the various submissions they made to the Panel during the Panel proceedings.

6.76 The United States and the European Communities requested modification or clarification of the Panel's description of specific aspects associated with the EC system of customs administration in the following paragraphs: 2.26, 2.33, 2.57, 2.72, 7.160, 7.166, 7.168, 7.181, 7.187, 7.299, 7.319, 7.343 and footnotes 306, 650. The Panel acceded to those requests to the extent that they were consistent with the evidence that had been presented by the parties to the Panel during the Panel proceedings.

6.77 The European Communities requested changes to the English translations of certain exhibits filed by the United States, the original language of which was German (namely, Exhibits US-23, US-41 and US-50) in the following paragraphs: 7.251 and 7.253. The Panel accepted those changes to the extent that they were faithful to the German version of the exhibits in question.

6.78 In the case of the following paragraphs, suggestions were made by one party and were not objected to by the other party: 7.327, 7.329 – 7.346, 7.347 – 7.356, 7.360, 7.386 – 7.399, 7.402, 7.444, 8.1 (concerning the Panel's terms of reference), 8.1(a)(vii), (viii) and (xi), and 8.2. The Panel accepted all such suggested changes.

6.79 In addition, the United States and/or the European Communities requested clarification of certain factual matters in paragraphs 7.262 and 7.265. The Panel made the necessary clarifications to those paragraphs.

VII. FINDINGS

A. ARTICLE X OF THE GATT 1994

7.1 Article X of the GATT 1994, entitled "Publication and Administration of Trade Regulations" provides that:

> "1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.
>
> 2. No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.
>
> 3. (a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.
>
> (b) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures 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 unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be

> lodged by importers; Provided that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.
>
> (c) The provisions of subparagraph (b) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement. Any contracting party employing such procedures shall, upon request, furnish the CONTRACTING PARTIES with full information thereon in order that they may determine whether such procedures conform to the requirements of this subparagraph."

7.2 In this dispute, the United States has made claims under Article X:3(a) and Article X:3(b) of the GATT 1994. The Panel will address each of these claims in turn, following consideration of a number of matters concerning the Panel's terms of references and procedural issues that have been raised.

B. THE PANEL'S TERMS OF REFERENCE

1. The measure(s) at issue

(a) Summary of the parties' arguments

7.3 The **United States** clarified in its first written submission that it is exclusively concerned with the requirement of "uniform" administration contained in Article X:3(a) of the GATT 1994.[115] The United States claims that the following measures are not being administered in a uniform way by the European Communities in violation of Article X:3(a) of the GATT 1994: the "Community Customs Code" contained in Council Regulation (EEC) No. 2913/92 of 12 October 1992; the "Implementing Regulation" implementing the Community Customs Code contained in Commission Regulation (EEC) No. 2454/93 of 2 July 1993; and the "Common Customs Tariff", which was originally promulgated in Council Regulation (EEC) No. 2658/87 but which is updated annually in the EC Official Journal.[116] The United States explains that, while it is principally challenging these three measures because they comprise the substance of EC customs laws, they are "supplemented" by miscellaneous Commission regulations and other measures.[117] The United States submits that these supplementary measures pertain to specific products or groups of products in ways that elaborate on provisions set forth in the three principal measures. According to the United States, because of their specificity and the diverse range of issues covered, it would be impossible to identify all such supplementary measures. Nevertheless, by way of example, the United States refers to Council Regulation (EC) No. 493/2005 regarding the suspension of duties on a subset of LCD monitors.[118] The United States also refers to an explanatory note to the Combined Nomenclature on the classification of certain camcorders.[119] The United States submits that the three principal measures

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[115] United States' first written submission, footnote 15.

[116] United States' first written submission, para. 3.

[117] United States' replies to Panel question Nos. 3 and 128.

[118] Exhibit US-28.

[119] Explanatory Notes to the Combined Nomenclature of the European Communities, 13 July 2000, p. 316 (Exhibit US-62).

and the supplementary measures are not administered in a uniform manner in violation of Article X:3(a) of the GATT 1994.[120]

7.4 The **European Communities** argues that the laws and regulations listed in the United States' request for establishment of a panel are not the "measures at issue" for the United States' claims under Article X:3(a) of the GATT 1994 within the meaning of Article 6.2 of the DSU. According to the European Communities, it is clear from that request that the United States' claim relates to the manner in which the European Communities administers the measures listed in the request, not to the measures themselves. The European Communities submits that the enumeration of laws and other measures in the request merely serves the purpose of identifying the laws which the European Communities allegedly fails to administer in a non-uniform manner.[121]

7.5 In response, the **United States** notes that it is not challenging the substance of the measures mentioned in its request for establishment of a panel.[122] Rather, it is challenging the manner in which EC customs law is administered. However, according to the United States, the manner in which the European Communities administers its customs law may not itself be a "measure". Therefore, the "specific measures at issue" for the purposes of Article 6.2 of the DSU are the laws, regulations, decisions and rulings that make up EC customs law, although in some cases these are being administered through laws and regulations which are themselves measures.[123]

7.6 The **European Communities** does not agree that the manner of administration of laws may not itself be a measure. In this regard, the European Communities submits that the Appellate Body has confirmed that any act or omission attributable to a WTO Member can be a measure of that Member for purposes of WTO dispute settlement. According to the European Communities, this statement also applies to the administration of laws referred to in Article X:3(a) of the GATT 1994. Whether a particular measure is challengeable in the WTO depends entirely on the substance of the WTO obligation in question.[124] The European Communities argues that the identification of the measure(s) at issue in the present dispute is particularly necessary given the specific features of Article X:3(a) of the GATT 1994.[125] The European Communities submits that the United States' suggestion that the "manner of administration" may not be a measure would lead to the absurd result that non-compliance with Article X:3(a) of the GATT 1994 could never be challenged under the DSU.[126] The European Communities also notes in this regard that the Appellate Body has confirmed that Article X:3(a) of the GATT 1994 only relates to the administration of the laws and regulations referred to in Article X:1 of the GATT 1994, not to the substance of those laws and regulations.[127]

(b) Analysis by the Panel

7.7 In the context of the United States' claim that the European Communities has violated Article X:3(a) of the GATT 1994, the question has arisen as to what the "measure(s) at issue" is under Article 6.2 of the DSU for the purposes of a claim made pursuant to Article X:3(a) of the GATT 1994. In particular, the Panel has been called upon to determine whether the measures at issue in this dispute are the laws, regulations and other measures referred to in the United States' request for establishment

[120] United States' reply to Panel question No. 128.

[121] European Communities' second written submission, para. 7.

[122] United States' replies to Panel question Nos. 1, 4 and 128.

[123] United States' replies to Panel question Nos. 1 and 4.

[124] European Communities' second written submission, para. 8 referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

[125] European Communities' second written submission, para. 9 referring to Appellate Body Report, *EC – Bananas III*, para. 200.

[126] European Communities' second written submission, para. 10.

[127] European Communities' second written submission, para. 9 referring to Appellate Body Report, *EC – Bananas III*, para. 200.

of a panel as has been submitted by the United States or, rather, the manner of administration of the EC customs system as has been submitted by the European Communities.

(i) Interpretation of the term "measures at issue" under Article 6.2 of the DSU

7.8 By way of background for the Panel's consideration of the "measure(s) at issue" for the purposes of a claim under Article X:3(a) of the GATT 1994, the Panel will first examine more generally the meaning of the term "measures at issue", which appears in Article 6.2 of the DSU.

7.9 Article 6.2 of the DSU provides in relevant part that:

> "The request for the establishment of a panel shall … identify the specific *measures at issue* and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." (emphasis added)

7.10 In summary, Article 6.2 of the DSU contains two distinct requirements that must be fulfilled in respect of a request for establishment of a panel: (1) the request must identify the specific measures at issue; and (2) it must contain a brief summary of the legal basis of the complaint.

7.11 The "measure at issue" identified in a request for establishment of a panel plays a pivotal role in a WTO dispute for a number of reasons.

7.12 *First*, the "measure at issue" together with the "legal basis of the complaint" comprise the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.[128] In turn, a panel's terms of reference define the scope of a dispute and serve the due process objective of notifying the parties and third parties to a dispute of the nature of the complainant's case.[129]

7.13 *Second*, it is the "measure at issue" identified in the request for establishment of a panel that must be brought into conformity in the event that that measure is found to be in violation of a WTO obligation. This is evident, *inter alia*, from Article 19.1 of the DSU, which provides in relevant part that:

> "Where a panel or the Appellate Body concludes that a *measure* is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the *measure* into conformity with that agreement." (emphasis added)

7.14 The Panel understands that there is an inter-linkage between the reference to the term "measure" in Article 19.1 of the DSU and to the term "measures at issue" in Article 6.2 of the DSU. In particular, a panel and the Appellate Body may only make recommendations under Article 19.1 of the DSU with respect to a measure that has been specifically identified in the relevant request for establishment of a panel in accordance with Article 6.2 of the DSU and which has been found to be inconsistent with a WTO obligation.

7.15 Of relevance to the interpretation of the term "measure" in Article 6.2 of the DSU is the following statement by the Appellate Body:

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[128] Appellate Body Report, *US – Carbon Steel*, para. 125.
[129] Appellate Body Report, *US – Carbon Steel*, para. 126.

"In principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings.[130] The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch.[131]

In addition, in GATT and WTO dispute settlement practice, panels have frequently examined measures consisting not only of particular acts applied only to a specific situation, but also of acts setting forth rules or norms that are intended to have general and prospective application.[132] In other words, instruments of a Member containing rules or norms could constitute a 'measure', irrespective of how or whether those rules or norms are applied in a particular instance. This is so because the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade. This objective would be frustrated if instruments setting out rules or norms inconsistent with a Member's obligations could not be brought before a panel once they have been adopted and irrespective of any particular instance of application of such rules or norms.[133] It would also lead to a multiplicity of litigation if instruments embodying rules or norms could not be challenged as such, but only in the instances of their application. Thus, allowing claims against measures, as such, serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated."[134]

7.16 Regarding the significance that should be attached, if any, to the term "at issue" in Article 6.2 of the DSU when referring to the specific measures that are required to be identified in a request for establishment of a panel, the Panel notes that the ordinary meaning of that term indicates that it refers to what is being challenged by the complainant.[135] Therefore, we understand that the term "measure at issue" in Article 6.2 of the DSU refers to the measure that is the subject of the challenge in a particular dispute.

7.17 In the Panel's view, the term "measure at issue" in Article 6.2 of the DSU should be interpreted in the light of the specific WTO obligation that is allegedly being violated by that measure in a particular dispute. The Panel considers that such an approach is necessary because the "measure at issue", which has been referred to in a request for establishment of a panel in accordance with Article 6.2 of the DSU, will be the subject of a recommendation to be brought into conformity

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[130](*original footnote*) We need not consider, in this appeal, related issues such as the extent to which the acts or omissions of regional or local governments, or even the actions of private entities, could be attributed to a Member in particular circumstances.

[131] (*original footnote*) Both specific determinations made by a Member's executive agencies and regulations issued by its executive branch can constitute acts attributable to that Member. See, for example, the Panel Report in *US – DRAMS*, where the measures referred to the panel included a USDOC determination in an administrative review as well as a regulatory provision issued by USDOC.

[132] (*original footnote*) See, for example Panel Report, *US – Superfund*; Panel Report, *US – Malt Beverages*; Panel Report, *EEC – Parts and Components*; Panel Report, *Thailand – Cigarettes*; Panel Report, *US – Tobacco*; Panel Report, *Argentina – Textiles and Apparel*; Panel Report, *Canada – Aircraft*; Panel Report, *Turkey – Textiles*; Panel Report, *US – FSC*; Panel Report, *US – Section 301 Trade Act*; Panel Report, *US – 1916 Act (EC)*; Panel Report, *US – 1916 Act (Japan)*; Panel Report, *US – Hot-Rolled Steel*; Panel Report, *US – Export Restraints*; Panel Report, *US – FSC (21.5 – EC)*; and Panel Report, *Chile – Price Band System*. See also Appellate Body Report, *US – Carbon Steel*, paras. 156 and 157. See also Appellate Body Report, *US – 1916 Act*, footnotes 34 and 35 to paras. 60 and 61, respectively.

[133] (*original footnote*) Panel Report, *US – Superfund*, para. 5.2.2.

[134] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 81-82.

[135] The New Shorter Oxford English Dictionary defines "at issue" as "the position of parties of which one affirms and the other denies a point": *The New Shorter Oxford English Dictionary*, 1993, p. 1428.

pursuant to Article 19.1 of the DSU by a panel and/or the Appellate Body, if that measure is found to be in violation of a WTO obligation. The manner in which the measure is to be brought into conformity is clearly linked to the substance of the WTO obligation with which the measure in question has been found to be inconsistent. Therefore, the Panel considers that, at least in the context of some claims, the substance of the WTO obligation with which a measure may have been found to be inconsistent might have an impact upon the interpretation of the term "measures at issue" in Article 6.2 of the DSU. Having said this, the Panel does not wish to suggest that the distinct requirements in Article 6.2 of the DSU to identify the specific measures at issue and to provide a brief summary of the legal basis of the complaint should be merged and assessed as a single requirement. On the contrary, these requirements serve different purposes. On the one hand, the requirement to refer to the specific "measure at issue" in the request for establishment of a panel serves the purpose of identifying the act or omission of a WTO Member that is being challenged, whereas the requirement to provide a legal basis of the complaint indicates the legal benchmark or standard against which the act or omission is to be assessed to determine WTO-inconsistency or otherwise. While these are clearly distinct requirements that serve different purposes, they are, nevertheless, interrelated such that the interpretation of one in the context of a particular dispute may help to inform the interpretation of the other.

(ii) The "measure(s) at issue" for the purposes of a claim under Article X:3(a) of the GATT 1994

7.18 Bearing these general considerations in mind, the Panel now turns to the question of what are the "measure(s) at issue" for the purposes of a claim under Article X:3(a) of the GATT 1994? We commence with an analysis of the relevant aspects of Article X:3(a) of the GATT 1994 because, as noted in paragraph 7.17 above, the term "measure at issue" in Article 6.2 of the DSU should be interpreted in the light of the specific WTO obligation that is allegedly being violated by that measure.

7.19 Article X:3(a) of the GATT 1994 provides that:

> "Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article."

7.20 In the Panel's view, the essential aspect of the obligation contained in Article X:3(a) of the GATT 1994 that has a bearing upon the interpretation of the term "measures at issue" in Article 6.2 of the DSU for the purposes of a claim under Article X:3(a) of the GATT 1994 is the obligation to "administer in a uniform, impartial and reasonable manner". The Panel considers that, in the light of this essential aspect of the obligation contained in Article X:3(a) of the GATT 1994, when a violation of Article X:3(a) of the GATT 1994 is being claimed, the relevant request for establishment of a panel must identify the manner of administration that is allegedly non-uniform, partial and/or unreasonable.

7.21 In this regard, the Panel recalls that it is evident from Articles 6.2 and 19.1 of the DSU that it is the "measure at issue" in the request for establishment of a panel that must be brought into conformity in the event that that measure is found to be in violation of a WTO obligation. If a WTO Member were found to be in violation of Article X:3(a) of the GATT 1994, this would mean that the manner in which laws, regulations, decisions and/or rulings of the kind described in Article X:1 of the GATT 1994 are being administered by that Member is not uniform, impartial and/or reasonable. If, in the light of such a violation, a panel or the Appellate Body has recommended to the DSB that the Member bring the measure in question into conformity, the Member would need to alter the *manner* in which the relevant laws, regulations, decisions and/or rulings are being *administered* in order to abide by that recommendation.

7.22 While the "measure at issue" for the purposes of a claim under Article X:3(a) of the GATT 1994 is the manner of administration that is allegedly non-uniform, partial and/or unreasonable, this

does not necessarily mean that the mere identification of the manner of administration in a request for establishment of a panel will meet the requirement in Article 6.2 of the DSU to identify the *specific* measure at issue. In the Panel's view, what is necessary to meet the requirement of specificity in Article 6.2 of the DSU will vary from case to case. In the following section of our report, we discuss, *inter alia*, the specificity requirement under Article 6.2 of the DSU for the purposes of the present dispute.

(iii) The "measure at issue" for the purposes of the United States' claim under Article X:3(a) of the GATT 1994 in this dispute

7.23 The Panel will now consider the United States' request for establishment of a panel as a whole, to determine the specific measure(s) at issue for the purposes of the United States' claim under Article X:3(a) of the GATT 1994 in this dispute. In its request for establishment of a panel, the United States makes reference to the essential aspect of the obligation contained in Article X:3(a) of the GATT 1994 set out in paragraph 7.20 above, namely, the manner of administration that allegedly results in non-uniformity.[136]

Manner of administration

7.24 In particular, the United States' request for establishment of a panel states in relevant part that:

> "The United States considers that the *manner* in which the European Communities ('EC') *administers* its laws, regulations, decisions and rulings of the kind described in Article X:1 of the *General Agreement on Tariffs and Trade 1994* ('GATT 1994') is not uniform, impartial and reasonable, and therefore is inconsistent with Article X:3(a) of the GATT 1994.
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> ...
>
> Administration of [the measures set out in paragraph 7.26 below] in the European Communities is *carried out by the national customs authorities* of EC member States. Such administration takes numerous different forms. The United States understands that the *myriad forms of administration* of these measures include, but are not limited to, laws, regulations, handbooks, manuals, and administrative practices of customs authorities of member States of the European Communities."[137] (emphasis added)

7.25 The terms of the United States' request for establishment of a panel indicate that it challenges the manner of administration of certain aspects of EC customs law.[138] The request clarifies that the administration challenged by the United States is that undertaken by the "national customs authorities of EC member States". In addition, the request indicates that the specific forms of administration by national customs authorities challenged by the United States under Article X:3(a) of the GATT 1994 include, *inter alia*, laws, regulations, handbooks, manuals, and administrative practices.

"Laws, regulations, decisions and rulings of the kind described in Article X:1 of the GATT 1994"

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[136] As noted previously, in footnote 15 of its first written submission, the United States clarified that, in the context of the present dispute, it only claims that the manner of administration of the EC system of customs administration is not "uniform" in violation of Article X:3(a) of the GATT 1994. The United States explicitly stated that it does not take a position on whether or not the manner of administration of the EC system is "impartial" or "unreasonable" within the meaning of Article X:3(a) of the GATT 1994.

[137] WT/DS315/8, which is contained in Annex D of the Panel's report.

[138] In its submissions to the Panel in these proceedings, the United States has confirmed that it is challenging the manner of administration of the measures mentioned in its request for establishment of a panel and not the substance of those measures: United States' replies to Panel question Nos. 1, 4 and 128.

7.26 Notably, the United States' request also refers to the "laws, regulations, decisions and rulings of the kind described in Article X:1 of the GATT 1994", which the United States alleges are not being administered in a uniform manner in violation of Article X:3(a) of the GATT 1994. In particular, the United States' request for establishment of a panel states in relevant part that:

> "For purposes of this request, the laws, regulations, decisions and rulings (collectively, 'measures') that the European Communities fails to administer in such a manner pertain to the classification and valuation of products for customs purposes and to requirements, restrictions or prohibitions on imports. The measures consist of:
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> - Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, including all annexes thereto, as amended [the 'Community Customs Code'];
> - Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, including all annexes thereto, as amended [the 'Implementing Regulation'];
> - Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, including all annexes thereto, as amended [the 'Common Customs Tariff'];
> - the Integrated Tariff of the European Communities established by virtue of Article 2 of Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, including all annexes thereto, as amended [the 'TARIC']; and
> - for each of the above laws and regulations, all amendments, implementing measures and other related measures."[139]

7.27 In the Panel's view, the specificity requirement in Article 6.2 of the DSU requires the inclusion of the "laws, regulations, decisions and rulings of the kind described in [Article X:1 of the GATT 1994]" alleged to be administered in a manner that is in violation of Article X:3(a) of the GATT 1994 in the United States' request for establishment of a panel. In this regard, the Panel recalls that the requirements in Article 6.2 of the DSU, including the obligation to *specifically* identify the "measure at issue", serve the important due process objective of notifying the parties and third parties to a dispute of the nature of the complainant's case. We consider that this due process objective would not be fully achieved if a responding Member were only informed about the manner of administration that allegedly results in non-uniformity, partiality and/or unreasonableness but not the laws, regulations, decisions or rulings that are allegedly being administered in a manner contrary to the requirements of Article X:3(a) of the GATT 1994.

7.28 The Panel also notes that the United States' request for establishment of a panel refers to all "amendments, implementing measures and other related measures" for the Community Customs Code, the Implementing Regulation, the Common Customs Tariff and the TARIC. This broad language used by the United States indicates that measures that amend, implement, or are related to the Community Customs Code, the Implementing Regulation, the Common Customs Tariff or the TARIC could be within our terms of reference.[140]

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[139] WT/DS315/8, which is contained in Annex D of the Panel's report.
[140] In this regard, see the Panel's analysis in paragraphs 7.36 – 7.37 below.

Areas of customs administration

7.29 An issue that has arisen in the context of this dispute is whether Article 6.2 of the DSU, when read in the light of Article X:3(a) of the GATT 1994, also requires identification of the specific areas of customs administration in respect of which it is being alleged that Article X:3(a) of the GATT 1994 has been violated.

7.30 The Panel notes that, in this case, the United States has challenged the administration of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff, the TARIC and related measures. These measures cumulatively contain, literally, thousands of different provisions, they relate to a vast array of different customs areas, and may entail administration in a multitude of diverse ways.[141] Consequently, we consider that, in the context of this dispute, the specificity requirement in Article 6.2 of the DSU additionally requires the identification of the customs areas in the context of which the obligation contained in Article X:3(a) of the GATT 1994 is alleged by the United States to be violated. In our view, without such additional specificity regarding the customs areas at issue, the European Communities would not have been accorded its due process right to be informed of the nature of the United States' claim under Article X:3(a) of the GATT 1994.

7.31 In this regard, we note that, in *EC – Computer Equipment*, the Appellate Body addressed the question of whether the measures at issue and the products affected by those measures had been identified with sufficient specificity for the purposes of Article 6.2 of the DSU. The Appellate Body noted in that case that, even though "Article 6.2, does *not* explicitly require that the products to which the 'specific measures at issue' apply be identified ... with respect to certain WTO obligations, *in order to identify 'the specific measures at issue' it may also be necessary to identify the products subject to the measures in dispute*".[142] The Panel considers that, in the context of this case, identification of the areas of customs administration at issue is necessary to *specifically* identify the "measures at issue" in the same way suggested by the Appellate Body in *EC – Computer Equipment*. In other words, the areas of customs administration help to *specifically* identify the "measure at issue", namely, the manner of administration.

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[141] The Community Customs Code (Exhibit US-5) comprises 253 articles and is divided into nine Titles, dealing with the following topics – Title I: General Provisions; Title II: Factors on the basis of which import duties or export duties and the other measures prescribed in respect of trade in goods are applied; Title III: Provisions applicable to goods brought into the customs territory of the Community until they are assigned a customs-approved treatment or use; Title IV: Customs-approved treatment or use; Title V: Goods leaving the customs territory of the Community; Title VI: Privileged operations; Title VII: Customs debt; Title VIII: Appeals; Title IX: Final provisions.

The Implementing Regulation (Exhibit US-6) comprises 915 articles covering the following topics – PART I: General Implementing Provisions: Title I: General; Title II: Binding Information; Title III: Favourable Tariff Treatment by reason of the nature of goods; Title IV: Origin of Goods; Title V: Customs Value; Title VI: Introduction of Goods into the Customs Territory; Title VII: Customs Declarations – Normal Procedure; Title VIII: Examination of the Goods, Findings of the Customs Office and other measures taken by the Customs Office; Title IX: Simplified Procedures. PART II: Customs-approved Treatment of Use: Title I: Release for free circulation; Title II: Customs Status of Goods and Transit; Title III: Customs Procedures with Economic Impact; Title IV: Implementing Provisions relating to Export; Title V: Other Customs-approved Treatments or Uses; Title VI: Goods Leaving the Customs Territory of the Community. PART III: Privileged Operation: Title I: Returned Goods. PART IV: Customs Debt: Title I: Security; Title II: Incurrence of the Debt; Title III: Recovery of the Amount of the Customs Debt; Title IV: Repayment or Remission of Import or Export Duties. PART IVA: Controls on the Use and/or Destination of Goods. PART V: Final Provisions.

The Common Customs Tariff consists of 21 sections, covering 99 chapters and includes more than 5000 tariff headings.

[142] Appellate Body Report, *EC – Computer Equipment*, para. 67.

7.32 In this case, the United States' request for establishment of a panel specifically identifies the following areas of customs administration:

- classification and valuation of goods;
- procedures for the classification and valuation of goods, including the provision of binding classification and valuation information to importers;
- procedures for the entry and release of goods, including different certificate of origin requirements, different criteria among member States for the physical inspection of goods, different licensing requirements for importation of food products, and different procedures for processing express delivery shipments;
- procedures for auditing entry statements after goods are released into the stream of commerce in the European Communities;
- penalties and procedures regarding the imposition of penalties for violation of customs rules; and
- record-keeping requirements.[143]

(iv) Summary

7.33 In the Panel's view, when read as a whole, the United States' request for establishment of a panel indicates that the "specific measure at issue" in this dispute for the purposes of Article 6.2 of the DSU is the manner of administration by the national customs authorities of the member States of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff, the TARIC and related measures in the areas of customs administration specifically identified in the United States' request for establishment of a panel – namely, the classification and valuation of goods, procedures for the classification and valuation of goods, procedures for the entry and release of goods, procedures for auditing entry statements after goods are released into free circulation, penalties and procedures regarding the imposition of penalties for violation of customs rules and record-keeping requirements. Therefore, pursuant to Article 7.1 of the DSU, under our terms of reference, we are only authorized to consider the manner of administration by the national customs authorities of the member States of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff, the TARIC and related measures in the areas of customs administration specifically identified in the United States' request for establishment of a panel.

2. Temporal matters concerning the Panel's terms of reference

(a) Summary of the parties' arguments

7.34 The **European Communities** submits that the Panel's terms of reference only include measures that were in existence at the time the matter was referred to it by the DSB. Therefore, according to the European Communities, the Panel cannot make findings on measures which no longer existed at the time it was established nor on measures which were not yet in existence at the time the Panel was established.[144]

[143] WT/DS315/8, which is contained in Annex D of the Panel's report.
[144] European Communities' comments on the United States' reply to Panel question No. 124.

(b) Analysis by the Panel

7.35 The Panel notes that the European Communities has raised the issue of whether or not there are any temporal limitations on the measures upon which the Panel may make findings in addressing the United States' claim under Article X:3(a) of the GATT 1994. In particular, the European Communities argues that the Panel's terms of reference only include measures in existence at the time the matter was referred to it by the DSB. Therefore, according to the European Communities, the Panel cannot make findings on measures which no longer existed at the time it was established nor on measures which were not yet in existence at that time it was established.[145]

7.36 We understand that, as a general principle, a panel is competent to make findings and recommendations on measures in existence at the time of establishment of the panel, assuming that the request for establishment of a panel covers those measures. Nevertheless, a panel may also be competent to make findings and make recommendations on measures that have expired or are not yet in existence at the time of establishment, assuming again that the request covers those measures. More specifically, we understand that, to the extent that expired measures affect the operation of a covered agreement at the time of establishment of a panel, they may properly be the subject of findings and recommendations by a panel, particularly if such findings and recommendations are necessary to secure a positive solution to the dispute.[146] Further, measures that are not in existence at the time of establishment may be the subject of findings and recommendations by a panel when they come into existence provided that they do not change the essential nature of the complaining Member's case as reflected in its request for establishment of a panel.[147]

7.37 In the context of this dispute, the Panel recalls that the "specific measure at issue" in this dispute comprises the *manner of administration* of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff, the TARIC and related measures. As will become evident when the Panel interprets and applies Article X:3(a) of the GATT 1994 in the context of the specific instances of violation alleged by the United States, the manner of administration in a particular case may not have a clear starting point or end point. More particularly, administration may be part of an ongoing series of interlinked acts or measures, which could, thereby, implicate acts or measures that no longer existed or did not exist at the time of establishment of the panel. In other words, administration may comprise a continuum of steps and acts, some of which may pre-date or post-date the step or act of administration that is considered by a panel at the time of establishment of that panel.[148] In our view, the steps and acts of administration that pre-date or post-date the establishment of a panel may be relevant to determining whether or not a violation of Article X:3(a) of the GATT 1994 exists at the time of establishment. The relevance of these observations will become apparent when we address the particular instances of alleged violation of Article X:3(a) of the GATT 1994 by the European Communities later in our report.

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[145] European Communities' comments on the United States' reply to Panel question No. 124.

[146] See, Appellate Body Report, *US – Upland Cotton*, para. 261; Appellate Body Report, *Chile – Price Band System*, paras. 126 – 144; Appellate Body Report, *EC – Chicken Cuts*, para. 156.

[147] See, Appellate Body Report, *Chile – Price Band System*, paras. 126 - 144.

[148] In this regard, the Panel recalls that, as a general rule, panels are required to consider measures in existence at the time of establishment of the panel.

3. The scope of the United States' challenge of the EC system of customs administration under Article X:3(a) of the GATT 1994

(a) Summary of the parties' arguments

7.38 The **United States** submits that, with respect to its claim under Article X:3(a) of the GATT 1994, it is challenging the absence of uniformity in the administration of EC customs law overall.[149] The United States submits that its request for establishment of a panel indicates that its challenge under Article X:3(a) of the GATT 1994 relates to the absence of uniformity of administration of EC customs law overall and demonstrates that a challenge based on the administration of EC customs law as a whole is within the Panel's terms of reference. More specifically, the United States explains that, first, the request identifies the Community Customs Code, the Implementing Regulation and the Community Customs Tariff. In the United States' view, these are the principal elements of EC customs law as a whole. The United States further submits that, later in its request for establishment of a panel, it makes clear that the lack of uniform administration that forms the basis for the United States' complaint is "manifest in differences among member States in a number of areas, including but not limited to" those that are enumerated. According to the United States, these aspects of its request for establishment of a panel demonstrate that a challenge based on the administration of EC customs law as a whole is within the Panel's terms of reference.[150] The United States further argues that, in its various submissions, it described the problem of non-uniform administration in the European Communities in systemic terms and then described how that problem manifests itself in the three areas of tariff classification, customs valuation and customs procedures.[151]

7.39 The **European Communities** argues that the United States has refused to identify the specific aspects of EC customs administration under challenge.[152] According to the European Communities, the measure at issue in the present dispute is the administration of EC customs law in the areas specifically referred to in the United States' request for establishment of a panel, as further refined in the United States' first written submission, notably tariff classification, customs valuation, processing under customs control, local clearance procedures and penalties. The European Communities submits that these more limited terms of reference are confirmed by the title of the present dispute – "*Selected* Customs Matters" (emphasis added). The European Communities concludes that the United States cannot seek to include all customs matters in the Panel's terms of reference by challenging the EC customs administration system as a whole.[153] The European Communities adds that such a wide interpretation of the United States' request for establishment of a panel is not in accordance with the requirements of Article 6.2 of the DSU, which requires a sufficient identification of the specific measures at issue.[154] The European Communities submits that it cannot be expected to defend itself against nebulous charges of non-uniform administration pursuant to Article X:3(a) of the GATT 1994 in areas that the United States has not identified in its request for establishment of a panel and its first written submission.[155]

(b) Analysis by the Panel

7.40 In the context of this dispute, the Panel has been called upon to determine whether the United States is entitled to challenge the EC system of customs administration overall or as a whole as has been submitted by the United States or, rather, whether the United States is limited to making

[149] United States' reply to Panel question No. 1.
[150] United States' reply to Panel question No. 124.
[151] United States' reply to Panel question No. 3.
[152] European Communities' second written submission, para. 12.
[153] European Communities' second written submission, para. 13.
[154] European Communities' comments on the United States' reply to Panel question No. 124.
[155] European Communities' second written submission, para. 14.

arguments with respect to the specific customs areas that have been identified in its request for establishment of a panel, as has been submitted by the European Communities.

7.41 Before addressing that specific question, the Panel would like to make some general comments regarding its terms of reference that would appear to bear upon that question.

7.42 *First*, a panel's terms of reference do not change over time and are not affected by the way in which complaining Members advance their case.[156] As we have stated previously, a panel's terms of reference are defined by the request for establishment of a panel. If a request is drafted in broad terms, the panel's terms of reference will have corresponding breadth for the duration of the time for which the panel is seized of a dispute. A complaining Member that argues its case at any point during the panel proceedings in more limited terms than those provided for in its request for establishment of a panel is not obliged to confine itself to those more limited terms for the remainder of the proceedings before the Panel.

7.43 *Second*, the title of a case has no bearing upon the scope of a Panel's terms of reference. As mentioned previously, a Panel's terms of reference are defined by the measures and the claims that have been identified in the request for establishment of a panel. Neither Article 7 of the DSU, which defines the panel's terms of reference, nor the linked requirements of Article 6.2 of the DSU, make any reference to the title of the case.[157] Ultimately, the breadth or narrowness of a particular challenge will be governed exclusively by the terms of the relevant request for establishment of a panel.

7.44 Turning now to the specific question we have been called upon to address identified in paragraph 7.40 above, there is nothing in the DSU nor in the other WTO Agreements that would prevent a complaining Member from challenging a responding Member's system as a whole or overall. Nevertheless, if a complaining Member wishes to make such a challenge, the request for establishment of a panel in which the responding Member's system is challenged as a whole or overall must meet the requirements of Article 6.2 of the DSU. Whether or not the requirements of Article 6.2 of the DSU have been fulfilled in an individual case will depend upon the particular request for establishment of a panel and the relevant facts surrounding that case.

7.45 The United States has submitted that its challenge of the EC system of customs administration as a whole or overall is evident from two aspects of its request for establishment of a panel. *First*, it submits that the request identifies the Community Customs Code, the Implementing Regulation and the Community Customs Tariff, which it argues are the principal elements of EC customs law as a whole. In other words, the United States submits that, since it has identified what it labels as the "principal elements" of the EC system of customs administration in its request, by implication, it challenges the EC system as a whole. *Second*, the United States submits that its request makes clear that the lack of uniform administration that forms the basis of its claim under Article X:3(a) of the GATT 1994 is "manifest in differences among member States in a number of areas, *including but not limited to*" the areas specifically enumerated in the request. The United States argues that the inclusive language in its request indicates that the whole EC system of customs administration is implicated by its claim under Article X:3(a) of the GATT 1994.

7.46 In the Panel's view, pursuant to the terms of the United States' request for establishment of a panel, the United States is precluded from challenging the EC system of customs administration as a whole or overall in this dispute. The Panel is of the view that, due to the wording and content of the

[156] That is not to say, however, that a panel would be obliged to make findings and/or rulings and recommendations with respect to all the measures and claims identified in a request for establishment of a panel. On the contrary, the panel is vested with a discretion to only rule on those matters necessary to secure a positive solution to a dispute: Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19.

[157] Further, the Panel notes that the title of a dispute usually originates from the WTO Secretariat.

United States' request, the Panel's terms of reference regarding the scope of the United States' claim under Article X:3(a) of the GATT 1994 are restricted to the specific areas of customs administration referred to in such request, which are set out in paragraph 7.32 above. Our reasoning is as follows.

7.47 *First*, the Panel considers that the references by the United States in its request for establishment of a panel to the Community Customs Code, the Implementing Regulation and the Community Customs Tariff cannot be considered in isolation from the reference in that request to a number of areas of customs administration.[158] When these aspects of the United States' request for establishment of a panel are read together, they indicate that the United States' claim under Article X:3(a) of the GATT 1994 extends to some, but not all, areas of customs administration covered by the Community Customs Code, the Implementing Regulation and the Community Customs Tariff.

7.48 *Second*, the Panel notes that the areas of customs administration listed in the United States' request for establishment of a panel do not cover the entire spectrum of areas that comprise the totality of the EC system of customs administration. The scope of the spectrum is evident from the contents of the various measures referred to by the United States in its request – namely, the Community Customs Code, the Implementing Regulation, the Common Customs Tariff, the TARIC and other "related measures". Areas that are part of the EC system of customs administration but which have not been referred to in the United States' request include transit procedures, customs debt, inward processing, outward processing, exportation and re-exportation.[159] In the Panel's understanding, these areas of the EC system of customs administration are not insignificant in terms of frequency of usage and volume of trade affected. Therefore, their absence from the United States' request for establishment of a panel is notable and supports the Panel's finding in paragraph 7.46 above that, on the basis of its request for establishment of a panel, the United States is precluded from challenging the EC system of customs administration overall or as a whole under Article X:3(a) of the GATT 1994 in this dispute.

7.49 *Finally*, the Panel notes that the list of the areas of customs administration contained in the United States' request for establishment of a panel is preceded by the following text: "Lack of uniform, impartial and reasonable administration of the above-identified measures is manifest in differences among member States in a number of areas, *including, but not limited to, the following...*". We do not consider that the phrase "including, but not limited to" on its own has the legal effect of incorporating into the Panel's terms of reference *all* areas of customs administration in the EC system

[158] The Panel recalls its finding in paragraph 7.33 above that the "specific measure at issue" in this dispute for the purposes of Article 6.2 of the DSU is the manner of administration by the national customs authorities of the member States of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff, the TARIC and related measures in the areas of customs administration specifically identified in the United States' request for establishment of a panel. The Panel also notes that, by referring to various elements of its request for establishment of a panel in support of its argument that the request relates to the EC system of customs administration as a whole, the United States itself appears to advocate the approach that the various aspects of the "measures at issue" for the purposes of a claim under Article X:3(a) of the GATT 1994 are to be considered together: United States' reply to Panel question No. 124.

[159] "Transit procedures" are governed *inter alia* by Articles 54-55, 91-97 and 163-165 of the Community Customs Code and Articles 309-495, 616-623 and 712-716 of the Implementing Regulation. "Customs debt" is governed *inter alia* by Articles 189-242 of the Community Customs Code and Articles 857-912 of the Implementing Regulation. "Inward processing" is governed by Articles 114-129 of the Community Customs Code and Articles 275-276, 538-547, 549-649 and 829-839 of the Implementing Regulation. "Outward processing" is governed *inter alia* by Articles 145-160 of the Community Customs Code and Articles 277 and 748-787 of the Implementing Regulation. "Exportation" is governed *inter alia* by Articles 161-162 of the Community Customs Code and Articles 788-798 and 843-856 of the Implementing Regulation. "Re-exportation" is governed *inter alia* by Article 182 of the Community Customs Code and Articles 841-842 of the Implementing Regulation.

and not just those specifically identified in the United States' request. In our view, if we were to interpret that phrase as having the legal effect of including areas not specifically identified in the request, such interpretation would undermine an important due process objective of the requirements of Article 6.2 of the DSU – namely, to provide sufficient notice and information to the responding party and third parties to a dispute of the nature of the complainant's case.[160]

7.50 In the light of the foregoing, after having considered the United States' request for establishment of a panel as a whole, the Panel concludes that its terms of reference regarding the United States' claim under Article X:3(a) of the GATT 1994 do not include a challenge to the EC system of customs administration overall or as a whole under Article X:3(a) of the GATT 1994. Rather, as stated in paragraph 7.33 above, our terms of reference are confined to the manner of administration by the national customs authorities of the member States of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff, the TARIC and related measures in the areas of customs administration specifically identified in the United States' request for establishment of a panel.

4. The nature of the United States' challenge of the EC system of customs administration under Article X:3(a) of the GATT 1994

(a) Summary of the parties' arguments

7.51 The **United States** submits that it challenges the design and structure of the EC system of customs administration "as such". According to the United States, while it is true that Article X:3(a) of the GATT 1994 is concerned with administration, it is possible that a system of customs administration "as such" will be in violation of Article X:3(a) of the GATT 1994 if it necessarily results in non-uniform administration.[161] The United States submits that, in the case of the EC system of customs administration, it is the absence of a critical feature from the design and structure of the European Communities' system of customs administration that necessarily results in non-uniform administration in breach of Article X:3(a) of the GATT 1994 – namely, a procedure or institution that ensures that divergences of administration among the customs authorities of the 25 member States do not occur or that promptly reconciles such divergences as a matter of course when they do occur. In the United States' view, the procedures and institutions identified by the European Communities as instrumental in achieving uniform administration in the European Communities cannot and do not result in uniform administration of EC customs law by 25 independent, regionally limited customs authorities. Rather, according to the United States, such procedures and institutions constitute a loose network within which various responses to non-uniform administration may but need not necessarily occur. The United States argues that since the EC system of customs administration lacks any procedures or institutions to ensure that divergences do not occur or, when divergences come to light, they will be reconciled promptly and as a matter of course, that system necessarily results in non-uniform administration in breach of Article X:3(a) of the GATT 1994.[162] The United States submits that this structural shortcoming in the EC system results in non-uniform administration with respect to all areas of customs administration. The United States argues that, in each of these areas, the only procedures or institutions that allegedly secure uniform administration are general, non-binding, discretionary procedures and institutions, with the exception of review by national courts. However, in the United States' view, review by national courts does not secure uniform administration given the discretion that courts have in deciding whether or not to refer matters to the ECJ, the lack of an obligation on the part of the customs authority in a given member State to follow the decisions of

[160] Appellate Body Report, *India – Patents (US)*, para. 90.
[161] United States' reply to Panel question No. 173.
[162] United States' reply to Panel question No. 126(a).

courts in other member States, and the lack of any mechanism to inform the customs authorities in the various member States of relevant customs decisions by courts in other member States.[163]

7.52 The **European Communities** submits that the United States' request for establishment of a panel only referred to the administration of EC customs law as the measure at issue. According to the European Communities, the United States did not challenge measures of general application which constitute the EC system of customs administration. The European Communities submits that, therefore, these general measures are not within the Panel's terms of reference.[164] The European Communities also submits that, in cases where a law or regulation "mandates" a form of administration that is not uniform, reasonable, or impartial, such law or regulation could be regarded *per se* as a violation of Article X:3(a) of the GATT 1994. According to the European Communities, a law or regulation will be "mandatory" if it does not leave the authorities any possibility to administer the laws or regulations in question in a uniform, impartial, or reasonable manner.[165] However, the European Communities submits that the specific design and structure of the European Communities' system could become relevant under Article X:3(a) of the GATT 1994 only if it necessarily led to a lack of uniformity.[166] In this regard, the European Communities recalls that whether or not the EC system of customs administration ensures uniform administration must be evaluated on the basis of the system as a whole and not on the basis of individual measures considered in isolation.[167] The European Communities further submits that, whether the EC system of customs administration "as such" leads to non-uniform administration is a question of fact regarding the interpretation and application of a large body of EC municipal law. The burden of proof to establish that such municipal law is in violation of WTO obligations rests with the United States as the complainant.[168] The European Communities concludes that the United States has failed to show that there are any features in the EC system of customs administration which necessarily would lead to a lack of uniformity.[169] The European Communities explains that, in the European Communities, no law mandates non-uniform administration of EC customs law.[170] On the contrary, according to the European Communities, the EC system of customs administration contains numerous, interlocking mechanisms which, together, provide a high degree of assurance for a uniform interpretation and application of EC customs law.[171]

(b) Analysis by the Panel

7.53 Another question raised for the Panel's consideration in the context of this dispute is whether the United States is entitled to challenge "as such" the EC system of customs administration. In this regard, the Panel notes that the United States has clearly submitted that it challenges the design and structure of the EC system of customs administration "as such".[172] The European Communities argues that the United States' challenge of the EC system of customs administration "as such" is outside the Panel 's terms of reference.[173]

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[163] United States' reply to Panel question No. 126(b).

[164] European Communities' reply to Panel question No. 173.

[165] European Communities' reply to Panel question No. 154.

[166] European Communities' oral statement at the second substantive meeting, para. 44; European Communities' reply to Panel question No. 173.

[167] European Communities' oral statement at the second substantive meeting, para. 45; European Communities' comments on the United States' reply to Panel question No. 127.

[168] European Communities' reply to Panel question No. 173.

[169] European Communities' oral statement at the second substantive meeting, para. 64.

[170] European Communities' reply to Panel question No. 154.

[171] European Communities' oral statement at the second substantive meeting, para. 64.

[172] United States' reply to Panel question No. 173.

[173] European Communities' first written submission, para. 14; European Communities' reply to Panel question No. 173.

7.54 By way of preliminary comment, the Panel notes that the United States implicitly challenges "as such" the design and structure of the EC system of customs administration *as a whole or overall*. This is evident, *inter alia*, from the fact that the United States submits that alleged structural deficiencies in the EC system necessarily result in a violation of Article X:3(a) of the GATT in *all* areas of customs administration in the European Communities.[174] The Panel recalls its findings in paragraph 7.46 *et seq* above, that the United States is precluded from challenging the EC system of customs administration as a whole or overall under Article X:3(a) of the GATT 1994 because, as previously stated, such a challenge is outside our terms of reference. Nevertheless, we also found in paragraph 7.33 above that our terms of reference authorise us to consider the manner of administration by the national customs authorities of the member States of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff, the TARIC and related measures in the areas of customs administration specifically identified in the United States' request for establishment of a panel. In the light of the fact that the United States has submitted that structural deficiencies in the EC system necessarily result in a violation of Article X:3(a) of the GATT in all areas of customs administration in the European Communities, we will consider whether or not the United States is entitled to make an "as such" challenge with respect to the design and structure of the EC system in the areas of customs administration that have been specifically identified in the United States' request for establishment of a panel.

7.55 The Panel notes first that a Member's *legislation* can be challenged "as such" as being in violation of a WTO obligation.[175] There also appears to be support for the view that a *system* (and, presumably, components thereof) can be challenged "as such", provided that the system comprises rules or norms that are intended to have general and prospective application.[176]

7.56 The Panel again refers to the language of the United States' request for establishment of a panel to determine whether or not our terms of reference permit consideration of an "as such" challenge with respect to the design and structure of the EC system in the areas of customs administration that have been specifically identified in the United States' request. We note in this regard that, in *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body stated that:

> "... In our view, 'as such' challenges against a Member's measures in WTO dispute settlement proceedings are serious challenges. By definition, an 'as such' claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct – not only in a particular instance that has occurred, but in future situations as well – will necessarily be inconsistent with that Member's WTO obligations. In essence, complaining parties bringing 'as such' challenges seek to prevent Members *ex ante* from engaging in certain conduct. The implications of such challenges are obviously more far-reaching than 'as applied' claims.
>
> We also expect that measures subject to 'as such' challenges would normally have undergone, under municipal law, thorough scrutiny through various deliberative processes to ensure consistency with the Member's international obligations, including those found in the covered agreements, and that the enactment of such a measure would implicitly reflect the conclusion of that Member that the measure is not inconsistent with those obligations. The presumption that WTO Members act in good faith in the implementation of their WTO commitments is particularly apt in the context of measures challenged 'as such'. We would therefore urge complaining

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[174] United States' reply to Panel question No. 126(b).

[175] Appellate Body Report, *US – 1916 Act*, para. 75.

[176] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 81-82 set out above in para. 7.15.

> parties to be *especially diligent* in setting out 'as such' claims in their panel requests as clearly as possible. In particular, we would expect that 'as such' claims state unambiguously the specific measures of municipal law challenged by the complaining party and the legal basis for the allegation that those measures are not consistent with particular provisions of the covered agreements. Through such straightforward presentations of 'as such' claims, panel requests should leave respondent parties in little doubt that, notwithstanding their own considered views on the WTO-consistency of their measures, another Member intends to challenge those measures, as such, in WTO dispute settlement proceedings."[177]

7.57 In the present case, the Panel considers that it is not clear from the United States' request for establishment of a panel that it intended to challenge the design and structure of aspects of the EC system of customs administration "as such".

7.58 *First*, in the Panel's view, there is nothing in the text of the United States' request for establishment of a panel that could be construed as clearly suggesting that the United States' challenge under Article X:3(a) of the GATT 1994 relates to the design and structure of the EC system of customs administration.

7.59 *Second*, the request for establishment of a panel suggests that the United States is concerned with the way in which administration is undertaken by member State customs authorities rather than with the design and structure of the customs administration system at the EC level "as such". In particular, the request starts by stating that "[t]he United States considers that the *manner* in which the European Communities ('EC') administers its laws, regulations, decisions and rulings of the kind described in Article X:1 of the General Agreement on Tariffs and Trade 1994 ('GATT 1994') is not uniform, impartial and reasonable, and therefore is inconsistent with Article X:3(a) of the GATT 1994" (emphasis added). We note that the term "manner" is defined as "the way in which something is done or happens; a method of action; a mode of procedure".[178] In our view, there is nothing in the ordinary meaning of the term "manner" to suggest that it relates to the design and structure of something. Rather, the ordinary meaning of that term suggests that it relates to application in practice.

7.60 In addition, when identifying the manner of administration that is allegedly in violation of Article X:3(a) of the GATT 1994, the request places emphasis on the actions of customs authorities of the member States whereas, in contrast, there is no mention of actions taken and/or procedures and institutions existing at the EC level, including the design and structure of the EC system of customs administration. In particular, the request states that:

> "Administration of these measures in the European Communities is *carried out by the national customs authorities of EC member States*. Such administration takes numerous different forms. The United States understands that the myriad forms of administration of these measures include, but are not limited to, laws, regulations, handbooks, manuals, and administrative practices of *customs authorities of member States of the European Communities*."[179] (emphasis added)

7.61 *Third*, we recall our finding in paragraph 7.20 above that the essential aspect of Article X:3(a) of the GATT 1994 is the obligation to "administer in a uniform, impartial and reasonable manner". By challenging the design and structure of the EC system of customs administration "as such" under Article X:3(a) of the GATT 1994, the United States is effectively arguing that the design and structure

[177] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 172-173.
[178] *The New Shorter Oxford English Dictionary*, 1993, p. 1687.
[179] WT/DS315/8, which is contained in Annex D of the Panel's report.

necessarily results in administration that is not uniform.[180] In other words, the United States is arguing that it is not challenging specific instances of administration of laws, regulations, decisions or rulings, at least, not exclusively. Rather, it is challenging the system, which is the institutional framework and context within which specific acts of administration take place. In the Panel's view, the United States' purported challenge of the design and structure of the EC system "as such" is not obviously linked to the essence of the obligation contained in Article X:3(a) of the GATT 1994 – namely, the obligation to administer in a uniform manner. In the light of the lack of obvious connection between the United States' purported challenge of the EC system of customs administration "as such" and this essential aspect of the obligation contained in Article X:3(a) of the GATT 1994, it was all the more necessary for the United States to have been clear about the nature of its challenge in its request for establishment of a panel.

7.62 *Finally*, the Panel observes that the United States' request for establishment of a panel makes no explicit reference to the terms "as such" or *per se*. The Panel considers that, generally speaking, the absence of these terms from a request for establishment of a panel, the significance of which is well understood in WTO dispute settlement parlance, would not necessarily mean that a complaining Member would be precluded from making an "as such" challenge, provided that the responding Member is in no doubt that an "as such" challenge is intended.[181] However, for the reasons referred to above, the Panel considers that the United States' request for establishment of a panel did not make clear that an "as such" challenge of the EC system of customs administration was being alleged.[182]

7.63 In the light of the foregoing factors taken in totality, the Panel concludes that, on the basis of the language and content of its request for establishment of a panel, the United States is precluded from making an "as such" challenge with respect to the design and structure of the EC system of customs administration as a whole and also with respect to the design and structure of the EC system in the areas of customs administration that have been specifically identified in the United States' request. Nevertheless, pursuant to the terms of its request for establishment of a panel, the United States is still entitled to claim that the administration of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff and the TARIC and related measures in the areas of customs administration specifically identified in the United States' request in particular instances is in violation of Article X:3(a) of the GATT 1994. Indeed, the United States itself submits that its claims are not confined to an "as such" challenge of the design and structure of the EC system of customs administration. The United States explains that it has demonstrated in its submissions specific examples of non-uniform administration within the context of the EC system.[183]

5. Overall conclusions regarding the Panel's terms of reference

7.64 The Panel concludes that, for the reasons set forth above, its terms of reference authorise the Panel to consider the manner of administration by the national customs authorities of the member States of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff,

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[180] Indeed, the United States explicitly argues as much in its reply to Panel question No. 126(a).

[181] We recall in this regard that the panel request serves the important due process objective of notifying the parties and third parties to a dispute of the nature of the complainant's case. See paragraph 7.12 above.

[182] Additionally, the Panel notes that the United States only clearly indicated its intention to make an "as such" challenge regarding the design and structure of the EC system of customs administration at a late stage in the Panel's proceedings, in response to a question posed by the Panel following the second substantive meeting (namely, United States' reply to Panel question No. 173. See also the United States' reply to Panel question No. 126). Prior to that stage of the Panel's proceedings, the United States made no explicit mention that its challenge under Article X:3(a) of the GATT 1994 was an "as such" challenge. This tends to support the view that, in its request for establishment of a panel, the United States did not intend to challenge the EC system of customs administration "as such".

[183] United States' reply to Panel question No. 126(b).

the TARIC and related measures in the areas of customs administration specifically identified in the United States' request for establishment of a panel. The Panel also concludes that, based on the language and content of the Panel's terms of reference, the Panel is precluded from considering "as such" challenges of the design and structure of the EC system of customs administration as a whole and also the design and structure of the EC system in the areas of customs administration that have been specifically identified in the United States' request for establishment of a panel. However, we are authorized to examine particular cases or instances of administration of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff and the TARIC and related measures in those areas of customs administration specifically identified in the United States' request, where such cases or instances have been presented and relied upon by the United States in the context of this dispute. The Panel will examine each of those cases or instances later in its report after having first considered a number of procedural issues and general matters concerning the interpretation and application of Article X:3(a) of the GATT 1994.

C. PROCEDURAL ISSUES

1. Admissibility of certain evidence

(a) Evidence contained in section III of the United States' oral statement at the second substantive meeting

7.65 The issue of whether certain evidence relied upon by the United States in the context of its claim under Article X:3(a) of the GATT 1994 should be admitted by the Panel was raised by the European Communities during the Panel's second substantive meeting with the parties, which took place on 22 – 23 November 2005. In particular, on 22 November 2005, following presentation by the United States of its oral statement at that substantive meeting, the European Communities argued that evidence contained in section III of the United States' oral statement[184] constituted "new" evidence, that it was submitted too late and that, therefore, it should be found to be inadmissible by the Panel. The United States defended its reliance upon such evidence on the basis that it constituted "evidence necessary for the purposes of rebuttals" within the meaning of paragraph 12 of the Working Procedures.[185] The United States argued that, as such, the evidence had not been adduced too late.

7.66 On 23 November 2005, the Panel issued a letter to the parties indicating that it had decided to admit the evidence in question. In particular, the Panel's letter stated the following:

> "The Panel refers to a procedural issue raised orally by the European Communities on 22 November 2005 during the Panel's second substantive meeting with the parties. In particular, the European Communities argued that evidence contained in exhibits to section III of the United States' oral statement for the second substantive meeting should be considered inadmissible by the Panel because paragraph 12 of the Panel's Working Procedures prohibits the submission of 'new' factual evidence after the first substantive meeting. The United States responds that the evidence in question is not 'new'. Rather, according to the United States, it constitutes 'evidence necessary for purposes of rebuttals' within the meaning of paragraph 12 of the Working Procedures.
>
> The Panel has carefully considered the parties' arguments in light of paragraph 12 of its Working Procedures and relevant provisions of the DSU. Without concluding whether or not the evidence in question can be construed either as 'new' factual

[184] Section III of the United States' oral statement is entitled "Recent Cases Confirm That Processes EC Holds Out As Securing Uniform Administration Fail To Do So" and relates to the United States' claim under Article X:3(a) of the GATT 1994.

[185] The Panel's Working Procedures for this dispute are contained in Annex E of the Panel's report.

evidence or as evidence that is 'necessary for purposes of rebuttals' within the meaning of paragraph 12 of the Working Procedures, the Panel has decided to admit the evidence referred to by the United States in section III of its oral statement for the second substantive meeting. The Panel considers that it is authorized to admit the evidence on the basis of the following. Paragraph 12 of the Working Procedures provides that '[p]arties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttals'. Article 12.1 of the DSU authorises a panel to decide to deviate from the Working Procedures following consultation with the parties. Further, Article 11 of the DSU requires the Panel to make an objective assessment of the facts. We do not consider that we would be abiding by our duty in Article 11 of the DSU if we were to rule as inadmissible evidence that may have a bearing on the Panel's findings in this dispute.

In order to avoid any prejudice to the European Communities regarding the reference by the United States to evidence in section III of its oral statement, the Panel has decided to provide the European Communities with the right to comment on the contents of section III of the United States' oral statement for the second substantive meeting. ... The Panel reserves its right to pose questions to the United States and the European Communities regarding the contents of section III, including the evidence referred to therein and any comments made by the European Communities thereon.

...

The parties should note that the decision taken by the Panel in this communication only relates to the admissibility of evidence referred to by the United States in section III of its oral statement at the second substantive meeting. The decision has no bearing on the weight, if any, that the Panel may ultimately attribute to such evidence."

7.67 The Panel granted the European Communities a period of three weeks within which to provide its comments, commencing on the date the United States made its oral statement at the second substantive meeting in which it referred to the evidence in question.[186] Specifically, the European Communities was granted until 14 December 2005 to provide its comments. In its comments, the European Communities acknowledged that the working procedures contained in Appendix 3 of the DSU do not establish specific time limits for the presentation of evidence.[187] The European Communities also acknowledged that the Panel may, in consultation with the parties to the dispute, adopt more specific procedures than those contained in Appendix 3 of the DSU and/or may also amend the procedures in consultation with the parties.[188] The European Communities argued that, nevertheless, the submission by the United States of "new" factual evidence was not in accordance with the requirements of due process and procedural fairness, as reflected in paragraph 12 of the Panel's Working Procedures.[189] More specifically, the European Communities argued that the United States had not demonstrated any good cause for the late submission of the evidence, asserting that the United States had abstained from filing supporting evidence in its previous submissions and noting

[186] The Panel provided the European Communities with the opportunity to comment through a question posed by the Panel to the European Communities at the conclusion of the Panel's second substantive meeting with the parties. In particular, in Panel question No. 172, the Panel requested the European Communities to comment on section III of the United States' oral statement at the second substantive meeting, including any exhibits referred to in that section.

[187] European Communities' reply to Panel question No. 172, para. 6.

[188] European Communities' reply to Panel question No. 172, para. 6.

[189] European Communities' reply to Panel question No. 172, para. 9.

that the evidence referred to in section III of the United States' oral statement dated back several years.[190] The European Communities further submitted that the Panel's decision to grant it additional time to comment on section III did not address its due process concerns because it was required to present a third submission containing comments on section III of the United States' oral statement at the second substantive meeting in parallel to replying to the Panel's questions following the second substantive meeting and providing comments on the United States' replies to those questions.[191]

7.68 On 15 December 2005, following receipt of the European Communities' comments, the Panel sent the parties a supplementary list of questions regarding section III of the United States' oral statement at the second substantive meeting and the European Communities' comments thereon. One of those questions requested the United States to explain why it had not referred to the evidence contained in section III prior to the Panel's second substantive meeting with the parties. In response, the United States submitted that it only became aware of that evidence through a presentation made on 27 October 2005[192] – that is, after the United States' second written submission had been filed. The United States submitted that, in any event, the illustrative cases referred to in that presentation, which were subsequently relied upon by the United States in section III of its oral statement at the second substantive meeting, rebutted the European Communities' contention during the first stage of the Panel's proceedings that the United States was basing its claims on theoretical scenarios. The United States further submitted that that evidence highlighted issues that had been developed during earlier stages of this dispute and it also involved relatively recent events. The United States submitted that, therefore, the evidence in question fell within the scope of paragraph 12 of the Panel's Working Procedures.[193]

7.69 As noted in paragraph 7.66 above, the Panel decided on 23 November 2005 to admit the evidence contained in section III of the United States' oral statement at the second substantive meeting. Given that the parties have made additional comments concerning the admissibility of such evidence since that decision was taken, the Panel considers it necessary to affirm the decision to admit that evidence. The Panel does not consider it necessary to decide whether the evidence in question amounts to "new" factual evidence as submitted by the European Communities or evidence that is "necessary for purposes of rebuttals" within the meaning of paragraph 12 of the Working Procedures as submitted by the United States. We hold this view because, as explained in our letter of 23 November 2005, regardless of the way in which that evidence is characterized, we have the authority to admit it pursuant to Article 12.1 of the DSU and paragraph 12 of the Working Procedures.

7.70 In any case, the Panel feels compelled to admit the evidence contained in section III of the United States' oral statement at the second substantive meeting in the light of Article 11 of the DSU. Under that Article, we are obliged to make an objective assessment of, *inter alia*, the facts of the case. As stated in our letter of 23 November 2005, we would not be abiding by our duty in Article 11 if we were to ignore evidence that may have a bearing on our findings in this dispute. Furthermore, even if the evidence in question could be construed as "new" evidence, the Panel provided the European Communities with a period of three weeks to comment on that evidence, commencing on the date the evidence in question was referred to by the United States. The period of three weeks was discussed and agreed upon by the Panel and the parties at the second substantive meeting.[194] At that time, the European Communities did not indicate to the Panel that that period would be insufficient to allow it

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[190] European Communities' reply to Panel question No. 172, paras. 12-13.

[191] European Communities' reply to Panel question No. 172, para. 15.

[192] Philippe De Baere, "Coping with customs in the EU: The uniformity challenge: Judicial review of customs decisions and implementing legislation", PowerPoint Presentation at ABA International Law Section, 27 October 2005 (Exhibit US-59).

[193] United States' reply to Panel question No. 177.

[194] In particular, this period was agreed upon during the closing phase of the Panel's second substantive meeting with the parties.

to fully respond to the arguments made and evidence adduced in section III of the United States' oral statement.

(b) Evidence relied upon by the United States in sections of its oral statement at the second substantive meeting other than that contained in section III

7.71 In its comments on section III of the United States' oral statement at the second substantive meeting, which were filed on 14 December 2005, the European Communities referred to "additional" evidence relied upon by the United States in sections of its oral statement at the second substantive meeting other than that contained in section III.[195] With respect to such "additional" evidence, the European Communities stated that "it is not clear why this evidence has not been presented in earlier submissions"[196]. In its supplementary list of questions regarding section III of the United States' oral statement at the second substantive meeting sent to the parties on 15 December 2005, the Panel requested the European Communities to clearly identify the "additional" evidence it was referring to in the cited comment.[197] In response, the European Communities referred to the evidence contained in Exhibits US-73[198], US-74[199], US-75[200], US-76[201], US-77[202], US-78[203], US-79[204] and US-80.[205]

7.72 The Panel has decided to admit what the European Communities describes as "additional" evidence contained in sections of the United States' oral statement at the second substantive meeting other than section III. Our reasoning is as follows.

7.73 *First*, when the European Communities raised the issue of the admissibility of the "additional" evidence, it did not clearly and specifically request the Panel to reject such evidence on the ground that it constituted "new" evidence.[206] Rather, the European Communities merely noted that the Panel's decision of 23 November 2005 to admit certain evidence only related to section III, but not to "additional evidence referred to in other parts" of the United States' oral statement made at the second substantive meeting.[207] Further, the European Communities merely questioned why the evidence had not been submitted earlier without explicitly requesting its rejection.

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[195] European Communities' reply to Panel question No. 172, para. 15.
[196] European Communities' reply to Panel question No. 172, para. 11.
[197] Panel question No. 182.
[198] European Commission, *External and intra-European Union trade*, pp. 94-95, September 2005.
[199] Edwin A. Vermulst, *EC Customs Classification Rules: Should Ice Cream Melt?*, 15 Mich. J. Int'l L. 1241, pp. 1314-15, 1994.
[200] Letter from Mark MacGann, Director General, EICTA, to Manuel Arnal Monreal, Director International Affairs and Tariff Matters, European Commission, 2 September 2005.
[201] HM Customs & Excise, Tariff Notice 13/04.
[202] Douanerechten. Indeligen van bepaalde LCD monitoren in de gecombineerde nomenclatuur, No. CPP2005/1372M, 8 July 2005 (original and unofficial English translation).
[203] BTI DEM/2975/05-1 (start date of validity 19 July 2005).
[204] Affidavit of Mark R. Berman, President and Chief Executive Officer of Rockland Industries, Inc., 10 November 2005.
[205] Treaty of Nice, Amending the Treaty on European Union, the Treaties Establishing the European Communities, and Certain Related Acts, reprinted in *Official Journal of the European Communities*, pp. C80/22 to C80/24 & C80/80, 10 March 2001.
[206] In contrast, when referring to the evidence contained in section III of the United States' oral statement at the second substantive meeting, the European Communities clearly stated that such evidence constituted "new evidence". See, for example, European Communities' reply to Panel question No. 172, para. 10. Further, the European Communities alleged that there was no good cause for the late submission of evidence contained in section III of the United States' oral statement at the second substantive meeting but made no reference to evidence contained in other sections of the United States' oral statement in making this allegation: European Communities' reply to Panel question No. 172, para. 12.
[207] European Communities' reply to Panel question No. 172, para. 15.

7.74 *Second*, even if the European Communities' comments regarding the "additional" evidence could be construed as a request to the Panel to reject that evidence on the ground that it constitutes "new" evidence, the Panel considers that the European Communities did not raise its objections to such evidence early enough so as to allow the Panel to seek the United States' response, if the Panel were to have considered it necessary. In this regard, the Panel notes that, at the second substantive meeting, the European Communities did not raise any concerns regarding the admissibility of evidence contained in sections of the United States' oral statement other than section III. Nor did the European Communities raise any concerns immediately thereafter. The first mention of the European Communities' apparent concerns regarding the admissibility of such evidence was made in its comments on the evidence contained in section III of the United States' oral statement, three weeks after the point in time when the so-called "additional" evidence was referred to by the United States at the second substantive meeting. We consider that the European Communities should have raised its concerns regarding the evidence other than that contained in section III earlier, rather than at a stage when only one step remained before closure of the Panel's factual record.[208]

7.75 *Finally*, the Panel recalls that, under Article 11 of the DSU, the Panel is obliged to make an objective assessment of, *inter alia*, the facts of the case. We consider that, pursuant to that Article, we are authorized to have regard to the evidence contained in Exhibits US-73, US-74, US-75, US-76, US-77, US-78, US-79 and US-80 because it may have a bearing on our findings in this dispute regarding the United States' claim under Article X:3(a) of the GATT 1994.

(c) Summary and conclusions

7.76 In summary, the Panel considers that, for the reasons set forth above, the evidence contained in the United States' oral statement at the second substantive meeting, including but not limited to that contained in section III of the statement, is admissible. The Panel considers that it is authorized to admit such evidence pursuant to Article 12.1 of the DSU and paragraph 12 of the Working Procedures. Furthermore, the Panel is of the view that the admission of such evidence is necessary in the light of the Panel's obligation under Article 11 of the DSU to make an objective assessment of, *inter alia*, the facts of the case. The Panel also considers that, with respect to the evidence contained in section III of the United States' oral statement at the second substantive meeting, it ensured the preservation of the due process rights of the European Communities by providing the European Communities with an opportunity to comment on the evidence in question within what the Panel considers to be a reasonable amount of time.[209]

2. Requests by the United States that the Panel exercise its discretion under Article 13 of the DSU

7.77 As previously noted, in this dispute the United States makes claims, *inter alia*, under Article X:3(a) of the GATT 1994. Specifically, the United States claims that the administration of EC customs law is not uniform and is, therefore, in violation of Article X:3(a) of the GATT 1994.

[208] In light of the European Communities' objections to the evidence contained in section III of the United States' oral statement made at the second substantive meeting, the Panel and the parties agreed upon the steps that would occur to take account of those objections. The first step entailed the European Communities making comments on evidence contained in section III of the United States' oral statement, which comments were received on 14 December 2005. The final step entailed responding to the Panel's questions on section III of the United States' oral statement at the second substantive meeting and the European Communities' comments thereon. The Panel's questions were sent to the parties on 15 December 2005 and the parties' replies were received on 22 December 2005.

[209] In addition, the Panel notes that it received a letter dated 21 December 2005, entitled "DS315 Amicus Curiae". By letter dated 9 January 2006, the Panel informed the parties to this dispute of its decision not to admit the letter as part of the Panel's record because, *inter alia*, it was filed too late and its admission would have unduly delayed the Panel's proceedings.

Following the Panel's first substantive meeting with the parties, the Panel posed a number of questions to the United States requesting it to provide all relevant statistical evidence and/or other information to demonstrate the incidence of non-uniform administration with respect to tariff classification[210], customs valuation[211] and customs procedures[212] in the context of the overall administration of the EC customs regime. In response to the Panel's questions regarding tariff classification and customs valuation, the United States first argued that the information sought by the Panel was not needed to reach the conclusion that the European Communities is not in compliance with its obligation of uniform administration under Article X:3(a) of the GATT 1994. In the alternative, the United States requested the Panel to exercise its discretion under Article 13 of the DSU because the European Communities, rather than the United States, was likely to have the information sought.

7.78 Article 13 of the DSU provides that:

> "1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.
>
> 2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4."

7.79 In the area of *tariff classification*, the United States requested the Panel to seek from the European Communities a statistically significant sample of binding tariff information ("BTI") and other classification decisions from various member States in order to determine the frequency of divergent administration in that area pursuant to Article 13 of the DSU.[213] Additionally, the United States requested the Panel to seek a copy of a 2003 study to which reference had been made in the European Communities' draft Modernized Customs Code.[214] The United States submitted that it had requested a copy of that study during consultations with the European Communities for this dispute but that the European Communities refused to provide it. In making its request that the Panel exercise its discretion under Article 13 of the DSU regarding the study referred to in the draft Modernized Customs Code, the United States submitted that the Panel should draw an adverse inference should the European Communities refuse to provide it.[215]

7.80 In the *customs valuation* area, the United States requested the Panel to seek information from the European Communities of the type that enabled the EC Court of Auditors to make the findings

[210] Panel question No. 16.
[211] Panel question No. 24.
[212] Panel question No. 33.
[213] United States' reply to Panel question No. 16.
[214] United States' reply to Panel question No. 16. The draft Modernized Customs Code (European Commission, Directorate-General for Taxation and Customs Union, TAXUD/458/2004 – Rev 4, *Draft Modernized Customs Code*, 11 November 2004) is contained in Exhibit US-33. The study to which the United States refers is mentioned on page 4 of Exhibit US-33. In particular, the draft Modernized Customs Code refers to "[a]n external study in 2003 [which] has allowed the Commission to gain a clearer understanding of the current situation in the Member States and of the potential costs and benefits".
[215] United States' reply to Panel question No. 16.

contained in its report on customs valuation, Special Report No. 23/2000 pursuant to Article 13 of the DSU.[216] In this regard, the United States noted that, in evaluating the incidence of non-uniform administration with respect to valuation rules, the EC Court of Auditors had 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.[217]

7.81 In response, the European Communities submitted that the United States' requests that the Panel exercise its discretion pursuant to Article 13 of the DSU should be rejected because they amounted to an attempt by the United States to rid itself of its burden to make a prima facie case and, therefore, went considerably beyond the functions of a panel under Article 13 of the DSU. The European Communities also submitted that it is not credible for the United States to claim, on the one hand, that there is widespread non-uniform administration of EC customs law in violation of Article X:3(a) of the GATT 1994, but that it does not have any evidence to support this claim, and that the European Communities should provide the information requested.[218] In response specifically to the United States' request concerning the EC Court of Auditors report, the European Communities submitted that it would not be practicable to comply if the Panel were to make such a request. According to the European Communities, the EC Court of Auditors' Special Report No. 23/2000 was based on audit visits that took place on the premises of the Commission and the customs administrations of 12 member States in 1999 – 2000.[219] The European Communities submitted that, whatever information the EC Court of Auditors may have collected at that time is in the possession of the EC Court of Auditors only. In addition, such information would reflect the situation in 1999 – 2000, but not the situation today.[220]

7.82 At the second substantive meeting with the parties, the Panel stated that, at that stage, it did not intend to exercise its discretion under Article 13 of the DSU. The Panel noted that, when the United States made its requests that the Panel exercise its discretion pursuant to Article 13 of the DSU, the United States submitted that it "does not believe that the [requested] information at issue is necessary for the Panel to find that the EC is not in compliance with its obligation of uniform administration".[221]

7.83 The Panel affirms the decision it took at the second substantive meeting not to exercise its discretion under Article 13 of the DSU because, since the Panel took that decision, the United States has not made any additional arguments to the effect that the requested information is necessary. In fact, the United States has repeatedly submitted to the Panel, both before the second substantive meeting and subsequently, that it has proved that the European Communities is in violation of Article X:3(a) of the GATT 1994[222], even in the absence of the evidence it requests pursuant to Article 13 of the DSU. Accordingly, since the United States – being the party that requested the Panel

[216] United States' reply to Panel question No. 24 referring to Court of Auditors, Special Report No. 23/2000 concerning valuation of imported goods for customs purposes (customs valuation), together with the Commission's replies, 14 March 2001 contained in Exhibit US-14.

[217] United States' reply to Panel question No. 24 referring to Court of Auditors, Special Report No. 23/2000 concerning valuation of imported goods for customs purposes (customs valuation), together with the Commission's replies, 14 March 2001, para. 10 (Exhibit US-14).

[218] European Communities' second written submission, paras. 48-50.

[219] Court of Auditors, Special Report No 23/2000 concerning valuation of imported goods for customs purposes (customs valuation), together with the Commission's replies, 14 March 2001, paras. 9-10 (Exhibit US-14).

[220] European Communities' second written submission, para. 155.

[221] United States' replies to Panel question Nos. 16, 24 and 33.

[222] United States' reply to Panel question Nos. 16, 24, 33, 124, 126(b), 173 and 179; United States' oral statement at the second substantive meeting, paras. 4 and 6; United States' comments on the European Communities' reply to Panel question No. 173.

to exercise its discretion under Article 13 of the DSU – does not consider that the information it suggests should be sought from the European Communities is necessary for the Panel to find that the European Communities is not in compliance with its obligation under Article X:3(a) of the GATT 1994, the Panel does not see any compelling reason to exercise its discretion under Article 13 of the DSU to request that information. The Panel's decision not to exercise its discretion under Article 13 of the DSU dispenses with the need to address the United States' argument that adverse inferences should be drawn if the European Communities were to have refused to provide a copy of the study referred to in the draft Modernized Customs Code despite a request by the Panel for its production.[223]

D. CLAIMS UNDER ARTICLE X:3(A) OF THE GATT 1994

1. Article X:3(a) of the GATT 1994

7.84 Article X:3(a) of the GATT 1994 provides that:

> "Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article."

2. Findings requested by the United States under Article X:3(a) of the GATT 1994

(a) Summary of the parties' arguments

7.85 The **United States** submits that, with respect to its claim under Article X:3(a) of the GATT 1994, it is exclusively concerned with the requirement of "uniform" administration.[224] The United States notes that the principal finding it is asking the Panel to make is that the EC system of customs administration as a whole is inconsistent with the obligation of uniform administration under Article X:3(a) of the GATT 1994. The United States considers that such a finding does not preclude findings of non-uniform administration regarding the specific areas of customs administration to which it has referred in its submissions to substantiate its claim of violation of Article X:3(a) of the GATT 1994 by the European Communities. According to the United States, while findings on specific areas of customs administration in the European Communities are not necessary to make the finding requested with respect to the EC system of customs administration as a whole, they would tend to support the finding requested by the United States that the EC system overall is in violation of Article X:3(a) of the GATT 1994.[225]

7.86 The United States submits that the evidence it has presented supports subsidiary findings that the European Communities fails to meet its obligation of uniform administration under Article X:3(a) of the GATT 1994 with respect to administration:

(a) in the area of tariff classification, of the Common Customs Tariff;

(b) in the area of customs valuation, of:

(i) Article 32(1)(c) of the Community Customs Code regarding the treatment of royalty payments for customs valuation purposes;

[223] United States' reply to Panel question No. 16.
[224] United States' first written submission, footnote 15.
[225] United States' reply to Panel question No. 124.

(ii) Article 147 of the Implementing Regulation regarding customs valuation on a basis other than the last sale that led to the introduction of a good into the customs territory of the European Communities;

(iii) Article 29 of the Community Customs Code and Article 143(1)(e) of the Implementing Regulation regarding circumstances under which parties are to be treated as "related" for customs valuation purposes;

(c) in the area of customs procedures, of:

(i) the valuation provisions contained in the Community Customs Code (Articles 28 – 36) and the Implementing Regulation (Articles 141 – 181a and Annexes 23 –29), to the extent that different member State authorities employ different audit procedures with respect to products following their release for free circulation[226];

(ii) all classification and valuation provisions in the Common Customs Tariff, the Community Customs Code and the Implementing Regulation, to the extent that different member State authorities have at their disposal different penalties to ensure compliance with those provisions;

(iii) Article 133 of the Community Customs Code and Articles 502(3) and 552 of the Implementing Regulation regarding assessment of the economic conditions for allowing processing under customs control;

(iv) Articles 263-267 of the Implementing Regulation regarding local clearance procedures; and

(d) Article 221 of the Community Customs Code regarding the period following the incurrence of a customs debt during which liability for the debt may be communicated to the debtor and the suspension of that period during the pendency of an appeal.[227]

7.87 The United States notes that it is challenging non-uniformity in the administration of EC customs law under Article X:3(a) of the GATT 1994. According to the United States, that law is administered principally by authorities located in each of the European Communities' 25 member States. The United States notes that, therefore, it is the administration of EC customs law by the authorities located in each of the 25 member States that is the focus of the United States' claim under Article X:3(a) of the GATT 1994. However, the United States also notes that decisions and actions taken by the EC Commission and other EC institutions play a role in the administration of EC customs law. In particular, the United States submits that they are relevant to the United States' claim under Article X:3(a) of the GATT 1994 inasmuch as such institutions do not step in to ensure uniform administration among the customs authorities located throughout the territory of the European Communities.[228]

7.88 In response, regarding the United States' claim that it is challenging the administration of the EC system of customs administration as a whole, the **European Communities** submits that such a

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[226] The United States made it clear that its allegations concerning audit procedures related to products following their release for free circulation in United States' first written submission, para. 96 and the United States' reply to Panel question No. 28.

[227] United States' replies to Panel question Nos. 124 and 179.

[228] United States' reply to Panel question No. 125.

wide interpretation of the United States' request for establishment of a panel is not in accordance with the requirements of Article 6.2 of the DSU, which requires identification of the specific measures at issue. The European Communities also submits that the Panel's terms of reference regarding the United States' claim under Article X:3(a) of the GATT 1994 only cover the areas of customs administration specifically enumerated in the United States' request for establishment of a panel.

(b) Analysis by the Panel

7.89 During the course of the Panel's proceedings, the United States requested the Panel to make a finding that the EC system of customs administration as a whole is inconsistent with Article X:3(a) of the GATT 1994. The United States also requested the Panel to make "subsidiary" findings regarding the specific areas of customs administration to which the United States has referred in its submissions to substantiate its claim of violation of Article X:3(a) of the GATT 1994 by the European Communities. Finally, the United States requests findings regarding administration of EC customs law by customs authorities in the 25 member States of the European Communities but notes that decisions and actions taken by the EC Commission and other EC institutions may be relevant to the Panel's findings to the extent that those institutions do not intervene to ensure uniform administration among the 25 member States.[229]

7.90 The Panel recalls that its terms of reference in this dispute are governed by the United States' request for establishment of a panel. The Panel is only authorized to make findings, conclusions and recommendations with respect to matters within its terms of reference.

7.91 Regarding the United States' request for a finding that the EC system of customs administration as a whole is inconsistent with Article X:3(a) of the GATT 1994, the Panel refers to its finding in paragraph 7.50 above that the United States' challenge of the EC system of customs administration as a whole or overall is outside the Panel's terms of reference. Accordingly, the Panel is not authorized to make any findings, conclusions and recommendations regarding the EC system of customs administration as a whole.

7.92 With respect to the United States' request for "subsidiary" findings in respect of particular areas of customs administration, the Panel recalls its finding in paragraph 7.33 above that its terms of reference relate to the manner of administration of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff, the TARIC and related measures in the areas of customs administration specifically identified in the United States' request for establishment of a panel – namely, the classification and valuation of goods, procedures for the classification and valuation of goods, procedures for the entry and release of goods, procedures for auditing entry statements after goods are released into free circulation, penalties and procedures regarding the imposition of penalties for violation of customs rules and record-keeping requirements. Therefore, the Panel is authorized to make findings with respect to the manner of administration of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff, the TARIC and related measures with respect to the areas of customs administration specifically identified in the United States' request for establishment of a panel.

7.93 We recall our finding in paragraph 7.63 above that the United States is precluded from making an "as such" challenge with respect to the design and structure of the EC system in the areas of customs administration that have been specifically identified in the United States' request for establishment of a panel. Nevertheless, as previously stated, we are authorized to make findings with respect to particular instances of alleged violations of Article X:3(a) of the GATT 1994 regarding the administration of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff and the TARIC and related measures in the areas of customs administration

[229] United States' replies to Panel question Nos. 124 and 125.

specifically identified in the United States' request. Accordingly, in the succeeding section of our report, we will address the particular instances of alleged violations of Article X:3(a) of the GATT 1994.

3. Interpretation of Article X:3(a) of the GATT 1994

7.94 Before considering the particular instances of violation of Article X:3(a) of the GATT 1994 alleged by the United States, the Panel will first explain its interpretation of the relevant terms of Article X:3(a) of the GATT 1994.

(a) Interpretation of "administer"

(i) Summary of the parties' arguments

Ordinary meaning

7.95 The **United States** submits that the ordinary meaning of "administer" that is relevant to the use of that term in Article X:3(a) of the GATT 1994 is to "carry on or execute (an office, affairs, etc.)".[230] 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.[231] The United States explains that, by its reference to "treatment" in this context, it means the application to a particular good or a particular transaction of laws, regulations, decisions and rulings of the kind described in Article X:1 of the GATT 1994. For example, according to the United States, when a customs authority applies a measure of general application – such as 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.[232]

7.96 The **European Communities** submits that the term "administer" relates to the execution of something. In the case of Article X:3(a) of the GATT 1994, "administration" relates to the laws, regulations, decision and rulings of general application referred to in Article X:1 of the GATT 1994. In other words, in the context of Article X:3(a) of the GATT 1994, to "administer" means to execute general laws and regulations, i.e. to apply them in concrete cases. The European Communities submits that this interpretation is confirmed by the French and Spanish texts, which use the terms "appliquera" and "aplicará", both of which can be translated as "shall apply". Therefore, according to the European Communities, the French and Spanish texts confirm that Article X:3(a) of the GATT 1994 is concerned with the application of the general laws and regulations referred to in Article X:1 of the GATT 1994.[233] The European Communities further submits that Article X:3(a) of the GATT 1994 exists to provide certain minimum standards of predictability for traders. Accordingly, Article X:3(a) of the GATT 1994 is primarily concerned with the administrative outcomes affecting traders, and not with laws and procedures as such. The European Communities submits that, only to the extent that a particular procedure results necessarily and inevitably in a violation of Article X:3(a) of the GATT 1994, could such a procedure itself be said to be in violation of this provision.[234]

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[230] United States' first written submission, para. 34 referring to *The New Shorter Oxford English Dictionary*, 1993, p. 28 (Exhibit US-3).
[231] United States' first written submission, para. 20.
[232] United States' reply to Panel question No. 7.
[233] European Communities' reply to Panel question No. 109.
[234] European Communities' reply to Panel question No. 94.

Substance versus administration

7.97 Referring to comments made by the Appellate Body in *EC – Bananas III*, the **European Communities** submits that the requirements of Article X:3(a) of the GATT 1994 do not concern the customs laws themselves, but only the administration of those laws.[235] According to the European Communities, this means that Article X:3(a) of the GATT 1994 does not require harmonization of laws within a Member where, for instance, different legal regimes are applicable within different parts of the territory of a WTO Member.[236]

7.98 In response, the **United States** submits that the line the European Communities draws between substance and administration would render Article X:3(a) of the GATT 1994 meaningless. The United States argues more specifically that, by characterizing all laws, regulations, and rules pertaining to customs matters as substantive measures, the European Communities would put all laws, regulations and rules that are instruments of customs administration beyond the reach of the disciplines Members have agreed to in Article X:3 of the GATT 1994.[237]

Forms of administration

7.99 The **United States** submits that Article X:3(a) of the GATT 1994 requires uniformity of administration and is indifferent to the various forms that administration may take.[238] The United States submits that Article X:3(a) of the GATT 1994 applies to administrative procedures applicable to traders, such as penalty and audit procedures, inasmuch as those procedures evidence non-uniform administration of laws, regulations, decisions, and rulings of the type described in Article X:1 of the GATT 1994.[239] According to the United States, Article X:3(a) of the GATT 1994 also applies to substantive decisions and the results of administrative processes that affect traders, such as particular decisions with respect to classification and valuation.[240] The United States submits that 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) of the GATT 1994. Where substantive decisions differ from one member State to another, this is evidence of a lack of uniform administration of the laws at issue.[241]

7.100 The United States further submits that customs laws may be administered through instruments which are themselves laws.[242] In the United States' view, 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) of the GATT 1994. That is, they are the measures being administered. According to the United States, in principle, any of these measures is capable of being administered through tools that are themselves laws, regulations or other measures.[243] The United States submits that such tools which take the form of laws, regulations or other measures and which are administrative in nature are examined under Article X:3(a) of the GATT 1994 for their substance. In contrast, administration which takes the form of laws, regulations or other measures that are not administrative in nature is examined under Article X:3(a) of the GATT 1994 not for their substance but to see whether they are being administered in a uniform manner.[244] The United States

[235] European Communities' first written submission, para. 216 referring to Appellate Body Report, *EC – Bananas III*, para. 200.
[236] European Communities' first written submission, para. 217.
[237] United States' oral statement at the first substantive meeting, para. 23.
[238] United States' replies to Panel question Nos. 93 and 94.
[239] United States' reply to Panel question No. 90.
[240] United States' reply to Panel question No. 94.
[241] United States' reply to Panel question No. 12.
[242] United States' oral statement at the first substantive meeting, para. 21.
[243] United States' reply to Panel question No. 93.
[244] United States' reply to Panel question No. 90.

explains that, where the substance of measures that administer customs laws differs from region to region, logically, administration of the customs laws is non-uniform in violation of Article X:3(a) of the GATT 1994.[245]

7.101 The **European Communities** recalls that the term to "administer" in Article X:3(a) of the GATT 1994 is defined as to "execute" or to "apply", which means that Article X:3(a) of the GATT 1994 applies to the execution in concrete cases of the laws, regulations, decisions and rulings of general application referred to in Article X:1 of the GATT 1994. According to the European Communities, a law is itself of general application, and itself needs to be executed or applied. Accordingly, it cannot be said that such a law "executes" or "applies" another law. The European Communities submits that arguing that a law can itself constitute "administration" of a law would undermine the clear distinction between the administration of laws and the laws themselves.[246] The European Communities adds that, since the laws, regulations, judicial decisions and administrative rulings referred to in Article X of the GATT 1994 all have in common that they must be "of general application", they cannot be said to be executed or applied by another law which is equally of general application.[247]

(ii) Analysis by the Panel

7.102 The United States' claim under Article X:3(a) of the GATT 1994 raises the question of the scope of the term "administer" in that Article. Some particular questions the Panel has been called upon to address in the context of this dispute are: Does the term "administer" relate to the application of laws, regulations, decisions and rulings in particular cases? If so, does it concern the manner in which administrative processes are conducted? Does it also extend to the substantive results of those processes? Does the term "administer" cover measures that are themselves in the form of laws and regulations? In interpreting Article X:3(a) of the GATT 1994 to address these questions, among others, the Panel will undertake its analysis pursuant to Articles 31 and 32 of the *Vienna Convention on the Law of Treaties (Vienna Convention).*

Ordinary meaning

7.103 Article 31(1) of the *Vienna Convention* indicates that a treaty provision must be interpreted in accordance with its *ordinary meaning*. Regarding the ordinary meaning of the term "administer", the verb is defined as to "carry on or execute (an office, affairs etc.)" and to "execute or dispense (justice)"[248]. In turn, the term "execute" is defined as "carry out, put into effect (a plan, purpose, command, sentence, law, will)".[249] The noun "administration" is defined as "the action of administering something (a sacrament, justice, remedies, an oath etc.) to another" and "the management of public affairs; government"[250].

7.104 The definition of the term "administer" when read in conjunction with the definition of the term "execute" suggests that, in the context of Article X:3(a) of the GATT 1994, "administer" refers to any action that puts into practical effect the relevant laws, regulations, decisions and/or rulings of the kind described in Article X:1 of the GATT 1994. In the Panel's view, this indicates that the term covers the *application* of laws, regulations, decisions and rulings in particular cases because the application of a law etc. in a particular case necessarily involves giving practical effect to that law etc.

[245] United States' reply to Panel question No. 133.
[246] European Communities' reply to Panel question No. 93(a).
[247] European Communities' reply to Panel question No. 93(b).
[248] *The New Shorter Oxford English Dictionary*, 1993, p. 28.
[249] *The New Shorter Oxford English Dictionary*, 1993, p. 877.
[250] *The New Shorter Oxford English Dictionary*, 1993, p. 28.

7.105 In the Panel's view, the application of a law in a particular case encompasses the *administrative process*[251] entailed in that application, because the administrative process represents the series of steps, actions or events that are taken or occur in pursuance of what is required by the law in question. In addition, we consider that the application of a law in a particular case encompasses the *results of administrative processes*. We hold this view because the results of administrative processes are the final manifestation of the application of a law in a particular case. Furthermore, the results of administrative processes are, by definition, the product of administrative processes which, as we have already said, would seem to fall within the scope of the ordinary meaning of the term "administer".

7.106 However, the Panel notes that there would appear to be nothing in the ordinary meaning of the term "administer" that would suggest that it covers *laws and regulations as such*. On the contrary, the relevant dictionary definitions indicate that the term "administer" refers to positive action or steps taken to put into effect measures such as laws and regulations, but not the laws and regulations themselves, which merely exist without effect until they are actually applied in practice.

Context

7.107 Article 31(1) of the *Vienna Convention* indicates that a treaty provision must be interpreted in its *context*. As for the relevant context for the interpretation of Article X:3(a) of the GATT 1994, notably, it is contained in Article X of the GATT 1994, which is entitled "Publication and Administration of Trade Regulations". The title as well as the content of the various provisions of Article X of the GATT 1994 indicate that that Article, at least in part, is aimed at ensuring that due process is accorded to traders when they import or export. In this regard, we note that Article X:1 of the GATT 1994 requires that customs laws, regulations etc. should be published "in such a manner as to enable governments and traders to become acquainted with them". Article X:2 of the GATT 1994 prohibits the enforcement of a customs law "before such measure has been officially published". Article X:3(b) of the GATT 1994 requires the establishment of bodies or procedures for the "review and correction of administrative action relating to customs matters". This due process theme, which would appear to be reflected in each of sub-paragraphs of Article X of the GATT 1994, has been referred to by the Appellate Body when interpreting that Article.[252]

7.108 The due process theme underlying Article X of the GATT 1994 suggests that the aim of Article X:3(a) of the GATT 1994 is to ensure that traders are treated fairly and consistently when seeking to import from or export to a particular WTO Member.[253] This, in turn, suggests to us that the term "administer" in Article X:3(a) of the GATT 1994 relates to the *application* of laws in particular cases and, particularly, to *administrative processes and their results*, since the application of the obligation of uniformity (and, for that matter, the obligations of reasonableness and impartiality) to such processes and their results pursuant to Article X:3(a) of the GATT 1994, helps to ensure that traders are treated fairly and consistently. It is unclear whether the due process objective underlying

[251] In this regard, we note that the term "process" is defined, *inter alia*, as a continuous series of actions, events or changes; a course of action, a procedure; esp. a continuous and regular action or succession of actions occurring or performed in a definite manner: *The New Shorter Oxford English Dictionary*, 1993, p. 2364.

[252] In particular, the Appellate Body referred to the fundamental importance of the transparency standards contained in Article X of the GATT 1994 and stated that that Article has due process dimensions: Appellate Body Report, *US – Underwear,* pp 20-21. In addition, the Appellate Body has stated that "[i]t is clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards of transparency and procedural fairness in the administration of trade regulations.": Appellate Body Report, *US - Shrimp*, para. 183. With respect to the latter case, the Panel notes that the meaning of the "minimum standards" referred to by the Appellate Body is discussed in paragraph 7.134 below.

[253] This interpretation appears to be reflected in the statement made by the panel in *Argentina – Hides and Leather* that "[u]niform administration requires that Members ensure that their laws are applied *consistently and predictably.*" (emphasis added): Panel Report, *Argentina – Hides and Leather*, para. 11.83.

Article X of the GATT 1994 also indicates that the term "administer" in Article X:3(a) of the GATT 1994 also relates to *laws and regulations as such*. Presumably, the publication of laws (which is required under Article X:1 of the GATT 1994) coupled with an obligation to ensure uniform, reasonable and impartial *application* of such laws and regulations would suffice to meet the due process objective underlying Article X of the GATT 1994. Therefore, it is not clear that it should be inferred from this objective that Article X:3(a) of the GATT 1994 requires *laws and regulations themselves* to also be uniform, reasonable and impartial.

Interpretation of Spanish and French versions of Article X:3(a) of the GATT 1994

7.109 The final clause of the WTO Agreement indicates that, for that Agreement, of which the GATT 1994 is a part, the English, French and Spanish texts are authentic.

7.110 Article X:3(a) of the French version of the GATT 1994 provides that:

> "Chaque partie contractante appliquera d'une manière uniforme, impartiale et raisonnable, tous les règlements, lois, décisions judiciaires et administratives visés au paragraphe premier du présent article."

7.111 Article X:3(a) of the Spanish version of the GATT 1994 provides that:

> "Cada parte contratante aplicará de manera uniforme, imparcial y razonable sus leyes, reglamentos, decisiones judiciales y disposiciones administrativas a que se refiere el párrafo 1 de este artículo."

7.112 The Panel understands that the terms "appliquera" and "aplicará" in the French and Spanish versions of Article X:3(a) of the GATT 1994 respectively are synonymous with the term "shall apply" in English.[254] Therefore, it is the Panel's view that the use of the terms "appliquera" and "aplicará" in the French and Spanish versions of Article X:3(a) of the GATT 1994 respectively tends to confirm that Article X:3(a) of the GATT relates to the application of laws, regulations, etc. but not to the laws and regulations as such.

Summary and conclusions

7.113 In summary, the interpretative material the Panel is entitled to rely upon under the *Vienna Convention* in interpreting the term "administer" in Article X:3(a) of the GATT 1994 indicates that that term relates to the application of laws and regulations, including administrative processes and their results, but not to laws and regulations as such. In this regard, we note that this view tends to be supported by statements made by panels and the Appellate Body in other cases, which have stressed that Article X:3(a) of the GATT is not concerned with the *substance* of laws, regulations, decisions and rulings themselves but, rather, with their *administration*.[255] In other words, these statements tend to support the view that Article X:3(a) of the GATT 1994 does not concern what a particular law says (i.e. its substance) but, instead, concerns the way the law is applied in practice (i.e. the way in which it is administered).

7.114 The Panel recalls the United States' argument that laws or regulations that may be construed as "tools of administration" or "administrative in nature" may be examined under Article X:3(a) of the

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[254] "Aplicar" is defined, *inter alia,* as "to apply": *Collins Spanish Dictionary*, 1985, p.41. "Appliquer" is defined, *inter alia,* as "to apply": *Robert & Collins Senior*, 2002, p. 49. We note that, in turn, the term "apply" is defined as "to put use with a particular subject matter <apply the law to the facts>": *Black's Law Dictionary*, 1999, p. 96.

[255] See, for example, Appellate Body Report, *EC – Bananas III*, para. 200.

GATT 1994 for their substance to determine whether or not they evidence non-uniform administration of laws, regulations or other measures whereas other laws and regulations (that is, those that cannot be considered as "tools of administration" or "administrative in nature") are examined under Article X:3(a) of the GATT 1994 to determine whether they are being administered in a uniform fashion.[256] However, the Panel is not persuaded by this contention. Our reasons are as follows.

7.115 *First*, the Panel considers that the interpretation put forward by the United States would blur a distinction which the Panel considers is demanded by the text of Article X:3(a) of the GATT 1994. In particular, in our view, the text of Article X:3(a) of the GATT 1994 effectively requires a distinction to be drawn between, on the one hand, the instruments being administered (i.e. laws, regulations, decisions and rulings of the kind described in Article X:1 of the GATT 1994) and, on the other hand, the acts of administration of those laws, regulations, judicial decisions and administrative rulings. However, according to the United States, laws and regulations that are "tools of administration" or "administrative in nature" are evidence of non-uniform administration of laws, regulations, judicial decisions and administrative rulings of the kind described in Article X:1 of the GATT 1994 because they put into effect those laws, regulations, decisions and rulings, but they may also simultaneously be laws and regulations of the kind described in Article X:1 of the GATT 1994. In our view, the text of Article X:3(a) of the GATT 1994 does not contemplate the possibility that laws and regulations can *simultaneously* qualify as laws, regulations, judicial decisions and administrative rulings of the kind described in Article X:1 of the GATT 1994 and as acts of administration within the meaning of Article X:3(a) of the GATT 1994.

7.116 In this regard, the Panel recalls that the obligation of uniform administration under Article X:3(a) of the GATT 1994 relates to "laws, regulations, decisions and rulings of the kind described in [Article X:1 of the GATT 1994]". In turn, Article X:1 of the GATT 1994 refers to "[l]aws, regulations, judicial decisions and administrative rulings *of general application*" (emphasis added). The ordinary meaning of the term "general", which is of relevance in the context of Article X:1 of the GATT 1994, is: "Not specifically limited in application; related to a whole class of objects, cases, occasions, etc.; (of a rule, law etc.) true for all or nearly all cases coming under its terms."[257] The ordinary meaning of the term "application" of relevance for the purposes of Article X:1 of the GATT 1994 is: "The bringing of a general or figurative statement, a theory, principle, etc., to bear upon a matter."[258] The Panel understands that, therefore, the "[l]aws, regulations, judicial decisions and administrative rulings *of general application*" described in Article X:1 of the GATT 1994 are laws, regulations, judicial decisions and administrative rulings that apply to a range of situations or cases, rather than being limited in their scope of application. Accordingly, the "laws, regulations, decisions and rulings of the kind described in [Article X:1 of the GATT 1994]" to which Article X:3(a) of the GATT 1994 refers are laws, regulations, judicial decisions and administrative rulings that apply to a range of situations or cases, rather than being limited in their scope of application.

7.117 *Second*, the Panel notes that the United States' interpretation suggests that, when applied to what the United States describes as laws or regulations that are "tools of administration" or "administrative in nature", the obligation to administer in a uniform manner under Article X:3(a) of the GATT 1994 means that the *substance* of those laws or regulations may be considered. In other words, the United States submits that, pursuant to the obligation of uniform administration under Article X:3(a) of the GATT 1994, the substance of laws or regulations that are "tools of administration" or "administrative in nature" must be uniform (i.e. the same) throughout the territory of a WTO Member. In the Panel's view, the interpretation put forward by the United States would

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[256] In this regard, the Panel notes that the United States relies upon comments made by the panel in *Argentina – Hides and Leather*, paras. 11.69-11.72.

[257] *The New Shorter Oxford English Dictionary*, p. 1073.

[258] *The New Shorter Oxford English Dictionary*, p. 100.

render redundant in Article X:3(a) of the GATT 1994 either the term "administer" or the reference to "laws, regulations, decisions and rulings of the kind described in [Article X:1 of the GATT 1994]", at least with respect to laws and regulations the United States labels as "tools of administration" or "administrative in nature". More specifically, such an interpretation would mean that, in essence, "laws, regulations, decisions and rulings of the kind described in [Article X:1 of the GATT 1994]" that are "tools of administration" or "administrative in nature" must be uniform or that "tools of administration" which are laws or regulations (regardless of whether or not they are laws, regulations, decisions and rulings of the kind described in Article X:1 of the GATT 1994) must be uniform. We note that, such an interpretation, which in the first alternative effectively reads out the term "administer" from Article X:3(a) of the GATT 1994 and in the second alternative effectively reads out the reference to "laws, regulations, decisions and rulings of the kind described in [Article X:1 of the GATT 1994]" (at least, with respect to laws, regulations, decisions or rulings that are "tools of administration" or "administrative in nature"), is precluded by the principle of effective treaty interpretation, which requires us to give meaning and effect to all the terms of Article X:3(a) of the GATT 1994.[259]

7.118 *Third*, according to the United States, all laws and regulations, whether "tools of administration" or "administrative in nature" or otherwise, are subject to the obligation of uniform administration under Article X:3(a) of the GATT 1994. However, in the United States' view, those that qualify as "tools of administration" or "administrative in nature" are examined under Article X:3(a) of the GATT 1994 for their substance as evidence of non-uniform administration of the laws, regulations or other measures that they put into effect whereas those that do not so qualify are examined under Article X:3(a) of the GATT 1994 to determine whether or not they are being administered in a uniform fashion. In the Panel's view, there is no textual support in Article X:3(a) of the GATT 1994 for this two-track, differential approach.

7.119 Therefore, in the light of the foregoing, the Panel confirms its conclusion that the term "administer" in Article X:3(a) of the GATT 1994 relates to the application of laws and regulations, including administrative processes and their results but not to laws and regulations as such.

(b) Interpretation of "uniform"

(i) Summary of the parties' arguments

7.120 The **United States** submits that the ordinary meaning of the term "uniform" that is relevant to the use of that term in Article X:3(a) of the GATT 1994 is "of one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times."[260] The United States argues that the obligation of uniform administration under Article X:3(a) of the GATT 1994 requires uniform administration across the territory of a WTO Member. 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 of that Member and the Member provides no mechanism for the systematic reconciliation of such differences.[261]

7.121 The **European Communities** submits that it agrees with the definition of the term "uniform" as "of one unchanging form, character, or kind; that is or stays the same in different places or

[259] The Appellate Body in *US – Gasoline* stated that one of the corollaries of the "general rule of interpretation" in Article 31 of the *Vienna Convention* is that "interpretation must give meaning and effect to all the terms of a treaty," and that an interpreter must not "adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.": Appellate Body Report, *US – Gasoline*, p. 23.

[260] United States' first written submission, paras. 34 and 35, referring to *The New Shorter Oxford English Dictionary*, 1993, p. 3488 (Exhibit US-4) and relying upon the panel report in *Argentina – Hides and Leather,* para. 11.80.

[261] United States' first written submission, para. 20.

circumstances, or at different times". The European Communities further submits that identical standards must apply to the requirement of uniformity over time, across the territory, or as between individuals.[262]

(ii) Analysis by the Panel

7.122 The Panel has been called upon to determine the test that should be applied in determining whether or not the obligation of "uniform" administration in Article X:3(a) of the GATT 1994 has been violated. In determining what is meant by the term "uniform" in the context of Article X:3(a) of the GATT 1994, the Panel will undertake its analysis pursuant to Articles 31 and 32 of the *Vienna Convention*.

Ordinary meaning

7.123 Regarding the *ordinary meaning* of the term "uniform", a WTO panel has noted that the dictionary defines the term "uniform" as "of one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times."[263] This definition, which has been relied upon by both the United States and the European Communities and was supported by a number of third parties to this dispute, indicates, that the term "uniform" requires, *inter alia*, geographic uniformity.[264] In other words, according to this definition, administration should be uniform in different places within a particular WTO Member pursuant to Article X:3(a) of the GATT 1994. The Panel sees no reason to disagree with this interpretation.

7.124 As for the standard that should be applied in determining whether or not administration is "uniform" in a particular case, the use of the term "the same" in the definition relied upon by the panel cited in the previous paragraph suggests that administration should be absolutely and instantaneously identical, when such administration concerns the same facts. However, the Panel notes that the term "uniform" has also been defined as "conforming to one standard, rule, or pattern; alike, similar".[265] This definition appears to imply a less exacting standard of uniformity than the former, requiring that the same rules be applied but not necessarily that the results of administration be identical. We now turn to the context for the interpretation of the term "uniformity" in Article X:3(a) of the GATT 1994 to determine which, if either, of these two interpretations of the standard of uniformity is more appropriate for the purposes of Article X:3(a) of the GATT 1994.

Context

7.125 The Panel will first consider the *immediate context* of the term "uniform", namely the other terms that appear in Article X:3(a) of the GATT 1994. The Panel recalls that Article X:3(a) of the GATT 1994 requires Members, *inter alia*, to "administer" in a uniform manner all their "laws, regulations, decisions and rulings of the kind described in Article X:1". It is clear from the terms of Article X:3(a) of the GATT 1994 that the uniformity obligation is intrinsically tied to the meaning of "administer" and to the "laws, regulations, decisions and rulings of the kind described in Article X:1 of the GATT 1994".

7.126 The Panel found in paragraph 7.113 above that the term "administer" in Article X:3(a) of the GATT 1994 relates to the application of laws and regulations, including administrative processes and

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[262] European Communities' reply to Panel question No. 151 referring to Panel Report, *Argentina – Hides and Leather*, para. 11.80.

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

[264] The Panel notes that, in the context of this dispute, it has only been called upon to address issues of alleged geographical non-uniformity. Therefore, the Panel will restrict its interpretation of the term "uniformity" to this aspect of the term.

[265] *The New Shorter Oxford English Dictionary*, 1993, p. 3488.

their results but not to laws and regulations as such. The Panel understands that the specific form, nature and scale of administration that may be at issue in a dispute concerning the application of Article X:3(a) of the GATT 1994 may vary from case to case. In particular, one case may involve administration concerning a specific, self-contained administrative process whereas another case may involve the administration of an entire system. The Panel considers that, therefore, in order to interpret the term "uniform" in a particular case involving an alleged violation of Article X:3(a) of the GATT 1994, it is necessary to first clarify the administration that is being challenged in a particular case.

7.127 Similarly, the Panel is of the view that, in order to interpret the term "uniform" in a particular case, it is necessary to clarify "laws, regulations, decisions and rulings of the kind described in [Article X:1 of the GATT 1994]", which are allegedly being administered in a non-uniform manner in violation of Article X:3(a) of the GATT 1994. At one end of the spectrum, it may be the case that a challenge under Article X:3(a) of the GATT 1994 relates to the administration of a single, specific legislative provision. At the other end of the spectrum, a challenge under Article X:3(a) of the GATT 1994 may relate to the administration of a vast body of legislative provisions. There are numerous possibilities between these two extremes of the spectrum.

7.128 It is evident from the foregoing that the form, nature and scale of administration[266] that may be at issue in a dispute concerning the application of Article X:3(a) of the GATT 1994, both in terms of the type of administration and the legislative framework within which the administration in question is occurring, may vary greatly from case to case. Given the range of possibilities in this regard, the Panel does not consider it possible to define a single concept of "uniformity" that would apply across the board. Indeed, in the Panel's view, the form, nature and scale of the alleged non-uniform administration and the laws, regulations, decisions and rulings that are allegedly being administered in a non-uniform manner should be taken into consideration when interpreting the term "uniform" in Article X:3(a) of the GATT 1994 in the context of a particular case.

7.129 The Panel considers that the narrower the challenge both in terms of the administration that is being challenged and the laws, regulations, decisions and rulings which are alleged to be administered in a non-uniform manner in a particular case, the more demanding the requirement of uniformity. On the other hand, the broader and more wide-ranging the challenge both in terms of the nature of administration that is being challenged and the specific laws, regulations, decisions and rulings or provisions thereof that are alleged to be administered in a non-uniform manner in a particular case, a less exacting standard of uniformity should be applied.

Supplementary means of interpretation

7.130 In the Panel's view, the approach set out in paragraph 7.129 above, which entails a notion of uniformity, the threshold for which differs depending upon the form, nature and scale of the challenge under Article X:3(a) of the GATT 1994 in question, is warranted by reference to the factual context, which, in our view, may be taken into consideration pursuant to Article 32 of the *Vienna Convention* as *supplementary means of interpretation*.[267]

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[266] When we refer to the "scale of administration" here and elsewhere in our report, we mean the scale of the particular act or acts of administration that are the subject of challenge under Article X:3(a) of the GATT 1994. We do *not* mean the scale of a system of administration that exists in a particular WTO Member.

[267] We note that the panel in *EC – Chicken Cuts* relied upon "factual context" when interpreting the ordinary meaning of the term "salted" in the European Communities' GATT Schedule: Panel Report, *EC – Chicken Cuts*, para. 7.105. On appeal, the European Communities challenged the panel's reliance upon the so-called "factual context". The Appellate Body upheld the panel's analysis stating that "... we would agree with the European Communities that there is no reference in the *Vienna Convention* to "factual context" as a separate analytical step under Article 31. Nevertheless, we do not believe that the Panel was incorrect to consider

7.131 In particular, the Panel considers that, if we were to interpret Article X:3(a) of the GATT 1994 to impose a requirement of absolute uniformity – that is, uniformity in every case where the facts are identical, which is suggested by one interpretation of the ordinary meaning of the term "uniform" – this would lead to a result which is unreasonable. In this regard, the Panel notes that the practical reality of many systems of customs administration is that they involve millions of acts of administration every year. The Panel does not consider that it is practically viable to achieve absolute uniformity in each and every case involving identical facts, particularly in the context of large Members across whose borders many products are being imported and exported every day and where there are many customs officials involved.

7.132 The Panel considers that the factual context also indicates that the interpretation of the term "uniform" in Article X:3(a) of the GATT 1994 does not necessarily entail instantaneous uniformity, which could be inferred from one interpretation of the ordinary meaning of the term "uniform". In our view, interpreting Article X:3(a) of the GATT 1994 to impose an obligation of instantaneous uniformity would lead to an unreasonable result since achieving such instantaneous uniformity would not always be practically feasible in respect of many systems of customs administration. We consider that, rather, uniformity must be attained within a period of time that is reasonable. The Panel considers that, in order to avoid a finding of non-uniform administration under Article X:3(a) of the GATT 1994, it must be clear at the time of establishment of the panel that any non-uniformity that may have existed was remedied within a period of time that is reasonable. In our view, what is reasonable will depend upon the form, nature and scale of the administration at issue. It will also depend upon the complexity of the factual and legal issues raised by the act of administration that is being challenged.

7.133 In our view, in no case can non-uniform administration persist for indefinite periods of time as this would effectively render redundant the term "uniform" in Article X:3(a) of the GATT 1994, which would be contrary to the principle of effective treaty interpretation.[268] Furthermore, such an interpretation would be inconsistent with our obligation under the *Vienna Convention* to interpret Article X:3(a) of the GATT 1994 in good faith.

7.134 In all cases, regardless of the form, nature and scale of administration at issue, the Panel considers that administration should not fall below certain minimum standards of due process, which encompass notions such as notice, transparency, fairness and equity.[269] In the Panel's view, such

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elements such as the 'products covered by the concession contained in heading 02.10', 'flavour, texture, [and] other physical properties' of the products falling under heading 02.10, and 'preservation' when interpreting the term 'salted' as it appears in heading 02.10. The Panel's consideration of these elements under 'ordinary meaning' of the term 'salted' complemented its analysis of the dictionary definitions of that term. In any event, even if we were to agree with the European Communities that these elements are not to be considered under 'ordinary meaning', they certainly could be considered under 'context'.": Appellate Body Report, *EC – Chicken Cuts*, para. 176. In the Panel's view, the Appellate Body' approval of the use of the "factual context" under Article 31 of the *Vienna Convention* indicates that it may alternatively/additionally be taken into consideration under Article 32 of the *Vienna Convention*. We find support for this view in *EC – Chicken Cuts*, where the Appellate Body stated that: "We stress, moreover, that Article 32 does not define exhaustively the supplementary means of interpretation to which an interpreter may have recourse. It states only that they *include* the preparatory work of the treaty and the circumstances of its conclusion. Thus, an interpreter has a certain flexibility in considering relevant supplementary means in a given case so as to assist in ascertaining the common intentions of the parties.": Appellate Body Report, *EC – Chicken Cuts*, para. 283.

[268] In this regard, we recall that in *US – Gasoline*, the Appellate Body stated that one of the corollaries of the "general rule of interpretation" in Article 31 of the *Vienna Convention* is that "interpretation must give meaning and effect to all the terms of a treaty," and that an interpreter must not "adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.": Appellate Body Report, *US – Gasoline*, p. 23.

[269] We note in this regard that, in *US – Shrimp*, the Appellate Body stated that:

standards derive from the broader due process context of Article X:3(a) of the GATT 1994, which has been discussed above in paragraphs 7.107 – 7.108.

Summary and conclusions

7.135 In summary, the interpretative material upon which the Panel is entitled to rely under the *Vienna Convention* in interpreting the term "uniform" in Article X:3(a) of the GATT 1994 indicates that that term covers, *inter alia*, geographic uniformity. In other words, administration should be uniform in different places within a particular WTO Member. Further, the Panel considers that the form, nature and scale of the alleged non-uniform administration and the laws, regulations, judicial decisions and rulings that are allegedly being administered in a non-uniform manner should be taken into consideration when interpreting the term "uniform" in Article X:3(a) of the GATT 1994 in the context of a particular case. The Panel considers that the narrower the challenge both in terms of the administration that is being challenged and the laws, regulations, decisions and rulings which are alleged to be administered in a non-uniform manner in a particular case, the more demanding the requirement of uniformity. The broader and more wide-ranging the challenge both in terms of the nature of administration that is being challenged and the specific laws, regulations, decisions and rulings or provisions thereof that are alleged to be administered in a non-uniform manner in a particular case, a less exacting standard of uniformity should be applied. The Panel also considers that the interpretation of the term "uniform" in Article X:3(a) of the GATT 1994 does not necessarily entail instantaneous uniformity. Rather, uniformity must be attained within a period of time that is reasonable. What is reasonable will depend upon the form, nature and scale of the administration at issue as well as the complexity of the factual and legal issues raised by the act of administration that is being challenged. It is the Panel's view that, in all cases, regardless of the form, nature and scope of administration at issue, administration should not fall below certain minimum standards of due process, which encompass notions such as notice, transparency, fairness and equity.

4. Relevance of Article XXIV:12 of the GATT 1994 for the interpretation of Article X:3(a) of the GATT 1994 in the context of this dispute

(a) Summary of the parties' arguments

7.136 The **European Communities** submits that the reality of the United States' claim under Article X:3(a) of the GATT 1994 is that it is effectively seeking to require the European Communities

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"It appears to us that, effectively, exporting Members applying for certification whose applications are rejected are denied basic fairness and due process, and are discriminated against, vis-à-vis those Members which are granted certification.

The provisions of Article X:3 of the GATT 1994 bear upon this matter. In our view, Section 609 falls within the 'laws, regulations, judicial decisions and administrative rulings of general application' described in Article X:1. Inasmuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure which purports to be an exception to the treaty obligations of the Member imposing the measure and which effectively results in a suspension pro hac vice of the treaty rights of other Members.

It is also clear to us that *Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations* which, in our view, are not met here. The non-transparent and ex parte nature of the internal governmental procedures applied by the competent officials in the Office of Marine Conservation, the Department of State, and the United States National Marine Fisheries Service throughout the certification processes under Section 609, as well as the fact that countries whose applications are denied do not receive formal notice of such denial, nor of the reasons for the denial, and the fact, too, that there is no formal legal procedure for review of, or appeal from, a denial of an application, are all contrary to the spirit, if not the letter, of Article X:3 of the GATT 1994." (emphasis added): Appellate Body Report, *US – Shrimp*, paras. 181 - 183.

to establish a central customs agency.[270] The European Communities argues that Article X:3(a) of the GATT 1994 does not prescribe the ways in which a WTO Member must implement its customs laws, including the question of through what authorities or administration customs laws are administered. According to the European Communities, Article X:3(a) of the GATT 1994 in no way excludes that, in a federal or quasi-federal state or entity, customs laws could be administered by authorities at the sub-federal level.[271] In support, the European Communities refers to Article XXIV:12 of the GATT 1994, which provides that "[e]ach contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories".[272] The European Communities notes that the GATT panel in *Canada – Gold Coins* found that Article XXIV:12 of the GATT 1994 has the "function of allowing federal States to accede to the General Agreement without having to change the federal distribution of competence". The European Communities submits that, accordingly, any interpretation of Article X:3(a) of the GATT 1994 that would affect the internal distribution of competence is incompatible with Article XXIV:12 of the GATT 1994.[273]

7.137 In response, the **United States** clarifies that the United States has never insisted that the European Communities must create an EC customs agency and an EC customs court and must harmonize member States' laws. The United States simply argues that the European Communities, like other WTO Members, must administer its customs laws in a manner consistent with Article X:3(a) of the GATT 1994.[274] The United States submits that Article XXIV:12 of the GATT 1994 concerns "the observance of the General Agreement by regional and local government authorities." According to the United States, in contrast, this dispute does not concern the observance of an obligation under the GATT 1994 by regional and local government authorities but, rather, by the European Communities itself. The United States argues that, therefore, this case is distinguishable from *Canada – Gold Coins*, which involved a provincial government of Canada adopting a measure for the raising of provincial revenue – a power that Canada's constitution vested exclusively in the provincial legislature – in a manner that put Canada in breach of its obligation under Article III of the GATT 1994.[275] Additionally, the United States notes that, if the European Communities has sought to invoke Article XXIV:12 of the GATT 1994 as a defence, this entails a burden to demonstrate that lapses in the uniform administration of EC customs law concern matters "which the central government cannot control under the constitutional distribution of powers".[276] According to the United States, if the European Communities is arguing that it is not able to control the administration of customs law by the customs authorities in the member States under its constitutional distribution of powers, this reinforces the point that the European Communities is not meeting its obligation to administer its customs law uniformly under Article X:3(a) of the GATT 1994.[277]

7.138 The **European Communities** responds that Article XXIV:12 of the GATT 1994 must have a useful meaning. In the context of Article XXIV:12 of the GATT 1994, it must be considered whether the WTO Member in question has regional or local governments and authorities within its territories which have responsibilities for implementing the provisions of the GATT. According to the European Communities, if it does, the Member in question must take "reasonable measures" to ensure compliance.[278] The European Communities argues that, in order to determine what is a "reasonable

[270] European Communities' second written submission, para. 30.
[271] European Communities' first written submission, para. 252.
[272] European Communities' first written submission paras. 220-221.
[273] European Communities' first written submission paras. 220-221, referring to GATT Panel Report, *Canada – Gold Coins*, para. 58.
[274] United States' comments on the European Communities' reply to Panel question No. 158.
[275] United States' comments on the European Communities' reply to Panel question No. 158.
[276] GATT Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, BISD 39S/206, para. 5.79 (adopted 19 June 1992).
[277] United States' comments on the European Communities' reply to Panel question No. 158.
[278] European Communities' comments on the United States' reply to Panel question No. 176.

measure", the panel in *Canada – Gold Coins* held that "the consequences of [...] non-observance [of the provisions of the GATT] by the local government for trade relations with other contracting parties are to be weighed against the domestic difficulties of securing observance".[279]

7.139 The **United States** submits that, even if Article XXIV:12 of the GATT 1994 were relevant to this dispute, it would not excuse the European Communities from its obligation under Article X:3(a) of the GATT 1994 or in any way affect its obligation under that Article. In this regard, the United States refers to paragraph 13 of the Understanding on the Interpretation of Article XXIV of the GATT 1994 which, according to the United States, makes clear that "[e]ach Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994... ." That is, in the United States' view, Article XXIV:12 of the GATT 1994 imposes an obligation on Members with federal structures to take "reasonable measures" to "ensure observance" by local or regional governments of a Member's obligations but does not alter the content of any GATT 1994 obligation for such Members. Further, according to the United States, even where observance of WTO obligations by regional or local governments is at issue, paragraph 14 of the Understanding on Article XXIV and Article 22.9 of the DSU provide that "[t]he provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the [DSU]" and "[t]he provisions of the covered agreements and [the DSU]," respectively, "relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance." The United States submits that, therefore, even if, pursuant to Article XXIV:12 of the GATT 1994, the European Communities' only obligation under Article X:3(a) of the GATT 1994 was to take "reasonable measures" to secure uniform administration of EC customs law, its failure to actually administer its customs law in a uniform manner would not excuse it from relevant provisions on compensation and suspension of concessions.[280]

(b) Analysis by the Panel

7.140 The Panel notes that, in the context of this dispute, the United States argues that the European Communities has breached its obligation under Article X:3(a) of the GATT 1994 by virtue of its failure to administer EC customs law in a uniform manner.[281] The United States acknowledges that the administration of EC customs law is carried out by the customs authorities in the member States but submits that, to the extent that the European Communities does not control the administration by those customs authorities to ensure uniform administration, the European Communities is in violation of Article X:3(a) of the GATT 1994.[282]

7.141 By way of preliminary comment, the Panel notes that the terms of Article X:3(a) of the GATT 1994 simply require Members to administer laws, regulations, decisions and rulings of the kind described in Article X:1 in a manner that is, *inter alia*, uniform. Article X:3(a) of the GATT 1994 does not prescribe how uniform administration must be achieved. Therefore, the Panel considers that Article X:3(a) of the GATT 1994 vests discretion in Members to determine how to achieve uniform administration, including the nature and level of entities that are charged with administration and the tools that are put in place to achieve uniform administration. Accordingly, the Panel considers that there is nothing in Article X:3(a) of the GATT 1994 to prevent the European Communities from administering its customs laws through, *inter alia*, customs authorities of its constituent member States.[283]

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

[280] United States' comments on the European Communities' reply to Panel question No. 158.

[281] United States' comments on the European Communities' reply to Panel question No. 158.

[282] United States' comments on the European Communities' reply to Panel question No. 158.

[283] The Panel notes that, in the context of this dispute, the United States has not challenged as such the fact that the European Communities administers its customs laws through, *inter alia*, customs authorities of its constituent member States.

7.142 The question has arisen in this dispute as to whether or not Article XXIV:12 of the GATT 1994 has the effect of limiting the European Communities' obligations under Article X:3(a) of the GATT 1994 so that it is only required to take "reasonable measures" to ensure uniform administration by the customs authorities of the member States.[284] Article XXIV:12 of GATT 1994 provides that:

> "Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories."

7.143 The Understanding on the Interpretation of Article XXIV of GATT 1994 ("the Understanding"), which is part of the GATT 1994[285] and which was agreed upon during the Uruguay Round negotiations, provides the following with respect to Article XXIV:12 of the GATT 1994:

> "Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.
>
> The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked in respect of measures affecting its observance taken by regional or local governments or authorities within the territory of a Member. When the Dispute Settlement Body has ruled that a provision of GATT 1994 has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.
>
> Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of GATT 1994 taken within the territory of the former."

7.144 The Panel notes that Article XXIV:12 of the GATT 1994 is drafted as a positive obligation rather than as a defence. More specifically, the use of the word "shall"[286] in Article XXIV:12 of the GATT 1994 indicates that that Article imposes an obligation on Members to take all reasonable measures to ensure that local authorities comply with WTO obligations. This would tend to indicate that Article XXIV:12 of the GATT 1994 cannot be relied upon to attenuate nor to derogate from the provisions of the GATT 1994 (including Article X:3(a) of the GATT 1994), to which Article XXIV:12 of the GATT 1994 refers. The Understanding supports the view that Article XXIV:12 of the GATT 1994 imposes a positive obligation rather than attenuating or derogating from the provisions of the GATT 1994. Specifically, it states that "[e]ach Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994", suggesting that Article XXIV:12 of the GATT 1994 does not protect Members from being found in violation of their WTO obligations.[287] In addition, we note that the Understanding clearly states that, when the DSB

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[284] See, for example, European Communities' comments on the United States' reply to Panel question No. 176 and United States' comments on the European Communities' reply to Panel question No. 158.

[285] See Article 1(c) of the GATT 1994.

[286] Black's Law Dictionary defines the term "shall" as "has a duty to; more broadly, is required to.": *Black's Law Dictionary*, 1999, p. 1379.

[287] Further support for the view that Article XXIV:12 of the GATT 1994 does not attenuate nor derogate from the provisions of the GATT 1994, including Article X:3(a) of the GATT 1994 derives from Article XVI:4 of the WTO Agreement. Article XVI:4 of the WTO Agreement provides that: "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as

has ruled that a provision of GATT 1994 has not been observed by regional or local governments or authorities of a WTO Member, "the provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance".

7.145 In the light of the foregoing, it is the Panel's view that, irrespective of whether or not Article XXIV:12 of the GATT 1994 is applicable in the context of this dispute[288], that Article does not constitute an exception nor a derogation from the obligation of uniform administration in Article X:3(a) of the GATT 1994. Therefore, Article XXIV:12 of the GATT 1994 has no impact upon our examination of the United States' claims under Article X:3(a) of the GATT 1994.

5. Burden of proof

(a) Summary of parties' arguments

7.146 The **United States** submits that, under Article X:3(a) of the GATT 1994, it is necessary to examine the real effect that a measure might have on traders operating in the commercial world.[289]. According to the United States, this is evident from the context of Article X:3(a) of the GATT 1994, which includes in Article X:1 of the GATT 1994 an obligation to promptly publish certain customs measures and in Article X:3(b) of the GATT 1994 an obligation to provide fora for prompt review and correction of customs decisions, both of which plainly are oriented to facilitating the operations of traders.[290]

7.147 The **European Communities** agrees that the effect of administration on traders is a relevant consideration in the interpretation of Article X:3(a) of the GATT 1994. According to the European Communities, this means that the treatment which a trader can expect to receive from the customs authorities of a WTO Member should be reasonably predictable. This does not mean that individual instances of administrative error, which can be corrected through administrative and judicial mechanisms provided by a WTO Member's system, can be regarded as constituting a violation of Article X:3(a) of the GATT 1994. The European Communities submits that, rather, the effect on traders should be demonstrable through adequate evidence. The European Communities also submits that measures which entail no relevant difference in treatment between traders cannot be held to constitute a violation of Article X:3(a) of the GATT 1994.[291] The European Communities also considers that there is no requirement to show trade damage in order to prove a violation of Article X:3(a) of the GATT 1994. Rather, the question to be addressed is whether the complainant has suffered nullification and impairment within the meaning of Article XXIII of the GATT 1994. According to the European Communities, it follows from Article 3.8 of the DSU that, where there is an infringement of the obligations under the covered agreements, this is normally presumed to

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provided in the annexed Agreements." We understand that Article XVI:4 of the WTO Agreement establishes a clear obligation for all WTO Members to ensure the conformity of its laws, regulations and administrative procedures with their obligations under the covered Agreements, including the GATT 1994. See Appellate Body Report, *EC – Sardines*, para. 213.

[288] In this regard, the Panel recalls that the United States has suggested that Article XXIV:12 is inapplicable in the context of this dispute: United States' comments on the European Communities' reply to Panel question No. 158. The Panel notes that it does not need to take a position on whether or not the member States of the European Communities qualify as "regional and local governments or authorities" within the meaning of Article XXIV:12 of the GATT 1994.

[289] United States' first written submission, para. 117 referring to Panel Report, *Argentina – Hides and Leather*, para. 11.77.

[290] United States' first written submission, para. 117 referring to Panel Report, *Argentina – Hides and Leather*, para. 11.76.

[291] European Communities' reply to Panel question No. 174.

constitute a case of nullification and impairment. However, this presumption can be rebutted by the Member complained against.[292]

7.148 In response, the **United States** submits that an examination of the real effect that a measure might have on traders is not confined to an examination of whether traders in similar situations are required to pay different customs duties but includes consideration of the possible impact on the competitive situation. The United States submits that, therefore, in determining whether Article X:3(a) of the GATT 1994 has been violated, a panel should ask not whether one WTO Member has been treated differently from other WTO Members. Rather, it should ask whether traders have been treated differently based, for example, on the part of the Member's territory through which they import their goods. If the manner in which a Member administers its customs law might encourage a trader to prefer importation through one region rather than another, this would be probative of non-uniform administration, in breach of Article X:3(a) of the GATT 1994.[293] The United States submits that benefits accruing to the United States are nullified or impaired if traders are effectively compelled to alter shipping patterns or incur additional costs as a result of non-uniform administration in violation of Article X:3(a) of the GATT 1994.[294]

7.149 The **European Communities** submits that a minimal threshold applies under Article X:3(a) of the GATT 1994, which implies that a variation in administrative practice must have a significant impact on the administration of customs laws in order to constitute a breach of Article X:3(a) of the GATT 1994.[295] According to the European Communities, this minimum threshold reflects the fact that Article X:3(a) of the GATT 1994 does not require uniformity for its own sake but, rather, intends to protect the interests of traders.[296] In support, the European Communities refers to the Appellate Body's comments in *EC – Poultry* which, according to the European Communities, indicate that individual instances of administration are not probative for a violation of Article X:3(a) of the GATT 1994.[297] Further, the European Communities submits that the panel's comments in *US – Hot Rolled Steel* indicate that a pattern of decision-making is needed for the purposes of Article X:3(a) of the GATT 1994.[298] The European Communities argues that such an interpretation of Article X:3(a) of the GATT 1994 is particularly necessary given that customs authorities have to operate in complex and rapidly changing circumstances, to which they constantly need to adapt. Moreover, according to the European Communities, customs administration is a complex system, whose outcomes are determined by many factors, not all of which are attributable to the Member in question.[299]

7.150 In response, the **United States** submits that the European Communities urges on the Panel a relative view of Article X:3(a) of the GATT 1994 which requires an assessment of the particularities of the system of customs administration in question.[300] The United States also argues that, while the text of Article X:3(a) of the GATT 1994 refers to administration in a "uniform manner", it does not refer to a "pattern of non-uniform" administration.[301] Further, the United States argues that the European Communities' contention that non-uniformity is impermissible only when it amounts to a

[292] European Communities' reply to Panel question No. 175.
[293] United States' replies to Panel question Nos. 174 and 175.
[294] United States' comments on the European Communities' reply to Panel question No. 175.
[295] European Communities' oral statement at the first substantive meeting, para. 25 referring to GATT Panel Report, *EEC – Dessert Apples*, para. 12.30.
[296] European Communities' reply to Panel question No. 46.
[297] European Communities' first written submission, para. 239 referring to Appellate Body Report, *EC – Poultry*, paras. 111 and 113.
[298] European Communities' first written submission, para. 240 referring to Panel Report, *US – Hot Rolled Steel*, para. 7.268; European Communities' oral statement at the first substantive meeting, para. 26; European Communities' oral statement at the second substantive meeting, para. 28.
[299] European Communities' oral statement at the first substantive meeting, para. 26.
[300] United States' second written submission, para. 12.
[301] United States' second written submission, para. 28.

pattern of non-uniformity is misplaced because it draws this proposition from two reports that are not on point. First, with respect to the Appellate Body's report in *EC – Poultry*, the United States submits that the relevant issue there was not the meaning of uniform administration under Article X:3(a) of the GATT 1994 but, rather, whether or not Article X of the GATT 1994 applies to a particular import licence issued with respect to a particular shipment.[302] The United States submits that, similarly, the European Communities relies upon a single sentence in the panel report in *US – Hot-Rolled Steel*.[303] According to the United States, the panel in that case was not referring to a pattern as a generic requirement for making out a claim under Article X:3(a) of the GATT 194, but a pattern that might have enabled the panel to determine whether the particular application of the anti-dumping law at issue in that case was uniform or not.[304] The United States contends that the claim at issue in the present dispute is very different from the claim Japan was making in *US – Hot-Rolled Steel*. The United States submits that it is not arguing that a particular application of EC customs law represents non-uniform administration. Rather, it is arguing that the EC system of customs administration as a whole does not result in the uniform administration that Article X:3(a) of the GATT 1994 requires.[305]

(b) Analysis by the Panel

7.151 The Panel considers that the burden of proof for the purposes of the United States' claim under Article X:3(a) of the GATT 1994 is closely linked to the Panel's interpretation of the terms of that Article. Of particular relevance to the burden proof in the context of this dispute is the Panel's finding in paragraph 7.135 above that a notion of uniformity applies in the context of Article X:3(a) of the GATT 1994, the threshold for which differs depending upon the nature of the challenge in question. Such a notion of the term "uniform" would appear to entail a different burden of proof corresponding to the form, nature and scale of the administration that is being challenged under Article X:3(a) of the GATT 1994 in a particular case. As the Panel stated in paragraph 7.135 above, the narrower the challenge, the higher the degree of uniformity required; the broader the challenge, the less exacting the standard of uniformity to be applied.

7.152 With respect to this dispute, the Panel recalls its finding in paragraph 7.64 above that its terms of reference authorise the Panel to consider the manner of administration by the national customs authorities of the member States of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff, the TARIC and related measures in the areas of customs administration specifically identified in the United States' request for establishment of a panel. Pursuant to the Panel's terms of reference, the Panel is precluded from considering "as such" challenges of the design and structure of the EC system of customs administration, including challenges of the design and structure of the EC system in the areas of customs administration specifically identified in the United States' request for establishment of a panel. However, we are authorized to consider particular instances of administration of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff and the TARIC and related measures in the areas of customs administration specifically identified in the United States' request in particular instances which have been relied upon by the United States in the context of this dispute.

7.153 In the light of our terms of reference, for the purposes of resolving this dispute, the Panel considers that it is only necessary to determine the burden of proof applicable for particular instances of administration of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff and the TARIC and related measures in the areas of customs administration specifically identified in the United States' request, which have been relied upon by the United States in the context of this dispute. In the Panel's view, as will be explained in further detail below, such

[302] United States' oral statement at the first substantive meeting, paras. 17-19.
[303] United States' second written submission, para. 33.
[304] United States' second written submission, para. 35.
[305] United States' second written submission, paras. 36-38.

instances constitute narrow challenges when considered in the context of the EC system of customs administration as a whole. Therefore, in the Panel's view, a high degree of uniformity should apply in the context of such instances.

7.154 We do not consider it necessary to determine precisely how demanding the requirement of uniformity should be in this regard. The Panel considers that this will depend upon the circumstances surrounding the particular instance of alleged non-uniform administration. In deciding whether or not the standard has been met in a particular instance, the Panel considers it necessary to bear in mind the minimum standards of due process that underlie Article X:3(a) of the GATT 1994.[306] It is also necessary to ensure that the threshold is not set so high that Article X:3(a) of the GATT 1994 could never be violated as this is clearly not what the drafters of Article X:3(a) of the GATT 1994 intended. In addition, it is the Panel's view that a violation of Article X:3(a) of the GATT 1994 will be demonstrated if the non-uniform administration in question results in an actual or possible future adverse impact on the trading environment.[307]

6. Specific alleged violations of Article X:3(a) of the GATT 1994

7.155 In this section of the Panel's report, the Panel will address the particular instances of alleged violations of Article X:3(a) of the GATT 1994 regarding the administration of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff, the TARIC and related measures in the areas of customs administration specifically identified in the United States' request for establishment of a panel. Before doing so, however, the Panel considers it necessary to explain its understanding of certain aspects of the manner in which the EC system of customs administration functions because this is important context for the examination of the particular instances of alleged violations of Article X:3(a) of the GATT 1994 in respect of which such aspects have been raised. To the extent necessary, the Panel will consider other aspects of the EC system of customs administration when examining the particular instances of alleged violations of Article X:3(a) of the GATT 1994.

(a) Relevant aspects of the EC system of customs administration

(i) Administration by customs authorities in the EC member States

7.156 The Panel has been informed by the European Communities that the administration of EC customs law is primarily the responsibility of the member States.[308] The Panel understands that EC customs law is directly applicable in the member States, which means that such law must be fully and uniformly applied in all the member States.[309] Moreover, the European Communities has informed the Panel that the customs authorities of the member State authorities must apply EC customs law in accordance with all available guidance regarding its proper meaning, including the EC Treaty and the case law of the ECJ.[310]

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[306] See paragraph 7.134 above.

[307] We note in this regard that Article 3.8 of the DSU provides that: "In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rule has an adverse impact on other Members parties [sic] to that covered agreement, and in such cases, it shall be up to the other Member against whom the complaint has been brought to rebut the charge".

[308] European Communities' reply to Panel question No. 146.

[309] Case 106/77, *Simmenthal II*, [1978] ECR 629 (Exhibit EC-5).

[310] European Communities' reply to Panel question No. 77.

(ii) Institutions and mechanisms involved in the administration of the EC customs laws

Institutions and mechanisms applicable generally in all areas of customs administration[311]

Customs Code Committee

7.157 The European Communities identifies the Customs Code Committee as an important institution that helps to ensure uniform administration of EC customs law among the customs authorities of the member States.[312] As noted in paragraph 2.51 above in the factual aspects of the Panel's report, the Customs Code Committee is established by Articles 247a(1) and 248a(1) of the Community Customs Code. The Customs Code Committee is composed of representatives from each member State and is chaired by a representative of the Commission. Article 249 of the Community Customs Code states that the Customs Code Committee has the authority to examine any question concerning customs legislation which is raised by its chairperson, either on his or her own initiative or at the request of a member State's representative. A similar provision is found in Article 8 of Regulation No. 2658/87 establishing the Common Customs Tariff, according to which the Committee may examine any matter referred to it by its chairperson, either on his or her own initiative or at the request of a representative of a member State, concerning the Combined Nomenclature or the TARIC. The European Communities notes that the total number of meetings of the Customs Code Committee was 77 in 2002 (with 113 ½ days of meetings), 47 in 2003 (with 77 ½ days of meetings) and 85 in 2004 (with 118 ½ days of meetings).[313]

7.158 The Panel understands that, in practice, the Customs Code Committee gives opinions on amendments to the Community Customs Code or implementing measures proposed by the Commission; examines questions concerning the interpretation of customs provisions or definitions of terms used in customs legislation; and exercises powers granted by virtue of specific customs legislation. More particularly, in the *tariff classification area*, the Panel has been informed by the European Communities that the Customs Code Committee is frequently asked to provide opinions on measures proposed by the Commission which will secure a uniform application of the Common Customs Tariff, such as classification regulations and EC explanatory notes. In addition, the Committee may adopt opinions on specific issues of tariff classification.[314] In the *customs valuation area*, the Panel has been informed by the European Communities that the Customs Code Committee will consider divergence in the application of EC customs law on customs valuation which is brought before it by the Commission or a member State.[315] After such consideration, the Customs Code Committee may issue opinions, which may take the form of conclusions or commentaries on the rules on customs valuation.[316] Additionally, the Commission will consult the Customs Code Committee on draft amendments to the valuation rules contained in the Implementing Regulation.[317]

[311] The Panel notes that, in addition to the institutions and mechanisms dealt with below, the European Communities referred to budgetary and financial control mechanisms in place in the European Communities, which it argues helps to achieve uniform administration of EC customs law by the customs authorities of the member States: European Communities' first written submission, para. 158. These budgetary and financial control mechanisms are dealt with in paragraph 2.33 above.

[312] European Communities' first written submission, para. 85.

[313] European Communities' reply to Panel question No. 58(c). The European Communities also refers to Exhibit EC-103, which contains an overview of the number of meetings per section of the Customs Code Committee.

[314] European Communities' reply to Panel question No. 58(i)(iii).

[315] European Communities' reply to Panel question No. 58(j)(ii).

[316] These conclusions and commentaries are contained in Compendium of Customs Valuation Texts of eth Customs Code Committee, 2 December 2004 (Exhibit EC-37).

[317] European Communities' reply to Panel question No. 58(j)(iii).

7.159 It is apparent that not all matters entailing divergence in the administration of EC customs law between the customs authorities of the member States are brought before the Customs Code Committee for its consideration.[318] Moreover, the Committee may consider matters only if raised by the chairperson of the Committee or at the request of the member States' representatives.[319] The European Communities has stressed that the Customs Code Committee will not substitute itself for the individual customs authorities nor the competent courts of the member States in pending cases and, therefore, it will not usually examine individual cases.[320] Even in cases where matters are brought before the Customs Code Committee, the European Communities has acknowledged that, under the Rules of Procedure of the Customs Code Committee, there is no specific provision bestowing the Commission with the power to ask customs authorities of the member States to provide specific information.[321] Furthermore, in such cases, difficulties in coming to an agreement and delays may occur due, *inter alia* to the fact that the Committee is composed of representatives from each member State[322] and that decisions are determined by means of a qualified majority vote.[323]

7.160 In addition, it is notable that the opinions of the Customs Code Committee are not legally binding on the customs authorities of the member States.[324] As stated by the European Communities itself, the Customs Code Committee does not have the authority to take decisions with respect to customs matters. Rather, the Customs Code Committee merely assists the competent EC institutions in the context of the management or regulatory procedures foreseen under the Customs Code Committee.[325] However, even in this capacity, it is unclear whether the opinions and

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[318] In the EC Court of Auditors Special Report No. 23/2000 concerning valuation of imported goods for customs purposes dated 14 March 2001, the EC Court of Auditors stated that "[m]any complex subject matters within the valuation area are not brought before the Valuation Committee.": EC Court of Auditors Special Report No 23/2000 concerning valuation of imported goods for customs purposes, 14 March 2001, para. 29 (Exhibit US-14).

[319] Article 249 of the Community Customs Code provides that: "The Committee may examine any question concerning customs legislation which is raised by its chairman, either on his own initiative or at the request of a Member State's representative." (Exhibit US-5).

[320] European Communities' replies to Panel question Nos. 58(j)(i) and 58(j)(v).

[321] European Communities' reply to Panel question No. 58(j)(v). The European Communities refers to Article 10 of the EC Treaty in this regard, which is dealt with below in paragraph 7.161 *et seq*.

[322] In the EC Court of Auditors Special Report No. 23/2000 concerning valuation of imported goods for customs purposes dated 14 March 2001, the EC Court of Auditors stated that: "Although the Valuation Committee offers a platform for the Member States to establish a common approach to similar individual cases, inevitably, with 15 different customs authorities, progress towards achieving consensus is slow. The Valuation Committee frequently becomes entrenched in details and disagreements between the representatives of the Member States"": EC Court of Auditors Special Report No 23/2000 concerning valuation of imported goods for customs purposes, 14 March 2001, para. 26 (Exhibit US-14). In addition, the EC Court of Auditors notes that "the Valuation Committee is too cumbersome a vehicle to achieve the Commission objectives": EC Court of Auditors Special Report No 23/2000 concerning valuation of imported goods for customs purposes, 14 March 2001, para. 29 (Exhibit US-14). Further, in a statement made by the Head of Customs Legislation Unit, European Commission in June 2004, Michael Lux noted that "organising a majority decision [of the Customs Code Committee] will be more difficult, since one will have to negotiate with 25 – instead of 15 – Member States. With so many members, the chairing of meetings will have to be firm to obtain any results at all.": *EU enlargement and customs law: What will change?*, Taxud/463/2004, Rev. 1, 14 June 2004, p. 4 (Exhibit US-15). In addition, in the context of this dispute, the European Communities has acknowledged that there are no specific time limits for how long a matter can remain on the agenda of the Customs Code Committee: European Communities' reply to Panel question No. 159(a).

[323] Article 6 of the Rules of Procedures of the Customs Code Committee, 5 December 2001 (Exhibit US-9).

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

[325] European Communities' first written submission, para. 266. See paragraphs 2.20 – 2.21 above, where the regulatory and management procedures are described.

recommendations made by the Customs Code Committee to the EC institutions can be enforced.[326] Therefore, in the light of the foregoing, it would appear that the Customs Code Committee has limited power to impose uniform administration of EC customs law on customs authorities of the member States.[327]

Article 10 of the EC Treaty

7.161 The European Communities submits that the "duty of cooperation" contained in Article 10 of the EC Treaty makes an important contribution to the uniform administration of EC customs law by the customs authorities of the member States.[328]

7.162 Article 10 of the EC Treaty provides that:

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

7.163 According to the European Communities, the "duty of cooperation" in Article 10 of the EC Treaty is legally binding and directly applicable in all member States. The European Communities submits that, therefore, the obligation contained in Article 10 of the EC Treaty must be respected by member States' authorities in the administration of EC customs law. The European Communities also submits that, where a member State infringes the duty of cooperation, this constitutes an infringement of the EC Treaty, against which the European Commission can bring infringement proceedings pursuant to Article 226 of the EC Treaty.[329]

7.164 Notably, Article 10 of the EC Treaty does not prescribe the "appropriate measures" which the member States (including customs authorities of the member States) must take to ensure fulfilment of their obligations under EC law, including EC customs law. Further, the European Communities has only referred to a handful of cases in which Article 10 of the EC Treaty was invoked as a basis for ensuring uniform administration of EC customs law among the customs authorities of the member

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[326] In the EC Court of Auditors Special Report No. 23/2000 concerning valuation of imported goods for customs purposes dated 14 March 2001, the EC Court of Auditors stated that "the Commission has not the authority to enforce the results of the Valuation Committee's work": EC Court of Auditors Special Report No 23/2000 concerning valuation of imported goods for customs purposes, 14 March 2001, para. 29 (Exhibit US-14).

[327] In the EC Court of Auditors Special Report No. 23/2000 concerning valuation of imported goods for customs purposes dated 14 March 2001, the EC Court of Auditors stated that: "The Commission uses the [Valuation section of the Customs Code Committee] to try to achieve its objective of ensuring that the valuation rules are applied correctly and in a uniform manner but has no powers to direct Member States to adopt a particular interpretation of the customs valuation legislation. The Commission views its mission as to encourage any form of convergence of practice between the administrations represented in the Valuation Committee, and has to rely on discussion, persuasion and encouragement as the means of achieving common treatment of identical problems in Member States.": EC Court of Auditors Special Report No 23/2000 concerning valuation of imported goods for customs purposes, 14 March 2001, para. 26 (Exhibit US-14).

[328] European Communities' reply to Panel question No. 58(l).

[329] European Communities' reply to Panel question No. 147. Infringement proceedings under, *inter alia*, Article 226 of the EC Treaty are discussed in paragraphs 7.169 – 7.170 below.

States.[330] Therefore, the Panel observes that the extent to which Article 10 of the EC Treaty contributes to the uniform administration of EC customs law is unclear.

Preliminary reference system

7.165 According to Article 234 of the EC Treaty, national courts of the member States may refer any question regarding the interpretation of EC law to the ECJ. The European Communities has informed the Panel that national courts or tribunals against whose decisions there is a judicial remedy under national law, are entitled, but in principle not required, to refer a question to the ECJ for a preliminary ruling. Subject to certain exceptions, member States' courts against whose decisions there is no judicial remedy under national law are obliged to refer such questions to the ECJ.[331]

7.166 The European Communities submits that the main objective of the ECJ preliminary reference system provided for under Article 234 of the EC Treaty is to guarantee the uniform interpretation and application of EC law, including EC customs law, throughout the member States. The European Communities further submits that it is through preliminary rulings issued by the ECJ, which are binding on all courts of the member States, that divergences within and between the member States can be avoided and the effective application of Community law be assured.[332]

7.167 The Panel notes that the preliminary reference system only becomes operational when two cumulative conditions have been satisfied. The first condition is that a trader disgruntled by the decision of a customs authority in a member State must appeal to a national court of the member State in question. Given the cost and time implicated by such an appeal, it is unclear whether traders will resort to such an option in all cases in which non-uniform application of EC customs law among the customs authorities of the member States becomes apparent. Notably, a trader is not authorized under EC law to proceed directly to the ECJ for a preliminary ruling. The second condition is that the national court to whom the trader has appealed must be obliged to or must decide to refer the matter to the ECJ for a preliminary ruling. Even in cases where a national court is technically obliged to refer a matter to the ECJ for a preliminary ruling[333], there are exceptions to this obligation. In particular, a national court is not obliged to refer a matter to the ECJ for a preliminary ruling when: the question raised is irrelevant; the provision of EC law in question has already been interpreted by the ECJ; or the correct application of EC law is so obvious as to leave no scope for any reasonable doubt.[334]

7.168 The European Communities provided the Panel with statistics concerning the use of the preliminary reference system in the context of the administration of EC customs law, including in the specific areas of custom administration listed in the United States' request for establishment of a panel. The European Communities explains that the total number of preliminary rulings requested by

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[330] In particular, in the *tariff classification area*, the European Communities refers to Case C-206/03, *Commissioners of Customs & Excise v. SmithKline Beecham*, Order of the Court of 19 January 2005 (not yet reported) (Exhibit EC-142) and to Case C-453/00, *Kühne & Heitz v. Productschap voor Pluimvee en Eieren* [2004] ECR I-837 (Exhibit EC-61). In the *area of customs procedures* (and, specifically, with respect to the imposition of penalties in the context of violations of EC customs law), the European Communities refers to Case C-213/99 *José Teodoro de Andrade v. Director da Alfândega de Leixoes*, *de Andrade* [2000] ECR I-11083 (Exhibit US-31), Case C-91/02 *Hannle + Hofstetter Internationale Spedition v. Fianzlandesdirektion für Wien, Niederosterreich* Judgment of 16 October 2003 (not yet reported) (Exhibit EC-143), Case C-36/94 *Siesse v. Director da Alfândega de Alcântara*, *Siesse* [1995] ECR I-3573 (Exhibit EC-40), Case 68/88 *Commission v. Greece* 1989 [ECR] 2965 (Exhibit EC-38).

[331] European Communities' first written submission, para. 95.

[332] European Communities' first written submission, para. 185.

[333] That is, because there is no judicial remedy under national law from the national court or where a national court considers that an act of a Community institution is invalid.

[334] Case C-495/03 *Intermodal Transports BV v. Staatssecretaris van Financiën*, 15 September 2005, para. 33 (Exhibit US-71) and Case 283/81, *Cilfit*, [1982], ECR 3415, paras. 10-16 (Exhibit EC-160).

member State courts during the period 1995 – 2005 was 2,314, of which 249 concerned customs administration. The European Communities notes that, of the 249 requests for preliminary ruling in the area of customs administration, 55 related to tariff classification, 9 related to customs valuation and 162 concerned customs procedures.[335] The Panel notes that the use of the preliminary reference system to secure uniform administration by the customs authorities of the member States in the area of customs administration during the period of 1995 – 2005 appears low, especially in the light of the European Communities assertion that literally millions of customs decisions are taken by customs authorities in the member States each year in the European Communities.[336]

Infringement proceedings

7.169 "Infringement proceedings" may be instituted before the ECJ against member States for failure to fulfil an obligation under EC law pursuant to Articles 226-228 of the EC Treaty. The European Communities submits that infringement proceedings against authorities of the member States play an important role in ensuring uniform administration among customs authorities of the member States of EC customs law.[337]

7.170 The European Communities notes that, since 1995, 83 infringement proceedings have been commenced by the EC Commission against the member States concerning the administration of customs law.[338] Of those 83 cases, 2 cases related to tariff classification, 1 case related to customs valuation and 44 cases related to customs procedures.[339] The Panel notes that the use of infringement proceedings to secure uniform administration by the customs authorities of the member States in the area of customs administration during the period of 1995 – 2000 appears low, especially in the light of the European Communities assertion that literally millions of customs decisions are taken each year in the European Communities.[340]

The European Ombudsman

7.171 The European Communities submits that the European Ombudsman is a mechanism that contributes to the uniform administration of EC customs law by the customs authorities of the member States.[341]

7.172 The Panel considers that the extent to which the European Ombudsman is effective in ensuring uniform administration among the customs authorities of the member States of EC customs law is unclear in the light of the following facts. *First*, it is apparent that the European Ombudsman's jurisdiction is limited to consideration of complaints of maladministration on the part of the institutions and bodies of the European Union.[342] Therefore, it would appear that the European Ombudsman cannot investigate complaints against customs authorities in the member States for the non-uniform application of EC customs law. *Second*, since 1999, the European Ombudsman has issued only four decisions on matters of customs administration. In one case, the European Ombudsman made a critical remark. In two cases, the European Ombudsman found no maladministration. In a further case, the complaint was withdrawn, so that the European Ombudsman

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[335] European Communities' reply to Panel question No. 162.

[336] European Communities' closing statement at the second substantive meeting, para. 20.

[337] European Communities' first written submission, para. 46; European Communities' second written submission, para. 172; European Communities' oral statement at the second substantive meeting, para. 49.

[338] European Communities' reply to United States' question No. 1.

[339] European Communities' reply to Panel question No. 164.

[340] European Communities' closing statement at the second substantive meeting, para. 20.

[341] European Communities' first written submission, para. 50; European Communities' second written submission, para. 167.

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

did not take a decision on the substance of the complaint.[343] The Panel notes that the use of the European Ombudsman to secure uniform administration by the customs authorities of the member States in the area of customs administration since 1999 appears low, especially in the light of the European Communities assertion that literally millions of customs decisions are taken each year in the European Communities.[344]

Complaints to the EC Commission

7.173 The European Communities submits that any individual with a concern regarding the administration of customs matters can bring the issue to the attention of the EC Commission, which will consider the matter and respond in accordance with the Commission's Code of Conduct.[345]

7.174 The European Communities has informed the Panel that, during the period of 1996 – 2004, over 17,000 letters were received by the EC Commission from private bodies and operators on customs matters. The European Communities noted that it was not possible to determine the number of letters that concerned the areas of tariff classification, customs valuation and customs procedures, but was willing to provide the Panel with a representative table for the period of 2002 – 2005.[346] Further, the European Communities informed the Panel that it was not feasible to explain the reaction and/or action taken by the Commission in each of the cases and the time taken by the Commission to respond.[347]

Restrictions on the adoption of national measures by customs authorities of the member States

7.175 The European Communities submits that national measures implemented by customs authorities of the member States (including national practices and provisions) must strictly respect EC law and may otherwise be set aside by the courts.[348] Nevertheless, the European Communities itself submits that a member State may act to supplement provisions contained in EC law if it is explicitly authorized to do so[349], or if a specific issue is not covered by EC law.[350] Moreover, the European Communities submits that member States' authorities are not prevented from issuing administrative guidelines or other non-binding documents for administrative purposes, although the ECJ has indicated that such measures cannot derogate in any way from the application of EC law by the customs authorities and the courts.[351] More specifically, the ECJ has stated that national authorities cannot issue binding guidelines for the interpretation of EC law. Accordingly, the interpretation of

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[343] European Communities' reply to Panel question No. 165 referring to the Reebok case (Exhibit US-52).

[344] European Communities' closing statement at the second substantive meeting, para. 20.

[345] European Communities' first written submission, para. 275 referring to Commission communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law, 10 October 2002 (Exhibit EC-11) and to Rules of Procedure of the Commission, 8 December 2000 (Exhibit EC-12).

[346] European Communities' reply to Panel question No. 166 referring to Tables of correspondence 2002 – 2005, DG TAXUD (Exhibit EC-149).

[347] European Communities' reply to Panel question No. 166.

[348] European Communities' reply to Panel question No. 78 referring to Case 230/78, Eridania-Zuccherifici [1979] ECR 2749, para. 34 (Exhibit EC-114).

[349] The European Communities clarifies that the authorisation does not necessarily have to be "explicit"; it is sufficient if it follows from the text of the Community legislation.

[350] European Communities' reply to Panel question No. 78; European Communities' reply to Panel question No. 157.

[351] European Communities' reply to Panel question No. 157.

EC law by national administrations and courts must be guided exclusively by the text of EC law, and all contrary provisions or guidelines of national origin must be set aside.[352]

7.176 The European Communities notes that, in areas that are not regulated by EC law, member States are free to legislate and to administer their own laws. The European Communities acknowledges that there are no mechanisms in place at the EC level to ensure a uniform interpretation and application of the laws of member States in such areas. However, the European Communities submits that, in such areas, the member States may still be required to respect certain principles of EC law, including Article 10 of the EC Treaty discussed in paragraph 7.161 *et seq* above and ECJ jurisprudence.[353]

Consultations and mutual assistance between member State customs authorities

7.177 The European Communities has acknowledged that there is no general obligation contained in EC customs law requiring the customs authorities of the member States to consult other customs authorities of other member States before making customs decisions, although obligations of mutual consultation may arise in specific situations, for instance in the context of the issuance of BTI, which is discussed in more detail in paragraph 7.181 below.[354] Further, Council Regulation (EC) No. 515/97 on mutual assistance between the administrative authorities of the member States and cooperation between the latter and the Commission seeks to ensure the correct application of, *inter alia*, EC customs law.[355] The European Communities explains that, under Regulation No. 515/97, member States have the general right to request relevant information from other member States, on either persons or transactions involving imports of goods, from other administrations. Member States also have the obligation to provide assistance (including communication of all information in their possession) where they consider it useful for ensuring compliance with customs legislation, or where breaches (actual or potential) of customs legislation arise.[356]

Best practice guidelines

7.178 Article 4 of Decision No. 253/2003/EC of the European Parliament and the Council of 11 February 2003 adopting an action programme for customs in the Community refers to the need, *inter alia* to identify, develop and apply best working practices, especially in the areas of post-clearance audit control, risk analysis and simplified procedures; to improve the standardization and simplification of customs procedures, systems and controls; to improve the coordination of and co-operation between laboratories carrying out analysis for customs purposes in order to ensure, in particular, a uniform and unambiguous tariff classification throughout the European Union; and to develop common training measures and the organisational framework for customs training that would respond to the needs arising from programme actions. The European Communities refers to a list of programme actions which fall into the above-mentioned categories.[357] The European Communities also submits that the Community and its member States have undertaken a series of actions to

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[352] European Communities' reply to Panel question No. 78.

[353] European Communities' reply to Panel question No. 85.

[354] The European Communities submits that examples would include the following provisions: single authorisation for end-use (Article 292 [2] of the Implementing Regulation); customs procedures with economic impact (Article 500 of the Implementing Regulation); regular shipping service (Articles 313a-313b of the Implementing Regulation); proof of Community status by authorized consignor (Article 324e of the Implementing Regulation); simplified transit procedure for air transport - level 2 (Article 445 of the Implementing Regulation); simplified transit procedure for sea transport - level 2 (Article 448 of the Implementing Regulation): European Communities' reply to Panel question No. 79.

[355] Exhibit EC-42.

[356] European Communities' reply to Panel question No. 149.

[357] Exhibit EC-117.

improve working practices.[358] In the area of *tariff classification*, the European Communities refers to the EBTI guidelines as a form of best working practice guidelines.[359] Regarding the best practice guidelines that exist in the area of *customs valuation*, the European Communities refers to the Compendium of Customs Valuation texts[360], which is regularly updated, and into which all relevant conclusion and commentaries are integrated.[361] Regarding best working practice guidelines in the *customs procedure area* (audit following release for circulation, penalties for infringements of EC customs legislation, processing under customs control and local clearance procedures), the European Communities refers to a Risk Analysis Guide issued to Member States in 1998[362]; a Standard Risk Management Framework issued in 2002[363]; the Customs Audit Guide[364]; and 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.[365]

<u>Institutions and mechanisms applicable in specific areas of customs administration referred to in the United States' request for establishment of a panel</u>

Tariff classification

7.179 The European Communities notes that the administration of EC rules in the area of tariff classification is, in principle, the responsibility of the customs authorities of the member States. However, according to the European Communities, there are a number of tools to ensure uniform administration by the customs authorities of the member States, including classification regulations, explanatory notes to the Common Customs Tariff, opinions of the Customs Code Committee and BTI. These tools are explained in the factual aspects of the Panel's report in paragraphs 2.37 – 2.48 above.

7.180 The European Communities submits that, when there is disagreement among customs authorities of the member States regarding tariff classification, the customs authorities concerned *should* consult with one another. Nevertheless, the European Communities acknowledges that the customs authorities of the member States are *not obliged* to consult with one another.[366] The European Communities also submits that, if the disagreement persists, the matter *must* be raised with the Customs Code Committee. However, as noted above in paragraph 7.159, the Customs Code Committee may consider matters only if raised by the chairperson of the Committee or a member State representative.[367] Furthermore, as submitted by the European Communities itself, the Customs Code Committee will not usually examine individual cases of divergent application of EC customs law, including in the area of tariff classification.[368] Moreover, the Panel recalls that the opinions of the Customs Code Committee are not legally binding.[369] Additionally, the Panel notes that EC customs law does not appear to make provision for the situation where a customs authority of a member State refuses to consult with a customs authority of another member State regarding disagreements concerning the tariff classification of a particular good.

[358] European Communities' reply to Panel question No. 83.
[359] European Communities' reply to Panel question No. 167 referring to Exhibit EC-32. These guidelines are discussed in more detail in paragraph 7.181 below.
[360] This Compendium, which is contained in Exhibit EC-37, is discussed in more detail in paragraph 7.186 *et seq* below.
[361] European Communities' reply to Panel question No. 167.
[362] Exhibit EC-150.
[363] Exhibit EC-151.
[364] Exhibit EC-90.
[365] European Communities' reply to Panel question No. 167 referring to Exhibit EC-41.
[366] European Communities' reply to Panel question No. 56.
[367] Article 249 of the Community Customs Code.
[368] European Communities' replies to Panel question Nos. 58(j)(i) and 58(j)(v).
[369] Joined Cases 69 and 70/76, *Dittmeyer*, [1977] ECR 231 (Exhibit EC-31).

7.181 With respect to the issuance of BTI by the customs authorities of the member States, Article 8(1) of the Implementing Regulation provides that a copy of the application for BTI and a copy of BTI notified to the applicant must be transmitted to the EC Commission, which are then stored in a central database run by the EC Commission – namely, the EBTI database. According to the administrative guidelines issued by the Commission on the EBTI system, the EBTI database should be consulted by customs authorities prior to the issuance of BTI in cases where there is a doubt regarding the correct classification, or where different headings merit consideration.[370] Notably, however, the European Communities acknowledges that the administrative guidelines on the EBTI system are not legally binding and, therefore, there is no obligation on the part of customs authorities of the member States to consult the EBTI database when they classify a good.[371] The European Communities submits that, nevertheless, in the administration of EC customs law, all member States are bound by the duty of cooperation contained in Article 10 of the EC Treaty according to which member States must use all tools available to ensure the proper and uniform administration of EC customs law, including the EBTI system.[372] Moreover, the European Communities explains that customs authorities of the member States are not obliged to consult the EBTI database because, in the majority of cases, the classification of goods is unproblematic. Therefore, according to the European Communities, it would be disproportionate and result in a considerable slowing-down of customs procedures, to require consultation of the EBTI database in each and every case involving a classification of goods by customs authorities of the member States.[373] The European Communities further explains that the purpose of BTI is primarily to provide holders with a measure of legal certainty as regards the tariff classification of goods throughout the European Communities, rather than to ensure uniform administration of EC rules in the area of tariff classification.[374]

7.182 Concerning the revocation of BTI, the Panel understands that, in the context of the EC system of customs administration, such revocation is not imposed on other customs authorities operating within the context of the same system and there is no obligation to inform other customs authorities of the decision to revoke BTI.[375] For example, cases may arise where a customs authority of a member State considers that its interpretation of a particular tariff heading is erroneous and decides to revoke BTI that was issued in accordance with its former interpretation. The Panel observes that, if the system of customs administration does not provide for uniform application of the revocation and/or does not oblige the revoking customs authority to consult and/or to notify other customs authorities of the decision to revoke, the customs authorities in other member States may continue classifying under the heading formerly used by the revoking customs authority.[376]

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[370] Administrative Guidelines on the European Binding Tariff Information (EBTI) System and its Operation, 28 October 2004, p. 7 (Exhibit EC-32).

[371] European Communities' reply to US question No. 3 following the first substantive meeting.

[372] European Communities' reply to Panel question No. 55. Article 10 of the EC Treaty is discussed above in paragraph 7.161 *et seq*.

[373] European Communities' reply to US question No. 3 following the first substantive meeting.

[374] According to the European Communities, this objective can be deduced from numerous provisions of Community law concerning the granting and effect of binding tariff information, in particular Article 12 of the Community Customs Code and Articles 5, 10, and 11 of the Implementing Regulation: European Communities' reply to Panel question No. 50.

[375] The Panel understands that, under EC customs law, there is no provision that provides that the revocation of BTI is immediately binding on the customs authorities of all member States. Furthermore, we understand that there is no specific provision in EC customs law requiring the transmission of the revocation of BTI by customs authorities of the member States to the Commission.

[376] Indeed, the Advocate General in the decision in *Timmermans Transport & Logistics BV v. Inspecteur der Belastingdienst Douanedistrict Roosendaal and Hoogenboom Production Ltd v. Inspecteur der Belastingdienst Douanedistrict Rotterdam* pointed out the risks of non-uniform administration in such a scenario, stating that:

Customs valuation

7.183 The European Communities submits that the administration of EC rules in the area of customs valuation is primarily the responsibility of the customs authorities of the member States.[377] However, according to the European Communities, there are a number of tools to ensure uniform administration by the customs authorities of the member States, including amendments to EC rules regarding customs valuation, opinions of the Customs Code Committee and the Compendium of Customs Valuation texts. These tools are explained in the factual aspects of the Panel's report in paragraphs 2.49 – 2.56 above.

7.184 The European Communities submits that, where a need for further detailed rules on valuation exists, the EC Commission may, in accordance with the procedure of Article 247 of the Community Customs Code, amend the valuation rules contained in the Implementing Regulation, which amendments will be legally binding in all member States.[378]

7.185 With respect to the utility of opinions of the Customs Code Committee to achieve uniform administration by the customs authorities of the member States in the customs valuation area, the European Communities notes that the Customs Code Committee may adopt guidelines and conclusions on questions of customs valuation wherever necessary.[379] In this regard, the Panel recalls

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"[T]he view may be taken that BTI must be revoked where the customs authorities have actually made an error (i.e. one established as such rather than one which they merely claim to have committed) in the interpretation of the customs nomenclature and, therefore, in the tariff classification of the goods covered by the BTI in question. ...

However, I do not share the opinion ... that customs authorities are entitled to revoke BTI in cases where they take the view at their own discretion (i.e. on the basis of their assessment alone) that they have made an error in the interpretation of the customs nomenclature and in the corresponding tariff classification. After all, such revocation is not necessarily justified because the error in question has not necessarily been established as such. Furthermore, the possibility of revoking BTI in this way is not readily compatible either with the objective of the uniform application of the customs nomenclature or with the objective of legal certainty pursued by the introduction of BTI.

As regards the objective of the uniform application of the customs nomenclature, I consider that, while a Commission decision ordering the revocation of BTI is necessarily aimed at, and has the effect of ensuring the correct and uniform application of the customs nomenclature, the same cannot be said of the practice whereby the customs authorities decide at their own discretion to revoke BTI which they have issued following a change in their own interpretation of the relevant nomenclature, even though, in so doing, the authorities in question may be motivated by the desire to align their interpretation with that given by other customs authorities.

After all, it should be borne in mind that, unlike the Commission, the customs authorities issuing BTI do not necessarily have an overview of all the BTI notices issued by all the other customs authorities within the Community in respect of identical or similar goods.

In my opinion, where customs authorities consider that they have made an error in the interpretation of the customs nomenclature when issuing BTI, they should notify the Commission to that effect in order to ensure that it is indeed an error such as to justify revocation of the BTI in question. Only a mechanism such as this would be capable of ensuring that the customs nomenclature is applied correctly, or at least uniformly. In my view, the need for customs authorities to notify the Commission in this way follows both from the objectives of legal certainty and the uniform application of the customs nomenclature pursued through the introduction of BTI, and from the obligation incumbent on Member States, under Article 10 EC, to cooperate dutifully with the Community institutions.": *Timmermans Transport & Logistics BV v. Inspecteur der Belastingdienst - Douanedistrict Roosendaal and Hoogenboom Production Ltd v. Inspecteur der Belastingdienst - Douanedistrict Rotterdam*, Opinion of the Advocate General, Cases C-133/02 and C-134/02, 2004 ECR I-01125, 11 September 2003, paras. 58-62 (Exhibit US-21).

[377] European Communities' reply to Panel question No. 146.

[378] European Communities' first written submission, para. 128.

[379] European Communities' reply to Panel question No. 146.

that the opinions of the Customs Code Committee are not legally binding on the customs authorities of the member States.[380]

7.186 The European Communities also notes that the Commission has issued a Compendium of Customs Valuation texts. This Compendium contains commentaries prepared and conclusions reached by the Customs Code Committee on specific issues of customs valuation. In addition, it contains excerpts from relevant judgments of the ECJ on valuation issues, as well as indices of other relevant texts.[381] However, the Panel understands that the commentaries contained in the Compendium of Customs Valuation texts have no legal status and, therefore, do not have binding effect.[382] Furthermore, as far as the Panel is aware, EC customs law does not oblige customs authorities of the member States to make reference to the Compendium when making decisions on customs valuation matters.

7.187 The Panel also understands that, in the area of customs valuation, there is no obligation under EC law to consult when there is disagreement among customs authorities of the member States regarding customs valuation in a particular situation. The European Communities refers to what it labels as a "best practice guide", dealing with the exchange of information between member States in relation, *inter alia*, to valuation decisions.[383] The Panel notes that the document to which the European Communities refers is a report of the Customs 2002 Project Group "to examine possible working tools to assist information exchange in customs valuation matters", which was set up in response to the EC Court of Auditors Special Report No. 23/2000 concerning valuation of imported goods for customs purposes.[384] The report of the Customs 2002 Project Group notes that current informal bilateral contacts among customs authorities of the member States work well regarding the exchange of customs valuation information but states that this situation could be usefully complemented by a more formalized system available to all administrations.[385] As far as the Panel is aware, such a system has not yet been implemented in the European Communities.

Customs procedures

7.188 Concerning customs procedures, the European Communities submits that the conduct of processing under customs control, local clearance procedure, customs audits and the administration of penalty provisions are the responsibility of the customs authorities of the member States authorities.[386]

7.189 The Panel notes that Article 250 of the Community Customs Code provides that, where a customs procedure is used in several member States, the decisions, measures and documents issued by one member State shall have the same legal effects in other member States as such decisions, measures taken and documents issued by each of those member States.

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

[381] European Communities' first written submission, para. 130 referring to the Compendium of Customs Valuation texts of the Customs Code Committee, 2 December 2004 (Exhibit EC-37).

[382] Indeed, the version of the Compendium available on the Internet states that: "[T]he present compendium has no legal status. It has been prepared primarily for Member States administrations but can be circulated to all interested parties": http://ec.europa.eu/comm/taxation_customs/resources/documents/ccut.en.pdf referred to by the European Communities in paragraph 130 of its first written submission.

[383] European Communities' reply to Panel question No. 149 referring to Final report, Customs 2002 Project Group to examine possible working tools to assist information exchange in customs valuation matters, 21 November 2002 (Exhibit EC-144).

[384] Exhibit US-14.

[385] Final report, Customs 2002 Project Group to examine possible working tools to assist information exchange in customs valuation matters, 21 November 2002, p. 7 (Exhibit EC-144).

[386] European Communities' reply to Panel question No. 146.

7.190 The Panel understands that, in the area of customs procedures, there is no obligation under EC law to consult when there is disagreement among customs authorities of the member States regarding customs procedures in a particular situation. The European Communities submits, and the United States has not contested, that, with respect to local clearance procedure and processing under customs control, where such a procedure involves more than one member State, exchange of information is practised among customs authorities of the member States.[387]

General observations regarding the institutions and mechanisms involved in the administration of the EC customs laws

7.191 The European Communities submits that whether or not a lack of uniformity exists in a particular system of customs administration can only be determined on the basis of all relevant facts, which necessarily includes a consideration of all the features of the customs system in question.[388] The European Communities contends that, in the context of its system of customs administration, it is not appropriate to consider a small number of instruments in isolation, ignoring the wider range of instruments that contribute to the uniform interpretation and application of EC customs law.[389] In this regard, the Panel notes that, in its consideration of the EC system of customs administration as a whole, the Panel found the system complicated and, at times, opaque and confusing. We can imagine that the difficulties we encountered in our efforts to understand the EC system of customs administration would be multiplied manifold for traders in general and small traders in particular who are trying to import into the European Communities.

7.192 The Panel will now consider the particular instances of alleged violations of Article X:3(a) of the GATT 1994 regarding the administration of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff, the TARIC and related measures. More particularly, the Panel will consider the United States' allegations of: non-uniform administration of the Common Customs Tariff in the area of tariff classification; non-uniform administration of the Community Customs Code and the Implementing Regulation in the area of customs valuation; non-uniform administration of the Community Customs Code and the Implementing Regulation in the area of customs procedures; and non-uniform administration regarding Article 221(3) of the Community Customs Code.

(b) Allegations of non-uniform administration of the Common Customs Tariff in the area of tariff classification

(i) Tariff classification of network cards for personal computers

Summary of the parties' arguments

7.193 The **United States** submits that the case of *Peacock AG* v. *Hauptzollamt Paderborn* describes divergence in classification of network cards for personal computers between Denmark, Netherlands, and the United Kingdom, on the one hand, and Germany, on the other.[390] The United States notes that, in the context of that case, the Advocate General observed that "customs authorities of various

[387] European Communities' reply to Panel question No. 149.
[388] European Communities' oral statement at the second substantive meeting, para. 10.
[389] European Communities' first written submission, para. 260.
[390] United States' first written submission, footnote 33 referring to Case C-339/98, *Peacock AG* v. *Hauptzollamt Paderborn*, Opinion of the Advocate General, 2000 ECR I-08947, 28 October 1999, paras. 7-8 (Exhibit US-17).

Community Member States issued conflicting BTIs classifying items of LAN equipment variously under headings 8471, 8473 and 8517 [of the Common Customs Tariff]".[391]

7.194 In response, the **European Communities** notes that the *Peacock* case relates to importations of network cards for personal computers before 1995. In 1995, the European Communities adopted Regulation No. 1165/95 foreseeing the classification of the network cards in question under heading 8517 (electrical apparatus for line telegraphy).[392] However, Regulation No. 1165/95 did not apply to importations that took place before its entry into force.[393] Further, the European Communities submits that the classification of network cards for personal computers by the German customs authorities which came to light in the *Peacock* case was appealed in a competent court in Germany, which referred the question to the ECJ for a preliminary ruling. By judgment of 19 October 2000, the ECJ decided that the classification by the German authorities had been erroneous, and that the products in question had to be classified under heading 8471 (automatic data-processing machines and parts thereof).[394] The European Communities submits that, in a further ruling, the ECJ confirmed this interpretation and decided that Regulation No. 1165/95 was invalid.[395]

7.195 The **United States** notes in response that, even though the divergence in classification of network cards for personal computers may have been resolved through litigation that ultimately led to an ECJ decision, this does not rebut evidence of non-uniform administration because non-uniform administration existed and, moreover, was allowed to persist for years. The United States notes in this regard that the divergence in network cards for personal computers occurred in 1995 but was not resolved until five years later, when the ECJ rendered a decision in 2000.[396]

7.196 The **European Communities** argues that BTI is only binding against the holder of the BTI and is not binding against other persons.[397] Further, the European Communities submits that what is significant is not that a divergence may occur but, rather, that it is addressed and removed once it occurs. According to the European Communities, this is precisely what happened in the context of the *Peacock* case.[398] In addition, the European Communities submits that the correct classification of network equipment is a complex technical question with which many customs authorities have had to come to terms.[399] In this regard, the European Communities notes that the classification of network equipment has also led to a WTO dispute between the European Communities and the United States concerning the correct classification of LAN equipment (including network cards).[400]

[391] United States' comments on the European Communities' reply to Panel question No. 161 referring to Case C-339/98, *Peacock AG* v. *Hauptzollamt Paderborn*, Opinion of the Advocate General, 2000 ECR I-08947, 28 October 1999, para. 15 (Exhibit US-17).

[392] Commission Regulation No. 1165/95 of 23 May 1995 concerning the classification of certain goods in the Combined Nomenclature (Exhibit EC-135).

[393] European Communities' second written submission, para. 134.

[394] Case C-339/98, *Peacock*, [2000] ECR I-8497, 19 October 2000 (Exhibit EC-87).

[395] European Communities' second written submission, para. 135 referring to Case C-463/98, *Cabletron System Ltd v The Revenue Commissioners* [2001] ECR I-3495, 10 May 2001 (Exhibit EC-136).

[396] United States' reply to Panel question No. 20; United States' oral statement at the second substantive meeting, para. 21.

[397] European Communities' reply to Panel question No. 161 referring to Case C-495/03, *Intermodal Transports BV v. Staatssecretaris van Financiën*, 15 September 2005, not yet reported, para. 27 (Exhibit US-71).

[398] European Communities' second written submission, para. 136.

[399] Case C-339/98, *Peacock AG* v. *Hauptzollamt Paderborn*, Opinion of the Advocate General, 2000 ECR I-08947, 28 October 1999, para. 11 *et seq.* (Exhibit US-17).

[400] European Communities' second written submission, para. 137 referring to Appellate Body Report and Panel Reports, *EC – Computer Equipment*.

Analysis by the Panel

7.197 The Panel notes that the United States challenges an alleged divergence in the tariff classification of network cards for personal computers among customs authorities of the member States of the European Communities.[401]

7.198 In the Panel's view, the tariff classification of a product, such as network cards for personal computers, constitutes an act of administration within the meaning of Article X:3(a) of the GATT 1994. This act of administration is a matter within the Panel's terms of reference since it amounts to an instance of administration of the Common Customs Tariff in the tariff classification area.[402]

7.199 With respect to the question of whether or not the tariff classification of network cards for personal computers is "uniform" within the meaning of Article X:3(a) of the GATT 1994, the Panel recalls its finding in paragraph 7.135 above that geographic uniformity is required under Article X:3(a) of the GATT 1994. That is, administration should be uniform in different places within a particular WTO Member. The Panel also recalls its finding in paragraph 7.135 above that the form, nature and scale of the alleged non-uniform administration and the laws, regulations, judicial decisions and rulings that are allegedly being administered in a non-uniform manner should be taken into consideration when interpreting the term "uniform" in Article X:3(a) of the GATT 1994. The Panel considers that the United States' challenge with respect to the tariff classification of network cards for personal computers is narrow in nature. It involves the interpretation of only a few tariff headings in the Common Customs Tariff to determine the classification of a single product – namely, network cards for personal computers. Therefore, given the narrowness of this challenge, the Panel considers that a high degree of uniformity is required for the purposes of Article X:3(a) of the GATT 1994. We now turn to the facts to determine whether or not this high degree of uniformity has been achieved with respect to the tariff classification of network cards for personal computers.

7.200 The Panel notes that, in support of the United States' allegation of the existence of divergent tariff classification of network cards for personal computers among the member States of the European Communities, it relies upon the following explanation of the factual background of the main proceedings of the case before the ECJ in *Peacock AG* v. *Hauptzollamt Paderborn*, which is contained in the Advocate General's opinion:

> "According to the order for references, Peacock AG (the applicant), a German company, imported large quantities of network cards from the United States of America and other non-member countries between July 1990 and May 1995, having them cleared through customs under CN subheading 8473 3000 as electronic circuits, for use solely as parts for computers falling under heading 8471 (cards). In 1993, the applicant and two of its subsidiaries received binding customs tariff information (BTIs) from the Danish, Netherlands and United Kingdom customs authorities, to the effect that such network cards were to be classified under heading 8473 of the CN.
>
> The Hauptzollamt (Principal Customs Office) Paderborn (the defendant), however, subsequently issued amendment notices and claimed the extra customs duty which should have been paid had the goods been classified under what it considered to be the correct CN heading, namely 8517. The applicant challenged both those notices and the group customs declarations which it had made in compliance with them. By

[401] United States' first written submission, footnote 33 referring to Case C-339/98, *Peacock AG* v. *Hauptzollamt Paderborn*, Opinion of the Advocate General, 2000 ECR I-08947, 28 October 1999, paras. 7-8 (Exhibit US-17).

[402] For information on EC institutions and mechanisms applicable in the tariff classification area, see paragraphs 7.179 – 7.182 above.

decision of 11 September 1995 the defendant rejected the objections as unfounded, holding that network cards were to be classified under heading 8517."[403]

7.201 The facts as contained in the Advocate General's opinion do indicate the existence at one point in time of differences in tariff classification between, on the one hand, the German customs authorities (who classified the product in question under heading 8517) and, on the other hand, Danish, Dutch and UK customs authorities (who classified it under heading 8473). The Panel notes that the European Communities has not contested the existence of such differences.[404] In the light of the foregoing, the Panel considers that, sometime during the period 1990 – 1995, the European Communities was not administering the Common Customs Tariff concerning the tariff classification of network cards for personal computers in a uniform manner in violation of Article X:3(a) of the GATT 1994.

7.202 Nevertheless, the Panel is of the view that the efforts taken by EC institutions to reconcile such differences need to be taken into consideration for the purposes of this dispute. In the year 2000, following the reference by the German national court to the ECJ for a preliminary ruling in the *Peacock* case, the ECJ concluded that the products in question were to be classified under heading 8471 – that is, under a heading that had not been the basis for classification neither by the German customs authorities nor by the Danish, Dutch and UK customs authorities.[405]

7.203 Notably, the importations that gave rise to the ECJ's preliminary ruling in the *Peacock* case occurred between 1990 and 1995.[406] They took place before adoption of Commission Regulation (EC) No. 1165/95 of 23 May 1995, according to which certain products were classified under sub-heading 8517 82 90.[407] The products classified under heading 8517 pursuant to Regulation No. 1165/95 were apparently identical to the products at issue in the *Peacock* case.[408]

7.204 Given that the importations at issue in the *Peacock* case pre-dated the adoption of Regulation No. 1165/95, Regulation No. 1165/95 was not at issue in that case.[409] Nevertheless, in the light of the apparent inconsistency between, on the one hand, the classification of network cards for personal computers under heading 8471 by the ECJ in its 2000 preliminary ruling in the *Peacock* case and, on the other hand, in Regulation No. 1165/95, which classified the products under heading 8517, the ECJ ruled the latter Regulation legally invalid in a preliminary ruling in the case of *Cabletron Systems Ltd v The Revenue Commissioners*.[410] In the *Cabletron* case, the ECJ specifically took note

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[403] Case C-339/98, *Peacock AG* v. *Hauptzollamt Paderborn*, Opinion of the Advocate General, 2000 ECR I-08947, 28 October 1999, paras. 7 - 8 (Exhibit US-17).

[404] European Communities' second written submission, paras. 134-137.

[405] Case C-339/98, *Peacock*, [2000] ECR I-8497, 19 October 2000 (Exhibit EC-87).

[406] At paragraph 3, the Advocate General states that the goods with which the main proceedings are concerned were imported between 1990 and 1995: Case C-339/98, *Peacock AG* v. *Hauptzollamt Paderborn*, Opinion of the Advocate General, 2000 ECR I-08947, 28 October 1999 (Exhibit US-17).

[407] In particular, Regulation No. 1165/95 classified the following products under sub-heading 8517 82 90: "An adapter card for incorporation in cable linked digital automatic data-processing (ADP) machines enabling the exchange of data over a local area network (LAN) without using a modem)". (Exhibit EC-135).

[408] This is evident from paragraph 6 of Case C-339/98, *Peacock AG* v. *Hauptzollamt Paderborn*, Opinion of the Advocate General, 2000 ECR I-08947, 28 October 1999 (Exhibit US-17).

[409] Indeed, as noted by the Advocate General in his opinion, "[t]he national court has not sought a ruling on the validity of Regulation No. 1165/95, which came into force after the importations with which the main proceedings are concerned, but has expressed the view that a ruling that the network cards were to be classified under heading 8473 would indirectly entail its invalidity in so far as it classified them elsewhere": Case C-339/98, Opinion of the Advocate General, 2000 ECR I-08947, para. 9 (28 October 1999) (Exhibit US-17).

[410] Case C-463/98, *Cabletron System Ltd v The Revenue Commissioners*, [2001] ECR I-3495, 10 May 2001 (Exhibit EC-136).

of its ruling in the *Peacock* case[411] and stated that "[t]he Commission [in drafting Regulation No. 1165/95] ought to have realised, in the light of the wording of headings No 8471 and No 8517, read in conjunction with the explanatory notes, as worded when those regulations were adopted, that it was wrong to classify those types of network equipment under heading No 8517. ... [they] must be classified under heading No. 8471 of the Combined Nomenclature".[412]

7.205 In summary, on the basis of the evidence that has been submitted to the Panel in the context of this dispute, divergence in tariff classification of network cards for personal computers existed between 1990 and 1995. Such divergence came to the attention of an EC institution – namely, the ECJ – through a request for preliminary ruling in the *Peacock* case in the year 2000. In its preliminary ruling in the *Peacock* case as well as in a preliminary ruling issued in the year 2001 in the *Cabletron* case, the ECJ clarified the correct classification of the network cards for personal computers. The Panel understands that a preliminary ruling issued by the ECJ is binding on the national court hearing the case in which the ruling is given.[413] Further, we understand from the European Communities that a preliminary ruling issued by the ECJ, including those issued in the context of the *Peacock* and *Cabletron* cases, are binding on all courts of the member States.[414] The Panel has not been provided with any evidence to indicate that divergence in tariff classification of network cards for personal computers among member States persisted following the issuance of the ECJ's preliminary rulings in the *Peacock* and *Cabletron* cases.

7.206 In the light of the foregoing, the Panel concludes that differences in administration did appear to exist in the tariff classification of the products in question between, on the one hand, the German customs authorities and, on the other hand, Danish, Dutch and UK customs authorities between 1990 and 1995. The Panel considers that, during that period, the European Communities was not administering the Common Customs Tariff concerning the tariff classification of network cards for personal computers in a uniform manner in violation of Article X:3(a) of the GATT 1994. However, the non-uniform administration in question occurred more than 10 years ago. Therefore, we do not consider that the differences in question demonstrate that the European Communities currently administers the Common Customs Tariff non-uniformly with respect to the tariff classification of network cards for personal computers. In this regard, we recall our finding in paragraph 7.36 above that, as a general principle, a panel is competent to consider measures in existence at the time of establishment of the panel but a panel may also be competent to consider measures that had expired at the time of establishment to the extent that such expired measures affect the operation of a covered agreement at that time. In this case, the Panel has no evidence before it to indicate that the differences in tariff classification of network cards for personal computers that existed between 1990 and 1995 persist and/or continue to have effect today. On the contrary, the Panel understands that, once the differences in question were brought to the attention of EC institutions through the *Peacock* and *Cabletron* cases, such differences were resolved.

7.207 The Panel concludes that the tariff classification of network cards for personal computers does not currently amount to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994. Therefore, the Panel finds no violation of Article X:3(a) of the GATT 1994 with respect to the tariff classification of network cards for personal computers.

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[411] Case C-463/98, *Cabletron System Ltd v The Revenue Commissioners*, [2001] ECR I-3495, 10 May 2001, para. 16 *et seq*. (Exhibit EC-136).

[412] Case C-463/98, *Cabletron System Ltd v The Revenue Commissioners* [2001] ECR I-3495, 10 May 2001, paras. 1 and 2 (Exhibit EC-136).

[413] Case 29/68, *Milchkontor v Hauptzollamt Saarbrücken*, [1969] ECR 165 (Exhibit EC-59).

[414] European Communities' reply to Panel question No. 163.

(ii) Tariff classification of drip irrigation products

Summary of the parties' arguments

7.208 The **United States** refers 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 as a pipe.[415] The United States explains that French customs authorities issued BTI for the product in question in 1999, classifying it as an irrigation system under tariff heading 8424 of the Common Customs Tariff, which carried an *ad valorem* duty rate of 1.7%. In December 2000, when an importer of the same product attempted to import the product through Spain, the Spanish customs authorities disregarded the French BTI and classified the product as a pipe, under tariff heading 3717 of the Common Customs Tariff, which carried an *ad valorem* duty rate of 6.4%.[416]

7.209 In response, the **European Communities** clarifies that BTI was issued by French customs authorities on 6 July 1999 for a Roberts Irrigation Product (Ro-Drip) under CN code 8424 81 10, which covers water appliances. On 9 February 2001, Spanish customs authorities issued BTI in which it classified the same product under CN code 3917 32 99. According to the European Communities, the issue of divergent BTI was discussed by the Tariff and Statistical Nomenclature Section of the Customs Code Committee. The issue was resolved by adoption of Commission Regulation (EC) No. 763/2002 of 3 May 2002, which classified the product under heading 3917 32 99.[417] Consequently, France revoked and replaced the previously issued BTI.[418]

7.210 The **United States** responds that, even though the divergence in classification of drip irrigation products may have been resolved through the adoption of a regulation, this does not rebut evidence of non-uniform administration, because non-uniform administration existed and, moreover, was allowed to persist for a year and a half.[419] Specifically, the United States submits that the divergence in classification of the drip irrigation product occurred in February 2001 and was not resolved until 15 months later, in May 2002. During that time, the divergence effectively compelled the exporter to modify its shipping practices, sending its product to France rather than Spain.[420]

7.211 The **European Communities** responds that BTI is binding only against the holder of the BTI and is not binding against other persons.[421] According to the European Communities, the BTI issued by France and Spain were not issued for the same holders. Further, the European Communities submits that what is significant is not that a divergence in tariff classification may occur but, rather, that it is addressed and removed once it occurs.[422] According to the European Communities, this is precisely what happened in the case of drip irrigation products. Once the divergent BTI had been detected, the case was promptly addressed and resolved within a period of time that is reasonable. The European Communities submits that a period of less than 15 months between the issuance of the divergent BTI to the adoption of the classification regulation does not constitute an excessively long period for definitively resolving a complex classification issue.[423]

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[415] United States' first written submission, footnote 33.

[416] United States' reply to Panel question No. 15.

[417] Commission Regulation (EC) No. 763/2002 of 3 May 2002 concerning the classification of certain goods in the Combined Nomenclature (Exhibit EC-88).

[418] European Communities' second written submission, para. 142.

[419] United States' replies to Panel question Nos. 15 and 20.

[420] United States' oral statement at the second substantive meeting, para. 21.

[421] European Communities' reply to Panel question No. 161 referring to Case C-495/03, *Intermodal Transports BV v. Staatssecretaris van Financiën*, 15 September 2005, not yet reported, para. 27 (Exhibit US-71).

[422] European Communities' second written submission, para. 143.

[423] European Communities' second written submission, para. 143.

Analysis by the Panel

7.212 The Panel notes that the United States challenges divergence in the tariff classification of drip irrigation products among customs authorities of the member States of the European Communities.[424]

7.213 In the Panel's view, the tariff classification of a product, including drip irrigations products, constitutes an act of administration within the meaning of Article X:3(a) of the GATT 1994. This act of administration is a matter within the Panel's terms of reference since it amounts to an instance of administration of the Common Customs Tariff in the tariff classification area.[425]

7.214 With respect to the question of whether or not the tariff classification of drip irrigation products is "uniform" within the meaning of Article X:3(a) of the GATT 1994, the Panel recalls its finding in paragraph 7.135 above that geographic uniformity is required under Article X:3(a) of the GATT 1994. That is, administration should be uniform in different places within a particular WTO Member. The Panel also recalls its finding in paragraph 7.135 above that the form, nature and scale of the alleged non-uniform administration and the laws, regulations, judicial decisions and rulings that are allegedly being administered in a non-uniform manner should be taken into consideration when interpreting the term "uniform" in Article X:3(a) of the GATT 1994. The Panel considers that the United States' challenge with respect to the tariff classification of drip irrigation products is narrow in nature. It involves the interpretation of only a few tariff headings in the Common Customs Tariff to determine the classification of a single product – namely, drip irrigation products. Therefore, given the narrowness of this challenge, the Panel considers that a high degree of uniformity is required for the purposes of Article X:3(a) of the GATT 1994. We now turn to the facts to determine whether or not this high degree of uniformity has been achieved with respect to the tariff classification of drip irrigation products.

7.215 The Panel notes that the United States has not provided any evidence to support its allegation of divergence in the tariff classification of drip irrigation products. Rather, it merely asserts the existence of a difference between French and Spanish BTI for drip irrigation products in its submissions.[426] Nevertheless, the Panel is willing to accept this assertion in light of the fact that the European Communities does not dispute the existence of divergence in this regard.[427]

7.216 On the basis of the European Communities' explanation of the facts[428], the divergence in tariff classification of drip irrigation products occurred between 1999 and 2001. In particular, the French customs authorities classified drip irrigation products under sub-heading 8424 81 10 of the Common Customs Tariff in BTI that was issued in July 1999 whereas the Spanish customs authorities classified the products under sub-heading 3917 32 99 of the Common Customs Tariff in BTI that was issued in February 2001. In Commission Regulation (EC) No. 763/2002 of 3 May 2002, drip irrigation products were classified under sub-heading 3917 32 99.[429] The Panel has not been provided with any evidence indicating that the divergence in tariff classification of drip irrigation products among member States persisted following the adoption of Regulation No. 763/2002.

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[424] United States' first written submission, footnote 33.

[425] For information on EC institutions and mechanisms applicable in the tariff classification area, see paragraphs 7.179 – 7.182 above.

[426] United States' first written submission, footnote 33; United States' reply to Panel question No. 15.

[427] European Communities' second written submission, paras. 142-143.

[428] This explanation largely corresponds to the United States' description of the facts. In any case, the Panel notes that neither party provided the Panel with evidence to enable it to verify which version of the facts was correct.

[429] Commission Regulation (EC) No 763/2002 of 3 May 2002 concerning the classification of certain goods in the Combined Nomenclature (Exhibit EC-88).

7.217 In the light of the foregoing facts, the Panel concludes that the tariff classification of drip irrigation products does not amount to non-uniform administration in violation of Article X:3(a) of the GATT 1994. On the basis of the parties' description of the facts, it would appear that differences existed in classification of the products in question between, on the one hand, the French customs authorities and, on the other hand, Spanish customs authorities. However, the evidence submitted to the Panel in this dispute indicates that those differences existed during a relatively short period of time, namely between early 2001 and mid-2002. Further, the differences in question occurred some time ago. Therefore, even if such differences qualify as instances of geographical non-uniformity within the meaning of Article X:3(a) of the GATT 1994, we do not consider that such differences demonstrate that the European Communities currently administers the Common Customs Tariff non-uniformly with respect to the tariff classification of drip irrigation products. In this regard, we recall our finding in paragraph 7.36 above that, as a general principle, a panel is competent to consider measures in existence at the time of establishment of the panel but a panel may also be competent to consider measures that had expired at the time of establishment to the extent that such expired measures affect the operation of a covered agreement at that time. Moreover, we have not been provided with any evidence to suggest that the differences in administration regarding the tariff classification of drip irrigation products that existed between 2001 and 2002 persist and/or continue to have effect today. On the contrary, the Panel understands that the differences have been resolved through adoption of Regulation No. 763/2002 of 3 May 2002.

7.218 The Panel concludes that the tariff classification of drip irrigation products does not amount to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994. Therefore, the Panel finds no violation of Article X:3(a) of the GATT 1994 with respect to the tariff classification of drip irrigation products.

(iii) Tariff classification of unisex articles or shorts

Summary of the parties' arguments

7.219 The **United States** argues that, in response to a recent survey among the membership of a trade association consisting of importers of products into the European Communities, respondents observed that "[u]nisex-articles or shorts have different classifications in Italy and Spain to those in Germany". According to the United States, because of this divergence in classification among the member States, these articles have to be imported via Germany, which causes additional costs.[430]

7.220 In response, the **European Communities** submits that the so-called "survey" relied upon by the United States is based on a comment from a single, unidentified company in the context of a trade association questionnaire of March 2005 and is not supported by any additional evidence. The European Communities submits that, therefore, it is impossible to ascertain the precise nature of the products concerned, nor to identify the tariff classification issues that might be involved. Accordingly, the European Communities considers that the statement cited by the United States does not provide any evidence of a lack of uniformity in classification practice in the European Communities with respect to unisex articles or shorts.[431]

[430] United States' first written submission, para. 76 referring to Foreign Trade Association, Questionnaire on the topic "Trade Facilitation": Facilitation of Trade in WTO States, March 2005, response to question 1.4, (Exhibit US-30).

[431] European Communities' second written submission, para. 133.

Analysis by the Panel

7.221 The Panel notes that the United States challenges divergence in the tariff classification of unisex articles or shorts among customs authorities of the member States of the European Communities.[432]

7.222 In the Panel's view, the tariff classification of a product, including unisex articles or shorts, constitutes an act of administration within the meaning of Article X:3(a) of the GATT 1994. This act of administration is a matter within the Panel's terms of reference since it amounts to an instance of administration of the Common Customs Tariff in the tariff classification area.[433]

7.223 With respect to the question of whether or not the tariff classification of unisex articles or shorts is "uniform" within the meaning of Article X:3(a) of the GATT 1994, the Panel recalls its finding in paragraph 7.135 above that geographic uniformity is required under Article X:3(a) of the GATT 1994. That is, administration should be uniform in different places within a particular WTO Member. The Panel also recalls its finding in paragraph 7.135 above that the form, nature and scale of the alleged non-uniform administration and the laws, regulations, judicial decisions and rulings that are allegedly being administered in a non-uniform manner should be taken into consideration when interpreting the term "uniform" in Article X:3(a) of the GATT 1994. The Panel considers that the United States' challenge with respect to the tariff classification of unisex articles or shorts is narrow in nature. It involves the interpretation of only a few tariff headings in the Common Customs Tariff to determine the classification of a single product – namely, unisex articles or shorts. Therefore, given the narrowness of this challenge, the Panel considers that a high degree of uniformity is required for the purposes of Article X:3(a) of the GATT 1994. We now turn to the facts to determine whether or not this high degree of uniformity has been achieved with respect to the tariff classification of unisex articles or shorts.

7.224 The Panel does not consider that the evidence relied upon by the United States demonstrates the existence of non-uniform administration within the meaning of Article X:3(a) of the GATT 1994 for the following reasons.

7.225 *First*, the *only* evidence relied upon by the United States is the March 2005 report of the Foreign Trade Association regarding a questionnaire on the topic of "Trade Facilitation": Facilitation of Trade in WTO States.[434] We do not consider that this report, on its own, constitutes probative evidence for the purposes of a claim under Article X:3(a) of the GATT 1994 given that it merely contains a sample of comments made by individual traders in response to questions posed in the questionnaire. The extent to which those comments are representative of concerns held by all traders seeking to import products into the European Communities is unclear. Indeed, the opening paragraph of the Foreign Trade Association's report itself states that "[t]he Trade Facilitation Questionnaire was sent to 70 FTA member companies. 20 answers reached the FTA ... The following represents quotations from the answers. Although the [quotations] do not always fully comply with the political consensus among all members, they highlight the practical problems European traders, especially importers, face at borders".

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[432] United States' first written submission, para. 76 referring to Foreign Trade Association, Questionnaire on the topic "Trade Facilitation": Facilitation of Trade in WTO States, March 2005, response to question 1.4, (Exhibit US-30).

[433] For information on EC institutions and mechanisms applicable in the tariff classification area, see paragraphs 7.179 – 7.182 above.

[434] Foreign Trade Association, Questionnaire on the topic "Trade Facilitation": Facilitation of Trade in WTO States, March 2005 (Exhibit US-30).

7.226 *Second*, the Panel is not convinced that the paragraph of the Foreign Trade Association's report cited by the United States in support of its allegations proves that a lack of uniform administration on the part of the European Communities in violation of Article X:3(a) of the GATT 1994 has occurred with respect to unisex articles or shorts. In our view, if anything, the cited paragraph suggests that the alleged differences in the tariff classification of unisex articles or shorts are linked to a lack of clarity in the relevant tariff heading(s) of the Harmonized System.[435] In this regard, we note that the comment upon which the United States relies reads as follows:

> "The classification of garments causes in general many problems. For example: Unisex-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. *The HS-Code should be simplified (one category for all clothes above waist and one for all clothes below waist)*."[436] (emphasis added)

7.227 *Finally*, even if the Foreign Trade Association's report could be read as indicating differences regarding the classification of unisex articles or shorts among the customs authorities of the member States, without any additional supporting evidence, it is impossible for the Panel to know whether or not such differences exist despite identity in the products being classified or, rather, because the products are not the same.

7.228 The Panel concludes that the United States has not proved that the tariff classification of unisex articles or shorts amounts to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994.

(iv) Tariff classification of blackout drapery lining

Summary of the parties' arguments

Evidence of divergence in classification

7.229 The **United States** submits that the blackout drapery lining case is a glaring example of non-uniform administration of the Common Customs Tariff in the context of which no EC institution has stepped in to cure the non-uniformity.[437] Specifically, the United States notes that, in BTI issued from 1999 to 2002, customs authorities in the United Kingdom, Ireland, and the Netherlands and, subsequently, in Belgium, classified similar drapery linings under tariff heading 5907 of the Common Customs Tariff ("Textile fabrics otherwise impregnated, coated or covered; painted canvas being theatrical scenery, studio back-cloths or the like"). However, during this same period, customs authorities in Germany classified the product under tariff heading 3921 of the Common Customs Tariff ("Other plates, sheets, film, foil and strip, of plastics"). The United States submits that, after almost five years of various requests by importers for review by different branches of the German customs authority, the Main Customs Office of Bremen issued a decision in September 2004, finding that imports of the product in question in October and November 1999 were properly classified under heading 3921.[438] According to the United States, the German customs authority acknowledged the existence of BTI for comparable goods but made no effort to explain why it was declining to follow

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[435] The European Communities is a signatory to the HS Convention. Therefore, pursuant to Article 3.1 of the HS Convention, the European Communities is obliged to use the HS headings and subheadings at the 6-digit level. The European Communities does, however, have flexibility to add headings and subheadings beyond the 6-digit level.

[436] Foreign Trade Association, Questionnaire on the topic "Trade Facilitation": Facilitation of Trade in WTO States, March 2005, para. 1.4 (Exhibit US-30).

[437] United States' reply to Panel question No. 4.

[438] United States' first written submission, para. 66.

the classification decisions reflected in that BTI.[439] Nor did it attempt to reconcile its classification decision with the classification decisions reflected in BTI issued by other member States' customs authorities. Moreover, according to the United States, the German customs authority relied on a rationale that is not compelled by the Common Customs Tariff.[440]

7.230 The **European Communities** argues that the present case does not concern the question of the heading under which a particular product should properly have been classified but, rather, the question of uniformity of administration of EC classification rules.[441]

Goods in question the same?

7.231 The **European Communities** submits that the products described in the decision of the Main Customs Office Bremen were not identical to the products described in the BTI issued by customs authorities in the United Kingdom, Ireland, and the Netherlands, since the former were not flocked with textile flock, while the products in the BTI are described as having been flocked. On the basis of these product descriptions, the products had to be classified differently.[442] According to the European Communities, the presence of a layer of textile flock is an important criterion for determining whether, under Chapter Note 2(a)(5) to Chapter 59 of the Common Customs Tariff, the textile fabric is used for reinforcement purposes only which, in turn, could affect classification.[443] Therefore, according to the European Communities, the difference in tariff classification referred to by the United States is not a lack of uniformity but, rather, the result of a correct application of the Common Customs Tariff.[444] The European Communities also submits that, even if a mistake had occurred in the factual appraisal of the products, this does not mean that there is a lack of uniformity in the application of EC customs law in violation of Article X:3(a) of the GATT 1994. In particular, if the importer felt that the German customs authorities had erred in their appraisal of the good in question, he could have appealed the decision of the Main Customs Office of Bremen before the Bremen Tax Court. According to the European Communities, if the importer has chosen not to appeal, then this cannot be used to claim a lack of uniformity in the EC system of customs classification. The European Communities adds that neither the importer nor the producer have ever brought the issue of classification of blackout drapery lining to the attention of the European Commission.[445]

7.232 The **United States** responds that it is not correct that the product before the German authorities was not flocked. According to the United States, as a matter of fact, the determination of the Main Customs Office of Hamburg upon which the Main Customs Office of Bremen relied found the product to contain "flocking with individual fibers."[446] The United States submits that the Main Customs Office of Bremen did not find an absence of flocking *per se* but, rather, that flocking did not constitute a distinct layer in the product at issue. What was relevant to the Main Customs Office of Bremen was the existence of plastic in the coating, regardless of whether textile flocking or other elements were mixed into that coating. The United States argues that the fact that the German

[439] Hauptzollamt Bremen, Letter Decision to Bautex-Stoffe GmbH regarding classification of blackout drapery lining, 22 September 2004 (original and English translation) (Exhibit US-23).
[440] United States' reply to Panel question No. 4.
[441] European Communities' second written submission, para. 116.
[442] European Communities' second written submission, para. 117.
[443] European Communities' first written submission, para. 337.
[444] European Communities' second written submission, para. 117.
[445] European Communities' first written submission, para. 340.
[446] United States' reply to Panel question No. 17(a) referring to Letter from Main Customs Office Hamburg-Waltershof to ORNATA GmbH, 29 July 1998 (original and English translation), p. 1 (Exhibit US-50).

customs authority took this approach, contrary to the approach taken by other member State authorities, is confirmed by the letter from the Main Customs Office of Hamburg.[447]

7.233 In response, the **European Communities** submits that the letter of the Main Customs Office Hamburg relied upon by the United States relates to an administrative appeal introduced by a company called Ornata GmbH. According to the European Communities, it does not appear that that appeal is in any way related to the administrative appeal introduced by Bautex-Stoffe GmbH, which was the subject of the decision of the Main Customs Office Bremen. Nor does it indicate that the Main Customs Office of Bremen relied on the letter of the Main Customs Office of Hamburg.[448]

7.234 The **United States** responds that the letter from the Main Customs Office of Bremen and the letter from the Main Customs Office of Hamburg both concern blackout drapery lining produced by Rockland Industries. The Main Customs Office of Bremen decided to exclude Rockland Industries' product from classification under tariff heading 5907 on a ground evidently not applied by other EC customs authorities – that is, on the ground that the product had plastic in its coating, regardless of whether textile flocking or other elements were mixed into that coating.[449] The United States further submits that the European Communities erroneously calls into question whether the lining produced by Rockland Industries at issue in the decision by the Main Customs Office of Bremen, which was classified under tariff heading 3921, was materially identical to lining that other member States had classified under heading 5907. In support, the United States submits that Rockland Industries' President and Chief Executive Officer attests under oath that: "All coated products produced by Rockland incorporate textile flocking as part of the coating process. Rockland has never produced a coated product that does not incorporate textile flocking. ... Textile flocking is required to prevent the fabric from sticking together."[450]

7.235 In response, the **European Communities** submits that an affidavit by the Chairman of Rockland Industries, the producer of blackout drapery lining, is a statement by a person with a clear interest in the classification of blackout drapery lining and, therefore, has no probative value. Moreover, the affidavit does not concern the question of whether the products before the EC authorities were in fact identical.[451] More specifically, while the affidavit indicates that the product which was the subject of the decision by the Main Customs Office of Bremen was produced by Rockland Industries, it provides no answer as to whether the products for which the BTI were issued by the Dutch, Irish and UK authorities were also products of Rockland Industries.[452] Rather, it merely contains an assurance that Rockland Industries has never produced any product that is not flocked.[453] The European Communities adds that, in order to determine the correct classification of the product, the question is not whether the product incorporates textile flocking as part of the coating process but, rather, whether there is a layer of textile flocking visible to the naked eye. According to the European Communities, this is not a question that can be answered through an affidavit sworn by the President of the producer of the good.[454]

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[447] United States' oral statement at the second substantive meeting, para. 62 referring to Letter from Main Customs Office Hamburg-Waltershof to ORNATA GmbH, 29 July 1998 (original and English translation) (Exhibit US-50).

[448] European Communities' second written submission, para. 108.

[449] United States' reply to Panel question No. 137(a).

[450] United States' oral statement at the second substantive meeting, para. 61 referring to Affidavit of Mark R. Berman, President and Chief Executive Officer of Rockland Industries, Inc., 10 November 2005 (Exhibit US-79).

[451] European Communities' closing statement at the second substantive meeting, para. 16.

[452] European Communities' comments on the United States' reply to Panel question No. 137(a).

[453] European Communities' closing statement at the second substantive meeting, para. 16.

[454] European Communities' comments on the United States' reply to Panel question No. 137(a).

Explanatory Note to sub-heading 5907 of the Harmonized System

7.236 The **United States** refers to the explanatory note accompanying heading 5907 of the Harmonized System, which provides, *inter alia*, that "[t]he fabrics covered [under 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. ...".[455] The United States submits that, in the light of that explanatory note, for classification purposes, the relative density of the flocking is not a material point of distinction. According to the United States, customs authorities of member States other than Germany have classified blackout drapery lining under heading 5907 in cases where the flocking on the products surface was found to be "sparsely applied".[456] The United States submits that, in contrast, the Main Customs Office of Bremen stated 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."[457]

7.237 The **European Communities** responds that it is wrong to say that the decision of the Main Customs Office of Bremen is incompatible with the explanatory note to heading 5907 of the Harmonized System. According to the European Communities, explanatory note (G)(1) to heading 5907 provides that the fabrics covered include "fabric, the surface of which is coated with glue (rubber glue or other), plastics, rubber or other materials and sprinkled with a fine layer of other materials such as (1) textile flock or dust to produce imitation suèdes".[458] The European Communities submits that, therefore, the presence of textile flock or dust was a relevant criterion for the classification under heading 5907. The decision of the Main Customs Office of Bremen took account of this factor by noting the absence of a layer of textile flock. Since the product was not flocked, it could not be classified under heading 5907.[459]

German interpretative aid

7.238 The **United States** submits that the Hamburg Customs Office relied upon an interpretive aid 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. The United States submits that the aid in question directed the customs authority to consider the density of the product's fibre. According to the United States, the Main Customs Office of Bremen plainly relied on the findings of the Hamburg Customs Office and, moreover, expressly referred to the fact that "[t]he web is not fine", an apparent allusion to the finding of the Main Customs Office of Hamburg based on the interpretive aid.[460]

7.239 In response, the **European Communities** submits that the aid in question was referred to only by the Main Customs Office of Hamburg, not by the Main Customs Office of Bremen, which decided the appeal.[461] Further, according to the European Communities, the text contains nothing which is contrary to EC law. In particular, the criterion that the web is not fine was developed in analogy to

[455] United States' reply to Panel question No. 17(a) referring to Harmonized System Explanatory Note, subheading 5907 (Exhibit US-48).

[456] United States' reply to Panel question No. 17(a) referring to BTI UK103424227 (Exhibit US-51).

[457] United States' reply to Panel question No. 17(a) referring to Hauptzollamt Bremen, Letter Decision to Bautex-Stoffe GmbH, 22 September 2004 (original and English translation) (Exhibit US-23). The Panel notes that the English translation of the decision of Main Customs Office of Bremen submitted by the United States refers to heading 3921 whereas the German version of the decision refers to heading 5903.

[458] Harmonized System Explanatory Note, subheading 5907 (Exhibit US-48; Exhibit EC-127).

[459] European Communities' second written submission, para. 111.

[460] United States' reply to Panel question No. 17(a) referring to Hauptzollamt Bremen, Letter Decision to Bautex-Stoffe GmbH, 22 September 2004 (original and English translation) (Exhibit US-23).

[461] European Communities' first written submission, para. 342.

another EC classification regulation and is a relevant factor to determine whether the textile fabric is present merely for reinforcing purposes.[462] The European Communities also submits that the text in question is purely an interpretative aid prepared for administrative purposes which does not have the force of law and does not derogate from EC law. In this regard, the European Communities argues that the ECJ has clarified that handbooks, guidance or other compilations prepared by member States have no legally binding character in EC law.[463]

7.240 The **United States** submits in response that the EC classification regulation with respect to which the European Communities argues the German interpretative aid was developed by way of analogy is a regulation pertaining to the classification of ski trousers, which are classifiable under Chapter 62 of the Common Customs Tariff.[464] The United States submits that the interpretative 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. 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, according to the United States, Note 2(a) to Chapter 59 of the Common Customs Tariff expressly makes that criterion irrelevant to the classification of coated fabrics. In particular, 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. ..."[465] The United States explains that, having ruled out classification of the blackout drapery lining in question under heading 5907, apparently based on its view that the existence of plastic in the coating precluded such classification, the German customs authority then looked to a German interpretive aid. The United States submits that the German customs authority relied on it in a way that turned out to be determinative.[466]

7.241 The **European Communities** submits that the United States' criticism of the reference to a classification regulation concerning a type of ski trousers is unwarranted. Commission Regulation (EC) No. 1458/97 concerned the classification of garments under heading 6210, which covers "garments made up of fabrics of heading 5602, 5603, 5903, 5906 or 5907".[467] The European Communities submits that, implicitly, the classification regulation in question concerned the classification of the fabric out of which garments are made. That regulation implicitly required application of Note 2(a)(5) to Chapter 59 of the Common Customs Tariff to determine whether the fabric serves merely reinforcing purposes. The European Communities submits that it was in this context that the Main Customs Office of Hamburg took into account the "tight weave" of the fabric.[468] The European Communities submits that the weight referred to in the chapeau of Note 2(a) to Chapter 59 is the weight of the entire product – that is, the fabric as impregnated, coated, covered or laminated. The Main Customs Office of Bremen did not consider the weight of the product, but rather the density of the web of the polyester fabric, which is only a part of the product.[469] The European Communities submits that, according to Note (2)(a)(5) to Chapter 59 of the Common Customs Tariff, heading 5903 does not apply to plates, sheets, or strips of cellular plastics, combined with textile fabric, where the textile fabric is present merely for reinforcing purposes. For the application of heading 5903, it is, therefore, necessary to determine whether the textile fabric is present merely for

[462] European Communities' first written submission, para. 343 referring to Commission Regulation (EC) No. 1458/97 concerning the classification of certain goods in the Combined Nomenclature (Exhibit EC-78).

[463] European Communities' first written submission, para. 344 referring to Case C-161/88, *Friedrich Binder*, [1989] ECR 2415, 12 July 1989, para. 19 (Exhibit EC-79).

[464] Commission Regulation (EC) No. 1458/97 concerning the classification of certain goods in the Combined Nomenclature (Exhibit EC-78).

[465] United States' reply to Panel question No. 17(a).

[466] United States' oral statement at the second substantive meeting, para. 63.

[467] Excerpt of heading 6210 of the Common Customs Tariff (Exhibit EC-132).

[468] European Communities' second written submission, para. 113.

[469] European Communities' second written submission, para. 115.

reinforcing purposes and, consequently, the question whether the web was fine is a relevant criterion for establishing whether it is present for reinforcement purposes or not.[470]

7.242 In response, the **United States** submits that the notes pertaining to Chapter 39 of the Common Customs Tariff make no reference to density of weave as a relevant criterion, and the notes to Chapter 59 expressly provide that classification under that chapter is to be determined *regardless* of weight per square meter. The European Communities asserts without basis that the reference to weight per square meter is different from density of weave. In fact, however, weight per square meter necessarily is a function of density of weave.[471]

Compatibility with WCO opinion

7.243 The **United States** submits that, in October 2004, the Secretariat of the World Customs Organization (WCO) issued an opinion agreeing that the product in question should be classified under heading 5907 of the Harmonized System.[472] According to the United States, shortly thereafter, Belgian customs authorities issued a decision classifying blackout drapery lining under heading 5907. However, the German decision remains unchanged.[473]

7.244 In response, the **European Communities** submits that the WCO opinion is irrelevant. The European Communities notes that the opinion states that "the visible outer layer consists of cotton flocking which completely covers the acrylic cellular plastic". According to the European Communities, this does not correspond to the description of the product before the German customs authorities. The European Communities also notes that the opinion is purely the opinion of an official of the WCO, which does not have any legally binding status under the Harmonized System Convention. Moreover, if the United States believed there was a dispute concerning the application of the Harmonized System Convention, it could submit this dispute to the Harmonised System Committee in accordance with Article 10 of the HS Convention but has not done so as yet.[474]

Analysis by the Panel

General

7.245 The Panel notes that the United States challenges divergence in the tariff classification of blackout drapery lining among customs authorities of the member States of the European Communities.[475]

7.246 In the Panel's view, the tariff classification of a product, including blackout drapery lining, constitutes an act of administration within the meaning of Article X:3(a) of the GATT 1994. This act of administration is a matter within the Panel's terms of reference since it amounts to an instance of administration of the Common Customs Tariff in the tariff classification area.[476]

7.247 With respect to the question of whether or not the tariff classification of blackout drapery lining is "uniform" within the meaning of Article X:3(a) of the GATT 1994, the Panel recalls its

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[470] European Communities' second written submission, para. 112.

[471] United States' oral statement at the second substantive meeting, para. 64.

[472] Letter from Mr. Chriticles Mwansa, Director, World Customs Organization, Tariff and Trade Affairs Directorate, to Mr. Myles B. Harmon, Director, Office of Regulations and Rulings, U.S. Customs and Border Protection, 26 October 2004 (Exhibit US-24).

[473] United States' first written submission, para. 68.

[474] European Communities' first written submission, para. 341.

[475] United States' first written submission, para. 66.

[476] For information on EC institutions and mechanisms applicable in the tariff classification area, see paragraphs 7.179 – 7.182 above.

finding in paragraph 7.135 above that geographic uniformity is required under Article X:3(a) of the GATT 1994. That is, administration should be uniform in different places within a particular WTO Member. The Panel also recalls its finding in paragraph 7.125 above that the form, nature and scale of the alleged non-uniform administration and the laws, regulations, judicial decisions and rulings that are allegedly being administered in a non-uniform manner should be taken into consideration when interpreting the term "uniform" in Article X:3(a) of the GATT 1994. The Panel considers that the United States' challenge with respect to the tariff classification of blackout drapery lining is narrow in nature. It involves the interpretation of only a few tariff headings in the Common Customs Tariff to determine the classification of a single product – namely, blackout drapery lining. Therefore, given the narrowness of this challenge, the Panel considers that a high degree of uniformity is required for the purposes of Article X:3(a) of the GATT 1994. We now turn to the facts to determine whether or not this high degree of uniformity has been achieved with respect to the tariff classification of blackout drapery lining.

Evidence relied upon by the United States to prove the existence of divergence in the tariff classification of blackout drapery lining

7.248 The United States alleges the existence of divergence in tariff classification of blackout drapery lining from 1999 to 2002 between, on the one hand, customs authorities in the United Kingdom, Ireland, and the Netherlands and, subsequently, in Belgium, who classified the product in question under tariff heading 5907 of the Common Customs Tariff (which covers "Textile fabrics otherwise impregnated, coated or covered; painted canvas being theatrical scenery, studio back-cloths or the like") and, on the other hand, customs authorities in Germany, who classified the product in question under heading 3921 of the Common Customs Tariff (which covers "Other plates, sheets, film, foil and strip, of plastics").

7.249 To support its allegation the United States refers to a number of BTI notices issued for blackout drapery lining by customs authorities in the United Kingdom (dated 17 March 1999, 12 June 1999 and 22 December 1999), in Ireland (dated 1 April 1999) and in the Netherlands (dated 13 February 2002).[477] Each BTI relied upon by the United States classifies the product under heading 5907. The descriptions of the products in each of those BTI are set out immediately below:

BTI issued by UK customs authority dated 17 March 1999

"Thermal curtain lining; also known as blackout material. Consisting of a plain weave fabric of 50% polyester and 50% cotton fibres. Visibly coated on one side only with a layer of acrylic foam. Textile flock then appears to have been sparesly [sic] applied to the top of this coating giving it a slightly raised or brushed effect. Used in such places as hotels etc to darken and block out sunlight in rooms where the sun is a problem. The fabric may also be applied to the back of existing transparent/translucent curtains; as lining material; giving the same net result. Similar in appearance to the fabric used in photographic studios etc."

BTI issued by UK customs authority dated 12 June 1999

"Plain weave fabric 70% Polyester 30% Cotton. Visibly coated on one side only. Textile flock has been applied giving the fabric a slightly raised or brushed effect. Used as a blackout material"

BTI issued by UK customs authority dated 22 December 1999

[477] BTI issued from 1999 through 2002 by customs authorities in the United Kingdom, Ireland, and the Netherlands (Exhibit US-22).

> "Textile fabric constructed of textile flock with a layer of cellular plastic and a knitted textile backing. 71.3% foam (PU/PVC); 16.6% polyester; 12.1% viscose"
>
> *BTI issued by Irish customs authority dated 1 April 1999*
>
> "Thermal curtain lining (blackout curtain lining), plain weave fabric of 50% polyester and 50% cotton, visibly coated on one side with a layer of acrylic foam. Textile flock has then been applied on top of this coating."
>
> *BTI issued by Dutch customs authority dated 13 February 2002*
>
> "Fabric of 100% cottons covertly with low acrylic resin polymers, on which a layer has been textielvezeltjes introduced (flock). The fabric is provided on roles [sic] of approximately 50 meters length, packs in plastic and by 4 roles [sic] in a hamper box."

7.250 In addition, with respect to the tariff classification of blackout drapery lining in Belgium, it is evident from a decision issued by the Hamburg ZPLA[478], aspects of which are excerpted in paragraph 7.252 below, that certain products imported into Belgium by Rockland Industries were classified by the Belgian customs authorities under heading 5907.[479] An affidavit of Mr Mark Berman, Chief Executive Officer of Rockland Industries, states in relevant part that:

> "6. All coated products produced by Rockland incorporate textile flocking as part of the coating process. Rockland has never produced a coated product that does not incorporate textile flocking.
>
> 7. Textile flocking is required to prevent the fabric from sticking together."[480]

7.251 The United States contrasts the tariff classification of blackout drapery lining by the customs authorities in the United Kingdom, Ireland, the Netherlands and Belgium with certain decisions and opinions issued by German customs authorities. In particular, the United States refers to an expert opinion issued by the Main Customs Office of Bremen to Bautex-Stoffe GmbH ("Bautex") dated 29 September 2004.[481] In that expert opinion, the Main Customs Office of Bremen found that certain products that had been imported into Germany by Bautex in October and November 1999 had been

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[478] The Panel understands that the acronym ZPLA can be translated in English as "Testing and Training Establishment for Technical Customs Matters". The body referred to by the Panel in its findings as the "Hamburg ZPLA" is referred to by the parties variously as the "Hamburg Customs Office", the "Main Customs Office of Hamburg" and the "Hamburg ZPLA".

[479] Letter from Oberfinanzdirektion Hamburg to HZA Bremen regarding Protest of Bautex-Stoffe GmbH, 3 February 2003 (original and English translation) (Exhibit US-41). Further, in a letter from Marc De Schutter, Federal Government Services, Financial Section, Administration of Border Police and Import Taxes, Western Board to Inspector of Border Police and Import Taxes in Antwerp - C.T.D.A.I., 26 November 2004, (original and English translation) (Exhibit US-25), it is evident that "tissue" with "a covering surface of non-cellular synthetic material which contains filler materials (titanium dioxide and silicates), which are covered at its surface with body hair" were classified by Belgian customs authorities under tariff heading 5907.

[480] Affidavit of Mark R. Berman, President and Chief Executive Officer of Rockland Industries, Inc., 10 November 2005, paras. 6 - 7 (Exhibit US-79). The Panel notes the European Communities' objections to this affidavit on the ground that it constitutes a statement by a person with a clear interest in the classification of blackout drapery lining and, therefore, has no probative value: European Communities' closing statement at the second substantive meeting, para. 16. Nevertheless, the Panel considers that the affidavit contains evidence that contributes constructively to our duty under Article 11 of the DSU to conduct an objective assessment of the matter before us.

[481] The Panel notes that the European Communities characterises this expert opinion of the Main Customs Office of Bremen as a "decision": European Communities' first written submission, para. 333.

properly classified under heading 3921.[482] The Main Customs Office of Bremen's expert opinion states in relevant part that:[483]

> "According to the classification opinion of the Hamburg ZPLA as well as three supplementary opinions on the matter, the goods in question consist of rolls of a white fabric made of polyester, coated on one side with acrylate. The fabric is not dense and not further treated. The plastic coating consists of cellular plastic. The fabric and the coating are of approximately the same thickness. The fabric is to be considered as no more than an underlay. The imported goods are covered by heading 3921.
>
> According to the classification opinion, a hardened oil-based coating is not present. The surface is not covered with a thin layer of textile flock. The fabric is not dense, and is uniform in color. The fabric serves only as a reinforcement.
>
> Classification of the goods under heading 5907 could only be considered if, in accordance with the wording of that heading, "other textile fabrics ... ", the goods were not plastic-coated as required by heading 5903. The fact that the plastic coating has been treated with flame retardant and the like does not change the fact that the plastic coating exists. Therefore, classification under heading 5907 is excluded. Given that the plastic coating has a cellular structure, it is excluded from classification under heading 5903 and should be classified under heading 3921.
>
> As cellular plastic sheets made of other plastics, the imported goods are to be assigned code number 3921 1900 990. The legal grounds for this classification are to be found in Note 2(a)(5) to Chapter 59 of the Customs Tariff.
>
> The Main Customs Office of Bremen is convinced of the correctness of the Hamburg ZPLA's findings regarding the material composition of the goods.
>
> Numerous other binding customs decisions [BTI] have been handed down for comparable goods (darkening material)."

7.252 In reaching its conclusion that the products in question should be classified under heading 3921, the Main Customs Office of Bremen relied, *inter alia*, on a decision issued by the Hamburg ZPLA dated 3 February 2003 regarding a "protest" filed by Bautex.[484] The decision of the Hamburg ZPLA (the "Bautex decision issued by the Hamburg ZPLA") states in relevant part that:

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[482] Hauptzollamt Bremen, Letter Decision to Bautex-Stoffe GmbH regarding classification of blackout drapery lining, 29 September 2004 (Exhibit US-23).

[483] The Panel notes that it found the United States' translation into English of various exhibits that were originally in German difficult to understand and, at times, incorrect. Therefore, in its findings, the Panel relies upon its own unofficial translations of Exhibits US-23, 41 and 50. Nevertheless, the Panel considers that differences between, on the one hand, the United States' translations of Exhibits US-23, 41 and 50 and, on the other hand, the Panel's translations of those exhibits do not affect the substance of the Panel's findings regarding the tariff classification of blackout drapery lining.

[484] Letter from Oberfinanzdirektion Hamburg to HZA Bremen regarding Protest of Bautex-Stoffe GmbH, 3 February 2003 (original and English translation) (Exhibit US-41). It is apparent from the decision of the Main Customs Office of Bremen that the opinion of the Hamburg ZPLA was relied upon by the Main Customs Office of Bremen, in addition to "three supplementary opinions on the same matter": Hauptzollamt Bremen, Letter Decision to Bautex-Stoffe GmbH regarding classification of blackout drapery lining, 29 September 2004 (Exhibit US-23).

> "According to the expert opinion, the coating does not consist of hardened oil; the IR-spectrum, however, indicates traces of oil and polyallylesters are present in the extract. The main ingredient of the coating, however, is likely to be acrylate, according to the IR-spectrum. ...
>
> There is a series of vZTA[485] regarding various darkening materials ... in which the cellular plastic was coated with a synthetic layer, which shows a little flocking and which corresponds to the merchandise in question. Among these, vZTA 55/03 provides a good basis for comparison because the applicant submitted the same documents as Bautex-Stoffe GmbH in its protest filing. I am referring to the letters of the Belgian Customs Office according to which a product of the company Rockland Industries was classified under sub-heading 5907 000 90. This use of the same documents for classification in all cases strengthens the suspicion that the documents do not necessarily match the merchandise...
>
> An important difference lies in the fact that, in the case of vZTA 55/03, the fabric is dense whereas the fabric is not dense in the merchandise under consideration. ...
>
> Because the product in question consists of a cellular plastic, I adhere to my suggested opinion that [sub-heading] 3921 19 is appropriate."

7.253 The affidavit of Mr Mark Berman, Chief Executive Officer of Rockland Industries, referred to in paragraph 7.250 above, stated that the products that were the subject of the classification in the expert opinion of the Main Customs Office of Bremen and in the Bautex decision issued by Hamburg ZPLA were identical in all material respects to those that were the subject of a 1998 classification letter by the Hamburg ZPLA concerning a "protest" filed by Ornata GmbH (the "Ornata letter issued by the Hamburg ZPLA").[486] In the Ornata letter issued by the Hamburg ZPLA,[487] the products in question were described in the following terms:

> "According to ZPLA's findings, the tested merchandise shows under magnification on the surface <u>isolated</u> fibres; a cohesive layer is not present. A coating of the fabric with a thin layer of flock is not present. Because the surface treatment (flocking with individual fibres) is not visible to the naked eye, classification of the merchandise under heading 5907 is out of the question according to Chapter 59, Note 5 (a) and (c).
>
> ...
>
> In this particular case, ZPLA determined the following composition of the merchandise: a <u>white</u> fabric made out of polyester/cotton, which is on <u>one side</u> covered with cellular plastic (and flock fibres) with the layer built up – white fabric (0.20 mm thickness) – white/black/white cellular plastic layers made from polyacrylate with additives (0.20 mm thickness) – flock. The spun fabric is not dense and is not further processed. According to the above-mentioned definition, the white fabric is merely a base for reinforcement purposes. The merchandise is therefore excluded from heading 5903, according to Note 2(a)(5) to Chapter 59 and should be classified under Chapter 39.

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[485] The Panel understands that the German acronym "vZTA" corresponds to the English acronym "BTI".

[486] Affidavit of Mark R. Berman, President and Chief Executive Officer of Rockland Industries, Inc., 10 November 2005 (Exhibit US-79).

[487] Letter from Main Customs Office Hamburg-Waltershof to ORNATA GmbH in response to protest regarding classification, 29 July 1998 (Exhibit US-50).

> ...
>
> According to your opinion, as expressed in your letter ..., a coating of the merchandise with flock dust is visible with the naked eye, whereas ZPLA determined that flock dust fibers were only visible under magnification.
>
> The expression "visible with the naked eye" means, according to established jurisprudence that the impregnation, coating or covering of the fabric has to be directly visible in a simple visual examination ...
>
> Because a magnifier (aid) is necessary for the determination of flock dust fibres, therefore, the covering of the fabric with flock dust is not visible to the naked eye. According to the objective features and characteristics, as specified by the wording of the tariff headings in the Common Customs Tariff and the sections or chapter notes, classification under heading 5907 is therefore not possible ..." (emphasis in original)

7.254 The European Communities argues that the products classified, on the one hand, by customs authorities in the United Kingdom, Ireland, the Netherlands and Belgium and, on the other hand, by customs authorities in Germany, were not identical in relevant respects and, therefore, had to be classified differently.[488] In addressing this argument, the Panel notes that its task here is not to determine the correct classification under the Common Customs Tariff of the products being considered by, on the one hand, customs authorities in the United Kingdom, Ireland, the Netherlands and Belgium and, on the other hand, customs authorities in Germany. Rather, our task is to determine whether the divergence in tariff classification with respect to those products demonstrates non-uniform administration within the meaning of Article X:3(a) of the GATT 1994. In undertaking this task, we will focus on determining whether or not there was any objectively justifiable basis upon which the German customs authorities considered that the products, the subject of classification by the customs authorities in United Kingdom, Ireland, the Netherlands and Belgium, were different from the products that were the subject of classification by the German customs authorities. If not, this would tend to indicate the existence of non-uniform administration in violation of Article X:3(a) of the GATT 1994.

Physical characteristics of the products that were the subject of classification by on the one hand, customs authorities in the United Kingdom, Ireland, the Netherlands and Belgium and, on the other hand, customs authorities in Germany

7.255 Regarding the products that were the subject of classification by the customs authorities in United Kingdom, Ireland, the Netherlands and Belgium, the Panel notes that the BTI submitted by the United States indicates that the products classified by the customs authorities in the United Kingdom, Ireland and the Netherlands are all textile products covered with a layer of flocking.[489] Further, when read in conjunction with the affidavit of Mr Mark Berman, Chief Executive Officer of Rockland Industries, the relevant decision of the Hamburg ZPLA indicates that the products classified by the customs authorities in Belgium were all textile products incorporating textile flocking.[490]

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[488] See, for example, European Communities' second written submission, para. 117 and European Communities' closing statement at the second substantive meeting, para. 16.

[489] See paragraph 7.249 above.

[490] See paragraph 7.250 above. In the Harmonized System (heading 5603) "textile flock" is defined as consisting of textile fibres not exceeding 5 mm in length (silk, wool, cotton, man-made fibres, etc.). It is obtained as waste during various finishing operations and, in particular, from the shearing of velvets. It is also produced by cutting textile tow or fibres. Textile dust is obtained as waste, or by grinding textile fibres to a powder. Textile flock and dust fall in this heading even if bleached or dyed or if the fibres have been artificially curled.

7.256 With respect to the products classified by the German customs authority, the Panel notes that the only evidence provided that casts light on the physical characteristics of those products are the expert opinion of the Main Customs Office of Bremen[491], the Bautex decision issued by the Hamburg ZPLA[492], the Ornata letter issued by the Hamburg ZPLA[493] and the affidavit of Mr Mark Berman, Chief Executive Officer of Rockland Industries, concerning products manufactured by Rockland Industries.[494]

7.257 It is evident from the excerpts of the expert opinion of the Main Customs Office of Bremen set out in paragraph 7.251 above, that, unlike the customs authorities in the United Kingdom, Ireland, the Netherlands and Belgium, the Main Customs Office of Bremen did not characterize the products as textile products. Rather, the products were described as "cellular plastic sheets". The Main Customs Office of Bremen explained that the products also possessed a fabric component but that such component "is to be considered as no more than underlay" and "serves only as a reinforcement".

7.258 Like the expert opinion of the Main Customs Office of Bremen, the Bautex decision issued by the Hamburg ZPLA also appeared to characterize the products in question as a plastic. In particular, in its decision set out in paragraph 7.252 above, the Hamburg ZPLA described the product as being predominantly an "acrylate"[495] and consisting of a "cellular plastic". The Hamburg ZPLA appeared to acknowledge the presence of textile elements. For example, the Hamburg ZPLA referred to "traces of ... polyallylesters" and "a little flocking". However, the Hamburg ZPLA considered that the fabric in question was not "dense" enough to warrant classification of the product under heading 5907 (i.e. as a textile product).

7.259 According to the Ornata letter issued by the Hamburg ZPLA set out in paragraph 7.253 above, the products that were the subject of classification were considered flocked, thus sharing an important feature in common with the products the subject of classification by the customs authorities in the United Kingdom, Ireland, the Netherlands and Belgium. However, unlike the customs authorities in the United Kingdom, Ireland, the Netherlands and Belgium, the Hamburg ZPLA considered that such flocking was not sufficient so as to warrant classification under heading 5907 because the "flock dust fibres" were not "visible to the naked eye". The Hamburg ZPLA further stated that the fabric component of the product in question was "merely a base for reinforcement purposes".

7.260 It is apparent that the products that were the subject of classification in the expert opinion by the Main Customs Office of Bremen and in the Bautex decision issued by the Hamburg ZPLA were produced by Rockland Industries and were identical.[496] It is less clear whether the products that were the subject of classification by the Main Customs Office of Bremen and in the Bautex decision issued

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[491] Hauptzollamt Bremen, Letter Decision to Bautex-Stoffe GmbH regarding classification of blackout drapery lining, 29 September 2004 (Exhibit US-23).

[492] Letter from Oberfinanzdirektion Hamburg to HZA Bremen regarding Protest of Bautex-Stoffe GmbH, 3 February 2003 (original and English translation) (Exhibit US-41).

[493] Letter from Main Customs Office Hamburg-Waltershof to ORNATA GmbH in response to protest regarding classification. 29 July 1998 (Exhibit US-50).

[494] Affidavit of Mark R. Berman, President and Chief Executive Officer of Rockland Industries, Inc., 10 November 2005, paras. 6 – 7 (Exhibit US-79).

[495] The term "acrylate" is defined as "a salt or ester of acrylic acid": *The New Shorter Oxford English Dictionary*, 1993, p. 21.

[496] The decision issued by the Main Customs Office of Bremen specifically notes that the products the subject of classification were manufactured by Rockland Industries: Hauptzollamt Bremen, Letter Decision to Bautex-Stoffe GmbH regarding classification of blackout drapery lining, 29 September 2004 (Exhibit US-23). As noted in paragraph 7.252 above, in reaching its decision that the products in question should be classified under heading 3921, the Main Customs Office of Bremen relied, *inter alia*, on the Bautex decision issued by the Hamburg ZPLA.

by the Hamburg ZPLA were identical with the products that were the subject of classification in the Ornata letter issued by the Hamburg ZPLA. In this regard, we recall that, in his affidavit, Mr Mark Berman states that the product that was the subject of classification in the Ornata letter issued by the Hamburg ZPLA was "identical in all material respects to the product sold to [Bautex] by Rockland".[497] The United States has not submitted any evidence to support Mr Berman's assertion that the products that were the subject of classification in the Ornata letter issued by the Hamburg ZPLA were "identical in all material respects" with those that were the subject of classification by the Main Customs Office of Bremen and in the Bautex decision issued by the Hamburg ZPLA. In this regard, the Panel notes that Mr Berman's appraisal of what is material may be different from the matters that are relevant for the purposes of determining whether or not the tariff classification of blackout drapery lining in the European Communities amounts to non-uniform administration in violation of Article X:3(a) of the GATT 1994.

7.261 In any event, the Panel notes that the three decisions by the German customs authorities did not consider that the textile/fabric/flocking components of the products that were the subject of classification were significant and/or visible to the naked eye. This would appear to contrast with the physical characteristics of the products that were the subject of classification by the customs authorities in the United Kingdom, Ireland, the Netherlands and Belgium. In this regard, the Panel recalls that the United States has referred to an affidavit of Mr Mark Berman, Chief Executive Officer of the company whose products were the subject of classification by the Main Customs Office of Bremen and the Hamburg ZPLA in respect of the Bautex decision.[498] The Panel acknowledges that that affidavit indicates that the products that were the subject of classification by those two German customs authorities were "coated products" incorporating "textile flocking". However, as was submitted by the European Communities during the Panel's proceedings[499], the affidavit does not address the question of whether the products before the customs authorities in the United Kingdom, Ireland, the Netherlands and Belgium were, in fact, identical to the products that were the subject of classification by the German customs authorities. Indeed, the Panel has not been provided with any evidence that proves that the products in question were, in fact, identical.

7.262 With regard to the opinion of the WCO Secretariat referred to by the United States in which the WCO Secretariat suggested that the products that were the subject of classification there were classifiable under heading 5907 (i.e. different from the heading relied upon by the German customs authorities),[500] the Panel notes that there is no compelling evidence in that opinion to indicate that the products the subject of the WCO Secretariat's opinion had the same key physical characteristics as those possessed by the products that were the subject of classification by the German customs authorities. In particular, the WCO Secretariat described the products in question as follows:

> "[T]he product at issue would appear to be woven fabric made from 70% polyester and 30% cotton, which is coated on one side, in a three-pass operation, with a three-layer foam mixture of clay, titanium dioxide, carbon black, flame retardant, acrylic and textile flock. The layer closest to the woven fabric is an acrylic cellular plastic. The middle layer is composed mainly of titanium dioxide with carbon black. The outer layer is composed of an acrylic cellular plastic with cotton flocking fibers. The

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[497] Affidavit of Mark R. Berman, President and Chief Executive Officer of Rockland Industries, Inc., 10 November 2005, para. 8 (Exhibit US-79).

[498] Affidavit of Mark R. Berman, President and Chief Executive Officer of Rockland Industries, Inc., 10 November 2005 (Exhibit US-79).

[499] European Communities' closing statement at the second substantive meeting, para. 16.

[500] Letter from M. Chriticles Mwansa, Director, World Customs Organization, Tariff and Trade Affairs Directorate, to M. Myles B. Harmon, Director, Office of Regulations and Rulings, U.S. Customs and Border Protection regarding classification of blackout drapery lining (26 October 2004) (Exhibit US-24).

woven fabric, which is used to make blackout drapery lining, accounts for 24.7% of the weight of the blackout lining, and the coating for 75.3%.

...

[I]t could be argued that the product at issue, consisting of a textile fabric which is neither figured nor worked, and which is uniformly dyed and coated with cellular plastic, should be classified in heading 39.21 by virtue of Note 2(a)(5) to Chapter 59.

However, judging by the information submitted and the sample supplied, this product is not merely a textile fabric laminated with cellular plastic. It also incorporates a middle layer composed mainly of titanium dioxide and carbon black, and in addition the visible outer layer consists of cotton flocking which completely covers the acrylic cellular plastic.

...

[I]t is the titanium dioxide and the carbon black which confer on this product its blackout properties, while the cotton flocking covers the external surface of the fabric, preventing the layer of acrylic plastic from sticking and giving the fabric a hand similar to that of a suede fabric.

The Secretariat shares your Administration's view that the significance of these additional layers cannot be ignored, given the use which will be made of this textile product (manufacture of linings for blackout curtains).

The Secretariat can also agree with you that the product at issue can be likened to a coated fabric of the kind described on page 1036 of the Explanatory Notes under item (g)(1), and as a result the Secretariat would tend to classify it in heading 59.07 by application of Interpretative Rule 1."

7.263 It would appear that the products under consideration by the WCO Secretariat comprised textile fabric laminated with cellular plastic. Further, the product in question included a visible outer layer consisting of cotton flocking, which completely covered the acrylic cellular plastic. As noted previously, the products that were the subject of classification by the Main Customs Office of Bremen and in the Bautex decision issued by Hamburg ZPLA were characterised as predominantly plastic rather than textile, which arguably, distinguish them from the products under consideration by the WCO Secretariat. Further, the products that were the subject of classification in the Ornata letter issued by the Hamburg ZPLA were characterised as possessing "flock dust fibres" which were not "visible to the naked eye". Again, the absence of a visible layer of textile flocking arguably distinguish them from the products under consideration by the WCO Secretariat. Indeed, while not binding, the WCO Secretariat opinion appears to suggest that, in the absence of a visible outer layer of cotton flocking completely covering the acrylic cellular plastic (which apparently characterised the products the subject of the WCO Secretariat's classification opinion), the products would have been classifiable under heading 3921.

7.264 On the basis of the limited evidence before the Panel, the Panel can only assume that the products that were the subject of classification by the Main Customs Office of Bremen, in the Bautex decision issued by the Hamburg ZPLA and in the Ornata letter issued by Hamburg ZPLA, were not identical to those that were the subject of classification by the customs authorities in the United Kingdom, Ireland, the Netherlands and Belgium. This indicates to the Panel that there was an objectively justifiable basis upon which the German customs authorities considered that the products that were the subject of classification by the customs authorities in the United Kingdom, Ireland, the

Netherlands and Belgium were different from the products that were the subject of classification by the German customs authorities.

7.265 Therefore, the Panel does not consider that the divergent *decisions* regarding the tariff classification by, on the one hand, the German customs authorities and, on the other hand, the customs authorities in the United Kingdom, Ireland, the Netherlands and Belgium amounts to non-uniform administration in violation of Article X:3(a) of the GATT 1994. As stated previously, we consider that, on the basis of the limited evidence before the Panel, there was an objective factual basis that justifies the decision by the German customs authorities to classify the product in question in a manner differently from the customs authorities in the United Kingdom, Ireland, the Netherlands and Belgium. Nevertheless, the Panel notes that the United States has also implicitly challenged the *administrative process* that led to divergent classification decisions regarding blackout drapery lining.[501] We consider that process immediately below.

Administrative process leading to tariff classification decisions for the product in question by German customs authorities

7.266 The Panel recalls its finding that the term "administer" in Article X:3(a) of the GATT 1994 relates to the application of laws and regulations, including administrative processes. In the Panel's view, the administrative process leading to a tariff classification decision, such as the tariff classification of blackout drapery lining, constitutes an act of administration within the meaning of Article X:3(a) of the GATT 1994. Further, it amounts to an instance of administration of the Common Customs Tariff in the tariff classification area, a matter that is within the Panel's terms of reference.

German interpretative aid

7.267 In the Panel's view, a system of customs administration which allows or, at least, does not prevent customs authorities from unilaterally relying upon interpretative aids in carrying out their functions, which are not provided for in the binding rules applicable to all customs authorities, such as in the European Communities, could lead to non-uniform administration in violation of Article X:3(a) of the GATT 1994 in certain circumstances.

7.268 The Bautex decision issued by the Hamburg ZPLA makes explicit reference to an interpretative aid that was particular to Germany.[502] In particular, that decision refers to a note to Chapter 59 of the Tariff entitled "Erl. Zu Kap. 59 NEH Rz. 02.0 ff".[503] Notably, the interpretative aid sets out criteria, which are aimed at determining whether or not the textile component of a product is present merely for reinforcing purposes in accordance with Note 2(a)(5) to Chapter 59 of the Common Customs Tariff. The interpretative aid states, *inter alia*, that, in determining whether or not the textile component of a product is present merely for reinforcing purposes, it is necessary to consider whether the fabric in question is "tightly woven". This criterion appears to have been relied upon by the German customs authorities in each of the three decisions with which we have been provided.

7.269 In particular, as previously noted, the Bautex decision issued by the Hamburg ZPLA makes explicit reference to an interpretative aid that was particular to Germany and then proceeds to state

[501] United States' first written submission, paras. 71 – 72.

[502] The European Communities does not dispute that the Bautex decision issued by the Hamburg ZPLA was based, at least in part, on an interpretative aid that was particular to Germany: European Communities' first written submission, para. 343.

[503] This note is contained in "National Decisions and Indications accompanying Chapter 59 of the German Tariff Schedule" (original and English translation) (Exhibit US-43).

that "the fabric is not dense in the merchandise under consideration".[504] In other words, the Hamburg ZPLA appeared to correlate the criterion of "tightly woven" in the German interpretative aid with the criterion of density of the fabric. This criterion of density was also relied upon by the Main Customs Office of Bremen[505] and by the Hamburg ZPLA in respect of the opinion concerning Ornata[506].

7.270 Notably, the interpretative aid relied upon by the German customs authorities in each of these cases is not contained in the relevant chapters of the Common Customs Tariff, namely Chapters 39 and 59.[507] The European Communities submits that the fabric density criterion was developed pursuant to Commission Regulation (EC) No. 1458/97.[508] As the European Communities itself explains, that regulation concerned the classification of garments. The Panel considers it difficult to reconcile the fact that a product that was considered as predominantly plastic by two of the German customs authorities in question (i.e. the Main Customs Office of Bremen and the Hamburg ZPLA in respect of the Bautex decision) would be classified by those customs authorities based on an interpretative aid developed in analogy to a regulation concerning textile products. Moreover, even if the fabric density criterion amounted to what the European Communities describes as a "purely interpretative aid prepared for administrative purposes which does not in any way have force of law, and does not derogate from Community law"[509], the Panel notes that the criterion appears to have played a critical role for the German customs authorities in deciding how to classify the products in question.[510]

7.271 The Panel has not been provided with any evidence to indicate that any other member States are relying upon an aid akin to that used by the German customs authorities with respect to the tariff classification of blackout drapery lining. Further, the interpretative aid relied upon by the German customs authorities is not contained in the relevant chapters of the Common Customs Tariff.[511] Additionally, the German interpretative aid apparently has in the past and may continue in the future to have an impact upon the tariff classification of blackout drapery lining in the European Communities. These factors demonstrate that the German customs authorities' reliance upon the interpretative aid in question amounts to non-uniform administration in violation of Article X:3(a) of the GATT 1994.

Tariff classification decisions in other member States

7.272 By way of observation, a customs administration system which does not *require* reference by customs authorities to decisions taken by other customs authorities operating within the same system

[504] See paragraph 7.252 above.

[505] In particular, the Main Customs Office of Bremen states that "[t]he fabric is not dense". See paragraph 7.251 above.

[506] The Ornata decision issued by the Hamburg ZPLA states that: "[t[he spun fabric is not dense": See paragraph 7.253 above.

[507] In this regard, see paragraphs 7.175 – 7.176 above.

[508] Commission Regulation (EC) No. 1458/97 concerning the classification of certain goods in the Combined Nomenclature (Exhibit EC-78).

[509] European Communities' first written submission, para. 344 referring to Exhibit EC-79, para. 19.

[510] In this respect, the Panel notes that the European Communities submits that member States' customs authorities are not prevented from issuing administrative guidelines or other non-binding documents for administrative purposes. However, the ECJ has confirmed that such measures cannot derogate in any way from the application of EC law: European Communities' reply to Panel question No. 157.

[511] In this regard, the Panel notes that the European Communities submits that member States can only act to supplement provisions contained in EC law if they have been specifically authorized to do so or if a specific issue is not covered by EC law: European Communities' reply to Panel question No. 157. In the case of the tariff classification of blackout drapery lining, the Panel notes that this appears to be covered by the Common Customs Tariff. Further, the Panel has not been provided with any evidence to indicate that member States have been specifically authorized to supplement the Common Customs Tariff with respect to the tariff classification of blackout drapery lining.

and/or cooperation between customs authorities before customs decisions are taken, such as in the European Communities, could lead to non-uniform administration in violation of Article X:3(a) of the GATT 1994 in certain circumstances.[512]

7.273 In the present case, the Panel also notes that, while the Main Customs Office of Bremen acknowledged the existence of "numerous binding customs tariff decisions ... handed down regarding comparable goods"[513], without any explanation, it went on to state that it "sees no reason to vacate the contested Notice of Change to Tax". Similarly in the Bautex decision issued by the Hamburg ZPLA, the German customs authority referred to a classification decision by Belgian customs authority but distinguished it on the basis that "[t]he use of the same documents for classification in all cases strengthens the suspicion that the documents do not necessarily match the merchandise."[514]

7.274 The Panel is of the view that the failure on the part of the Main Customs Office of Bremen to take into account "numerous binding customs tariff decisions ... handed down regarding comparable goods" or, at a minimum, to explain why they were deemed irrelevant to the classification at hand is not consistent with the obligation of uniform administration in Article X:3(a) of the GATT 1994. The Panel considers that it was all the more incumbent upon the Main Customs Office of Bremen to provide such explanations in the light of the fact that Bautex-Stoffe GmbH – the company requesting review of the classification of products before the Main Customs Office of Bremen – objected on numerous occasions to the classification of the products under heading 3921 on the ground that the goods consisted of a fabric comprising polyester and wool, coated with acrylic and flocked with cotton fibers[515] and because the Main Customs Office of Bremen was clearly aware of the existence of classification decisions by other customs authorities for "comparable goods". For the same reasons, the Panel considers that it was not appropriate for the German customs authority in the Bautex decision issued by the Hamburg ZPLA to have dismissed the tariff classification by Belgian customs authorities on the basis of a mere "suspicion" that the documents filed for classification of those products by the Belgian customs authorities did not correspond to the products themselves.[516]

7.275 Indeed, it is possible that, had the German customs authorities' consideration of classification decisions for blackout drapery lining issued by customs authorities in other member States gone beyond the merely superficial reference that their respective decisions evidence, the classification of the products before the German customs authorities might not have been different from the classification of the products before the customs authorities in United Kingdom, Ireland, the Netherlands and Belgium. In the Panel's view, the apparent failure on the part of German customs authorities to seriously consider classification decisions for blackout drapery lining of other customs

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[512] In this regard, see paragraph 7.177 above,

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

[514] Letter from Oberfinanzdirektion Hamburg to HZA Bremen regarding Protest of Bautex-Stoffe GmbH, 3 February 2003 (original and English translation) (Exhibit US-41).

[515] This is evident from page 2 of Hauptzollamt Bremen, Letter Decision to Bautex-Stoffe GmbH, 22 September 2004 (original and English translation) ("Bautex-Stoffe Decision") (Exhibit US-23) which refers to letters dated 2 May 2001, 25 August 2001, 22 August 2002 and 14 May 2003.

[516] With respect to its letter concerning Ornata, the Hamburg ZPLA states that: "In your protest letter of 18/12/1997 you mention that a number of fundamental decisions were taken by the EU finance authorities in Brussels with reference to merchandise under code 5907 0090 900. May I request you to inform me of the document numbers and dates of the decisions, if they are known to you. If you have further information and receipts to show that identical merchandise was treated differently in other EU countries (i.e. a classification other than heading 3921), please send me the documents, in order to clarify this situation.": Letter from Main Customs Office Hamburg-Waltershof to ORNATA GmbH in response to protest regarding classification (29 July 1998), p. 2 (Exhibit US-50). The Panel has not been provided with any evidence to suggest that the documentation for identical merchandise requested by the Hamburg ZPLA was not provided and/or that such documentation was not taken into account by the Hamburg ZPLA.

authorities may have had an impact and may continue to have an impact in the future upon trade in blackout drapery lining in the European Communities.[517] These factors demonstrate that the treatment by the German customs authorities of classification decisions for blackout drapery lining issued by other customs authorities amounts to non-uniform administration in violation of Article X:3(a) of the GATT 1994.

Conclusion

7.276 In conclusion, the Panel considers that the administrative process leading to the tariff classification of blackout drapery lining amounts to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994. The Panel considers that the acts of non-uniform administration which occurred between 1999 and 2002 with respect to the tariff classification of blackout drapery lining continue to have potential effect. In particular, German customs authorities may rely upon an interpretative aid particular to Germany in deciding how to classify blackout drapery lining whereas, apparently, customs authorities in other member States do not rely upon the same aid. Furthermore, German customs authorities are not obliged to make reference to the decisions of other customs authorities when classifying blackout drapery lining, even in cases where there is a possibility that the products the subject of those decisions are the same or similar. Therefore, the Panel finds a violation of Article X:3(a) of the GATT 1994 with respect to the tariff classification of blackout drapery lining.

(v) Tariff classification of liquid crystal display flat monitors with digital video interface

Summary of the parties' arguments

Evidence of divergence in classification

7.277 The **United States** refers to a case involving BTI for the classification of liquid crystal display (LCD) flat monitors with digital video interface (DVI). The United States notes that, until 2004, member State customs authorities had consistently classified LCD flat monitors with DVI as "computer monitors" under heading 8471 of the Common Customs Tariff ("Automatic data processing machines and units thereof ..."). The United States submits that, however, in 2004, customs authorities in the Netherlands began classifying the goods as "video monitors" under heading 8528 of the Common Customs Tariff ("Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors"). The United States submits that this matter was brought to the attention of the Customs Code Committee. According to the United States, the Customs Code Committee did not definitively resolve the classification question. Instead, in March 2005, the Council of the European Union issued a regulation temporarily resolving the matter for some of the monitors at issue (i.e. monitors with a diagonal measurement of 19 inches or less and an aspect ratio of 4:3 or 5:4). However, the United States submits that that regulation merely suspends duties on this subset of monitors until 31 December 2006 and, meanwhile, leaves unresolved the classification of monitors with a diagonal measurement greater than 19 inches, which at least one member State (i.e. the Netherlands) continues to classify as video monitors.[518] According to the United States, products above the size threshold defined in the Council regulation remain subject to duties depending on the classification assigned by customs authorities in different member States.[519]

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[517] For example, the impact might be trade diversion to member States other than Germany because of the administrative processes applied by at least some customs authorities in Germany with respect to the tariff classification of blackout drapery lining.

[518] United States' first written submission, para. 74 referring to Council Regulation (EC) No. 493/2005 of 16 March 2005 (Exhibit US-28).

[519] United States' reply to Panel question No. 4.

7.278 The **European Communities** responds that the correct classification of the monitors at issue is a relatively recent question, which has arisen due to the increasing convergence of information technology and consumer electronics. Many LCD monitors, by virtue of their design and technical characteristics, can serve both as a computer monitor and as a video monitor. The European Communities submits that it is, therefore, difficult for customs authorities to establish on an objective basis the precise purpose for which a particular monitor is intended.[520] The European Communities also notes that there are a large number of different types of LCD monitors on the market that differ in various aspects, including size, the interfaces they possess, the signals they can process, and general design. According to the European Communities, to the extent that such features may have an impact on their use, differences between different types of monitors may also need to be taken into account.[521] The European Communities submits that the evidence referred to by the United States in support of its claims does not show that there is a problem of non-uniform administration contrary to Article X:3(a) of the GATT 1994, but rather that there is an issue in the process of resolution. In this regard, the European Communities submits that the classification of the relevant monitors is an issue which is currently under review, and relevant measures will be submitted to the Customs Code Committee in the near future.[522]

Measures taken by the European Communities to resolve the divergence in classification

7.279 The **European Communities** notes that Council Regulation (EC) No. 493/2005 of 16 March 2005 temporarily suspends, until 31 December 2006, the duties for video monitors with a diagonal screen measurement of 48.5 cm or less and with an aspect ratio of 4:3 or 5:4.[523] The European Communities explains that the purpose of this measure is to provide certainty about tariff treatment to the concerned importers for a transitional period of time. This suspension was limited to those monitors which, on account of their size, are more likely to serve as computer monitors than larger monitors. The adoption of a temporary duty suspension was preferred to a classification regulation because, according to the European Communities, it allows further observation of the technological and commercial developments in this segment of the market.[524] The European Communities explains that, from a practical perspective, the suspension of the duties fulfils exactly the same purpose as that of a classification regulation. It assures traders that, regardless of whether the goods fall under headings 8471 or 8528, their goods will receive the same tariff treatment. The European Communities notes that the relevant industry association has characterised Regulation No. 493/2005 as "a very important suspension request which, when adopted as proposed, will benefit all importers of such products".[525] The European Communities submits that, before the expiration of the suspensive measure, EC institutions will review the situation and adopt any necessary measures.[526]

7.280 The **United States** submits that faced with the problem of divergent classification, the European Communities merely adopted a regulation that temporarily suspends duties on certain LCD monitors with DVI regardless of their classification. The United States notes that the temporary duty suspension only applies to monitors below a specified size threshold. Monitors above that threshold continue to be subject to divergent classification from member State to member State.[527] The United States also questions whether adoption of a Council regulation to deal temporarily with a subset of

[520] European Communities' first written submission, para. 349.
[521] European Communities' first written submission, para. 350.
[522] European Communities' closing statement at the second substantive meeting, para. 15.
[523] European Communities' first written submission, para. 356 referring to Council Regulation (EC) No 493/2005 of 16 March 2005 (Exhibit US-28).
[524] European Communities' first written submission, para. 357.
[525] European Communities' first written submission, para. 358 referring to Exhibit EC-84.
[526] European Communities' first written submission, para. 357.
[527] United States' reply to Panel question No. 17(b).

LCD monitors rather than a classification regulation, approved by the Customs Code Committee amounts to uniform administration within the meaning of Article X:3(a) of the GATT 1994. According to the United States, a duty suspension regulation is very different from a classification regulation. One is a temporary policy solution, while the other is a definitive determination of a technical issue. In the United States' view, 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 area.[528] The United States submits that, therefore, since the suspension regulation applies only to monitors below a certain size threshold, that it does not actually resolve the underlying classification question, for monitors above the size threshold, a state of non-uniformity with serious financial consequences remains.[529] According to the United States, traders organize their business affairs with a long-term view, and in making their shipping decisions, they are likely to take account of which customs authorities will accord the more favourable tariff treatment after the temporary regulation expires.[530]

7.281 The **European Communities** submits that the United States seems to insinuate that the European Communities chose Regulation No. 493/2005 in order to somehow circumvent the Customs Code Committee. The European Communities disputes this, arguing that the adoption of Regulation No. 493/2005 required a qualified majority of the member States in the Council, just as a favourable opinion of the Committee in management or regulatory procedure does. Rather, the instrument of a Council Regulation was chosen because this seemed better adapted to the specific circumstances of the case.[531] The European Communities adds that it has adopted another relevant measure, namely Regulation No. 634/2005, which classifies LCD monitors of a particular type under heading 8528. Currently, the Commission keeps monitoring the situation, and may adopt further classification regulations for LCD monitors or other appropriate measures as and when the need arises.[532]

7.282 The European Communities also submits that the reference to the long-term planning on the part of traders is irrelevant for the purposes of Article X:3(a) of the GATT 1994. The European Communities submits that Article X:3(a) of the GATT 1994 requires uniform administration; it does not prohibit legislative changes nor does it protect expectations of traders regarding the continuation of certain measures. Accordingly, the question of what measures the European Communities will adopt after the expiration of Regulation No. 493/2005 in order to ensure uniform administration is not prejudged by Article X:3(a) of the GATT 1994.[533] The European Communities also argues that the fact that Regulation No. 493/2005 is only valid until 31 December 2006 does not reduce its value for ensuring uniform tariff treatment throughout the European Communities presently. Moreover, before the expiration of the measure, the European Communities will examine the situation and will adopt the measures which are necessary. The European Communities submits that the United States cannot build an allegation of non-uniform administration on the mere speculation that the European Communities might fail to take certain measures in the future.[534] Therefore, according to the European Communities, it is irrelevant whether any provision compels the European Communities to take the necessary measures after the expiration of Regulation No. 493/2005.[535]

[528] United States' reply to Panel question No. 4.
[529] United States' oral statement at the second substantive meeting, para. 53.
[530] United States' reply to Panel question No. 137(b).
[531] European Communities' first written submission, para. 360.
[532] European Communities' first written submission, para. 361 referring to Exhibit EC-85.
[533] European Communities' comments on the United States' reply to Panel question No. 137(b).
[534] European Communities' second written submission, para. 122; European Communities' comments on the United States' reply to Panel question No. 137(b).
[535] European Communities' comments on the United States' reply to Panel question No. 137(b)

7.283 The European Communities also argues that the United States is wrong to claim that Regulation No. 493/2005 fails to ensure uniform administration because the measure concerns the suspension of a duty rate, rather than the classification of a product. In this regard, the European Communities notes that Article X:3(a) of the GATT 1994 does not require uniform administration for its own sake, but rather in order to ensure uniform conditions of treatment for traders. Accordingly, Article X:3(a) of the GATT 1994 can be held to be violated only where a variation of practice in fact has a significant impact on traders. In the case of LCD monitors, due to Regulation No. 493/2005, for the monitors covered by the regulation, there is no difference in tariff duties between monitors classified under heading 8471 and those classified under heading 8528, since the tariff rate for both will be 0%. Nor are there any other relevant differences in treatment. Accordingly, even if there were differences in tariff classification for the monitors at issue, this would have no impact on traders. The European Communities explains that this is why the trading community was in fact strongly supportive of the measure.[536] In addition, the European Communities considers that, even if the Panel were to hold that there was an incompatibility with Article X:3(a) of the GATT 1994, this incompatibility could not be held to constitute nullification or impairment of any benefit accruing to the United States under Article X:3(a) of the GATT 1994. In the case of LCD monitors, the tariff treatment for the monitors covered by Regulation No. 493/2005 is uniform and the duty rate is 0%. Therefore, the presumption of nullification and impairment established by Article 3.8 of the DSU would have to be considered as rebutted in the present case.[537]

7.284 In response, the **United States** submits that the implication that the trading community is satisfied by the measures taken by the European Communities so far regarding the tariff classification of LCD monitors is belied by recent statements from the industry concerned with this classification question. Specifically, in a September 2005 letter to the Commission's Director for International Affairs and Tariff Matters, the industry association that has focused on this matter ("EICTA") stated that: "[w]ithout such clarification [of the classification of monitors above the size threshold set forth in the duty suspension regulation], the industry is faced with an unacceptable situation were [sic] various Member States are applying classification rules in an inconsistent manner, causing competitive disadvantage for some importers and making the consequences of sourcing and routing decisions almost impossible to predict".[538] Further, as recently as 6 December 2005, EICTA advised the Commission of its profound concerns regarding this matter. According to the United States, EICTA noted not only its substantive disagreement with the Commission's proposed regulation, but also its dismay at the Commission's lack of consultation with the trade association, including its lack of response to the association's 2 September 2005 letter on this matter.[539]

7.285 In response, the **European Communities** submits that, in its letter, EICTA specifically calls on the Commission to postpone the discussion of the classification regulation. The European Communities question how postponement of a measure that will contribute to uniform administration, supports the United States' submission that the European Communities is not doing enough to ensure uniform administration. With reference to EICTA's letter, the European Communities submits that this, together with a number of other measures[540], are outside the Panel's terms of reference. Finally, the European Communities submits that, on the basis of ongoing consultations with the customs authorities of the member States as well as with concerned industry, the EC Commission has prepared

[536] European Communities' second written submission, para. 123 referring to letter containing industry response to Regulation No. 493/2005 concerning LCD Video Monitors, 16 November 2004 (Exhibit EC-84).

[537] European Communities' second written submission, para. 124.

[538] United States' oral statement at the second substantive meeting, para. 53 referring to Letter from Mark MacGann, Director General, EICTA, to Manuel Arnal Monreal, Director International Affairs and Tariff Matters, European Commission, 2 September 2005, p. 1 (Exhibit US-75).

[539] United States' reply to Panel question No. 137(b) referring to *See* Letter from Mark MacGann, Director General, EICTA, to Manuel Arnal Monreal, Director International Affairs and Tariff Matters, European Commission, 6 December 2005 (Exhibit US-81).

[540] Specifically, the European Communities refers to Exhibits US 75-78.

a draft classification regulation regarding LCD monitors. This measure will be submitted for the opinion of the Customs Code Committee at its meeting of 16 December 2005.[541]

Opinion of the Customs Code Committee

7.286 The **European Communities** submits that the Customs Code Committee was seized of the issue of the classification of LCD monitors for the first time in April 2004 and has reviewed the situation at regular intervals ever since. Since the classification issue requires technical input from industry, the Committee has, in accordance with Article 9 of its Rules of Procedure, heard representatives of the industry.[542] The European Communities notes that, at its 346th meeting of 30 June – 2 July 2004, the Customs Code Committee concluded that "unless an importer can demonstrate that a monitor is only to be used with an ADP machine (heading 8471) or to be used as an indicator panel (heading 8531), it has to be classified under heading 8528".[543] On the basis of the foregoing, the European Communities submits that the United States' allegations that the Netherlands wrongly classifies LCD monitors as video monitors is misplaced since, in principle, such a classification is in line with the Common Customs Tariff, as confirmed by the Customs Code Committee.[544]

7.287 In response, the **United States** submits that by characterizing the Dutch classification as "in line" with the Common Customs Tariff, the European Communities suggests that more than one classification may be "in line". According to the United States, where more than one classification is "in line" with the Common Customs Tariff, the European Communities does not provide a mechanism for systematically reconciling different classifications adopted by different member State authorities. The United States adds that the Customs Code Committee conclusion with which the Dutch classification supposedly is "in line" is not itself in line with the relevant Chapter Note from the Common Customs Tariff. Specifically, the Committee's conclusion would prohibit a monitor from being classified as a computer monitor under tariff heading 8471 unless an importer can demonstrate that it is "*only* to be used with an ADP machine"[545] – a computer machine. However, according to the United States, under the relevant chapter notes, a monitor may be classified as a computer monitor if "it is of a kind *solely or principally* used in an automatic data-processing system".[546]

7.288 The United States also notes that Regulation No. 634/2005 classifying monitors of a particular type under heading 8528, 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. ...".[547] The United States observes that the regulation 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 is that an importer must demonstrate that "a monitor is *only* to be used with an ADP machine" in order to have it classified under heading 8471. According to the United States, the Customs Code Committee's conclusion, which abandons the sole or principal use test set out in the Common Customs Tariff in favour of a sole use test, detracts from rather than promotes uniformity. In the view of the United States, member State authorities are now confronted with two conflicting

[541] European Communities' comments on the United States' reply to Panel question No. 137(b) referring to proposed new regulation on LCD monitors, 29 November 2005,(Exhibit EC-163) and Agenda for Customs Code Committee, 21 November 2005 (Exhibit EC-164).

[542] European Communities' first written submission, para. 352.

[543] European Communities' first written submission, para. 353.

[544] European Communities' first written submission, para. 354.

[545] European Communities' first written submission, para. 353.

[546] United States' oral statement at the first substantive meeting, para. 28; United States' reply to Panel question No. 4 referring to Commission Regulation No. 1810/2004 of 7 September 2004 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, 30 October 2004 at 504 (Chapter 84, note 5(B)(a)) (emphasis added). (Exhibit US-46).

[547] Commission Regulation (EC) No. 634/2005 of 26 April 2005 concerning the classification of certain goods in the Combined Nomenclature (Exhibit EC-85).

tests for classifying LCD monitors with DVI for ADP machines – the sole or principal use test in the Common Customs Tariff chapter notes or the sole use test in the Customs Code Committee's conclusion.[548]

7.289 The **European Communities** responds that the Customs Code Committee reached its conclusion on the basis of several presentations by the industry concerned. On this basis, the Committee concluded that industry had not succeeded in presenting any criteria on which principal use could be established.[549] The European Communities adds that it does not understand what purpose conclusions of the Customs Code Committee could have if it should be limited to restating the language of the Combined Nomenclature. According to the European Communities, in order to provide for a uniform application of the Common Customs Tariff, it must be possible for the Committee to reach, on the basis of the facts available, and acting in conformity with the Common Customs Tariff, specific conclusions concerning the classification of particular goods. It is in this way that the Committee can and does contribute to the uniform classification of goods throughout the European Communities.[550]

7.290 In counter-response, the **United States** submits that the Customs Code Committee's conclusions have put member State authorities in the quandary of having to decide what weight to give the conclusions in view of an apparently conflicting chapter note, namely Note 5 to Chapter 84 of the Common Customs Tariff.[551] The United States submits that this quandary is evidenced by different approaches taken by member State authorities. For example, in a tariff notice issued in 2004, the UK customs authority, evidently following the Customs Code Committee's conclusion, stated that "from October 2004, LCD/TFT Monitors that incorporate a DVI connector are to be classified in Combined Nomenclature (CN) code 8528 21 90".[552] Thus, according to the United States, the United Kingdom appears to be following the opinion of the Customs Code Committee and classifying all such monitors under heading 8528, regardless of sole or principal use. In the case of the Netherlands, the United States submits that it has abandoned the guidance of the Customs Code Committee for fear of adverse commercial impact and is now applying its own set of criteria for deciding whether to classify monitors under heading 8528 and 8471. Specifically, in a decree of July 2005, the Dutch customs authority explained that, since April 2004, it had been classifying LCD monitors with DVI under tariff heading 8528, in view of a Commission regulation concerning plasma monitors. It then went on to state that: "[n]ot all member states are following this policy. The result is a diverted flow of business, which is harmful to the competitiveness of Dutch industry in the logistics and services sector. For this reason, the Netherlands is making the policy as regards classification of certain LCDs in the Combined Nomenclature more precise".[553] Accordingly, the decree set forth criteria that the Netherlands follows as of 22 November 2004 for determining whether LCD monitors with DVI should be classified under heading 8471 or heading 8528. These criteria, which cover a number of factors, including how a good is presented in brochures, are evidently unique to the Netherlands, appearing in no EC regulation or even in EC guidance. Moreover, despite the Customs Code Committee's conclusion, the German authority appears to have continued classifying LCD monitors with DVI under heading 8471, even where they are principally though not solely for use with computers.[554]

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[548] United States' reply to Panel question No. 17(b).

[549] European Communities' second written submission, para. 127.

[550] European Communities' second written submission, para. 128.

[551] United States' oral statement at the second substantive meeting, para. 54.

[552] HM Customs & Excise, Tariff Notice 13/04 (Exhibit US-76).

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

[554] United States' reply to Panel question No. 137(b) referring to BTI DEM/2975/05-1 (start date of validity 19 July 2005) (Exhibit US-78).

Analysis by the Panel

7.291 The Panel notes that the United States challenges divergence in the tariff classification of LCD monitors with DVI among customs authorities of the member States of the European Communities.[555]

7.292 In the Panel's view, the tariff classification of a product, including of LCD monitors with DVI, constitutes an act of administration within the meaning of Article X:3(a) of the GATT 1994. This act of administration is a matter within the Panel's terms of reference since it amounts to an instance of administration of the Common Customs Tariff in the tariff classification area.[556]

7.293 With respect to the question of whether or not the tariff classification of LCD monitors with DVI is "uniform" within the meaning of Article X:3(a) of the GATT 1994, the Panel recalls its finding in paragraph 7.135 above that geographic uniformity is required under Article X:3(a) of the GATT 1994. That is, administration should be uniform in different places within a particular WTO Member. The Panel also recalls its finding in paragraph 7.135 above that the form, nature and scale of the alleged non-uniform administration and the laws, regulations, judicial decisions and rulings that are allegedly being administered in a non-uniform manner should be taken into consideration when interpreting the term "uniform" in Article X:3(a) of the GATT 1994. The Panel considers that the United States' challenge with respect to the tariff classification of LCD monitors with DVI is narrow in nature. It involves the interpretation of only a few tariff headings in the Common Customs Tariff to determine the classification of a single product – namely, of LCD monitors with DVI. Therefore, given the narrowness of this challenge, the Panel considers that a high degree of uniformity is required for the purposes of Article X:3(a) of the GATT 1994. We now turn to the facts to determine whether or not this high degree of uniformity has been achieved with respect to the tariff classification of LCD monitors with DVI.

7.294 The Panel notes that the European Communities does not appear to dispute that, in 2004, a divergence in the tariff classification of LCD monitors with DVI among customs authorities of the member States occurred, namely that customs authorities in the Netherlands classified LCD flat monitors with DVI "video monitors" under heading 8528 ("Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors") whereas customs authorities in other member States classified such LCD monitors as "computer monitors" under heading 8471 ("Automatic data processing machines and units thereof ...").[557] Further, the European Communities itself has noted

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[555] United States' first written submission, para. 74 referring to Council Regulation (EC) No. 493/2005 of 16 March 2005 (Exhibit US-28).

[556] For information on EC institutions and mechanisms applicable in the tariff classification area, see paragraphs 7.179 – 7.182 above.

[557] European Communities' first written submission, para. 349; European Communities closing statement at the second substantive meeting, para. 15; European Communities' comments on the United States' reply to Panel question No. 137(b). For example, in its closing statement at the second substantive meeting, the European Communities stated that "these recent developments do not show that there is a problem of non-uniform application contrary to Article X:3(a) GATT, but rather that there is an issue which is currently under review...": European Communities closing statement at the second substantive meeting, para. 15. Divergent tariff classification of LCD monitors with DVI between, on the one hand, Dutch customs authorities and, on the other hand, customs authorities in the other member States, tends to be supported by a press release entitled "Additional tax assessments again reveal the Netherlands to be the odd one out in the EU", which states that "[t]he Dutch Customs authorities have completely unexpectedly introduced importation criteria – newly published in November 2004 – and levies on LCD monitors with retrospective effect on all such products which were imported through the Netherlands by importers and logistical service providers in the period from 2002 – 2004. ... This situation is in marked contrast to the other EU countries, which have not issued additional assessments.": Press Release issued by Greenberg Traurig, 24 May 2005 (Exhibit US-29).

that many LCD monitors, by virtue of their design and technical characteristics, can serve both as a computer monitor and as a video monitor.[558] In these proceedings, the European Communities has not submitted that the divergence in tariff classification is limited to a subset of LCD monitors that can serve both as a computer monitor and as a video monitor.

7.295 The European Communities does submit, however, that the divergence in the tariff classification of LCD monitors with DVI among customs authorities of the member States has been the subject of past and ongoing action on the part of the European Communities to resolve the divergence.[559] After appraising all the relevant evidence before us, we are of the view that the action taken by the European Communities since 2004 when the existence of non-uniform administration became apparent has not had the effect of rectifying the divergence in the tariff classification of LCD monitors with DVI among customs authorities of the member States.[560] Our reasoning is as follows.

7.296 *First*, by the European Communities' own admission, Council Regulation (EC) No. 493/2005 of 16 March 2005, which was enacted in response to the divergence in tariff classification of LCD monitors with DVI, only applies to video monitors with a diagonal screen measurement of 48.5 cm or less and with an aspect ratio of 4:3 or 5:4.[561] The Regulation explains the rationale for the limited scope of its application in the preamble as follows: "Trade data indicate that currently monitors using liquid crystal display technology, with a diagonal measurement of the screen of 48,5 cm or less and a screen aspect ratio of 4:3 or 5:4, are mainly used as output units of automatic data-processing machines. However, such monitors are frequently also capable of reproducing video images from a source other than an automatic data-processing machine and therefore do not meet the condition of being solely or principally for use with such machines".[562] In other words, the Regulation limits its scope of application to monitors with a diagonal screen measurement of 48.5 cm or less and with an aspect ratio of 4:3 or 5:4 because, according to the Regulation, monitors with those features are mainly used as output units of automatic data-processing machines and are also capable of reproducing video images from a source other than an automatic data-processing machine. The Panel has not been provided with evidence to suggest that monitors falling outside the scope of the Regulation (because they do not have a diagonal screen measurement of 48.5 cm or less and do not have an aspect ratio of 4:3 or 5:4) would not also be used as outputs of automatic data-processing machines as well as reproducing video images from a source other than an automatic data-processing machine. In fact, to the contrary, the European Communities itself has submitted that many LCD monitors, by virtue of their design and technical characteristics, can serve both as a computer monitor and as a video monitor.[563] Moreover, the preamble to Regulation No. 493/2005 states that:

> "[T]he convergence of information technology, consumer electronics industries and new technologies has created a situation where it is becoming impossible, when classifying monitors, to determine, by reference to simple technical characteristics, the main purpose of a particular monitor. It follows from the case law of the Court of

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[558] European Communities' first written submission, para. 349.

[559] European Communities' first written submission, para. 361 referring to Commission Regulation No. 634/2005 (Exhibit EC-85); European Communities' closing statement at the second substantive meeting, para. 15; European Communities' comments on the United States' reply to Panel question No. 137(b) referring to proposed new regulation on LCD monitors, 29 November 2005,(Exhibit EC-163) and Agenda for Customs Code Committee, 21 November 2005 (Exhibit EC-164).

[560] The Panel notes that the action taken by the European Communities to address the divergence in the tariff classification of LCD monitors with DVI is not part of the "measure at issue" for the purposes of the United States' claim under Article X:3(a) of the GATT 1994. Rather, such action is relevant evidence to determine whether or not the divergence in the tariff classification of LCD monitors with DVI among customs authorities of the member States, which has not been disputed by the European Communities, has been resolved.

[561] Council Regulation (EC) No. 493/2005 of 16 March 2005 (Exhibit US-28).

[562] Council Regulation (EC) No. 493/2005 of 16 March 2005, 3rd preamble (Exhibit US-28).

[563] European Communities' first written submission, para. 349.

> Justice of the European Communities that classification cannot be based on actual use. The correct classification of individual products is to be based on objective and quantifiable data. It is currently not feasible to establish unambiguous criteria meeting this requirement."[564]

Therefore, while Regulation No. 493/2005 may have remedied the divergence in tariff classification with respect to those monitors falling within the scope of the Regulation, it would not have the same effect with respect to monitors that fall outside the scope of the Regulation.[565]

7.297 *Second*, Regulation No. 493/2005 indicates that the duty suspension applies to LCD monitors with DVI which are "classifiable under CN code 8528 21 90".[566] In other words, Regulation No. 493/2005 only applies to products that qualify under heading 8528. Accordingly, this Regulation would not be applicable and, therefore, would not be helpful in resolving the divergence in tariff classification in cases where it is unclear whether an LCD monitor should be classified under heading 8528 or, rather, under heading 8471. Such cases would appear to be at the core of the United States' allegation that tariff classification of LCD monitors with DVI diverges among customs authorities of the member States.

7.298 *Third*, the Panel notes the European Communities' statement that it has adopted another relevant measure – namely, Commission Regulation (EC) No. 634/2005 of 26 April 2005 – which classifies LCD monitors of a particular type under heading 8528.[567] This Regulation would appear to assist in resolving the ambiguity regarding whether a product should be classified under heading 8528 or, rather, under heading 8471. In particular, Regulation No. 634/2005 indicates that the classification of LCD monitors under heading 8528 is limited to "a colour monitor of the liquid crystal device (LCD) type with a diagonal measurement of the screen of 38,1 cm (15") and overall dimensions of 30,5 (W) x 22.9 (H) x 8.9 (D) cm". The Regulation also stipulates that "the product must display signals received from various sources, such as an automatic data-processing machine, a closed circuit television system, a DVD player or a camcorder" in order for the monitor to be classifiable under heading 8528. The Regulation further clarifies that: "Classification under subheading 8471 60 is excluded, as the monitor is not of a kind solely or principally used in an automatic data-processing system (see Note 5 to Chapter 84) in view of its capabilities to display signals from various sources".[568]

7.299 The Panel considers that the steps that Regulation No. 634/2005 may have made towards resolving the divergent classification of LCD monitors could be undermined when read in light of the opinion of the Customs Code Committee taken at its 346th meeting of 30 June – 2 July 2004, especially in light of the fact that, as a matter of practice, representatives of member State customs authorities participate in the Customs Code Committee decision-making process and the same customs authorities apply Regulation No. 634/2005.[569] In particular, the Customs Code Committee opined that "unless an importer can demonstrate that a monitor is only to be used with an ADP

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[564] Council Regulation (EC) No. 493/2005 of 16 March 2005, 2nd preamble (Exhibit US-28).

[565] The Panel notes that, here, it is not addressing the administration of Council Regulation (EC) No. 493/2005 of 16 March 2005 for the purposes of the United States' claim under Article X:3(a) of the GATT 1994. Rather, we are considering that Regulation to determine whether or not it indicates that the divergence in tariff classification of LCD monitors with DVI, which became apparent in 2004, has been resolved.

[566] Council Regulation (EC) No. 493/2005 of 16 March 2005, 4th preamble (Exhibit US-28).

[567] Exhibit EC-85.

[568] Commission Regulation No. 634/2005 of 26 April 2005, Annex, para. 4 (Exhibit EC-85). The Panel notes that, here, it is not addressing the administration of Commission Regulation No. 634/2005 for the purposes of the United States' claim under Article X:3(a) of the GATT 1994. Rather, we are considering that Regulation to determine whether or not it indicates that the divergence in tariff classification of LCD monitors with DVI, which became apparent in 2004, has been resolved.

[569] In this regard, see paragraphs 7.157 – 7.160 above.

machine (heading 8471) or to be used as an indicator panel (heading 8531), it has to be classified under heading 8528".[570] In other words, the Customs Code Committee's opinion requires that a monitor must *only* be used with an ADP machine in order for it to be classifiable under heading 8471. This statement contrasts with the formulation used in Regulation No. 634/2005 which implicitly states that heading 8471 60 only applies to monitors of a kind *solely or principally used* (not *only* used) in an automatic data-processing system.[571] This difference in formulation used in Regulation No. 634/2005 on the one hand and by the Customs Code Committee on the other could well have significant practical effects. We note in this regard the European Communities' submission that opinions of the Customs Code Committee play an important role in the uniform administration of the Common Customs Tariff and that member State customs authorities attach some importance to those opinions.[572]

7.300 *Fourth*, the Panel has evidence that customs authorities of the member States do not appear to have a clear idea of the practical effect of the various measures existing at the Community level regarding the tariff classification of LCD monitors with DVI. For example, in Tariff Notice 13/04, which, apparently, was issued following issuance of the opinion of the Customs Code Committee, the UK customs authority, stated that "from October 2004, LCD/TFT Monitors that incorporate a DVI connector are to be classified in Combined Nomenclature (CN) code 8528 21 90".[573] This tends to suggest that the UK customs authorities considered that monitors that did not incorporate DVI would not be classifiable under heading 8528 and, presumably, would, therefore, be classifiable under heading 8471. In other words, the UK authorities appear to have adopted the approach indicated by the Customs Code Committee.

7.301 More recently and subsequent to the coming into force of Regulation No. 634/2005, in a decree of 8 July 2005 concerning the classification of certain LCD monitors, the Dutch customs authorities stated that:

> "In accordance with Regulation (EC) number 754/2004 of 23 April 2004 (published in OJL 118), the European Commission has classified plasma-monitors with a screen diameter of 42 inches accompanied by a DVI connection, within heading 8528.
>
> The Customs committee, tariff and statistical nomenclature section, work instruments sector (329th meeting of 15 December 2003), by qualified majority agreed on advice to be given on the above-mentioned Regulation. Since then, The Netherlands, supported by the European Commission, has put forth the policy that LCD monitors which meet the requirements of the Regulation, are to be classified in heading 8528. Not all member states are following this policy. The result is a diverted flow of

[570] The relevant excerpt of the minutes of the Customs Code Committee's 346th meeting of 30 June-2 July 2004 meeting is set out in paragraph 353 of the European Communities' first written submission.

[571] The formulation used in Regulation No. 634/2005 is based on Note 5 to Chapter 84 of the Common Customs Tariff.

[572] For example, the European Communities notes that opinions of the Customs Code Committee are not legally binding but further notes that, as stated by the ECJ in Joined Cases 69 and 70/76, *Dittmeyer v Hauptzollamt Hamburg - Waltershof* (Exhibit EC-31), they constitute an important means of ensuring the uniform application of the common customs tariff and, as such, may be considered as a valid aid to the interpretation of the tariff. The European Communities further notes that member States' customs authorities are not legally bound by the opinions of the Customs Code Committee. However, they are bound by the duty of cooperation contained in Article 10 of the EC Treaty, which includes an obligation to contribute to the uniform application of Community law. For this reason, member States are bound to give due weight to interpretations of EC customs law set out in opinions of the Customs Code Committee. The European Communities adds that, from a practical point of view, opinions of the Committee typically reflect a common approach agreed by all member States: European Communities' reply to Panel question No. 58(l).

[573] HM Customs & Excise, Tariff Notice 13/04 (Exhibit US-76).

> business, which is harmful to the competitiveness of Dutch industry in the logistics and services sector. For this reason, The Netherlands is making the policy as regards classification of certain LCDs in the Combined Nomenclature more precise."[574]

The decree goes on to list criteria for the classification of LCD monitors, a number of which do not appear in any of the instruments existing at the Community level.[575]

7.302 Further, in BTI dated 19 July 2005, the German customs authority appears to have continued classifying LCD monitors with DVI under heading 8471, even where they are principally though not solely for use with computers.[576]

7.303 Moreover, there appears to be some confusion among participants in the industry regarding the tariff classification of LCD monitors with DVI. In particular, in a letter dated 2 September 2005 to the Commission's Director for International Affairs and Tariff Matters, the industry association dealing with LCD monitors ("EICTA") stated that "[w]ithout ... clarification [of the classification of LCD monitors], the industry is faced with an unacceptable situation were [sic] various Member States are applying classification rules in an inconsistent manner, causing competitive disadvantage for some importers and making the consequences of sourcing and routing decisions almost impossible to predict".[577] Further, by letter dated 6 December 2005, EICTA advised the EC Commission of its concerns regarding the enactment of a Regulation concerning the classification of goods under headings 8471 and 8528, which had not been enacted at the time the letter was sent to the EC Commission.[578]

7.304 On the basis of the evidence submitted to it, it is the Panel's view that the action taken by the European Communities has not had the effect of rectifying the divergence in the tariff classification of LCD monitors with DVI among customs authorities of the member States, the existence of which divergence since 2004 has not been disputed by the European Communities. In this regard, the evidence indicates that the ongoing existence of divergent tariff classification has had and is likely to

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[574] Douanerechten. Indeling van bepaalde LCD monitoren in de gecombineerde nomenclatuur, No. CPP2005/1372M (8 July 2005) (original and unofficial English translation) para. 1 (Exhibit US-77).

[575] The Dutch decree refers to the following criteria:

"- no other connection other than a VGA and/or DVI connection (the presence of an audio connection is allowed);

- a screen diameter not greater than 20 inches (51centimeters) with screen measurements (height/width) of approximately 3:4 (thus no "widescreen");

- the absence of a remote control/absence of an infra-red sensor on the monitor;

- the absence of an instrument which allows choice of channels or points to the use of the monitor as a television;

- no provision (covered by a metal plate or by other norms – ("slot-in type") allowing the monitor to be used as a video-monitor ("tariff engineering");

- the opportunity to place the screen in varying positions (adjust height, tilt forwards/backwards, turn in 90 degree angle (portrait/landscape)."

[576] United States' reply to Panel question No. 137(b) referring to BTI DEM/2975/05-1 (start date of validity 19 July 2005) (Exhibit US-78). The BTI indicates that the product that was classified by the German customs authorities was an LCD monitor with a 20,1" display screen with a network cable for connection with ADP machines, of a kind mainly used for ADP processing.

[577] United States' oral statement at the second substantive meeting, para. 53 referring to letter from Mark MacGann, Director General, EICTA, to Manuel Arnal Monreal, Director International Affairs and Tariff Matters, European Commission, p. 1, 2 September 2005 (Exhibit US-75).

[578] United States' reply to Panel question No. 137(b) referring to letter from Mark MacGann, Director General, EICTA, to Manuel Arnal Monreal, Director International Affairs and Tariff Matters, European Commission, 6 December 2005 (Exhibit US-81).

continue to have an adverse impact on the trading environment[579], until the divergence is resolved. The Panel considers that the precise manner in which such divergence is resolved is not a matter for its consideration. Nor is it a matter that is dictated by Article X:3(a) of the GATT 1994. However, the tools and mechanisms should be effective in removing the divergent tariff classification, which in our view, did not occur despite the various steps taken by the European Communities to resolve the divergence in tariff classification of LCD monitors with DVI.

7.305 In conclusion, the Panel considers that the tariff classification of LCD monitors with DVI amounts to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994. The Panel considers that measures adopted by the European Communities so far have not had the effect of removing divergence in tariff classification of such monitors which became evident in 2004.[580] Therefore, the Panel finds a violation of Article X:3(a) of the GATT 1994 with respect to the tariff classification of LCD monitors with DVI.

(vi) Treatment of BTI in member States other than the issuing member State

Summary of the parties' arguments

7.306 The **United States** notes that the Community Customs Code provides for the issuance by member State customs authorities of advance rulings in the form of BTI, which informs traders of the classification that will be assigned to particular goods on importation.[581] The United States further notes that Article 11 of the Implementing Regulation states that BTI issued by the authorities of one member State is "binding on the competent authorities of all the member States under the same conditions"[582] but submits that, in reality, member States do not always treat BTI issued by other member States as binding.[583] More particularly, the United States argues that BTI from one member State does not bind another member State to classify similar or identical goods imported by a person other than the holder of the BTI in the same way, with the result that the same product can be classified under different tariff classifications, and be subject to different tariff treatment, from one member State to another.[584] In support, the United States submits that, in a recent survey among the membership of a trade association consisting of importers of products into the European Communities, companies observed that "[b]inding tariff information from German authorities is still not accepted by other EU countries, especially Greece and Portugal."[585]

7.307 In response, the **European Communities** contests the existence of any problem regarding the recognition of BTI from Germany in other member States. The European Communities argues that

[579] The impact on the trading environment is evident, *inter alia*, from the evidence referred to by the Panel in paragraphs 7.300 – 7.303. The Panel considers that the fact that traders may be subject to the same duty (or, for that matter, no duty) whether the LCD monitors they are importing into the European Communities are classified under heading 8471 or 8528 does not detract from our conclusion that the trading environment has been affected as a result of the divergent tariff classification.

[580] The Panel notes the existence of a draft Regulation concerning the classification of LCD monitors contained in Exhibit EC-163. However, at the time the Panel issued its Interim Report to the parties, the Panel had not been provided with evidence to indicate that that draft regulation had the effect of removing divergence in tariff classification of such monitors which became evident in 2004.

[581] United States' first written submission, para. 22.

[582] Commission Regulation (EEC) No. 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code, Article 11 (Exhibit US-6).

[583] United States' first written submission, para. 47.

[584] United States' first written submission, para. 22.

[585] United States' first written submission, para. 76 referring to Foreign Trade Association, Questionnaire on the topic "Trade Facilitation": Facilitation of Trade in WTO States, March 2005, response to question 1.4 (Exhibit US-30).

the so-called "survey" relied upon by the United States is based on a comment from a single unidentified company in the context of a trade association questionnaire of March 2005 and is not supported by any additional evidence. Accordingly, it is impossible to verify the accuracy of the statement. The European Communities further submits that, even if an importer claims that BTI was not accepted, this might reflect a range of problems of an entirely different kind, for instance a lack of identity of the products imported with those described in the BTI. Moreover, if a customs authority fails to recognize BTI issued by another member State, the importer can obtain judicial review or inform the EC Commission. However, the European Communities submits that it is not aware of this having occurred.[586]

7.308 The **United States** submits that the case of *Peacock AG* v. *Hauptzollamt Paderborn* describes divergence in classification of network cards for personal computers between Denmark, Netherlands, and United Kingdom, on the one hand, and Germany, on the other.[587] According to the United States, the *Peacock* case illustrates that one or more member States did not treat BTI issued by other member States as binding[588]

7.309 The **European Communities** argues that BTI is only binding against the holder of the BTI and is not binding against other persons.[589] Further, the European Communities submits that what is significant is not that a divergence may occur but, rather, that it is addressed and removed once it occurs. According to the European Communities, this is precisely what happened in the context of the *Peacock* case.[590]

7.310 The **United States** refers to divergence in classification of drip irrigation products. The United States explains that French customs authorities issued BTI for the product in question in 1999, classifying it as an irrigation system under tariff heading 8424 of the Common Customs Tariff, which carried an *ad valorem* duty rate of 1.7%. In December 2000, when an importer of the same product attempted to import the product through Spain, the Spanish customs authorities disregarded the French BTI and classified the product as a pipe, under tariff heading 3717 of the Common Customs Tariff, which carried an *ad valorem* duty rate of 6.4%.[591] According to the United States, this case illustrates that one or more member States did not treat as binding BTI issued by other member States.[592]

7.311 The **European Communities** responds that BTI is binding only against the holder of the BTI and is not binding against other persons.[593] According to the European Communities, the BTI issued by customs authorities in France and Spain for the drip irrigation products were not issued for the same holders. Further, the European Communities submits that what is significant is not that a

[586] European Communities' second written submission, para. 95.

[587] United States' first written submission, footnote 33 referring to Case C-339/98, *Peacock AG* v. *Hauptzollamt Paderborn*, Opinion of the Advocate General, 2000 ECR I-08947, 28 October 1999, paras. 7-8 (Exhibit US-17).

[588] United States' reply to Panel question No. 20; United States' oral statement at the second substantive meeting, para. 21.

[589] European Communities' reply to Panel question No. 161 referring to Case C-495/03, *Intermodal Transports BV v. Staastsecretaris van Financiën*, 15 September 2005, not yet reported, para. 27 (Exhibit US-71).

[590] European Communities' second written submission, para. 136.

[591] United States' reply to Panel question No. 14.

[592] United States' reply to Panel question No. 20.

[593] European Communities' reply to Panel question No. 161 referring to Case C-495/03, *Intermodal Transports BV v. Staastsecretaris van Financiën*, 15 September 2005, not yet reported, para. 27 (Exhibit US-71).

divergence in tariff classification may occur but, rather, that it is addressed and removed once it occurs.[594]

7.312 The **United States** refers to the *Camcorders* case and submits that, following amendment of an explanatory note regarding camcorders in June 2004, the Spanish customs authority issued BTI classifying 19 camcorder models produced by a particular company under sub-heading 8525 40 91.[595] The French affiliate of the holder of the BTI informed the customs authority in France of the BTI's existence during the course of an audit by that office. Nevertheless, according to the United States, the French customs authority informed the company that it intended not to follow the classification set forth in the BTI, but instead, to collect duty based on its own determination of the correct classification of the camcorder models at issue.[596] The United States submits that while the context in which this matter emerged involved the post-clearance recovery of duties, nevertheless, determining the amount of duties to be recovered first requires a determination of classification.[597]

7.313 In response, the **European Communities** submits that the BTI issued by the Spanish authorities for camcorders are in full accordance with EC classification rules. According to the European Communities, the United States has not provided any evidence of any other member States having classified camcorders contrary to EC classification rules. Moreover, according to the European Communities, the United States does not provide any evidence on when the importation into France took place and whether indeed they related to products corresponding to those described in the BTI issued by the Spanish authorities. Further, the European Communities submits that it appears that the question addressed by the French authorities was one of post-clearance recovery of customs duties, and not one of tariff classification. Since the question is, therefore, not one regarding the uniform administration of tariff classification rules, but rather of the post-clearance recovery of customs debts, the European Communities considers that the issue is outside the Panel's terms of reference.[598]

7.314 The **United States** refers to the report of the panel in the dispute *EC – Chicken Cuts*. The United States notes that at issue there was whether a certain product should be classified under tariff heading 0210 or 0207 of the Common Customs Tariff. The complaining parties relied on issuance of BTI by several member States consistently classifying the product under heading 0210. In response, the European Communities asserted that "this interpretation was not followed in other EC customs offices".[599]

7.315 The **European Communities** submits that there was no difference of interpretation nor application of EC classification rules in the context of the *EC – Chicken Cuts* case. Further, the European Communities' statement related only to "interpretation". Nowhere in the panel's report in *EC – Chicken Cuts* was the European Communities reported as having said that BTI was not recognized when presented by the holder. Accordingly, in the European Communities' view, the statement quoted by the United States is not pertinent.[600]

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[594] European Communities' second written submission, para. 143 referring to United States' reply to Panel question No. 2, para 4.

[595] BTI issued by Spanish customs authority classifying camcorders under sub-heading 8525 40 91, with start date of validity in June 2004 (Exhibit US-65).

[596] United States' oral statement at the second substantive meeting, para. 30.

[597] United States' reply to Panel question No. 180.

[598] European Communities' reply to Panel question No. 172, para. 37.

[599] Panel Report, *EC – Chicken Cuts*, para. 7.260.

[600] European Communities' second written submission, para. 96.

Analysis by the Panel

7.316 The Panel notes that the essence of the United States challenge under Article X:3(a) of the GATT 1994 here is that customs authorities of the member States do not always treat BTI issued by customs authorities of other member States as binding.[601]

7.317 In the Panel's view, the treatment of BTI issued by customs authorities constitutes an act of administration within the meaning of Article X:3(a) of the GATT 1994. This act of administration is a matter within the Panel's terms of reference since it amounts to an instance of administration of the Common Customs Tariff in the tariff classification area.[602]

7.318 The context for the United States' challenge is Article 12(2) of the Community Customs Code, which provides that:

> Binding tariff information ... shall be binding on the customs authorities as against the holder of the information only in respect of the tariff classification ... of goods.

7.319 Article 11 of the Implementing Regulation is also relevant. It provides that:

> "Binding tariff information supplied by the customs authorities of a Member State since 1 January 1991 shall become binding on the competent authorities of all the Member States under the same conditions."[603]

7.320 As a starting point, the Panel notes that its task in this dispute is to determine whether or not Article X:3(a) of the GATT 1994 has been violated by the European Communities, not to determine the consistency or otherwise of EC acts with EC customs law. Having said that, the Panel can see that the failure on the part of customs authorities of member States to accept BTI issued by customs authorities in other member States when that BTI is presented by the holder in contravention of Article 12(2) of the Community Customs Code and Article 11 of the Implementing Regulation could simultaneously lead to non-uniform administration in violation of Article X:3(a) of the GATT 1994. In particular, if a customs authority of a member State refuses to acknowledge and treat as binding BTI issued by a customs authority of another member State for a product that is identical in all material respects to that which is the subject of the BTI when such BTI is invoked by the holder and, instead, classifies the product differently, this will necessarily result in non-uniform administration of the Common Customs Tariff in violation of Article X:3(a) of the GATT 1994. Nevertheless, the Panel notes that it has not been provided with sufficient evidence to prove that non-uniform administration in violation of Article X:3(a) of the GATT 1994 has occurred regarding the treatment of BTI in member States other than the issuing member State in the specific instances relied upon by the United States.

7.321 In particular, in support of its allegation that customs authorities of the member States do not always treat BTI issued by customs authorities of other member States as binding in violation of Article X:3(a) of the GATT 1994, the United States relies first upon the March 2005 report of the Foreign Trade Association regarding a questionnaire on the topic of "Trade Facilitation": Facilitation of Trade in WTO States.[604] More specifically, the United States relies upon the following statement

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[601] United States' first written submission, para. 47.

[602] For information on EC institutions and mechanisms applicable in the tariff classification area, see paragraphs 7.179 – 7.182 above.

[603] Commission Regulation (EEC) No. 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code, Article 11 (Exhibit US-6).

[604] Foreign Trade Association, Questionnaire on the topic "Trade Facilitation": Facilitation of Trade in WTO States, March 2005 (Exhibit US-30).

made by one trader, which is contained in the report: "Binding tariff information from German authorities is still not accepted by other EU countries, especially Greece and Portugal."[605] The Panel does not consider that this statement on its own constitutes probative evidence to support the United States' allegation given that it is simply a single, anecdotal comment made by one trader in response to questions posed in the questionnaire and is not supported by any factual evidence. The opening paragraph of the Foreign Trade Association's report itself states that "[t]he Trade Facilitation Questionnaire was sent to 70 FTA member companies. 20 answers reached the FTA ... The following represents quotations from the answers. Although the [quotations] do not always fully comply with the political consensus among all members, they highlight the practical problems European traders, especially importers, face at borders". Further, with respect to the specific statement relied upon by the United States, the Panel notes that it is very broad and general. It does not identify the products covered by the German BTI that is allegedly not being accepted elsewhere, particularly in Greece and Portugal. Nor does the statement indicate the period during which the German BTI was not accepted by customs authorities in other member States. Finally, the statement does not indicate whether or not BTI issued by German customs authorities that was not accepted by customs authorities in Greece and Portugal was invoked by the holder of the German BTI.

7.322 By way of additional support for its allegation that customs authorities of the member States do not always treat BTI issued by customs authorities of other member States as binding in violation of Article X:3(a) of the GATT 1994, the United States relies upon an alleged failure by German customs authorities to treat as binding BTI issued by customs authorities in Denmark, Netherlands, and United Kingdom for network cards for personal computers.[606] The United States makes additional allegations regarding tariff classification for this product, which are dealt with in detail in paragraph 7.193 *et seq* above. We note in that discussion that the facts indicate the existence of differences in tariff classification for network cards for personal computers between, on the one hand, the German customs authorities (who classified the product in question under heading 8517 of the Common Customs Tariff) and, on the other hand, Danish, Dutch and UK customs authorities (who classified it under heading 8473 of the Common Customs Tariff) at one point in time, the existence of which differences has not been contested by the European Communities.[607] Nevertheless, the Panel notes that it has not been presented with any evidence to indicate that German customs authorities refused to accept the classification by Danish, Dutch and UK customs authorities. Therefore, the Panel considers that there is no reason to deviate from our conclusion in paragraph 7.207 above that the tariff classification of network cards for personal computers does not currently amount to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994.

7.323 The United States also relies upon an alleged failure by Spanish customs authorities to treat as binding BTI issued by French customs authorities for drip irrigation products. The United States makes additional allegations regarding tariff classification for this product, which are dealt with in detail in paragraph 7.208 *et seq* above. We note in that discussion that the United States has not provided any evidence to support its allegation of differences in the tariff classification of drip irrigation products between customs authorities of the member States but that we are willing to accept its assertion in this regard in light of the fact that the European Communities does not dispute the existence of differences in this regard. Nevertheless, the Panel notes that it has not been presented with any evidence to indicate that Spanish customs authorities refused to accept the classification by French customs authorities. Therefore, the Panel considers that there is no reason to deviate from our conclusion in paragraph 7.218 above that the tariff classification of drip irrigation products does not amount to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994.

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[605] Foreign Trade Association, Questionnaire on the topic "Trade Facilitation": Facilitation of Trade in WTO States, March 2005, para. 1.4 (Exhibit US-30).

[606] In particular, the United States refers to Case C-339/98, *Peacock AG* v. *Hauptzollamt Paderborn*, Opinion of the Advocate General, 2000 ECR I-08947, 28 October 1999, paras. 7 - 8 (Exhibit US-17).

[607] See paragraph 7.201 above.

7.324 The United States also relies upon the circumstances surrounding the *Camcorders* case, in which an explanatory note relating to camcorders was amended.[608] The United States submits that BTI issued by Spanish customs authorities following the amendment was not accepted by French customs authorities even though the application for BTI before the French authorities was made by the French affiliate of the company that had secured BTI from the Spanish authorities and despite the fact that the Spanish BTI had been brought to the attention of the French authorities. The Panel notes that, in support of its allegation that French authorities refused to accept BTI issued by Spanish authorities in the context of the *Camcorders* case, the United States has provided copies of the BTI issued by the Spanish customs authorities.[609] However, it has provided no evidence of BTI and/or classification decisions issued by the French customs authorities. Nor has the United States submitted any evidence to prove that the French customs authorities were made aware of the Spanish BTI before classifying the products in question. Therefore, the Panel considers that the United States has not proved that the *Camcorders* case supports the United States' allegation that customs authorities of member States do not always treat BTI issued by customs authorities of other member States as binding.

7.325 The United States also refers to a statement made by the European Communities during the panel proceedings in the *EC – Chicken Cuts* case. In particular, the United States submits that, in those proceedings, the European Communities asserted that the interpretation contained in BTI issued by customs authorities in several member States concerning the classification of certain chicken products consistently classifying the product under heading 0210 of the Combined Nomenclature was not followed by other EC customs offices.[610]

7.326 *First*, the Panel notes that, on the basis of the panel's report in that case, the European Communities did not assert that BTI issued by customs authorities in certain member States had not been accepted in other member States. Rather, the European Communities submitted that the interpretation that the product in question should be classified under heading 0210 of the Common Customs Tariff had not been followed by certain customs offices in the European Communities.[611]

7.327 *Second*, despite the statements made by the European Communities in that case suggesting the existence of divergent tariff classification regarding the product in question, the panel noted that the European Communities had not produced BTI of instances where the products at issue had been classified under a heading other than heading 0210.[612] In other words, the panel did not find any evidence of divergent tariff classification regarding the product in question. Moreover, on the basis of the contents of the panel's report in that case, there would appear to have been no evidence before the panel to indicate that BTI issued by customs authorities in certain member States had not been accepted in other member States.

7.328 The Panel notes that, in the context of the United States' allegation that the tariff classification of blackout drapery lining is non-uniform in violation of Article X:3(a) of the GATT 1994, the United States alleged that the German customs authorities acknowledged the existence of BTI for comparable

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[608] This case is discussed by the Panel again in paragraph 7.348 *et seq* below.

[609] Exhibit US-65.

[610] Specifically, the United States relies upon the panel's summary of the European Communities' in that case contained in Panel Report, *EC – Chicken Cuts*, para. 7.260.

[611] According to the Panel Report in *EC – Chicken Cuts*, the European Communities accepted that a number of BTIs were issued by EC member State customs authorities (principally Hamburg in Germany, Rotterdam in the Netherlands and various offices in the United Kingdom), which classified the products at issue under subheading 0210.90. The European Communities further accepted that, given the commercial importance of some of the customs offices – namely, Hamburg and Rotterdam – substantial trade entered the European Communities under this incorrect interpretation. However, the European Communities submitted that this interpretation was not followed in other EC customs offices: Panel Report, *EC – Chicken Cuts*, para. 7.260.

[612] Panel Report, *EC – Chicken Cuts*, para. 7.270.

goods but made no effort to explain why it was declining to follow the classification decisions reflected in that BTI.[613] The Panel recalls its finding in paragraph 7.265 above that there would appear to have been an objective factual basis justifying the decision by the German customs authorities to classify the products in question differently from those being classified by other customs authorities in the European Communities. In turn, this would explain why the German customs authorities did not treat as binding BTI issued in other member States.[614] In addition, there is no indication that any BTI which was brought to the attention of the German customs authorities was invoked by the holder.

7.329 In the light of the foregoing, the Panel concludes that the United States has not proved that customs authorities in the member States have failed to treat as binding BTI issued by customs authorities in other member States and that such failure amounts to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994.

(vii) Refusal to withdraw revocation of BTI concerning Sony PlayStations2 in the context of the Sony PlayStation2 case

Summary of the parties' arguments

7.330 The **United States** refers to a case involving the tariff classification of the Sony PlayStation2 (PS2). The United States submits that the UK customs authority issued BTI for that good and then revoked it based on an EC Commission regulation adopting a different classification for the good. When that regulation was annulled by the EC Court of First Instance, rather than restore the BTI, the authority maintained the revocation based on new, national grounds only weeks after the ECJ's decision in the *Timmermans* case.[615] The United States submits that, prior to the ECJ's judgment in the *Timmermans* case which was issued in January 2004, the customs authority in the United Kingdom evidently believed that it was required to restore the BTI following the annulment of the regulation in question and that, in view of the Advocate General's opinion in the *Timmermans* case issued in September 2003, it could not amend the BTI based on its own, independent reinterpretation of the applicable classification rules. However, following the judgement by the ECJ in the *Timmermans* case, the UK customs authority was free to maintain the revocation of the BTI, not on the basis of the EC regulation that had been annulled, but on the basis of its own reinterpretation of the applicable classification rules. According to the United States, whether or not the BTI correctly classified the PS2, the *Sony PlayStation2* case stands for the broader proposition that, in accordance with the ECJ's judgement in the *Timmermans* case, each of the European Communities' 25 independent, geographically limited customs offices has the power to depart from a path of uniform administration of the classification rules based on its own reconsideration of those rules.[616]

7.331 In response, the **European Communities** submits the United States' allegation that the UK High Court of Justice revoked the BTI based on its own re-evaluation of the classification rules in the *PS2* case is misleading. The revocation took place because of the entry into force of an EC

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[613] Hauptzollamt Bremen, Letter Decision to Bautex-Stoffe GmbH regarding classification of blackout drapery lining, 22 September 2004 (original and English translation), p. 1 (Exhibit US-23).

[614] Nevertheless, the Panel recalls its findings in paragraphs 7.272 – 7.275 above that the failure on the part of the German customs authorities to have regard to classification decisions of customs authorities in other member States or at a minimum, to explain why they were deemed irrelevant to the classification at hand is not consistent with the obligation of uniform administration in Article X:3(a) of the GATT 1994. The Panel also considered that the dismissal by another German customs authority of the tariff classification by Belgian customs authorities on the basis of a mere "suspicion" that the documents filed for classification of those products by the Belgian customs authorities did not correspond to the products themselves was not consistent with Article X:3(a) of the GATT 1994.

[615] United States' oral statement at the second substantive meeting, para. 33.

[616] United States' reply to Panel question No. 184.

classification regulation. Accordingly, rather than following its own interpretation of classification rules, the UK High Court of Justice in fact duly applied Community law. According to the European Communities, the UK High Court of Justice upheld the validity of the revocation with explicit reliance on the ECJ's judgement in the *Timmermans* case and on the basis of clear evidence supporting the reasoning behind that revocation.[617]

Analysis by the Panel

7.332 The Panel notes that the essence of the United States' challenge with respect to the *Sony PlayStation2* case (*PS2* case) is that customs authorities of the member States are able to refuse to withdraw revocation of BTI even though such a refusal deviates from uniform administration.[618]

7.333 The Panel recalls its finding in paragraph 7.64 above that, on the basis of its request for establishment of a panel, the United States is precluded from making an "as such" challenge with respect to the design and structure of the EC system of customs administration as a whole and also with respect to the design and structure of the EC system in the areas of customs administration that have been specifically identified in the United States' request. In the context of the specific allegation made by the United States that customs authorities of the member States are able to refuse to withdraw revocation of BTI even though such a refusal deviates from uniform administration, the Panel considers that this is a matter outside our terms of reference because it concerns the structural aspects associated with the EC system of customs administration. Nevertheless, the Panel considers that, on the basis of the United States' request for establishment of a panel, the United States is able to claim and the Panel is authorized to consider whether or not there is evidence to indicate that the refusal to withdraw revocation of BTI regarding PS2 in the context of the *PS2* case by the UK customs authorities resulted in non-uniform administration in violation of Article X:3(a) of the GATT 1994. In this regard, the Panel notes that the refusal to withdraw revocation of BTI constitutes an act of administration within the meaning of Article X:3(a) of the GATT 1994. This act of administration is a matter within the Panel's terms of reference since it amounts to an instance of administration of the Common Customs Tariff in the tariff classification area.[619]

7.334 The relevant facts are set out in the judgement of the UK High Court of Justice, Chancery Division in the case of *Sony Computer Entertainment Europe Limited v the Commissioners of Customs and Excise*.[620] Specifically, on 28 August 2000, Sony applied to the UK customs authority for BTI for certain PS2 models under tariff heading 8471 of the Common Customs Tariff. On 19 October 2000, the UK customs authority issued BTI classifying the PS2 under heading 9504 of the Common Customs Tariff rather than under heading 8471 of the Common Customs Tariff. The UK customs authority explained that the basis for the decision was that the product was not considered to be freely programmable and, therefore, did not meet the criteria of Note 5(A)(a)(2) to Chapter 84 of the Common Customs Tariff. Accordingly, the product could not be classified under heading 8471. The UK customs authority noted that the classification under heading 9504 was justified *inter alia* on the basis of Commission Regulation (EC) No. 1508/2000 for a set of electronic devices consisting of a video game console.

7.335 On 22 November 2000, Sony requested a formal departmental review of the decision of 19 October 2000 by the UK customs authority to classify the PS2 under heading 9504 rather than under

[617] European Communities' reply to Panel question No. 172, para. 54 referring to *Sony Computer Entertainment Europe Ltd. v. Commissioners of Customs and Excise*, Judgment of the High Court of Justice, Chancery Division, EWHC 1644 (Ch), para. 118 (Exhibit US-70).

[618] United States' reply to Panel question No. 184.

[619] For information on EC institutions and mechanisms applicable in the tariff classification area, see paragraphs 7.179 – 7.182 above.

[620] *Sony Computer Entertainment Europe Ltd. v. Commissioners of Customs and Excise*, Judgment of the High Court of Justice, Chancery Division, EWHC 1644 (Ch), (Exhibit US-70).

8471. By letter dated 5 January 2001, the decision to classify the PS2 under heading 9504 was upheld following the departmental review. The decision was also confirmed by the Tariff and Nomenclature Section of the Customs Code Committee during its meeting of 26 – 27 February 2001. By letter dated 29 March 2001, Sony was informed of the Committee's decision and was notified that a draft regulation classifying the products in question under heading 9504 was being prepared. The justification in the draft regulation for the classification of PS2 under heading 9504 was as follows: "Of the various functions (including playing video games, playback of CD audio, DVD video, automatic data processing etc.) playing video games gives the apparatus its essential character and determines classification under heading 9504 as a game console".[621]

7.336 Prior to adoption of the draft regulation, Sony appealed to the UK VAT and Duties Tribunal against the decision issued following the departmental review, contained in the letter of 5 January 2001. This appeal was allowed. In allowing the appeal, the Tribunal noted that the UK customs authority's decision had been based on the fact that the PS2 was not "freely programmable" and, therefore, that it did not meet the criteria for coverage under heading 8471 in accordance with Note 5(A)(a)(2) to Chapter 84. The departmental review had upheld this rationale. The Tribunal to which Sony appealed found that the basis for the decision of the UK customs authority (and for the subsequent departmental review) was invalid in light of the fact that the draft regulation classified PS2 under heading 9504 for different reasons. The Tribunal concluded that, therefore, the UK customs authority's decision could not stand.

7.337 Following the Tribunal's decision allowing Sony's appeal, Sony requested the UK customs authority to issue new BTI classifying PS2 under tariff heading 8471. By letter dated 12 June 2001, Sony's request was granted but was made subject to the qualification that, following publication of the draft regulation which would classify PS2 under heading 9504, the BTI issued classifying PS2 under heading 8471 would be revoked.

7.338 On 10 July 2001, the draft regulation was adopted as Commission Regulation (EC) No. 1400/2001.[622] Pursuant to Article 1 of that Regulation, when read in conjunction with the Annex to that Regulation, PS2 was classified under heading 9504. Accordingly, on 25 July 2001, the UK customs authority wrote to Sony revoking the BTI which had classified PS2 under heading 8471. On 6 September 2001, Sony requested departmental review of the decision to revoke the BTI on the ground that the Regulation which provoked the revocation (i.e. Regulation No. 1400/2001) was illegal. Further, on 3 October 2001, Sony lodged an application with the ECJ to annul the Regulation No. 1400/2001 under Article 230 of the EC Treaty. On 30 September 2003, the Court of First Instance annulled the Regulation finding that, although PS2 could be classified under heading 9504, the explanation of the legal basis for classification of PS2 under heading 9504 pursuant to the Regulation was wrong.[623]

7.339 Following the annulment of Regulation No. 1400/2001, the UK customs authority sought advice from the Directorate-General, Taxation and Customs Union regarding the status of the BTI that had classified PS2 under heading 8471. The Directorate-General's response, contained in a letter dated 8 January 2004 and circulated to the customs authorities of all current and future member States, stated that in the light of the CFI's findings that the PS2 could not be classified under heading 8471 and that it could be classified in heading 9504, the EC Commission's view was that the PS2 was still correctly classifiable under heading 9504. On or about 1 May 2004, the WCO adopted a classification opinion which classified the PS2 under heading 9504.

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[621] The draft regulation was subsequently adopted as Commission Regulation (EC) No. 1400/2001 of 10 July 2001 (Exhibit EC-157).

[622] Commission Regulation (EC) No. 1400/2001 of 10 July 2001 (Exhibit EC-157).

[623] CFI Judgement: Sony Computer Entertainment Europe Ltd. v. Commission of the European Communities, Case T-243/01, 30 September 2003, paras. 120-128 (Exhibit US-12).

7.340 The Panel can see that the circumstances surrounding the *PS2* case could have resulted in non-uniform administration in violation of Article X:3(a) of the GATT 1994. Specifically, in the context of that case, the UK customs authority refused to withdraw the revocation of BTI classifying PS2 under heading 8471 even though Regulation No. 1400/2001, which had triggered the revocation, had been annulled. The UK customs authority refused to do so on the ground that Regulation No. 1400/2001 had been found invalid not because the classification of PS2 under heading 9504 had been incorrect in the Regulation but because the explanation of the legal basis for the classification under the Regulation was wrong. It is conceivable that other customs authorities in the European Communities could have adopted an approach other than that adopted by the UK customs authorities. In particular, they could have decided to honour BTI classifying the PS2 under heading 8471 given that the Regulation classifying the product under heading 9504 had been annulled. Alternatively, they could have decided to withdraw revocations of BTI that had classified PS2 under heading 8471. Had either of these possibilities eventuated, the Panel considers that a situation of non-uniform administration in violation of Article X:3(a) of the GATT 1994 would have resulted. In particular, while the UK authority classified the product under heading 9504, the other customs authorities would have classified the product under heading 8471. This scenario is possible in the context of the EC system of customs administration because it does not provide for uniform withdrawal of revocations of BTI. Nor does the system impose an obligation on member State customs authorities to consult with and/or notify other customs authorities of decisions to withdraw revocations of BTI.[624]

7.341 Nevertheless, the Panel notes that it has not been provided with any evidence to indicate that divergent tariff classification among member States occurred following the refusal by the UK customs authority to withdraw its revocation of BTI classifying PS2 under heading 8471. Indeed, the only evidence submitted by the United States regarding classification of PS2 are the judgements of the UK High Court of Justice[625] and the CFI[626] concerning the *PS2* case. The Panel considers that these judgements on their own do not prove that divergent tariff classification among member States occurred following the refusal by the UK customs authority to withdraw its revocation of BTI classifying PS2 under heading 8471.

7.342 The Panel also considers that the circumstances surrounding the *PS2* case could have resulted in non-uniform administration in violation of Article X:3(a) of the GATT 1994 in another respect. In particular, by letter dated 12 June 2001, the UK customs authorities decided to grant Sony BTI classifying PS2 under heading 8471 even though the UK authorities knew that the adoption of Regulation No. 1400/2001 was imminent and that that Regulation would have the effect of classifying the PS2 under heading 9504.[627] When the UK customs authorities issued BTI classifying PS2 under heading 8471 to Sony, it made it clear that the BTI would be revoked once Regulation No. 1400/2001 had been adopted. However, in the meantime, it is quite possible that other customs authorities classified PS2 under heading 9504 knowing that, eventually, Regulation No. 1400/2001 would apply to PS2 and would require classification under heading 9504. Nevertheless, as previously noted, the Panel has not been provided with any evidence to indicate that divergent classification among member States occurred following the issuance by the UK customs authority of BTI classifying PS2 under heading 8471.

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[624] The Panel understands that, under EC customs law, there is no provision that provides that the withdrawal of revocation of BTI is immediately binding on the customs authorities of all member States. Furthermore, we understand that there is no specific provision in EC customs law requiring the transmission of the withdrawal of revocation of BTI by customs authorities of the member States to the Commission.

[625] *Sony Computer Entertainment Europe Ltd. v. Commissioners of Customs and Excise*, Judgment of the High Court of Justice, Chancery Division, [2005] EWHC 1644 (Ch), 27 July 2005 (Exhibit US-70).

[626] CFI Judgement: Sony Computer Entertainment Europe Ltd. v. Commission of the European Communities, Case T-243/01, 30 September 2003 (Exhibit US-12).

[627] We note in this regard that, even the European Communities stated in its submissions to the Panel that "even though the BTI in question should not have been issued, this was a unique case due to the very specific circumstances of the case.": European Communities' reply to Panel question No. 184.

7.343 The Panel concludes that the United States has not proved that the failure to withdraw the revocation of BTI by the UK customs authorities with respect to the tariff classification of PS2 in the context of the *PS2* case amounts to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994.

(viii) Interpretation and application of an amendment to an explanatory note concerning camcorders in the Camcorders case

Summary of the parties' arguments

7.344 The **United States** submits that a presentation made by Mr De Baere, an EC customs law practitioner, points out that the consequences of an explanatory note may vary from member State to member State. In some member States, an explanatory note may be treated the same as a regulation and given prospective effect only. In other member States, an explanatory note may be treated as a clarification of the state of the law and given retrospective effect.[628] By way of example, the United States refers to a case involving the classification of video camera recorders ("camcorders"). The United States explains that at issue in that case was whether certain camcorders should be classified under tariff heading 8525 40 91 of the Common Customs Tariff (attracting a 4.9% tariff) or under tariff heading 8525 40 99 of the Common Customs Tariff (attracting a 14% tariff).[629]

7.345 The United States notes that a camcorder qualifies under heading 8525 40 91 if it is "[o]nly able to record sound and images taken by the television camera" whereas "other" camcorders qualify under heading 8525 40 99. The United States submits that, in July 2001, the Commission adopted an amendment to an earlier explanatory note covering heading 8525 40 99. The amendment provided that heading 8525 40 99 includes "'camcorders' in which the video input is obstructed by a plate, or in another way, or in which the video interface can be subsequently activated as video input by means of software."[630] The United States submits that, pursuant to the amended explanatory note, if a camcorder was susceptible to certain modifications, it should be classified under heading 8525 40 99, even if at the time of importation it appeared to be classifiable under heading 8525 40 91.[631]

7.346 The United States argues that, in view of the amended explanatory note, two member States (namely, France and Spain) reached back to collect additional duty on certain camcorders imported prior to the amendment that had been classified under heading 8525 40 91. That is, in view of the explanatory note, customs authorities in those member States revised the classification of merchandise that had already been imported and collected additional customs duties accordingly. By contrast, customs authorities in other member States refrained from giving retrospective effect to the explanatory note because, in their view, the note effectively established a new substantive rule – that is, it made susceptibility of camcorders to modification of use following importation a criterion for their classification. The United States submits that this was evidenced, for example, by the announcement of the explanatory note by the customs authority in the United Kingdom, in which it indicated that the note "does involve a change in practice for [the] United Kingdom".[632] Thus,

[628] United States' oral statement at the second substantive meeting, para. 26 referring to Exhibit US-59.

[629] United States' oral statement at the second substantive meeting, para. 27 referring to Commission Regulation No. 1810/2004 of 7 September 2004 amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and the Common Customs Tariff, 30 October 2004, p. 573 (Exhibit US-60).

[630] Uniform Application of the Combined Nomenclature (CN), Official Journal of the European Communities, 6 July 2001, p. C 190/10 (Exhibit US-61). Explanatory Notes to the Combined Nomenclature of the European Communities, Official Journal of the European Communities, 13 July 2000, p. 316 (Exhibit US-62).

[631] United States' oral statement at the second substantive meeting, para. 28.

[632] HM Customs & Excise, Tariff Notice 19/01, July 2001 (Exhibit US-63). Vorschriftensammlung Bundesfinanzverwaltung, VSF-Nachrichten N 46 2003, sec. I(3) 5 August 2003, (German customs notice on

according to the United States, different EC customs offices applied the amended explanatory note to the same situation differently, demonstrating that the European Communities fails to administer its customs law uniformly in violation of Article X:3(a) of the GATT 1994.[633]

7.347 In response, the **European Communities** submits that the United States has presented its reference to the *Camcorders* case as a rebuttal to the European Communities' argument that EC explanatory notes are a tool for securing uniform administration of EC classification rules.[634] However, according to the European Communities, the United States discusses that case to address the question of whether member States, subsequent to the adoption of an EC explanatory note, may reach back to collect additional duty on importations made prior to the issuance of the explanatory note. According to European Communities, this issue has nothing to do with the value of explanatory notes as tools for securing the uniform administration of tariff classification rules. Further, according to the European Communities, the United States has not shown that there has been any lack of uniformity as regards tariff classification in the European Communities following the issuance of the explanatory note in question.[635]

Analysis by the Panel

7.348 The Panel notes that the essence of the United States' challenge in the context of the *Camcorders* case appears to be that the way in which an amendment to an explanatory note to the Common Customs Tariff concerning camcorders was interpreted and applied varied from member State to member State. Specifically, in the context of the *Camcorders* case, the United States submits that, in some member States – namely, the United Kingdom and Germany – the explanatory note was treated as equivalent to a regulation and given prospective effect only. In other member States – namely, France and Spain, the explanatory note was treated as merely a clarification of the law and given retrospective effect.[636]

7.349 In the Panel's view, the interpretation and application of amendments to explanatory notes to the Common Customs Tariff by the customs authorities of the member States constitutes an act of administration within the meaning of Article X:3(a) of the GATT 1994. This act of administration is a matter within the Panel's terms of reference since it amounts to an instance of administration of the Common Customs Tariff in the tariff classification area.[637]

7.350 The Panel can see that differences in the interpretation and application of amendments to explanatory notes to the Common Customs Tariff among the member States could result in non-uniform administration in violation of Article X:3(a) of the GATT 1994. In particular, such differences could result in the imposition of duty treatment to importers of identical products that is not the same in different member States. For example, if one member State decides to treat an amendment to an explanatory notes as a mere clarification of the law and, therefore, retrospectively applies the amendment, this could mean that importers who had imported products into that member State prior to the amendment of the explanatory note would be liable for duty that is retrospectively

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application of the EC provisions on reimbursement/remission and recovery of import duties, together with unofficial English translation) (Exhibit US-64).

[633] United States' oral statement at the second substantive meeting, para. 29.

[634] In particular, the European Communities submitted that, in considering the EC system of customs administration in the tariff classification area, it was necessary to consider all relevant features of the EC system, including EC explanatory notes: European Communities' first written submission, paras. 262, 291 and 292; European Communities' oral statement at the first substantive meeting, paras. 38-39.

[635] European Communities' reply to Panel question No. 172, paras. 38-39.

[636] United States' oral statement at the second substantive meeting, paras. 26-27.

[637] At a minimum, the Panel considers that amendments to explanatory notes to the Common Customs Tariff are "related measures" to the Common Customs Tariff. In this regard, see paragraph 7.28 above. See also paragraphs 7.175 – 7.176 above.

being claimed. If, on the other hand, another member State decides to treat the amendment as akin to a substantive classification regulation and, therefore, applies it only prospectively, this would mean that importers who had imported products into that member State prior to the amendment of the explanatory note would not be retrospectively liable for duty. In the Panel's view, in the context of the EC system of customs administration, the absence of an obligation imposed upon the member States to treat the explanatory note in the same way, could amount to an instance of non-uniform administration in violation of Article X:3(a) of the GATT 1994.[638] Nevertheless, the Panel notes that it has not been provided with evidence to prove that non-uniform administration regarding the interpretation and application of the amended explanatory notes concerning camcorders actually occurred in the context of the *Camcorders* case.

7.351 In particular, the United States relies primarily upon a PowerPoint presentation made by Mr De Baere, an EC customs law practitioner.[639] According to the United States, that presentation points out that the consequences of an explanatory note may vary from member State to member State.[640] However, the only comment in the presentation that appears relevant to divergent interpretation and application of explanatory notes (and, presumably, amendments thereto) is that, with respect to camcorders, "Member States interpret the retrospective effect of the Explanatory Note differently (France and Spain)".[641] The Panel notes that the bullet point in Mr De Baere's presentation containing this statement makes no reference to any supporting factual material.

7.352 Relying upon the statement in Mr De Baere's presentation, the United States seeks to contrast the interpretation and application of the amendment to the explanatory note concerning camcorders in, on the one hand, France and Spain with, on the other hand, the interpretation and application of the same amendment in the United Kingdom and Germany. The United States does so by referring to a UK tariff notice[642] and to a German notice.[643] However, notably, the Panel has not been provided with any evidence regarding the treatment of the relevant amended explanatory note in France and Spain.[644] In the absence of such evidence, the Panel considers that it is impossible to draw any conclusions regarding the existence of non-uniform administration of the amended explanatory notes

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[638] We note in this regard that, according to Article 9(1)(a) of Regulation No. 2658/87, the Commission may issue explanatory notes to the Combined Nomenclature. Explanatory notes to the CN are not legally binding, and cannot amend the CN. However, the ECJ has repeatedly acknowledged that explanatory notes are an important aid in the interpretation of the CN: Case C-396/02, *DFDS*, judgment of 16 September 2004 (not yet published), para. 28 (Exhibit EC-25); Case C-259/97, *Clees*, [1998] ECR I-8127, para. 12 (Exhibit EC-29).

[639] Philippe De Baere, "Coping with customs in the EU: The uniformity challenge: Judicial review of customs decisions and implementing legislation", Presentation at ABA International Law Section, 27 October 2005 (Exhibit US-59).

[640] United States' oral statement at the second substantive meeting, para. 26 referring to Philippe De Baere, *Coping with customs in the EU: The uniformity challenge: Judicial review of customs decisions and implementing legislation*, Presentation at ABA International Law Section, 27 October 2005 (Exhibit US-59).

[641] Philippe De Baere, "Coping with customs in the EU: The uniformity challenge: Judicial review of customs decisions and implementing legislation", Presentation at ABA International Law Section, 27 October 2005, page 14 (Exhibit US-59).

[642] HM Customs & Excise, Tariff Notice 19/01, July 2001 (Exhibit US-63).

[643] Vorschriftensammlung Bundesfinanzverwaltung, VSF Nachrichten N 46 2003, sec. I(3), 5 August 2003, (German customs notice on application of the EC provisions on reimbursement/remission and recovery of import duties, together with unofficial English translation) (Exhibit US-64).

[644] The explanatory note in question was amended by notice dated 6 July 2001 (Uniform Application of the Combined Nomenclature, 6 July 2001, p. C 190/10 (Exhibit US-61). That explanatory note concerned the interpretation of sub-heading 8525 40 99. The Panel notes that it has been provided with copies of BTI classifying products under tariff heading 8525 40 91, issued by Spanish customs authorities in 2004 (Exhibit US-65). However, we have not been provided with any evidence to indicate that French and Spanish customs authorities applied the amended explanatory note to retrospectively classify products under sub-heading 8525 40 99 imported before July 2001.

as between customs authorities in France and Spain on the one hand and those in United Kingdom and Germany on the other.

7.353 Moreover, in the Panel's view, the evidence submitted regarding the interpretation and application of the amended explanatory note in the United Kingdom and Germany does not clearly prove that those two member States treat the explanatory note as akin to a substantive classification regulation and, therefore, prospectively apply the amendment, as has been submitted by the United States. Specifically, the UK tariff notice merely states that the amended explanatory note "does involve a change in practice for the United Kingdom". However, it does not contain any evidence as to whether or not the amendment will be given prospective or retrospective effect. The German notice constitutes an instruction from the federal finance administration. It appears to contain general statements regarding the recovery of import duties in cases where, *inter alia*, explanatory notes are amended. In this regard, the German notice states that: "To the extent that changes to the Explanatory Notes do not constitute changes of the content they may be applied retroactively, i.e. also to imports prior to their entry into force. In other cases where, for instance, the changes to the HS Explanatory Notes constitute a compromise in substance or a fundamental position without a conclusive character, they only apply for the future regarding the classification in the Combined Nomenclature."[645] In other words, the German notice tends to indicate that amendments to explanatory notes may be given either retroactive or prospective effect, depending upon the nature of the change. It does not, however, indicate that the amendment to the explanatory note at issue in the *Camcorders* case should be treated prospectively, as has been contended by the United States. In fact, the German notice contains no mention whatsoever of how the explanatory note at issue in the *Camcorders* case should be treated.

7.354 Following consideration of the evidence submitted by the United States as a whole, the Panel concludes that the United States has not proved that the interpretation and application of the amended explanatory note to the Common Customs Tariff concerning camcorders in the context of the *Camcorders* case was divergent among the member States in violation of Article X:3(a) of the GATT 1994.

(ix) Summary and conclusions

7.355 In summary, the Panel finds that, with respect to the United States' allegations of non-uniform administration of the Common Customs Tariff in the area of tariff classification:

(a) During 1990 – 1995, the European Communities was not administering the Common Customs Tariff regarding the tariff classification of network cards for personal computers in a uniform manner in violation of Article X:3(a) of the GATT 1994. However, the tariff classification of network cards for personal computers does not currently amount to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994. Therefore, the Panel finds no violation of Article X:3(a) of the GATT 1994 with respect to the tariff classification of network cards for personal computers.

(b) The tariff classification of drip irrigation products does not amount to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994. Therefore, the Panel finds no violation of Article X:3(a) of the GATT 1994 with respect to the tariff classification of drip irrigation products.

[645] Vorschriftensammlung Bundesfinanzverwaltung, VSF Nachrichten N 46 2003, sec. I(3), 5 August 2003, (German customs notice on application of the EC provisions on reimbursement/remission and recovery of import duties, together with unofficial English translation), p. 2 (Exhibit US-64).

(c) The United States has not proved that the tariff classification of unisex articles or shorts amounts to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994.

(d) The administrative process leading to the tariff classification of blackout drapery lining amounts to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994. Therefore, the Panel finds a violation of Article X:3(a) of the GATT 1994 with respect to the tariff classification of blackout drapery lining.

(e) The tariff classification of liquid crystal display monitors with digital video interface amounts to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994. Therefore, the Panel finds a violation of Article X:3(a) of the GATT 1994 with respect to the tariff classification of liquid crystal display monitors with digital video interface.

(f) The United States has not proved that customs authorities in the member States have failed to treat as binding BTI issued by customs authorities in other member States and that such failure amounts to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994.

(g) The United States has not proved that the refusal to withdraw the revocation of BTI by the UK customs authorities with respect to the tariff classification of the Sony PlayStation2 in the context of the *Sony PlayStation2* case amounts to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994.

(h) The United States has not proved that the interpretation and application of the amended explanatory notes to the Common Customs Tariff concerning camcorders in the context of the *Camcorders* case amounts to non-uniform administration in violation of Article X:3(a) of the GATT 1994.

(c) Allegations of non-uniform administration of the Community Customs Code and the Implementing Regulation in the area of customs valuation

(i) Royalty payments

Summary of the parties' arguments

7.356 The **United States** notes that the EC Court of Auditors found in its report that, in a number of cases, different member States apportioned royalties differently to the customs value of identical goods imported by the same company. The United States submits that the Court found that, in the cases identified, the member States involved either did not bring the disparate treatment to the attention of the Customs Code Committee, or that the matter was not examined by the Committee.[646]

7.357 In response, the **European Communities** notes that the treatment of royalties is regulated by Article 32(1)(c) of the Community Customs Code. The European Communities submits that it is not correct to state that different member States apportioned royalties differently to the customs value of identical goods imported by the same company since the examples referred to by the Court of Auditors mostly involved different subsidiaries established in various member States.[647] The European Communities adds that, following the report of the EC Court of Auditors, the Commission

[646] United States' first written submission, para. 86 referring to Court of Auditors Valuation Report, paras. 58-61 (Exhibit US-14).
[647] European Communities' first written submission, para. 392.

together with the Customs Code Committee worked through the cases examined by the Court of Auditors in order to clarify the issues and establish whether there had been a lack of uniformity. According to the European Communities, in most cases, it was confirmed that the questions involved were purely factual issues concerning the establishment of the conditions of Article 32(1)(c) of the Community Customs Code. The European Communities argues that, since no systematic lack of uniformity was found, it was concluded that no amendment to the Community Customs Code nor the Implementing Regulation was required.[648]

7.358 The **United States** submits that, even if the European Communities' assertions were correct, they still would not rebut the broader findings of the Court of Auditors report. For example, the Court of Auditors found "weaknesses" in the European Communities' administration of customs valuation rules to include, among others, "the absence of common control standards and working practices"; "the absence of common treatment of traders with operations in several member States"; and "the absence of Community law provisions allowing the establishment of Community-wide valuation decisions."[649]

Analysis by the Panel

7.359 The Panel notes that, in essence, the United States alleges differences between customs authorities in the member States regarding the manner in which royalties are apportioned to the customs value of identical goods imported by the same company.[650] In its submissions, the United States indicated that it specifically challenges the administration in the European Communities of Article 32(1)(c) of the Community Customs Code regarding the treatment of royalty payments for customs valuation purposes.[651]

7.360 In the Panel's view, the manner in which royalties are apportioned to the customs value of identical goods imported by the same company constitutes an act of administration within the meaning of Article X:3(a) of the GATT 1994. This act of administration is a matter within the Panel's terms of reference since it amounts to an instance of administration of Article 32(1)(c) of the Community Customs Code in the customs valuation area.[652]

7.361 With respect to the question of whether or not the manner in which royalties are apportioned to the customs value of identical goods imported by customs authorities in the member States is "uniform" within the meaning of Article X:3(a) of the GATT 1994, the Panel recalls its finding in paragraph 7.135 above that geographic uniformity is required under Article X:3(a) of the GATT 1994. That is, administration should be uniform in different places within a particular WTO Member. The Panel also recalls its finding in paragraph 7.135 above that the form, nature and scale of the alleged non-uniform administration and the laws, regulations, judicial decisions and rulings that are allegedly being administered in a non-uniform manner should be taken into consideration when interpreting the term "uniform" in Article X:3(a) of the GATT 1994. The Panel considers that the United States' challenge with respect to manner in which royalties are apportioned to the customs value of identical goods imported by the same company is narrow in nature. It involves the application of a single provision of the Community Customs Code – namely, Article 32(1)(c). Therefore, given the narrowness of this challenge, the Panel considers that a high degree of uniformity is required for the purposes of Article X:3(a) of the GATT 1994. We now turn to the facts to determine whether or not

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[648] European Communities' first written submission, para. 393.

[649] United States' reply to Panel question No. 137(c) referring to Court of Auditors Valuation Report, para. 86 (Exhibit US-14).

[650] United States' first written submission, para. 86 referring to Court of Auditors Valuation Report, paras. 58-61 (Exhibit US-14).

[651] United States' reply to Panel question No. 124.

[652] In this regard, see paragraphs 7.183 – 7.187 above.

this high degree of uniformity has been achieved with respect to the manner in which royalties are apportioned to the customs value.

7.362 Article 32(1)(c) of the Community Customs Code provides that:

> "In determining the customs value under Article 29 [of the Community Customs Code], there shall be added to the price actually paid or payable for the imported goods:
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> ...
>
> (c) Royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable."

7.363 The only evidence upon which the United States relies in support of its claim that Article 32(1)(c) of the Community Customs Code is not being administered in a uniform manner in violation of Article X:3(a) of the GATT 1994 is contained in the EC Court of Auditors Special Report No. 23/2000 concerning valuation of imported goods for customs purposes dated 14 March 2001.[653] We consider each of the relevant aspects of the report in turn.

7.364 *First*, the EC Court of Auditor's report makes general comments regarding the administration of the royalty provisions in EC customs law:

> "Royalties and licence fees may be included in the invoice price of imported goods or shown separately on the invoice as an addition to the basic price. They may also be calculated yearly as a percentage of the total value of sales of imported goods. ...
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> ...
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> The Commission has invested considerable effort to ensure uniform application of the rules. Even so the Court found several cases of apparently different treatment between the Member States. Given the present diversity of control methods within the customs union this is not surprising."[654]

7.365 In the Panel's view, while the excerpt of the EC Court of Auditor's report set out in the preceding paragraph indicates the existence of "different treatment" in the context of EC customs rules regarding royalties, it does not provide any detail of the nature of the different treatment.

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[653] By way of background, the Panel notes that EC Court of Auditors' report states that:

"The audit conducted by the EC Court of Auditors took place at the Commission and in all member States except the three that joined the Union on 1 January 1995 (Austria, Finland and Sweden). Visits were also made to the World Trade Organisation and the World Customs Organisation.

The audit included an examination of documents handled in the Commission Valuation Committee, customs authority valuation audit files, written valuation rulings, decisions of appeal tribunals and the actual customs declarations. Files and documentation concerning customs valuation procedures for more than 200 companies and groups of companies were examined.

In order to select its sample the Court used a predetermined list of the 50 most important trading companies worldwide, combined with lists, obtained in each Member State visited, of the 50 most important companies in terms of customs duties established.": EC Court of Auditors Special Report No 23/2000 concerning valuation of imported goods for customs purposes, 14 March 2001, paras. 9-11 (Exhibit US-14).

[654] EC Court of Auditors Special Report No 23/2000 concerning valuation of imported goods for customs purposes, 14 March 2001, paras. 55-57 (Exhibit US-14).

Therefore, in the Panel's view, these statements on their own are an insufficient basis upon which to infer that the "different treatment" in question corresponds to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994.

7.366 *Second*, the EC Court of Auditor's report refers to the payment by a particular company of customs duties on royalties in some member States but, apparently, not in others. Specifically, the report states:

> "In one case, the customs authority of the Member State where the headquarters of the company was based considered that three different transaction situations might apply for customs valuation purposes. All of them were legal and in some cases royalties and other payments would be included in the customs valuation. If the analysis of this customs authority is correct it is quite likely that the customs valuation of the imports by the company in six of the seven Member States examined by the Court are incorrect. In 1997 the company concerned paid more than 43 million euro in customs duties in these seven Member States. Uplifts for royalties applied by the different national customs ranged from 0% to 10% of the value of the imported goods."[655]

7.367 The Panel notes that the EC Court of Auditor's statement excerpted in the preceding paragraph refers to "three different transactions" engaged in by the company in question, some of which apparently entailed the payment of customs duties on royalties. The excerpt refers to the existence of errors in appraising these transactions on the part of a number of member States but there is insufficient information in the report for us to conclude that such errors resulted in non-uniform administration in violation of Article X:3(a) of the GATT 1994. The last sentence of the excerpt states that uplifts for royalties "applied by the different national customs" payable by the company in question "ranged from 0% to 10%". The Panel considers that, when read in context, this statement does not necessarily indicate non-uniform administration within the meaning of Article X:3(a) of the GATT 1994 given that it is unclear whether or not the different amounts of uplifts for royalties corresponded to the fact that materially different transactions were implicated, which could be inferred from the first sentence of the excerpt.

7.368 *Third*, the EC Court of Auditor's report refers to another instance in which a particular company paid customs duties on royalties in some member States but, apparently, not in others. Specifically, the report states:

> "In another case the majority of a company's Community imports passed through a distribution centre in one Member State. The customs authority in that Member State decided that none of the royalty payments made by the company formed part of the customs value. The Court found that in five of the Member States to which the importer had previously imported, the customs authorities had charged duty on at least part of the royalty and other additional payments by the importer.
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> In this case some Member States had exchanged information. However, even taking into account the different solutions and the extended timescale involved, the Member States authorities clearly had difficulties in accepting that the principal valuation questions were the same. The company paid over 33 million euro in customs duty in 1998. Notwithstanding its declared objective of maintaining equivalent conditions

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[655] EC Court of Auditors Special Report No 23/2000 concerning valuation of imported goods for customs purposes, 14 March 2001, para. 58 (Exhibit US-14).

for operators in the Member States ... the Commission did not examine the valuation treatment of this company."[656]

7.369 The Panel notes that the excerpt of the EC Court of Auditor's report set out in the preceding paragraph does tend to indicate the existence of differences in treatment of royalty payments for the purposes of customs valuation as between the member States. In particular, the report refers to the fact that the customs authority in one member State decided that royalty payments made by a particular importer did not form part of the customs value whereas the customs authorities in five other member States to which the importer had previously imported, did include royalty payments as part of the customs value. However, the question arises as to whether or not the transactions in question were, in fact, identical.

7.370 Regarding the question of whether or not the transactions in question were, in fact, identical, the report notes that customs authorities of one member State decided that royalty payments made by a particular company *did not* form part of the customs value but it was clear that, in the case of that member State, the imports were passed through a distribution centre. The report does not indicate that the imports into other member States, where customs authorities decided that royalty payments made by a particular company *did* form part of the customs value, were also passed through a distribution centre. Therefore, it is impossible to know whether or not the transactions in question were, in fact, identical. In summary, the Panel considers that the EC Court of Auditor's report does not contain sufficient information to know whether or not the "different treatment" in the context of EC customs rules regarding royalties constituted non-uniform administration in violation of Article X:3(a) of the GATT 1994.[657]

7.371 The Panel concludes that the United States has not proved that differences between member States regarding the manner in which royalties are apportioned to the customs value of identical goods imported by the same company exist that amount to non-uniform administration of Article 32(1)(c) of the Community Customs Code within the meaning of Article X:3(a) of the GATT 1994.

(ii) Valuation on a basis other than the transaction of the last sale (or "successive sale")

Summary of the parties' arguments

7.372 According to the **United States**, the EC Court of Auditors found in its report that, with respect to the application of the rule that allows imported goods, in certain cases, to be valued on a basis other than the transaction of the last sale which led to the introduction of the goods into the customs territory of the European Communities, 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,

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[656] EC Court of Auditors Special Report No 23/2000 concerning valuation of imported goods for customs purposes, 14 March 2001, para. 60 (Exhibit US-14).

[657] The Panel notes in this regard that the purpose of the EC Court of Auditor's report was not to ascertain the existence or otherwise of non-uniform administration within the meaning of Article X:3(a) of the GATT 1994. Rather, paragraph 12 of the report notes that: "The general objective of the audit was to examine the accuracy and consistency of the valuation for customs purposes of goods imported into the European union. The audit sought to establish: (a) how international rules on customs valuation have been incorporated into Community legislation; (b) what steps the Commission or Member States take to ensure proper application of Community rules on customs valuation and what control procedures the customs authorities of the Member States have put in place to comply with the requirements of Community legislation; (c) to what extent the Community legislation is applied consistently to imports, in particular to imports by companies with operations in more than one Member State." : EC Court of Auditors Special Report No 23/2000 concerning valuation of imported goods for customs purposes, 14 March 2001 (Exhibit US-14).

whereas authorities in other member States imposed no such requirement.[658] The United States also submits that it is significant not only that some EC customs authorities administer Article 147(1) of the Implementing Regulation by imposing a form of prior approval, while others do not, but also that the prior approval obtained from an EC customs authority in one region has no binding force in other parts of the territory of the European Communities.[659]

7.373 In response, the **European Communities** submits that the conditions under which a sale other than the last sale may be used as the basis for establishing the transaction value are set out in Article 147 of the Implementing Regulation.[660] The European Communities submits that, whereas the United States claims 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", the Court of Auditors merely stated that "*in practice*, some customs authorities do impose *a form of prior approval*". The European Communities submits that, contrary to the impression created by the United States, there is no form of legal requirement of prior approval in order to be able to rely on an earlier sale.[661] Moreover, given the potential complexity of the issue involved, it is not unreasonable for a customs authority to encourage traders who want to rely on the possibility of establishing the transaction value on the basis of an earlier sale to have this issue settled in advance. The European Communities submits that, in any event, it considers that such a practice constitutes a minor variation in administrative practice, which does not amount to a lack of uniformity incompatible with Article X:3(a) of the GATT 1994.[662]

7.374 The **United States** submits that there is no distinction between legally requiring importers to obtain prior approval and in practice imposing a form of prior approval.[663] Further, the United States disputes that the differences in questions regarding the administration of Article 147(1) of the Implementing Regulation represent a "minor variation." The United States submits that, from the trader's point of view, if it must obtain prior approval in order to base customs value on a sale other than the last sale, this would be relevant in deciding where to enter its goods into the European Communities. In this regard, the United States submits that there is no basis for the proposition that Article X:3(a) of the GATT 1994 is breached only by non-uniform administration that affects the ultimate customs debt owed by the trader but not by non-uniform administration that affects the burden borne or risk faced by the trader.[664]

7.375 The **European Communities** submits that, on the basis of a survey of the practices of the customs authorities of all member States, it can confirm that no member State, neither in law nor in practice, imposes a requirement of prior approval with respect to the conditions under which a sale other than the last sale may be used as the basis for establishing the transaction value for customs valuation purposes. According to the European Communities, the United States has not provided any evidence to the contrary.[665]

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[658] United States' first written submission, para. 87 referring to Court of Auditors Valuation Report, para. 64 (Exhibit US-14).

[659] United States' reply to Panel question No. 137(d).

[660] European Communities' first written submission, para. 394.

[661] European Communities' first written submission, para. 395.

[662] European Communities' first written submission, para. 396.

[663] United States' reply to Panel question No. 137(d) referring to European Communities' first written submission, paras. 394-396.

[664] United States' reply to Panel question No. 137(d) referring to Panel Report, *Argentina – Hides and Leather*, paras. 11.91-11.93.

[665] European Communities' comments on the United States' reply to Panel question No. 137(d).

Analysis by the Panel

7.376 The Panel notes that the United States challenges the administration of Article 147(1) of the Implementing Regulation. Specifically, the United States alleges that, in some member States, importers are practically required to obtain prior approval for valuation on a basis other than the transaction value of the last sale (also known as "successive sale"), whereas authorities in other member States impose no such requirement.[666] In addition, according to the United States, the prior approval obtained from a customs authority in one member State has no binding force elsewhere in the European Communities.[667]

7.377 In the Panel's view, the imposition of requirements regarding approval for valuation on a basis other than the transaction value of the last sale constitutes an act of administration within the meaning of Article X:3(a) of the GATT 1994. This act of administration is a matter within the Panel's terms of reference since it amounts to an instance of administration of the Article 147(1) of the Implementing Regulation in the customs valuation area.[668]

7.378 With respect to the question of whether or not the imposition of requirements regarding approval for valuation on a basis other than the transaction value of the last sale in the member States is "uniform" within the meaning of Article X:3(a) of the GATT 1994, the Panel recalls its finding in paragraph 7.135 above that geographic uniformity is required under Article X:3(a) of the GATT 1994. That is, administration should be uniform in different places within a particular WTO Member. The Panel also recalls its finding in paragraph 7.135 above that the form, nature and scale of the alleged non-uniform administration and the laws, regulations, judicial decisions and rulings that are allegedly being administered in a non-uniform manner should be taken into consideration when interpreting the term "uniform" in Article X:3(a) of the GATT 1994. The Panel considers that the United States' challenge with respect to the imposition of requirements regarding approval for valuation on a basis other than the transaction value of the last sale is narrow in nature. It involves the application of a single provision of the Implementing Regulation – namely, Article 147(1) of the Implementing Regulation. Therefore, given the narrowness of this challenge, the Panel considers that a high degree of uniformity is required for the purposes of Article X:3(a) of the GATT 1994. We now turn to the facts to determine whether or not this high degree of uniformity has been achieved with respect to the administration of Article 147(1) of the Implementing Regulation regarding the imposition of requirements regarding approval for valuation on a basis other than the transaction value of the last sale.

7.379 Article 147(1) of the Implementing Regulation provides in relevant part that:

> "1. For the purposes of Article 29 of the Code, the fact that the goods which are the subject of a sale are declared for free circulation shall be regarded as adequate indication that they were sold for export to the customs territory of the Community. In the case of successive sales before valuation, only the last sale, which led to the introduction of the goods into the customs territory of the Community, or a sale taking place in the customs territory of the Community before entry for free circulation of the goods shall constitute such indication.
>
> Where a price is declared which relates to a sale taking place before the last sale on the basis of which the goods were introduced into the customs territory of the Community, it must be demonstrated to the satisfaction of the customs authorities that this sale of goods took place for export to the customs territory in question."

[666] United States' first written submission, para. 87.
[667] United States' reply to Panel question No. 137(d).
[668] In this regard, see paragraphs 7.183 – 7187 above.

7.380 The only evidence upon which the United States relies in support of its claim that Article 147(1) of the Implementing Regulation is not being administered in a uniform manner in violation of Article X:3(a) of the GATT 1994 is contained in the EC Court of Auditors Special Report No. 23/2000 concerning valuation of imported goods for customs purposes dated 14 March 2001.

7.381 The relevant section of the Court's report states that:

> "The Court was unable to identify the full extent to which importers use or seek to use the successive sales provision. One reason for this is that, in order to apply to successive sales provision, unlike some other customs provisions, there is no legal requirement for an importer to obtain prior permission or authorisation. However, the Court found that, in practice, some customs authorities do impose a form of prior approval even though this has no basis in Community law. As in other aspects of customs valuation the Court found variations in the extent to which customs authorities allow the use of the provision or consult with each other. The Court has established that certain importers use the successive sales provision in one or more Member States but not in others and has drawn some significant examples of inconsistency to the attention of the Commission."[669]

7.382 The Panel notes that, in the section of the EC Court of Auditor's report excerpted in the preceding paragraph, the Court noted the existence of a "practice" on the part of customs authorities to impose a form of prior approval with respect to the successive sales provision of EC customs law, namely Article 147(1) of the Implementing Regulation. The Court specifically noted that such a practice has no basis in Community law and is not being followed in other member States. During the course of the Panel's proceedings, the European Communities submitted that, on the basis of a survey of the practices of the customs authorities of all member States, no member State, neither in law nor in practice, imposes a requirement of prior approval with respect to the conditions under which a sale other than the last sale may be used as the basis for establishing the transaction value for customs valuation purposes.[670] However, at the time the Panel issued its Interim Report to the parties, the European Communities had not submitted any evidence to substantiate its assertion in this regard.[671] Further, at that time, the Panel had not been provided with any evidence that would suggest that the practice engaged in by some customs authorities of imposing a form of prior approval that had been identified by the EC Court of Auditors in its report had since been remedied in the European Communities. The Panel considers that evidence clearly indicating the imposition of a requirement by member States, whether in practice and/or as a matter of law, that is not justified by the terms of EC law and which is not being applied in other member States, such as that contained in the EC Court of Auditors' report regarding the successive sales provision, necessarily falls foul of the obligation of uniform administration in Article X:3(a) of the GATT 1994.

7.383 Therefore, the Panel concludes that the administration of Article 147(1) of the Implementing Regulation in the European Communities is non-uniform in violation of Article X:3(a) of the GATT 1994 to the extent that customs authorities in some member States impose a form of prior approval with respect to the successive sales provision, which is inconsistent with EC customs laws, whereas customs authorities in other member States do not. The Panel notes in this regard that the practice of imposing a form of prior approval with respect to the successive sales provision results in an actual or

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[669] EC Court of Auditors Special Report No 23/2000 concerning valuation of imported goods for customs purposes, 14 March 2001, para. 64 (Exhibit US-14).

[670] European Communities' comments on the United States' reply to Panel question No. 137(d).

[671] The Panel considers that it was incumbent upon the European Communities to submit such evidence in the light of aspects of the EC Court of Auditor's report referred to in paragraph 7.383 above, which tend to call the European Communities assertion in this regard into question.

possible adverse impact on the trading environment in that it might affect the member State into which a trader decides to import.

7.384 With regard to the United States' allegation that the European Communities has also violated Article X:3(a) of the GATT 1994 because the prior approval obtained from a customs authority in one member State has no binding force elsewhere in the European Communities, the Panel notes that the United States has provided no evidence to substantiate this allegation. Therefore, we consider that the United States has not met its burden to make a prima facie case that the administration of Article 147(1) of the Implementing Regulation is non-uniform in violation of Article X:3(a) of the GATT 1994 because the prior approval obtained from a customs authority in one member State has no binding force elsewhere in the European Communities.

7.385 In the light of the foregoing, the Panel finds that, the imposition by customs authorities in some member States of a form of prior approval with respect to the successive sales provision, which is inconsistent with EC customs laws and which is not imposed by customs authorities in other member States means that the European Communities does not administer its customs law concerning successive sales – in particular, Article 147(1) of the Implementing Regulation – in a uniform manner in violation of Article X:3(a) of the GATT 1994.

(iii) Vehicle repair costs covered under warranty

Summary of the parties' arguments

7.386 The **United States** submits that the EC Court of Auditors notes in its report that different member States have taken different positions on whether the costs of automobile repair covered by a seller's warranty should be deducted from the customs value.[672] According to the United States, in at least one member State – namely, 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 European Communities 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. The United States submits that the Court observed that the Commission had been aware of differential treatment among member States for at least ten years and had not taken any steps to reconcile the difference.[673]

7.387 In response, as a preliminary matter, the **European Communities** notes that the EC Court of Auditors' report confirms that the Commission had not been aware of differential treatment among member States for 10 years. The Court merely referred to the German valuation practice, which it – contrary to the Commission – considered unjustified, as having been known for ten years.[674] The European Communities submits that when, through the report of the Court of Auditors, it became apparent that differences existed between member States in the treatment of repair cost covered by a warranty, the Commission, after careful examination of the issue and due consultation of the Customs Code Committee, adopted Commission Regulation (EC) No. 444/2002 of 11 March 2002, which introduced an amended version of Article 145 into the Implementing Regulation and specifically addresses the issue raised in the Court of Auditor's report.[675] According to the European Communities, with this amendment, the issue of warranties has been sufficiently clarified, and the

[672] United States' first written submission, para. 25 referring to Court of Auditors, Special Report No. 23/2000 concerning valuation of imported goods for customs purposes (customs valuation), together with the Commission's replies, paras. 73-74, 14 March 2001 (Exhibit US-14).

[673] United States' first written submission, para. 88 referring to Court of Auditors Valuation Report, paras. 73-74 (Exhibit US-14).

[674] European Communities' first written submission, footnote 194.

[675] European Communities' first written submission, para. 397 referring to Exhibit EC-89 and Exhibit EC-37, pp. 14-19.

uniform application of EC valuation law is secured. In the view of the European Communities, the example shows that the European Communities is perfectly capable of detecting and correcting non-uniform practices, if they arise.[676] Further, the European Communities notes that, on a complex issue of customs valuation, the European Communities itself detected the problem, and took the necessary measures to correct it. Accordingly, rather than showing any failure in the European Communities' system, the example of repair costs under warranty shows that the EC system of customs administration functions properly.[677]

7.388 In response, the **United States** submits that, as the EC Court of Auditors report explains, the Commission was first made aware of inconsistent member State practice in this area in a 1990 report. The 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 in Article X:3(a) of the GATT 1994.[678] Further, the United States submits that, while the regulation cited by the European Communities does appear to address the issue of treatment of repair costs covered by warranty, what is remarkable is that it took the European Communities 12 years to resolve this matter.[679] According to the United States, 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 uniform administration in Article X:3(a) of the GATT 1994.[680]

Analysis by the Panel

7.389 The Panel notes that, when the United States listed the "subsidiary findings" requested regarding the specific areas of customs administration it alleges are being administered by the European Communities in a non-uniform manner in violation of Article X:3(a) of the GATT 1994, the United States did not make mention of the European Communities' administration of valuation rules in cases involving vehicle repair costs covered under warranty.[681] Nevertheless, elsewhere in its submissions, the United States did allege differences among member States regarding whether or not the costs of automobile repair covered by a seller's warranty should be deducted from the customs value.[682] In light of these allegations, the Panel considers it necessary to address them.

7.390 The Panel notes that the United States challenges alleged differences in approaches taken by customs authorities in the member States regarding whether or not the costs of automobile repair covered by a seller's warranty should be deducted from the customs value.[683] The Panel understands that, in alleging differences among member States as to whether or not the costs of vehicle repair covered by a seller's warranty should be deducted from the customs value, the United States is implicitly challenging the administration of Article 29(3)(a) of the Community Customs Code.

7.391 In the Panel's view, the deduction (or not) of the costs of vehicle repair covered by a seller's warranty constitutes an act of administration within the meaning of Article X:3(a) of the GATT 1994. This act of administration is a matter within the Panel's terms of reference since it amounts to an

[676] European Communities' first written submission, para. 398.
[677] European Communities' second written submission, para. 156.
[678] United States' reply to Panel question No. 4.
[679] Court of Auditors Valuation Report, paras. 73-74 (Exhibit US-14).
[680] United States' reply to Panel question No. 25.
[681] United States' reply to Panel question No. 124.
[682] See, for example, United States' first written submission, paras. 88 - 89.
[683] United States' first written submission, para. 25 referring to Court of Auditors, Special Report No. 23/2000 concerning valuation of imported goods for customs purposes (customs valuation), together with the Commission's replies, paras. 73-74, 14 March 2001 (Exhibit US-14).

instance of administration of the Article 29(3)(a) of the Community Customs Code in the customs valuation area.[684]

7.392 With respect to the question of whether or not the deduction (or not) of the costs of vehicle repair covered by a seller's warranty in the member States is "uniform" within the meaning of Article X:3(a) of the GATT 1994, the Panel recalls its finding in paragraph 7.135 above that geographic uniformity is required under Article X:3(a) of the GATT 1994. That is, administration should be uniform in different places within a particular WTO Member. The Panel also recalls its finding in paragraph 7.135 above that the form, nature and scale of the alleged non-uniform administration and the laws, regulations, judicial decisions and rulings that are allegedly being administered in a non-uniform manner should be taken into consideration when interpreting the term "uniform" in Article X:3(a) of the GATT 1994. The Panel considers that the United States' challenge with respect to the deduction (or not) of the costs of vehicle repair covered by a seller's warranty is narrow in nature. It involves the application of a single provision of the Community Customs Code – namely, Article 29(3)(a) of the Community Customs Code. Therefore, given the narrowness of this challenge, the Panel considers that a high degree of uniformity is required for the purposes of Article X:3(a) of the GATT 1994. We now turn to the facts to determine whether or not this high degree of uniformity has been achieved with respect to the administration of Article 29(3)(a) of the Community Customs Code concerning the deduction (or not) of the costs of vehicle repair covered by a seller's warranty in the member States.

7.393 Article 29(3)(a) of the Community Customs Code provides that:

> "The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods and includes all payments made or to be made as a condition of sale of the imported goods by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller. The payment need not necessarily take the form of a transfer of money. Payment may be made by way of letters of credit or negotiable instrument and may be made directly or indirectly."

7.394 The only evidence upon which the United States relies in support of its claim that Article 29(3)(a) of the Community Customs Code is not being administered in a uniform manner in violation of Article X:3(a) of the GATT 1994 is contained in the EC Court of Auditors Special Report No. 23/2000 concerning valuation of imported goods for customs purposes dated 14 March 2001. We consider each of the relevant aspects of that report in turn.

7.395 *First*, the EC Court of Auditor's report makes general comments regarding the administration of EC customs law with respect to the costs of vehicle repair covered by a seller's warranty:

> "Manufacturers often give a guarantee or warranty with their products. Such guarantees mean that if the goods are later shown not to be in accordance with the sale specification the buyer will be compensated. ...
>
> The treatment of manufacturer's guarantees for imported cars is a prime example of an area where the individual customs authorities of the Member States apply different interpretations of Community legislation."[685]

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[684] In this regard, see paragraphs 7.183 – 7.187 above.

[685] EC Court of Auditors Special Report No 23/2000 concerning valuation of imported goods for customs purposes, 14 March 2001, paras. 71-72 (Exhibit US-14).

7.396 In the Panel's view, while the excerpt of the EC Court of Auditor's report set out in the preceding paragraph indicates the existence of "different interpretations" in the context of EC customs rules regarding the costs of vehicle repair covered by a seller's warranty, it does not provide any detail of the nature of the different interpretations nor of the practical consequences of such different interpretations. Therefore, in the Panel's view, these statements on their own are an insufficient basis upon which to infer that the "different interpretations" in question correspond to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994 regarding the treatment of the costs of vehicle repair covered by a seller's warranty for the purposes of customs valuation.

7.397 *Second*, the EC Court of Auditor's report refers specifically to differences among member States regarding whether or not they grant customs value reductions for the costs of vehicle repair covered by a seller's warranty. In particular, the report states:

> "In its annual report on the financial year 1990, the Court drew the Commission's attention to the practice of the German customs authority of granting value reductions on imports of motor vehicles against repair costs covered under warranty arrangements. The Court considered that these reductions were outside the provisions of Community law in force at that time. Ten years later, similar value reductions are still being applied by the German customs authority. The Court continues to consider this procedure as not conforming to the provisions of Community law.
>
> Similar situations are treated differently in other Member States. The customs authorities of three Member States (Italy, the Netherlands, the United Kingdom) have refused similar claims from importers of motor vehicles. The different approaches of Member States' customs administrations to this question may be one of the elements leading to trade diversion inside the Community.
>
> This is a clear indication of the lack of cohesion within the customs union, and one which may have resulted in losses of own resources. Regardless of any ultimate revision of the regulations, the fact remains that for over 10 years a practice of rebates, unchallenged by the Commission, has existed."[686]

7.398 The Panel notes that, in the sections of the EC Court of Auditor's report excerpted in the preceding paragraph, the Court noted the existence of "different" treatment among the member States regarding "similar situations" in relation to the treatment of costs of vehicle repair covered by a seller's warranty. Specifically, the Court notes that, whereas German customs authorities had granted reductions in imports of vehicles subject to repair costs covered under warranty, customs authorities in Italy, the Netherlands and the United Kingdom had failed to do so in similar situations. In the Panel's view, these findings of the EC Court of Auditors tend to indicate the existence of non-uniform administration within the meaning of Article X:3(a) of the GATT 1994 regarding the treatment of costs of vehicle repair covered by a seller's warranty. Indeed, in the context of this dispute, the European Communities does not dispute that the different treatment in question amounted to non-uniform administration.[687]

7.399 In the light of the foregoing, the Panel considers that, at the time the EC Court of Auditors prepared its report – namely, in 2001 – the European Communities was not administering its customs law concerning vehicle repair costs covered under warranty in a uniform manner in violation of

[686] EC Court of Auditors Special Report No 23/2000 concerning valuation of imported goods for customs purposes, 14 March 2001, paras. 73-75 (Exhibit US-14).

[687] European Communities' first written submission, para. 398; European Communities' second written submission, para. 156.

Article X:3(a) of the GATT 1994. The Panel is of the view that this instance of non-uniform administration is all the more noteworthy in light of the fact that the Court of Auditors had already prepared a report noting the same instance of non-uniform administration more than ten years earlier in 1990.[688] The Panel understands that, as in the case of the 2001 report, the EC Commission received a copy of the EC Court of Auditor's 1990 report and was provided with the opportunity to make comments thereon.[689]

7.400 The Panel notes that it was only after receiving critical comments in two consecutive reports by the EC Court of Auditors, which were separated by a period of ten years, that the Commission finally took action to remedy non-uniform administration regarding the treatment of the costs of vehicle repair covered by a seller's warranty. Specifically, in 2002, the EC Commission adopted Commission Regulation (EC) No. 444/2002 of 11 March 2002.[690] That Regulation had the effect, *inter alia*, of amending Article 145 of the Implementing Regulation. Following the amendment, Article 145(2) of the Implementing Regulation provided that and continues to provide that:

> "After release of the goods for free circulation, an adjustment made by the seller, to the benefit of the buyer, of the price actually paid or payable for the goods may be taken into consideration for the determination of the customs value in accordance with Article 29 of the Code, if it is demonstrated to the satisfaction of the customs authorities that:
>
> (a) the goods were defective at the moment referred to by Article 67 of the Code;
>
> (b) the seller made the adjustment in performance of a warranty obligation provided for in the contract of sale, concluded before release for free circulation of the goods;
>
> (c) the defective nature of the goods has not already been taken into account in the relevant sales contract."

7.401 The United States acknowledges that Regulation No. 44/2002 had the effect of resolving the non-uniform administration regarding the treatment of the costs of vehicle repair covered by a seller's warranty for the purposes of customs valuation.[691] Indeed, the Panel understands that the non-uniform administration concerning such costs that had existed at least between 1990 and 2001, was finally removed in 2002. There is no evidence before the Panel that would suggest that the non-uniform administration has re-emerged since then.

7.402 In the light of the foregoing, the Panel concludes that, in 2001, the European Communities was not administering Article 29(3)(a) of the Community Customs Code regarding the costs of vehicle repair covered by a seller's warranty in a uniform manner in violation of Article X:3(a) of the GATT 1994. However, this violation was remedied in 2002 through the enactment of Regulation No. 44/2002.

7.403 The Panel concludes that the European Communities is not currently administering Article 29(3)(a) of the Community Customs Code concerning vehicle repair costs covered under warranty in a manner that is non-uniform within the meaning of Article X:3(a) of the GATT 1994.

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[688] The Court of Auditors' Annual Report concerning the financial year 1990, Chapter 2, paragraph 2.52(a) (OJ C 324, 13.12.1991) referred to in EC Court of Auditors Special Report No 23/2000 concerning valuation of imported goods for customs purposes, 14 March 2001, paras. 73-75 (Exhibit US-14).

[689] The Panel notes that the EC Court of Auditors Special Report No 23/2000 contains a section containing "The Commission's Replies" pp. 13 - 18 (Exhibit US-14).

[690] Commission Regulation No. 444/2002 of 11 March 2002 (Exhibit EC-89).

[691] United States' reply to Panel question No. 4.

Therefore, the Panel finds no violation of Article X:3(a) of the GATT 1994 with respect to the administration of Article 29(3)(a) of the Community Customs Code concerning vehicle repair costs covered under warranty.

(iv) Relationship between EC importer and non-EC manufacturers

Summary of the parties' arguments

7.404 The **United States** argues that different member States have taken different positions on whether an importer is related to non-EC companies that manufacture its products and, accordingly, on how those products should be valued.[692] By way of example, the United States refers to a case involving Reebok International Limited ("RIL"), which contracts with various suppliers outside the European Communities to manufacture shoes that are then imported and sold to customers in the European Communities.[693] As for whether RIL's contracts with non-EC manufacturers establish a control relationship affecting the price at which the shoes are sold for export to the European Communities that should be taken into account in customs valuation, the United States notes that the Spanish customs authorities found that RIL's contracts with non-EC manufacturers established a control relationship vis-à- vis those suppliers. The relevant aspects of the contracts considered significant by the Spanish customs authorities related to quality approval, pricing conditions, and restrictions on delivery conditions. However, the contracts did not allow RIL to direct or restrain the management or activities of its suppliers. The United States submits that other member State customs authorities did not consider the contracts to have established a control relationship between RIL and its non-EC manufacturers.[694] According to the United States, RIL is in the process of appealing the valuation decisions of the Spanish customs authorities – a process that has already taken years and is expected to take even longer. The United States submits that coping with these inconsistencies has added costs to RIL's operations that would not be necessary if EC customs law were administered uniformly.[695]

7.405 The United States explains that its claims with respect to this issue are based on a narrative account by the importer at issue. The United States notes that, due to concerns relating to the pendency of litigation over the matter at issue and the commercial sensitivity of the information that supporting documentation would contain, the importer declined to provide documentation at this time. However, according to the United States, its claims are substantiated in a decision of the European Ombudsman.[696] The United States argues that that decision reveals how the Commission dealt with the company's complaint when it was brought to the Commission's attention in September 2000. According to the United States, 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."[697] When the company expressly requested referral to the Committee a year later, the Commission "rejected the idea."[698] The company renewed its request in January 2002 and, over two years later, still had not received a reply from the Commission. The United States notes that 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

[692] United States' first written submission, para. 25.
[693] United States' first written submission, para. 90.
[694] United States' first written submission, para. 91.
[695] United States' first written submission, para. 92.
[696] Exhibit US-52.
[697] Decision of the European Ombudsman on complaint 128/2004/OV against the European Commission, p. 2, 2 June 2004 (Exhibit US-52).
[698] Decision of the European Ombudsman on complaint 128/2004/OV against the European Commission, p. 2. 2 June 2004 (Exhibit US-52).

complainant stated that "he no longer wished to pursue the complaint".[699] However, according to the United States, it does *not* indicate that the underlying lack of uniformity 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.[700]

7.406 In response, the **European Communities** submits that the United States cannot justify its failure to discharge its burden of proof on the basis of the refusal of the importer in question to provide the necessary evidence.[701] Further, with respect to the decision by the European Ombudsman on a complaint by an individual importer, the European Communities confirms that the complaint was made on behalf of Reebok, which claimed that the European Commission was not properly discharging its responsibilities in respect of the administration of customs valuation law.[702] The European Communities notes that, however, the Ombudsman did not take a decision on the substance of the complaint. Rather, the complainant withdrew the complaint indicating that he "was satisfied with the position the Commission had adopted on the matter and with its proposal to look into pending problematic issues".[703]

7.407 The European Communities also submits that the facts as set out in the Ombudsman's decision are not presented entirely correctly. Notably, the United States refers to a quotation from a letter of the European Commission of 20 December 2000, in which the Commission is supposed to have stated "that the interpretation issues raised by the complainant were a matter for the national customs authorities". According to the European Communities, this quotation is not correct. In its letter of 20 December 2000, the Commission stated the following (emphasis added): "The *application* of this criterion [of Article 143(1)(e) Implementing Regulation] in individual cases is of course a matter for national administrations and the Commission Services could only express an opinion if a detailed file on all aspects of the case was to be forwarded by the customs services in question. However, our services do not, in general, have a responsibility to undertake a detailed examination of very specific cases, this being the task of the national administrations."[704] The European Communities considers that this statement correctly reflects the division of competences between the European Commission and the customs authorities of the member States, the latter of which are competent for the application of customs law in individual cases. According to the European Communities, it is neither possible nor appropriate for the Commission to substitute itself for the competent authority simply because, in an individual case of application, a trader is not satisfied with an approach taken by the customs authority.[705] The European Communities notes that, nevertheless, the Commission is responsible for monitoring and ensuring the correct and uniform interpretation and application of EC customs law. This was explicitly acknowledged in the following paragraph of the letter: "On the other hand, cases involving the proven divergence of valuation treatment of a company at EC level, or a clear mis-application or mis-interpretation of EC law, can be notified and consideration can then be given to appropriate action by the Commission Services".[706] According to the European Communities, in the case in question, at the time in question, Reebok had not submitted to the European Commission any evidence that showed an incorrect application of EC law or a divergence in the application of EC law. Accordingly, the Commission did not see any need to intervene in the specific pending case.[707]

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[699] Decision of the European Ombudsman on complaint 128/2004/OV against the European Commission, p. 4, 2 June 2004 (Exhibit US-52).
[700] United States' reply to Panel question No. 26.
[701] European Communities' second written submission, para. 162.
[702] European Communities' second written submission, para. 165.
[703] European Communities' second written submission, para. 166 referring to Exhibit US-52, p. 4.
[704] Exhibit EC-138.
[705] European Communities' second written submission, paras. 168-169.
[706] European Communities' second written submission, para. 170.
[707] European Communities' second written submission, para. 171.

7.408 The European Communities also argues that the valuation dispute between Reebok and the Spanish customs authorities is a complex valuation dispute concerning the assessment of whether RIL controls certain of its suppliers. According to the European Communities, the Commission has kept this case, which is currently pending before the Spanish tribunals, under close review, and has also discussed it in the Customs Code Committee. However, neither the European Commission nor the Customs Code Committee are a substitute for the normal appeals mechanisms before the national courts. In addition, RIL has not, in fact, submitted a formal complaint to the European Commission in this matter.[708] The European Communities explains that the Valuation Section of the Customs Code Committee examined the issue of the application of Article 143(1)(e) of the Implementing Regulation (dealing with related parties) by Spanish customs authorities but did not establish any incompatibility with EC law or lack of uniformity.[709] The European Communities further explains that, during the meetings of the Customs Code Committee on 1 October and 20 December 2004, the delegates' view was that the facts tended to show that the parties were related, as was previously concluded by the Spanish authorities. The European Communities adds that, since similar cases had been raised by two other member States, it was considered that, in 2005, further work was desirable in this context. It was also recalled that, since similar cases had come in for attention, and these relate to manufacturing and processing operations which have become significant in trade and economy terms, the Commission decided to carry further the work on the basis of a working group of the Committee. In August 2005, Reebok submitted, at the Commission's request, material indicating that there could be a divergent approach among member States. The European Communities notes that this material will now be looked at and the working group will begin to meet and work shortly. The European Communities submits that it is intended that the working group will produce concrete outputs which will address both the general interpretation and application of Article 143(1)(e) of the Implementing Regulation, and the specific elements which have been the subject of disagreement between the customs authorities in Spain and the firm in question.[710] The European Communities submits that, overall, it does not see that the Reebok case provides any support for the allegation that the European Communities fails to administer is customs valuation rules in a uniform manner.[711]

Analysis by the Panel

7.409 The Panel notes that the United States challenges the administration of Article 29 of the Community Customs Code and Article 143(1)(e) of the Implementing Regulation, which concern the circumstances in which parties are to be treated as "related" for customs valuation purposes. In particular, the United States argues that different member States have taken different positions on whether an importer is related to non-EC companies that manufacture its products and, accordingly, on how those products should be valued.[712]

7.410 In the Panel's view, the treatment (or not) of parties as "related" for the purposes of customs valuation constitutes an act of administration within the meaning of Article X:3(a) of the GATT 1994. This act of administration is a matter within the Panel's terms of reference since it amounts to an instance of administration of Article 29 of the Community Customs Code and Article 143(1)(e) of the Implementing Regulation in the customs valuation area.[713]

7.411 With respect to the question of whether the treatment (or not) of parties as "related" in the member States is "uniform" within the meaning of Article X:3(a) of the GATT 1994, the Panel recalls

[708] European Communities' oral statement at the first substantive meeting, para. 46.
[709] European Communities' first written submission, para. 407.
[710] European Communities' first written submission, para. 407; European Communities' reply to Panel question No. 62.
[711] European Communities' first written submission, para. 410.
[712] United States' first written submission, para. 25.
[713] In this regard, see paragraphs 7.183 – 7.187 above.

its finding in paragraph 7.135 above that geographic uniformity is required under Article X:3(a) of the GATT 1994. That is, administration should be uniform in different places within a particular WTO Member. The Panel also recalls its finding in paragraph 7.135 above that the form, nature and scale of the alleged non-uniform administration and the laws, regulations, judicial decisions and rulings that are allegedly being administered in a non-uniform manner should be taken into consideration when interpreting the term "uniform" in Article X:3(a) of the GATT 1994. The Panel considers that the United States' challenge with respect to the treatment (or not) of parties as "related" for customs valuation purposes is narrow in nature. It involves the application of a single provision of the Community Customs Code and a single provision of the Implementing Regulation – namely, Article 29 of the Community Customs Code and Article 143(1)(e) of the Implementing Regulation. Therefore, given the narrowness of this challenge, the Panel considers that a high degree of uniformity is required for the purposes of Article X:3(a) of the GATT 1994. We now turn to the facts to determine whether or not this high degree of uniformity has been achieved with respect to the treatment (or not) of parties as "related".

7.412 Article 29 of the Community Customs Code provides in relevant part that:

> "1. The customs value of imported goods shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to the customs territory of the Community, adjusted, where necessary, in accordance with Articles 32 and 33, provided:
>
> ...
>
> (d) that the buyer and seller are not related, or, where the buyer and seller are related, that the transaction value is acceptable for customs purposes under paragraph 2.
>
> 2.(a) In determining whether the transaction value is acceptable for the purposes of paragraph 1, the fact that the buyer and the seller are related shall not in itself be sufficient grounds for regarding the transaction value as unacceptable. Where necessary, the circumstances surrounding the sale shall be examined and the transaction value shall be accepted provided that the relationship did not influence the price. If, in the light of information provided by the declarant or otherwise, the customs authorities have grounds for considering that the relationship influenced the price, they shall communicate their grounds to the declarant and he shall be given a reasonable opportunity to respond. If the declarant so requests, the communication of the grounds shall be in writing.
>
> (b) In a sale between related persons, the transaction value shall be accepted and the goods valued in accordance with paragraph 1 wherever the declarant demonstrates that such value closely approximates to one of the following occurring at or about the same time:
>
> (i) the transaction value in sales, between buyers and sellers who are not related in any particular case, of identical or similar goods for export to the Community;
>
> (ii) the customs value of identical or similar goods, as determined under Article 30 (2) (c);

> (iii) the customs value of identical or similar goods, as determined under Article 30 (2) (d).
>
> In applying the foregoing tests, due account shall be taken of demonstrated differences in commercial levels, quantity levels, the elements enumerated in Article 32 and costs incurred by the seller in sales in which he and the buyer are not related and where such costs are not incurred by the seller in sales in which he and the buyer are related."

7.413 Article 143(1)(e) of the Implementing Regulation provides that persons shall be deemed to be related only if one of them directly or indirectly controls the other.

7.414 To support its allegation that Article 29 of the Community Customs Code and Article 143(1)(e) of the Implementing Regulation are being administered in a non-uniform manner in violation of Article X:3(a) of the GATT 1994, the United States refers to a case involving Reebok International Limited ("RIL"). According to the United States, Spanish customs authorities found that RIL's contracts with non-EC manufacturers established a control relationship *vis-à-vis* those suppliers whereas other member State authorities did not consider the contracts to have established a control relationship between RIL and its non-EC manufacturers.

7.415 The United States explains that its claims with respect to the administration of Article 29 of the Community Customs Code and Article 143(1)(e) of the Implementing Regulation issue are based on a narrative account by RIL because, due to concerns relating to the pendency of litigation over the matter at issue in this dispute and the commercial sensitivity of the information that supporting documentation would contain, RIL declined to provide documentation. Apart from its narrative account of RIL's experiences, the United States also relies upon a decision of the European Ombudsman concerning a complaint by RIL.[714] The United States argues that the decision reveals how the Commission dealt with the RIL's complaint when it was brought to the Commission's attention in September 2000. According to the United States, the European Ombudsman's decision does not indicate that the underlying lack of uniformity was resolved.

7.416 The Panel's appraisal of the Ombudsman's letter is that it does not, on its own, prove the existence of non-uniform administration of Article 29 of the Community Customs Code and Article 143(1)(e) of the Implementing Regulation in violation of Article X:3(a) of the GATT 1994.[715] The Ombudsman's letter notes RIL's complaint that "Community legislation is not interpreted in the same way in different Member States, such as the Netherlands and Spain". However, apart from making this observation on RIL's complaint, the Ombudsman did not make any factual findings regarding the uniformity or lack thereof among member States with respect to the question of whether or not parties are related for the purposes of Article 29 of the Community Customs Code and Article 143(1)(e) of the Implementing Regulation. In fact, the Panel has no objective evidence before it to prove the existence or otherwise of non-uniform administration in this regard. Moreover, in light of the fact that the European Communities has contested the existence of non-uniform administration in this respect,[716] the Panel does not consider it appropriate to make any inferences solely on the basis of the United States' narrative account.

7.417 With respect to the United States' more general comments regarding the manner in which the European Communities' handled RIL's complaint of alleged non-uniform administration, the Panel considers that these comments might be relevant for a claim of unreasonable or partial administration of EC customs law under Article X:3(a) of the GATT 1994, which claim the United States has not

[714] Exhibit US-52.
[715] With regard to the European Ombudsman, see paragraphs 7.171 – 7.172 above.
[716] European Communities' second written submission, para. 163.

made in the context of this dispute.[717] However, the Panel considers that such comments are not relevant for a claim of non-uniform administration under Article X:3(a) of the GATT 1994.

7.418 Accordingly, the Panel concludes that the United States has not proved that the manner of administration of Article 29 of the Community Customs Code and Article 143(1)(e) of the Implementing Regulation concerning the circumstances in which parties are to be treated as "related" for customs valuation purposes is non-uniform among the member States within the meaning of Article X:3(a) of the GATT 1994.

(v) Summary and conclusions

7.419 In summary, the Panel finds that, with respect to the United States' allegations of non-uniform administration of the Community Customs Code and the Implementing Regulation in the area of customs valuation:

(a) The United States has not proved that differences between member States regarding the manner in which royalties are apportioned to the customs value of identical goods imported by the same company exist that amount to non-uniform administration of Article 32(1)(c) of the Community Customs Code within the meaning of Article X:3(a) of the GATT 1994.

(b) The imposition by customs authorities in some member States of a form of prior approval with respect to the successive sales provision, which is inconsistent with EC customs laws and which is not imposed by customs authorities in other member States means that the European Communities does not administer its customs law concerning successive sales – in particular, Article 147(1) of the Implementing Regulation – in a uniform manner in violation of Article X:3(a) of the GATT 1994.

(c) In 2001, the European Communities was not administering Article 29(3)(a) of the Community Customs Code regarding the costs of vehicle repair covered by a seller's warranty in a uniform manner in violation of Article X:3(a) of the GATT 1994. However, the European Communities is not currently administering Article 29(3)(a) of the Community Customs Code concerning vehicle repair costs covered under warranty in a manner that is non-uniform within the meaning of Article X:3(a) of the GATT 1994. Therefore, the Panel finds no violation of Article X:3(a) of the GATT 1994 with respect to the administration of Article 29(3)(a) of the Community Customs Code concerning vehicle repair costs covered under warranty.

(d) The United States has not proved that the manner of administration of Article 29 of the Community Customs Code and Article 143(1)(e) of the Implementing Regulation concerning the circumstances in which parties are to be treated as "related" for customs valuation purposes is non-uniform among the member States within the meaning of Article X:3(a) of the GATT 1994.

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[717] The Panel recalls that the United States clarified in its first submission that it is exclusively concerned with the requirement of uniform administration under Article X:3(a) of the GATT 1994: United States' first written submission, footnote 15.

(d) Allegations of non-uniform administration of the Community Customs Code and the Implementing Regulation in the area of customs procedures

(i) Audit following release for free circulation

Summary of the parties' arguments

7.420 The **United States** notes that audit procedures are procedures for verifying importers' statements with respect to classification, valuation and origin of goods.[718] The United States submits that the EC Court of Auditors found in its report that different member State authorities take different approaches to valuation audits following the release of products into free circulation, with important consequences for importers.[719] According to the United States, 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. The United States asserts that, even among States in which authorities are permitted to perform post-importation audits, the Court found differences among working procedures with the consequence that "individual customs authorities are reluctant to accept each other's decisions".[720] The United States also notes that, in its report, the EC Court of Auditors observed that authorities in Belgium and the Netherlands routinely provide the importer with a written valuation decision at the conclusion of each audit, which are binding for five years, thus providing the importer with a degree of legal certainty similar to BTI.[721] According to the United States, by contrast, the Court found that "[c]ertain member States only issue such decisions when there are specific adjustments that have to be made (France, Ireland, Portugal, the United Kingdom). Others rarely make such written decisions (Denmark, Spain, Italy, Luxembourg). In Germany, the valuation decision does not exist as a separate written document. However, the detailed report that is given to the importer after an audit will normally contain the substance of a valuation decision".[722]

7.421 In response, the **European Communities** submits that questions of auditing are not part of customs procedures and, therefore, do not concern the administration of customs laws as such.[723] The European Communities submits that, in any event, under Article 78(2) of the Community Customs Code, every member State may proceed to all necessary verifications in order to satisfy themselves of the accuracy of the particulars contained in the customs declaration. According to the European Communities, this includes all questions regarding the value of the goods.[724] The European Communities also argues that it does not believe that Article X:3(a) of the GATT 1994 can require complete certainty for traders concerning questions of auditing. On the contrary, a certain degree of uncertainty as to when and under which conditions an audit will be carried out is in the interests of sound control and must be accepted by traders as part of a customs compliance policy. In addition, the European Communities submits that any administrative differences that might still exist are minor in nature, and do not amount to a violation of Article X:3(a) of the GATT 1994.[725] The European

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[718] United States' reply to Panel question No. 4.

[719] United States' first written submission, para. 96.

[720] United States' first written submission, para. 97 referring to EC Court of Auditors Valuation Report, paras. 33 and 37 (Exhibit US-14).

[721] United States' first written submission, para. 98.

[722] United States' first written submission, para. 99 referring to EC Court of Auditors Valuation Report, para. 46 (Exhibit US-14).

[723] In this regard, the European Communities notes that Article 4(16) of the Community Customs Code defines a "customs procedure" as any of the following: release for free circulation; transit; customs warehousing; inward processing; processing under customs control; temporary admission; outward processing; and exportation: European Communities' reply to Panel question No. 64(a). The European Communities further submits that post-release audits are not considered as "customs procedures" because they are not one of the procedures referred to in Article 4(16) of the Community Customs Code.

[724] European Communities' second written submission, para. 157.

[725] European Communities' first written submission, para. 400.

Communities further notes that the member State referred to by the Court of Auditors in which the customs authorities lack the right to perform post-importation audits except in cases of fraud was Greece. In 2000, Greece established a service with powers to conduct post-clearance audits. Finally, the European Communities submits that the Commission in conjunction with the member States has recently finalized a Community Customs Audit Guide.[726] According to the European Communities, this Guide ensures uniform audit practice across the European Communities.[727]

7.422 The **United States** disputes the European Communities' argument that audits are not part of customs procedures. According to the United States, the specific sense in which the European Communities uses the term "customs procedure" for the purposes of the Community Customs Code has no bearing on whether audits are customs procedures (in the ordinary sense of that term) for administering the Code.[728] The United States argues that, in any event, whether or not auditing is characterized as a customs procedure, audits are plainly tools for administering EC customs laws. According to the United States, to the extent that different member States use different audit procedures, they administer the underlying law differently.[729] The United States argues that, flowing from the ordinary meaning of "administer", audit procedures put EC customs laws into effect by verifying and enforcing compliance with those laws. It is through the tools of audit procedures, among others, that member State authorities "execute" or "carry out" EC customs laws.[730] The United States argues that the administration of EC customs laws depends in large part on the actions of traders themselves. Given the millions of declarations submitted to member State customs authorities each year, it would be impossible for the authorities to thoroughly inspect every shipment or verify the contents of every declaration before clearance. It is for this reason that tools for verifying and enforcing compliance with the customs laws are critical to "carrying out" or "putting into effect" those laws. Compliance with those laws is secured through traders' knowledge that the representations they make to the customs authorities ultimately are subject to verification and enforcement through audits and penalties.[731] The United States also submits that, given that the Community Customs Audit Guide was only recently finalized and, in any event, given that it is merely intended as an aid to member States, rather than a binding obligation on them, there is no basis for the assertion that it ensures a uniform practice across the European Communities.[732] Finally, regarding the European Communities' dismissal of differences among member States in this area as "minor in nature", the United States submits that, whereas some member States provide traders with legal certainty as to how specified transactions will be treated going forward, others do not.[733]

7.423 The **European Communities** submits that it does not believe that Article X:3(a) of the GATT 1994 requires harmonization of the relevant rules of general administrative law of the member States which govern audit procedures.[734] In addition, the European Communities submits that Article 78(2) of the Community Customs Code gives customs authorities the power to conduct post-clearance inspections and audits. All member States have the necessary audit capacities, and are guided by the Community Customs Audit Guide. The European Communities submits that it does not believe that audit provisions as such are among the laws enumerated in Article X:1 of the GATT 1994 since Article X:1 only covers those laws and regulations which pertain to the matters referred to in

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[726] Community Customs Audit Guide (Exhibit EC-90).
[727] European Communities' second written submission, para. 158.
[728] United States' second written submission, para. 83.
[729] United States' reply to Panel question No. 28.
[730] United States' second written submission, paras. 79-80.
[731] United States' second written submission, para. 81.
[732] United States' oral statement at the second substantive meeting, para. 68.
[733] United States' oral statement at the first substantive meeting, para. 55.
[734] European Communities' first written submission, para. 401.

this provision.[735] In any event, the basic provisions exist at the EC level, not at the member State level, and a uniform audit practice is ensured throughout the European Communities.[736]

7.424 The **United States** responds that tools of administration need not necessarily qualify as laws of general application within the meaning of Article X:1 of the GATT 1994. For the purposes of Article X:3(a) of the GATT 1994, it is the object of administration – the thing being administered – as opposed to the provision doing the administering, that must be a law of general application within the meaning of Article X:1. This is evident from the grammatical structure of Article X:3(a) of the GATT 1994, in which the phrase "laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article" is the object of the phrase "shall administer in a uniform, impartial and reasonable manner."[737]

Analysis by the Panel

7.425 The Panel notes that, in essence, the United States challenges the fact that different member States take different approaches to audits following the release of products into free circulation.[738] In support, the United States relies upon the EC Court of Auditors report, which it asserts, referred to differences among member States regarding the existence of the right of customs authorities to conduct post-importation audits and also regarding the working procedures adopted among the customs authorities that do have the right to conduct post-importation audits.[739]

7.426 With respect to its allegations concerning divergence in audit procedures among the member States, the United States does not specifically identify the provisions of EC customs laws it claims are being administered in a non-uniform fashion. Rather, the United States submits that it challenges the manner of administration of "the valuation provisions contained in the Community Customs Code (Articles 28 – 36) and the Implementing Regulation (Articles 141 – 181a and Annexes 23 –29), to the extent that different member State authorities employ different audit procedures"[740]. Nevertheless, in the Panel's understanding, the only provision of the various instruments identified in the United States' request for establishment of a panel which it alleges are being administered in a non-uniform manner and which concerns audit procedures following release for free circulation is Article 78(2) of the Community Customs Code.

7.427 In the Panel's view, the conduct (or not) of post-importation audits and the working procedures adopted among the customs authorities regarding post-importation audits constitute acts of administration within the meaning of Article X:3(a) of the GATT 1994. These acts of administration are matters within the Panel's terms of reference since they amount to instances of administration of Article 78(2) of the Community Customs Code with respect to procedures for the entry and release of goods.

7.428 Article 78(2) of the Community Customs Code provides that:

> "The customs authorities may, after releasing the goods and in order to satisfy themselves as to the accuracy of the particulars contained in the declaration, inspect the commercial documents and data relating to the import or export operations in respect of the goods concerned or to subsequent commercial operations involving those goods. Such inspections may be carried out at the premises of the declarant, of

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[735] European Communities' comments on the United States' reply to Panel question No. 138.
[736] European Communities' reply to Panel question No. 168(c).
[737] United States' reply to Panel question No. 129.
[738] United States' first written submission, para. 96.
[739] United States' first written submission, paras. 97 – 99 referring to EC Court of Auditors Valuation Report, paras. 33, 37 and 46 (Exhibit US-14).
[740] United States' replies to Panel question Nos. 124 and 179.

> any other person directly or indirectly involved in the said operations in a business capacity or of any other person in possession of the said document and data for business purposes. Those authorities may also examine the goods where it is still possible for them to be produced."

7.429 By way of general observation, the Panel notes that Article 78(2) of the Community Customs Code is discretionary rather than prescriptive in nature. More specifically, Article 78(2) of the Community Customs Code empowers customs authorities to conduct audits following the release of goods for free circulation but does not oblige them to do so. Further, Article 78(2) of the Community Customs Code does not impose any conditions on the manner in which audits are to be conducted other than to provide that the purpose of audits is to satisfy customs authorities of the accuracy of the particulars contained in the customs declaration. In satisfying itself of the accuracy of the particulars contained in the customs declaration, the customs authority is authorized under Article 78(2) of the Community Customs Code to "inspect the commercial documents and data relating to the import or export operations in respect of the goods concerned or to subsequent commercial operations involving those goods". The Panel considers that the discretionary nature of Article 78(2) of the Community Customs Code is notable because it reflects a policy decision on the part of the legislator to provide administrators with a certain degree of freedom in the application of that provision.

7.430 The Panel notes that the ordinary meaning of the terms of Article X:3(a) of the GATT 1994 does not indicate that Article X:3(a) of the GATT 1994 requires laws to be prescriptive rather than discretionary. As the Panel has noted in paragraph 7.20 above, the essential aspect Article X:3(a) of the GATT is the obligation to "administer in a uniform, impartial and reasonable manner". The Panel recalls its findings in paragraph 7.113 above that Article X:3(a) of the GATT 1994 does not concern what a particular law says (i.e. its substance) but, instead, concerns the way the law is applied in practice (i.e. the way in which it is administered). Therefore, the Panel considers that Article X:3(a) of the GATT 1994 does not dictate whether or not a provision regulating a particular matter of customs administration should be drafted in prescriptive rather than discretionary terms.[741]

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[741] In this regard, the Panel notes that the context of Article X:3(a) of the GATT 1994 could arguably be interpreted as suggesting that Article X:3(a) of the GATT 1994 is not aimed at harmonising WTO Members' customs laws by, *inter alia*, requiring prescriptive provisions to regulate customs matters. In fact, while the provisions of Article VIII of the GATT 1994 could be viewed as being aimed at, *inter alia*, harmonization of certain internal customs matters, notably, the relevant language used in Article VIII of the GATT 1994 is quite distinct from that used in Article X:3(a) of the GATT 1994. In particular, Article VIII of the GATT 1994, which, in general terms, covers certain import and export-related fees and formalities, provides in relevant part that:

"1. (a) All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.

(b) The contracting parties recognize the need for reducing the number and diversity of fees and charges referred to in subparagraph (a).

(c) The contracting parties also recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements.*

2. A contracting party shall, upon request by another contracting party or by the CONTRACTING PARTIES, review the operation of its laws and regulations in the light of the provisions of this Article.

3. No contracting party shall impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning.

7.431 The Panel notes that, by definition, discretionary provisions may be applied in different ways, which may or may not produce different substantive results. The Panel considers that, if such differences in application were to be interpreted as amounting to instances of non-uniform administration in violation of Article X:3(a) of the GATT 1994, this would mean that the application of many discretionary provisions would be in violation of Article X:3(a) of the GATT 1994. The Panel is of the view that the drafters of Article X:3(a) of the GATT 1994 could not have intended this result because there may be a justifiable rationale for the existence of discretion in such cases. Nevertheless, while the Panel considers that divergences resulting from the exercise of discretion in the law being administered do not necessarily fall foul of Article X:3(a) of the GATT 1994, the Panel does consider that there are certain limits implicit in Article X:3(a) of the GATT 1994 that circumscribe the types of provisions that may be couched in discretionary terms and that may have an impact upon the way in which discretion is exercised in particular cases. In particular, the Panel recalls its findings in paragraphs 7.107 and 7.108 above that the due process theme underlying Article X of the GATT 1994 suggests that the aim of Article X:3(a) of the GATT is to ensure that traders are treated fairly and consistently when seeking to import from or export to a particular WTO Member. The Panel also considers that an object and purpose of the WTO Agreement is to ensure security and predictability in the trading environment.[742] In the Panel's view, the existence and

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4. The provisions of this Article shall extend to fees, charges, formalities and requirements imposed by governmental authorities in connection with importation and exportation, including those relating to:

(a) consular transactions, such as consular invoices and certificates;
(b) quantitative restrictions;
(c) licensing;
(d) exchange control;
(e) statistical services;
(f) documents, documentation and certification;
(g) analysis and inspection; and
(h) quarantine, sanitation and fumigation."

[742] The preamble of the WTO Agreement specifies that one of the purposes of the Agreement is to "expand[] ... trade in goods and services." It also states that Members should contribute to such expansion "by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade." In *EC – Computer Equipment*, the Appellate Body stated that: "[T]he security and predictability of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade' is an object and purpose of the WTO Agreement, generally, as well as of the GATT 1994.": Appellate Body Report, *EC – Computer Equipment,* para. 82. This view was recently affirmed by the Appellate Body in Appellate Body Report, *EC – Chicken Cuts*, para. 243. The objective of security and predictability was also referred to by the Appellate Body in the context of Article III of the GATT 1994 (dealing with national treatment). In particular, in *Japan – Alcoholic Beverages II*, the Appellate Body stated that: "Our interpretation of Article III is faithful to the 'customary rules of interpretation of public international law'. WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the 'security and predictability' sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system.": Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 29-31. Finally, the objective of security and predictability has been referred to in the context of the DSU. In particular, in *US – Section 301 Trade Act*, the panel examined the European Communities' argument that Section 301 was inconsistent with Article 23 of the DSU ("Strengthening of the Multilateral System") as well as various articles of GATT 1994. In its examination, the panel discussed the importance of the concept of "security and predictability" and stated: "Providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble. Of all WTO disciplines, the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the market-place and its different operators. DSU provisions must, thus, be interpreted in the light of this object and purpose and in a manner which would most effectively enhance it. In this respect we are referring

exercise of discretion should not unduly compromise the underlying due process objective of Article X:3(a) of the GATT 1994. Nor should they render the trading environment insecure and unpredictable without just cause.

7.432 The Panel takes note of the European Communities' argument that a certain degree of uncertainty as to when and under which conditions an audit will be carried out is in the interest of sound control and must be accepted by traders as part of a customs compliance policy.[743] The Panel notes that the United States has not disputed the suggested rationale for the existence of discretion under Article 78(2) of the Community Customs Code put forward by the European Communities. The Panel has no reason to question this suggested rationale.[744] Further, the Panel notes that the Community Customs Audit Guide[745], which sets out a framework for post clearance and audit based controls, helps to ensure that the due process rights of traders are not unduly compromised.[746]

7.433 In support of its allegation of non-uniform administration with respect to audit procedures, the United States points to a statement made in the EC Court of Auditors Special Report No. 23/2000 concerning valuation of imported goods for customs purposes dated 14 March 2001 that customs authorities in at least one member State (apparently, Greece) lacked the right to perform post-importation audits whereas, implicitly, customs authorities in other member States possessed that right. The Panel understands that both the approach adopted by Greece at the time the EC Court of Auditors' report was prepared on the one hand and that adopted in the other member States would be consistent with Article 78(2) of the Community Customs Code given that, as noted previously, Article 78(2) authorises member State customs authorities to conduct audits but does not oblige them to do so. The United States also relies upon statements by the EC Court of Auditors in its report to the effect that some member States (Belgium and the Netherlands) routinely provide the importer with a written binding valuation decisions at the conclusion of each audit, others only issue such decisions when there are specific adjustments that have to be made (France, Ireland, Portugal, the United Kingdom), yet others rarely make such written decisions (Denmark, Spain, Italy, Luxembourg) and, finally, in Germany, the valuation decision does not exist as a separate written document. Again, the Panel would merely note that Article 78(2) of the Community Customs Code contains no requirements concerning the action to be taken by customs authorities following conclusion of an audit. In particular, Article 78(2) of the Community Customs Code does not impose an obligation to prepare written decisions following an audit. Nor does Article 78(2) of the Community Customs Code preclude the issuance of such decisions. Therefore, it would appear that the various approaches taken by the member States regarding the issuance of written decisions are all consistent with the terms of Article 78(2) of the Community Customs Code.

7.434 By way of summary, the Panel recalls that Article X:3(a) of the GATT 1994 does not dictate whether or not a provision regulating a particular matter of customs administration should be drafted in prescriptive rather than discretionary terms. The Panel further recalls that divergences resulting from the exercise of discretion in the law being administered do not necessarily fall foul of Article X:3(a) of the GATT 1994 provided that the existence and exercise of discretion do not unduly compromise the underlying due process objective of Article X:3(a) of the GATT 1994 and do not render the trading environment insecure and unpredictable without just cause. In light of these findings and given that the Panel has no reason to question the rationale indicated by the European

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not only to preambular language but also to positive law provisions in the DSU itself.": Panel Report, *US – Section 301 Trade Act*, para. 7.75.

[743] European Communities' first written submission, para. 400.

[744] Indeed, the Panel does not consider that it is in a position to second-guess policy choices made by legislators in the European Communities.

[745] The Community Customs Audit Guide is contained in Exhibit EC-90. In this regard, see paragraph 7.178 above.

[746] European Communities' first written submission, para. 400 referring to Exhibit EC-90.

Communities for the existence of discretion in Article 78(2) of the Community Customs Code, the Panel finds no violation of Article X:3(a) of the GATT 1994 with respect to the manner of administration of the audit procedure requirements in the European Communities by the member States applicable to goods following their release for free circulation, in particular Article 78(2) of the Community Customs Code.[747]

(ii) Penalties against infringements of EC customs legislation

Summary of the parties' arguments

7.435 The **United States** submits that, in the area of penalties for EC customs law violations, it is well recognized that, as a matter of EC law, different member States are entitled to impose, and do impose, different sanctions. The United States notes that the EC Commission itself has acknowledged that "[s]pecific offences may be considered in one Member State as a serious criminal act possibly leading to imprisonment, whilst in another Member State the same act may only lead to a small – or even no – fine".[748] Further, the United States submits that this area of divergence is one that has been noted by the ECJ on a number of occasions. By way of example, the United States refers to the ECJ's decision in *Jose Teodoro de Andrade* v. *Director da Alfândega de Leixões*, where the Court stated that "[a]s regards customs offences, the Court has pointed out that in the absence of harmonization of the Community legislation in that field, the member States are empowered to choose the penalties which seem appropriate to them".[749]

7.436 The **European Communities** submits that the United States' claim regarding penalties for violations of customs laws must be rejected because penalty provisions are not covered by Article X:3(a) of the GATT 1994, because Article X:3(a) does not require the harmonization of member States' penalty provisions and because EC law ensures a sufficient degree of uniformity of member States' penalty provisions.[750] Further, 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[751] and that, therefore, they are not covered by Article X:3(a) of the GATT 1994.[752] More specifically, the European Communities submits that penalties for violations of customs laws are not among the matters referred to in Article X:1 of the GATT 1994. The European Communities further submits that it cannot be considered that penalties for violations of customs laws necessarily "pertain to" the classification or the valuation of products, or to rates of duties.[753]

7.437 The European Communities also submits that member States' laws which contain penalty provisions are themselves laws of general application. Accordingly, even if these laws fell under Article X:1 of the GATT 1994, it would be the administration of those laws to which Article X:3(a) of the GATT 1994 applies. The European Communities submits that alleged differences between member States' penalty provisions to which the United States has referred are not differences in administration but, rather, differences between different legislative measures applicable in different

[747] In light of this conclusion, the Panel does not consider it necessary to determine whether or not audits following the release of goods for free circulation are properly categorised as "customs procedures".

[748] United States' second written submission, para. 72 referring to European Commission, Directorate-General for Taxation and Customs Union, TAXUD/447/2004 Rev 2, *An Explanatory Introduction to the modernized Customs Code*, p. 13, 24 February 2005 (Exhibit US-32).

[749] United States' first written submission, para. 100 referring to *Jose Teodoro de Andrade* v. *Director da Alfândega de Leixões*, Case C-213/99, ECR I-11083 7 December 2000, paras. 4, 18-20. (Exhibit US-31).

[750] European Communities' second written submission, para. 189.

[751] European Communities' first written submission, para. 431.

[752] European Communities' first written submission, para. 429; European Communities' oral statement at the first substantive meeting, para. 52.

[753] European Communities' reply to Panel question No. 119; European Communities' oral statement at the second substantive meeting, para. 67.

territories. That a particular topic may be regulated differently in different parts of the territory of a WTO Member has nothing to do with non-uniform administration.[754] The European Communities submits that, since Article X:3(a) of the GATT 1994 only concerns the *administration* of customs laws and not the *substance* of the customs laws themselves, Article X:3(a) of the GATT 1994 does not require the harmonization of member States' penalty provisions. The European Communities argues that, therefore, Article X:3(a) of the GATT 1994 does not create an obligation to harmonise laws which may exist within a WTO Member at the sub-federal level. It merely requires that such laws be administered uniformly within the territory in which they apply.[755] The European Communities further submits that the penalties applicable for violations of EC customs laws are set out in the national laws of the member States, which must respect the principles set out by Community law. Accordingly, it is not the administration of penalty provisions which varies within the European Communities; it is the laws themselves which are different, albeit within the limits set by Community law.[756] The European Communities concludes that the United States has not shown that the administration of those penalty provisions varies within the member States that have adopted them. Rather, according to the European Communities, the United States is effectively requiring a harmonization of penalty provisions within the European Communities but Article X:3(a) of the GATT 1994 provides no legal basis for such a claim.[757]

7.438 The **United States** submits that the European Communities' argument ignores the distinction between the laws that a member State administers and the tools for administering those laws. It assumes, without 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, according to the United States, 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) of the GATT 1994 applies to such laws.[758] The United States argues that, flowing from the ordinary meaning of "administer", member States' penalty provisions put EC customs laws into effect by verifying and enforcing compliance with those laws. It is through the tools of penalty provisions, among others, that member State authorities "execute" or "carry out" EC customs laws.[759] The United States notes that its arguments are directed at laws and regulations at the sub-federal level that are used to verify and enforce compliance with laws and regulations prescribed at the federal level; they are not directed at the vast body of laws and regulations at the sub-federal level that have nothing to do with verification and enforcement of compliance with other laws and regulations or that concern only verification and enforcement of compliance with other sub-federal laws and regulations.[760] The United States also submits that the European Communities' argument that differences in penalty laws are differences of substance rather than differences of administration mistakenly assumes that a law (or other measure) cannot be administrative in nature. In the United States' view, penalty laws are administrative in nature, inasmuch as they presume the existence of other laws and prescribe consequences for the violation of those laws.[761]

7.439 The **European Communities** responds that it does not agree that a penalty provision puts into effect or carries out the substantive rule the violation of which it is intended to sanction. For instance, a provision which provides for the imposition of a sanction for the failure to declare a good does not "carry out" or "put into effect" the provision which imposes the obligation to declare the

[754] European Communities' oral statement at the second substantive meeting, para. 69.

[755] European Communities' first written submission, para. 434; European Communities' oral statement at the first substantive meeting, para. 53.

[756] European Communities' first written submission, para. 435; European Communities' oral statement at the first substantive meeting, para. 53.

[757] European Communities' first written submission, para. 436.

[758] United States' reply to Panel question No. 32.

[759] United States' second written submission, paras. 79-80.

[760] United States' second written submission, para. 7.

[761] United States' replies to Panel question Nos. 4 and 32.

good. The penalty provision itself needs to be carried out through an administrative or judicial act imposing the sanction. It is this latter act which can be regarded as executing the prohibition, and thus constitutes "administration". In contrast, the penalty provision complements the substantive provision, but does not itself put it into effect.[762] According to the European Communities, penalty provisions and substantive provisions are both measures of general application which complement one another. That the former exists at the member States level and the latter at the EC level does not mean that the former administers the latter.[763] The European Communities also notes that it does not contest that penalty provisions are relevant tools for ensuring uniform administration of customs law. However, the fact that penalty provisions are tools for the uniform administration of customs laws does not mean that they are themselves laws or regulations pertaining to the matters enumerated in Article X:1 of the GATT 1994, in particular tariff classification, customs valuation, or rates of duty.[764] The European Communities submits that Article X:3(a) of the GATT 1994 requires the uniform administration only of the laws and regulations referred to in Article X:1 of the GATT 1994. If penalty provisions are merely "tools" to ensure a uniform administration of those laws, then penalty provisions as such do not fall within the scope of Article X:3(a) of the GATT 1994.[765] Further, according to the European Communities, the United States has not shown that the fact that penalty provisions are contained in laws of the Member States leads in any way to a non-uniformity in the administration of the laws covered by Article X:1 of the GATT 1994, in particular laws regarding tariff classification, customs valuation, and rates of duty. In addition, the European Communities submits that it is not correct to assume that differences in penalties would necessarily lead to a lack of uniformity in the application of the provisions the violation of which is sanctioned. Such a consequence would result only if sanctions were not dissuasive or effective. If, on the contrary, sanctions are dissuasive and effective, then it must be assumed that the related substantive provisions will be respected, regardless of differences in the level of sanctions applicable.[766]

7.440 The European Communities further submits that, even if Article X:3(a) of the GATT 1994 were considered to apply to the question of harmonization of penalty provisions, EC law provides for a sufficient level of harmonization in this respect.[767] In this regard, the European Communities submits that the ECJ has developed clear guidelines for penalty provisions for violations of EC customs law, which must, in particular, be effective, proportionate, and dissuasive, and that these principles have also been confirmed by the Council of the European Union.[768] The European Communities considers that these general requirements are sufficient for securing a uniform application of EC customs laws, in accordance with Article X:3(a) of the GATT 1994. According to the European Communities, the United States has not provided any evidence demonstrating that the absence of a full harmonization of penalty provisions in the EC leads to any lack of uniformity in the application of EC laws in areas referred to by Article X:1 of the GATT 1994.[769] In addition, the European Communities submits that the ECJ in *Jose Teodoro de Andrade* v. *Director da Alfândega de Leixões* emphasised that member States cannot act freely when laying down penalty provisions, but must ensure that the penalty is effective, proportionate and dissuasive. The European Communities explains that, in other words, member States are limited in two directions. They cannot lay down penalties that are excessively severe and, therefore, violate the principle of proportionality. On the other hand, they cannot lay down penalties which are so lenient that they have no dissuasive effect and, therefore, do not ensure the effective application of Community law. The European

[762] European Communities' oral statement at the second substantive meeting, para. 71.
[763] European Communities' oral statement at the second substantive meeting, para. 72.
[764] European Communities' second written submission, para. 192.
[765] European Communities' second written submission, para. 193.
[766] European Communities' second written submission, para. 209.
[767] European Communities first written submission, paras. 429 and 437; European Communities' oral statement at the first substantive meeting, para. 54.
[768] European Communities' first written submission, para. 438.
[769] European Communities' oral statement at the second substantive meeting, para. 79.

Communities adds that these fundamental principles are sufficient to ensure uniformity in the application of customs laws, confirmed by Article VIII:3 of the GATT 1994, which specifically addresses the issue of sanctions for violations of customs regulations and which merely provides for certain minimum standards of proportionality.[770]

7.441 In response, the **United States** submits that the fundamental principles to which the European Communities refers are very general principles, which permit a wide range of member State practices. The United States notes that the European Communities itself acknowledges that specific offences may be considered in one member State as a serious criminal act possibly leading to imprisonment, whilst in another member State the same act may only lead to a small – or even no – fine. According to the United States, the European Communities cannot suggest that it discharges its obligation of uniform administration where the applicable legal doctrines permit such dramatic divergences in administration. According to the United States, accepting that argument would effectively render Article X:3(a) of the GATT 1994 meaningless.[771]

Analysis by the Panel

7.442 The Panel notes that the essence of the United States' challenge is that, in the area of penalties for EC customs law violations, different member States are entitled to impose, and do impose, different sanctions.[772] The United States submits that penal laws are tools of administration of EC customs laws and, to the extent that they are different among member States, they result in non-uniform administration of customs laws in violation of Article X:3(a) of the GATT 1994.[773]

7.443 There are no provisions in the Community Customs Code nor in the Implementing Regulation that define offences at the EC level and identify the consequences of such offences (e.g. in the form of penalties).[774] As a result, the nature and level of such penalties are determined by the national laws of the member States. This fact was noted in the customs administration area by the ECJ in *Jose Teodoro de Andrade* v. *Director da Alfândega de Leixões*. In that case, the ECJ stated that "[a]s regards customs offences, the Court has pointed out that in the absence of harmonization of the Community legislation in that field, the member States are empowered to choose the penalties which seem appropriate to them."[775]

7.444 In the light of the foregoing, the question for the Panel's consideration is whether penalty laws can be viewed as "tools" that administer EC customs law and, if so, whether substantive differences in such tools among the member States – the existence of which is not disputed between the parties – mean that administration of EC customs laws is non-uniform within the meaning of Article X:3(a) of the GATT 1994. In this regard, the Panel recalls its finding in paragraph 7.114 *et seq* that the term "administer" refers to the application of laws and regulations, including administrative processes and their results but not to laws and regulations as such. Accordingly, it is the Panel's view that, for the purposes of Article X:3(a) of the GATT 1994, the substantive content of penalty laws of the member States used to enforce EC customs law cannot be viewed as acts of administration with respect to laws, regulations, decisions and rulings covered by Article X:1 of the GATT. Therefore, substantive differences in penalty laws between member States cannot be considered to be in violation of

[770] European Communities' first written submission, paras. 441-442.

[771] United States' oral statement at the first substantive meeting, para. 52 referring to European Commission, Directorate-General for Taxation and Customs Union, TAXUD/447/2004 Rev 2, *An Explanatory Introduction to the Modernized Customs Code*, p. 13, 24 February 2005). (Exhibit US-32).

[772] United States' first written submission, para. 26.

[773] United States' oral statement at the first substantive meeting, para. 50;. United States' reply to Panel question No. 32.

[774] In this regard, see paragraphs 7.175 – 7.176.

[775] *Jose Teodoro de Andrade* v. *Director da Alfândega de Leixões*, Case C-213/99, ECR I-11083 7 December 2000, para. 20 (Exhibit US-31).

Article X:3(a) of the GATT 1994. Therefore, the Panel finds no violation of Article X:3(a) of the GATT 1994 with respect to the substantive differences in penalty laws between member States.[776]

7.445 The Panel does wish to note, however, that while the Panel is of the view that substantive differences in penalty laws between member States cannot be considered to be in violation of Article X:3(a) of the GATT 1994, nevertheless, differences in the way member States have applied the judicial decision issued by the ECJ in *Jose Teodoro de Andrade* v. *Director da Alfândega de Leixões*, which requires that infringements of EC law are penalized through measures that make the penalty effective, proportionate and dissuasive, could, in theory, be considered to be in violation of Article X:3(a) of the GATT 1994. In this regard, the Panel notes that judicial decisions of the kind issued by the ECJ in the *Andrade* case fall within the scope of "laws, regulations, decisions and rulings of the kind described in [Article X:1 of the GATT 1994]". Further, the ECJ's decision in the *Andrade* case was confirmed in EC Council Resolution of 29 June 1995 on the effective uniform application of Community law and on the penalties applicable for breaches of Community law in the internal market.[777] In the Panel's view, this Council Resolution also falls within the scope of "laws, regulations, decisions and rulings of the kind described in [Article X:1 of the GATT 1994]". The Panel considers that the acknowledgement by the European Communities in the context of this dispute of substantive differences in penalty laws among member States could indicate that the judicial decision issued by the ECJ in *Jose Teodoro de Andrade* v. *Director da Alfândega de Leixões* and EC Council Resolution of 29 June 1995 on the effective uniform application of Community law and on the penalties applicable for breaches of Community law in the internal market are not being administered in a uniform manner by the member States in violation of Article X:3(a) of the GATT 1994. However, the Panel will not seek to determine whether or not the manner of administration by the member States of the judicial decision issued by the ECJ in *Jose Teodoro de Andrade* v. *Director da Alfândega de Leixões* and EC Council Resolution of 29 June 1995 on the effective uniform application of Community law and on the penalties applicable for breaches of Community law in the internal market is actually in violation of Article X:3(a) of the GATT 1994 given that the United States did not allege a violation of Article X:3(a) of the GATT 1994 in this regard.

(iii) Processing under customs control

Summary of the parties' arguments

7.446 The **United States** notes that "processing under customs control" allows duty to be assessed on a product that is imported into the European Communities once it has been further processed in the European Communities following importation rather than imposing duties on the imported product itself. According to the United States, in the European Communities, eligibility to use this procedure is determined according to an "economic conditions" assessment set out in EC law.[778] The United States submits that, under Annex 76 of the Implementing Regulation, the "economic conditions" are deemed to be fulfilled for certain goods and operations but for all other goods and operations, an assessment of the economic conditions must be made on a case-by-case basis by the customs authorities of the member State in which an application is made.[779]

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[776] In light of this conclusion, the Panel does not consider it necessary to determine whether or not penalty laws are properly categorised as "customs procedures", which was questioned by the European Communities in footnote 127 of its first written submission.

[777] Exhibit EC-41. In particular, the Council Resolution requests the member States to "take action to ensure that, when Community acts are transposed into national legislation, Community law is duly applied with the same effectiveness and thoroughness as national law and that, in any event, the penalty provisions adopted are effective, proportionate and dissuasive".

[778] United States' first written submission, paras. 27 and 103.

[779] United States' first written submission, para. 104 referring to Article 552(1) of the Implementing Regulation (Exhibit US-6).

7.447 The United States argues that, although the assessment of whether or not the "economic conditions" have been fulfilled in a given case entails an EC-wide assessment, EC customs law makes no provision for uniform application of that assessment throughout the European Communities. The United States argues that different member States apply the tests differently, which can have a significant commercial impact.[780] In this regard, the United States notes that Article 502(3) of the Implementing Regulation states that "the examination shall establish whether the use of non-Community sources enables processing activities to be created or maintained in the Community". The United States submits that at least one member State's authorities appear to apply tests that go beyond this basic guideline.[781] The United States argues in particular that, in the United Kingdom, authorities require an importer to show not only that "the use of non-Community sources enables processing activities to be created or maintained in the Community" as provided by Article 502(3), but also that the proposed processing will not "harm[ ] the essential interests of Community producers of similar goods."[782] The United States submits that, in contrast, the substance of French law implementing relevant provisions of EC customs law identifies a one-prong economic effects test for deciding whether to permit processing under customs control.[783] The United States submits that, in essence, French regulations simply require an importer to satisfy the condition set out in Article 502(3) of the Implementing Regulation and, therefore, do not impose the additional test of demonstrating the absence of harm to competitors in the European Communities that is contained in UK law.[784] Therefore, applicants to the French customs authority are not told that the information they provide must also show that the proposed processing activity will not adversely affect the essential interests of Community producers of similar goods. Nor are they told the types of evidence applicants should provide to satisfy the second prong to the economic test.[785]

7.448 According to the United States, a straightforward comparison between the French guidance and the UK guidance demonstrates that France and the United Kingdom are administering Article 133 of the Community Customs Code and Articles 502(3) and 552 of the Implementing Regulation non-uniformly. The United States clarifies that it has not made any arguments with respect to the application of the French law. According to the United States, this is not necessary because French law and the UK law – both tools for the administration of the EC law – are facially divergent.[786] According to the United States, the fact that different member States explicitly apply different tests, with at least one member State requiring affirmative evidence of the absence of harm to competitors in the European Communities and others simply requiring evidence of the creation or maintenance of processing within the European Communities, is stark evidence of a lack of uniformity in administration.[787] The United States submits that, therefore, the application of each of those laws will *necessarily* diverge from each other.[788]

7.449 In response, the **European Communities** argues that the French and UK documents referred to in the United States' arguments do not constitute "law". Their nature is simply that of guidance, which must always be interpreted in line with EC law. The European Communities submits that,

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[780] United States' first written submission, para. 27.
[781] United States' first written submission, para. 105.
[782] United States' first written submission, para. 106 referring to HM Customs & Excise, Notice 237, "Processing Under Customs Control (PCC)", June 2003 (Exhibit US-34).
[783] Bulletin officiel des douanes no. 6527, 31 August 2001, para. 83 (as modified by BOD no. 6609, 4 November 2004) (Exhibit US-35).
[784] United States' first written submission, para. 107.
[785] United States' reply to Panel question No. 140.
[786] United States' reply to Panel question No. 139.
[787] United States' first written submission, para. 107.
[788] United States' reply to Panel question No. 139.

therefore, the United States challenges what it considers to be a divergence between the French and the UK guidance concerning processing under customs control.[789]

7.450 The **United States** submits in response that, 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 and, therefore, 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. The United States submits that, to the extent that different member States' manuals or bulletins prescribe different means of carrying out the relevant EC rules, they evidence non-uniformity in the administration of those rules. According to the United States, non-uniformity in the application of the economic conditions test by different member State authorities is evident in the substance of manuals and bulletins that prescribe how the test is to be carried out in different member States.[790]

7.451 The **European Communities** argues that Article 133(e) of the Community Customs Code restricts authorisation for processing under control to cases "where the necessary conditions for the procedure to help create or maintain a processing activity in the Community without adversely affecting the essential interests of Community producers of similar goods (economic conditions) are fulfilled". According to the European Communities, Article 502(3) of the Implementing Regulation repeats the first part of the sentence, which must be considered as an abbreviated reference to the requirements laid down in Article 133(e) of the Community Customs Code. The European Communities submits that the situation could not be otherwise considering that the Implementing Regulation, which has been adopted by the Commission, is implementing legislation and cannot modify the requirements laid down by the Community Customs Code.[791] The European Communities submits that, furthermore, the French "Bulletin officiel des douanes" also refers to the test relating to the absence of harm to competitors in the European Communities.[792] The European Communities submits that the second subparagraph in paragraphs 78 and 79 of the French guidance underline the obligation upon the requesting party to provide information on the lack of adverse effects on the essential interests of Community producers of similar goods.[793]

7.452 The European Communities concludes that there is no divergence between the French and UK documents and that, therefore, it is for the United States to prove the existence of divergent application of the conditions for processing under customs control. According to the European Communities, the United States has submitted no such proof.[794] The European Communities submits that, in the absence of any evidence demonstrating that the French authorities follow a constant practice deviating from Article 133(e) of the Community Customs Code, the United States has failed to prove the existence of a pattern of non-uniform administration in relation to the processing under customs control procedure.[795]

7.453 The **United States** responds that the mention of absence of harm to competitors in the French customs bulletin is simply an introductory paraphrase of certain provisions from the Community

[789] European Communities' comments on the United States' reply to Panel question No. 139.
[790] United States' reply to Panel question No. 27.
[791] European Communities' first written submission, para. 413.
[792] European Communities' first written submission, para. 415 referring to Bulletin officiel des douanes no. 6527 at para. 78, 31 August 2001, p. 17 (as modified by BOD no. 6609, 4 November 2004) (Exhibit US-35).
[793] European Communities' comments on the United States' reply to Panel question No. 140.
[794] European Communities' comments on the United States' reply to Panel question No. 139.
[795] European Communities' second written submission, para. 183.

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"). The relevant modality makes no reference to harm to Community producers.[796]

7.454 The **European Communities** argues in response that the United States' criticism is based on an isolated and incorrect interpretation of the French guidance, which has to be interpreted in the context of the EC legislation. The guidance refers to the economic conditions required to obtain an authorisation to process under customs control in the same way as Article 502(3) of the Implementing Regulation – namely, by using an abbreviation of the requirements laid down in Article 133(e) of the Community Custom Code. The French authorities require the same kind of information as the United Kingdom: the information needed to assess whether "the necessary conditions for the procedure to help create or maintain a processing activity in the Community without adversely affecting the essential interests of Community producers of similar goods (economic conditions) are fulfilled".[797] The European Communities submits that this interpretation is supported by paragraph 78 of the French guidance, which, within Chapter III "Examination of economic conditions", plays the role of a chapeau to Section I, where paragraph 83 is located. Paragraph 78 provides that: "Articles 117-c, 133-e, and 148-c of the Community Customs Code stipulate that the granting of an authorization for inward processing, outward processing, or processing under customs control must not adversely affect the essential interests of Community producers of goods comparable to those used."[798] The European Communities submits that paragraph 78 is more than simply an introductory paraphrase of certain provisions from the Community Customs Code. This paragraph reminds, for Section I as a whole, that the absence of adverse effects on the essential interests of Community producers is a general economic condition that is common to the three customs procedures therein covered (inward processing, outward processing and processing under customs control), as it is clearly laid down in Articles 117 (c), 148(c) and 133(e) of the Community Customs Code, respectively.[799]

Analysis by the Panel

7.455 The Panel notes that the United States challenges substantive divergence in guidance between France and the United Kingdom regarding the administration of provisions of EC customs law concerning processing under customs control.[800] The United States explains that such *substantive* divergences in such guidance necessarily result in divergent *application* of EC customs law in this area by French and UK customs authorities.[801]

7.456 The law concerning processing under customs control which the United States alleges is being administered in a non-uniform fashion exists at the EC level. In particular, the United States challenges the manner of administration of Article 133 of the Community Customs Code and Articles 502(3) and 552 of the Implementing Regulation regarding assessment of the economic conditions for allowing processing under customs control.[802]

7.457 In the Panel's view, the application of EC law regarding processing under customs control constitutes an act of administration within the meaning of Article X:3(a) of the GATT 1994. This act of administration is a matter within the Panel's terms of reference since it amounts to an instance of

[796] United States' reply to Panel question No. 4.
[797] European Communities' second written submission, para. 178.
[798] European Communities' second written submission, para. 179 referring to Exhibit US-35.
[799] European Communities' second written submission, para. 180.
[800] United States' oral statement at the second substantive meeting, para. 75.
[801] United States' reply to Panel question No. 139.
[802] United States' replies to Panel question Nos. 124 and 139.

administration of the Article 133 of the Community Customs Code and Articles 502(3) and 552 of the Implementing Regulation with respect to procedures for the entry and release of goods.[803]

7.458 With respect to the question of whether or not the application of EC law regarding processing under customs control in the member States is "uniform" within the meaning of Article X:3(a) of the GATT 1994, the Panel recalls its finding in paragraph 7.135 above that geographic uniformity is required under Article X:3(a) of the GATT 1994. That is, administration should be uniform in different places within a particular WTO Member. The Panel also recalls its finding in paragraph 7.135 above that the form, nature and scale of the alleged non-uniform administration and the laws, regulations, judicial decisions and rulings that are allegedly being administered in a non-uniform manner should be taken into consideration when interpreting the term "uniform" in Article X:3(a) of the GATT 1994. The Panel considers that the United States' challenge with respect to the application of EC law regarding processing under customs control is narrow in nature. It involves the application of a few provisions of the Community Customs Code and the Implementing Regulation – namely, Article 133 of the Community Customs Code and Articles 502(3) and 552 of the Implementing Regulation. Therefore, given the narrowness of this challenge, the Panel considers that a high degree of uniformity is required for the purposes of Article X:3(a) of the GATT 1994. We now turn to the facts to determine whether or not this high degree of uniformity has been achieved with respect to the application of EC law regarding processing under customs control.

7.459 In summary, Article 133(e) of the Community Customs Code provides that, before granting authorization for processing under customs control pursuant to Article 85 of the Community Customs Code, customs authorities must examine the economic consequences of the use of the processing under customs control procedures to determine whether or not the procedure helps to create or maintain a processing activity in the European Communities without adversely affecting the essential interests of EC producers of similar goods. Article 502(3) of the Implementing Regulation provides that, in respect of processing under customs control arrangements, the examination shall establish whether the use of non-Community sources enables processing activities to be created or maintained in the Community. Article 552 and Part A of Annex 76 of the Implementing Regulation set out the cases in which the economic conditions are deemed to be fulfilled so that, in those cases, an examination of the economic conditions is not necessary. For the types of goods and operations mentioned in Part B of Annex 76 of the Implementing Regulation and those not covered by Part A of that Annex, the examination of the economic conditions must take place at Community level, through the relevant Committee procedure. For the types of goods and operations not mentioned in Annex 76 of the Implementing Regulation, pursuant to Articles 502(1) and 552(1) of the Implementing Regulation, the examination of the economic conditions shall take place at national level. When examinations take place at the national level, member States must communicate to the Commission relevant information in accordance with Article 522 of the Implementing Regulation. Furthermore, pursuant to Articles 503 and 504 of the Implementing Regulation, if a member State objects to an authorization issued or if the customs authorities concerned wish to consult before or after issuing an authorization, an examination of the economic condition may take place at Community level.

7.460 In the context of the United States' allegations of non-uniform administration of EC law regarding processing under customs control, the Panel understands that the act(s) of administration which the United States challenges is the manner in which the French and UK customs authorities apply EC customs law. In support of its challenge, the United States relies upon guidance issued by the French and UK customs authorities respectively concerning the administration of EC law on processing under customs control. According to the United States, the divergence in the contents of the French and UK guidance necessarily means that the manner in which the French and UK customs authorities implement or put into effect EC customs law will be non-uniform in violation of Article X:3(a) of the GATT 1994.

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[803] In this regard, see paragraphs 7.188 – 7.190 above.

7.461 To demonstrate the manner of administration by the UK customs authorities, the United States refers to HM Customs & Excise Notice 237, entitled "Processing under Customs Control (PCC)" dated June 2003. The introduction states that the purpose of the Notice is to explain the procedure pertaining to processing under customs control.[804] The Notice explains that the law on processing under customs control and other customs procedures is contained in the Community Customs Code and the Implementing Regulation.[805] Additionally, the Notice states in capitals and bold that "Nothing In This Notice Overrides The Law" and subsequently that "this notice is not the law".[806] The Notice also states that:

> "The DTI/DEFRA will use the evidence provided to establish whether the use of non-Community goods enables processing activities to be created or maintained in the Community without harming the essential interests of Community producers of similar goods. There are therefore two aspects to the economic test and you must provide evidence to show both the impact upon your business and the impact upon any other community producers of the imported goods. ..."[807]

7.462 Regarding the manner of administration by the French customs authorities, the United States refers to Bulletin officiel des douanes no. 6527 dated 31 August 2001. The cover page of the Bulletin notes certain documentary references – namely, the Community Customs Code and the Implementing Regulation.[808] The first paragraph of the chapter of Bulletin dealing with the "economic conditions" test (namely, Chapter III) also makes specific reference to relevant provisions of EC law, including Article 133(e) of the Community Customs Code, which concerns processing under customs control.[809] Regarding the requirements applicable under the economic conditions test for all customs procedures to which the test applies, the first paragraph of Chapter III provides that: "Articles 117-c, 133-e, and 148-c of the Community Customs Code stipulate that the granting of an authorization for inward processing, outward processing, or processing under customs control must not adversely affect the essential interests of Community producers of goods comparable to those used."[810] A latter paragraph in Chapter III, which exclusively concerns processing under customs control, provides that: ""With regard to processing under customs control, block 10 of the model request must be completed with information showing that use of this customs regime will create or maintain a processing activity in the Community (goods and operations not mentioned in of Annex 76, Part A of the IPC)."[811]

7.463 In the Panel's view, when read as a whole, the UK and French documents providing guidance regarding processing under customs control contain the same two substantive requirements that are mentioned in Article 133(e) of the Community Customs Code – namely, a requirement to determine whether or not the processing under customs control procedure helps to create or maintain a processing activity in the European Communities and a requirement to determine whether or not the

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[804] HM Customs & Excise, Notice 237, "Processing Under Customs Control (PCC)", June 2003, para. 1.1 (Exhibit US-34).

[805] HM Customs & Excise, Notice 237, "Processing Under Customs Control (PCC)", June 2003, para. 1.4 (Exhibit US-34).

[806] HM Customs & Excise, Notice 237, "Processing Under Customs Control (PCC)", June 2003, para. 1.4 (Exhibit US-34).

[807] HM Customs & Excise, Notice 237, "Processing Under Customs Control (PCC)", June 2003, para. 15 (Exhibit US-34). See also para. 3.4.

[808] Bulletin officiel des douanes no. 6527, 31 August 2001, p. 1 (as modified by BOD no. 6609, 4 November 2004) (Exhibit US-35).

[809] Bulletin officiel des douanes no. 6527, 31 August 2001, para. 78, p. 17 (as modified by BOD no. 6609, 4 November 2004) (Exhibit US-35).

[810] Bulletin officiel des douanes no. 6527, 31 August 2001, para. 78, p. 17 (as modified by BOD no. 6609, 4 November 2004) (Exhibit US-35).

[811] Bulletin officiel des douanes no. 6527, 31 August 2001, para. 83, p. 19 (as modified by BOD no. 6609, 4 November 2004) (Exhibit US-35).

essential interests of EC producers of similar goods are being affected. In particular, this is evident from the excerpt of the UK guidance set out in paragraph 7.461 above, which explicitly refers to the fact that the customs authority to whom an application for processing under customs control has been made will establish whether the use of non-Community goods enables processing activities to be created or maintained in the Community without harming the essential interests of Community producers of similar goods. Similarly, in the case of the French guidance, one paragraph of the Bulletin, which applies globally to all procedures to which an "economic conditions" test applies (of which processing under customs control is one), specifically refers to the need to determine whether or not the essential interests of EC producers of similar goods are being affected. Subsequently, in a paragraph that deals exclusively with processing under customs control, a reference is made to the requirement that the procedure must help to create or maintain a processing activity in the European Communities. Furthermore, as is evident from paragraphs 7.461 – 7.462 above, both the UK and French documents providing guidance make reference to the governing EC law. The Panel considers that anyone reading and/or applying the UK and French guidance documents would understand that those documents should be read in the light of the relevant aspects of EC law upon which they are based, including Article 133(e) of the Community Customs Code, to which the French guidance makes explicit reference.

7.464 In the light of the foregoing, the Panel considers that the United States has not proved the existence of a substantive divergence in French and UK guidance regarding the administration of provisions of EC customs law governing processing under customs control. Furthermore, the United States has provided no evidence that the manner in which the French and UK customs authorities actually apply such guidance results in practice is non-uniform within the meaning of Article X:3(a) of the GATT 1994.

7.465 Accordingly, the Panel concludes that the United States has not proved that the manner of administration of Article 133 of the Community Customs Code and Articles 502(3) and 552 of the Implementing Regulation regarding processing under customs control is non-uniform among the member States in violation of Article X:3(a) of the GATT 1994.

(iv) Local clearance procedures

Summary of the parties' arguments

7.466 The **United States** notes that "local clearance procedures" include procedures whereby importers may cause goods to enter into free circulation in the European Communities at their place of business, rather than presenting goods for inspection by the customs authorities. According to the United States, the actual requirements that users of this procedure must meet vary significantly from member State to member State, with the process being significantly more burdensome in some member States than others.[812] The United States argues that serious differences do, in fact, exist and their very existence illustrates lack of uniformity in the administration of EC customs law.[813] The United States submits that 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.[814]

7.467 The United States refers to the following table to illustrate the differences:[815]

[812] United States' first written submission, paras. 28 and 110.
[813] United States' first written submission, para. 117.
[814] United States' reply to Panel question No. 30.
[815] This table is contained in paragraph 116 of the United States' first written submission.

Member State	Requirements prior to release	Customs involvement prior to release	Requirements after release	Document retention requirements
United Kingdom	Manifest data provided to customs electronically without modification.	None.	Supplementary data on classification, valuation, origin transmitted to customs electronically.	Importer must retain supporting documents for 4 years.
France	Manifest data supplemented with classification, valuation and other data and registered in importer's inventory system; importer informs customs of initial declaration.	May inspect within specified time period prior to release.	Supplementary data, including supporting documents – DV1 valuation form, invoices, certificates – provided to customs in hard copy.	
Germany	Manifest data transmitted to customs, including translation of goods' description into German; initial declaration, including classification, valuation and origin information, made to customs.	May inspect within specified time period prior to release.	Supplementary data, including supporting documents – DV1 valuation form, invoices, certifications – provided to customs.	Importer must retain supporting documents for 6 years.
Italy	Manifest data transmitted to customs.	May inspect within 1 hour.	Supplementary declaration transmitted electronically; no DV1 valuation form required.	Importer must retain supporting documents for 5 years.
Netherlands	Initial declaration made through entry into importer's inventory system; contents of initial declaration negotiated locally.	May inspect within specified time prior to release.	DV1 valuation form transmitted electronically. Certain documents (e.g., licenses and certificates showing entitlement to	Importer must retain supporting documents for 10 years.

Member State	Requirements prior to release	Customs involvement prior to release	Requirements after release	Document retention requirements
			preferential tariff treatment) required with supplementary declaration, but not invoices or airwaybills.	

7.468 The **European Communities** submits that the United States does not provide a single exhibit to illustrate and support its claim, which renders it impossible for the European Communities to defend itself and does not allow the Panel to verify whether or not the United States' claim is substantiated. Further, it is clear that the United States has misunderstood the different steps in the process followed when goods are imported through this procedure. In addition, the United States' description of the procedure and of the documents retention requirements contains fundamental errors.[816] Therefore, according to the European Communities, the claim of non-uniform administration under Article X:3(a) of the GATT with respect to local clearance procedures is not sustained.[817]

7.469 In relation to customs involvement prior to release, the European Communities submits that the fact that, at the frontier, anti-smuggling and admissibility checks are made electronically does not mean that there is no involvement of customs. Moreover, if the goods do not fulfil these checks, there will be a customs action, such as a physical check and seizure. The European Communities submits that it is, therefore, wrong to state that there is no customs involvement prior to release in the United Kingdom.[818] Taking the United Kingdom and France as representative examples in relation to inspection of goods by the customs authorities prior to release, according to the European Communities, there is no contradiction between the practices in these two member States. In both cases, customs officials may or may not inspect goods prior to release.[819]

7.470 Concerning the requirements prior to release in the framework of the local clearance procedures, the European Communities submits that it is not the shipping manifest data itself which is provided but a simplified declaration containing certain data, where the trader has to insert a reference number.[820] The European Communities adds that the use of both electronic clearance systems and paper-based systems is possible. The European Communities submits that, as far as local clearance procedures are concerned, detailed Community rules for paper-based clearance can be found in Articles 263 to 267 of the Implementing Regulation. Where the clearance system used is electronic, additional rules are applicable and can be found in Articles 4(a) – (c) and Articles 222-224 of the same Regulation.[821] As regards supporting document requirements, the European Communities submits that all member States apply identical rules and that the issue raised by the United States concerning the valuation form "DV1" again stems from a confusion: all member States allow operators having regular trade flows with the same suppliers to submit only once the relevant DV1 together with the initial application to benefit from local clearance procedures.[822]

[816] European Communities' oral statement at the first substantive meeting, para. 49.
[817] European Communities' oral statement at the first substantive meeting, para. 49.
[818] European Communities' first written submission, para. 423.
[819] European Communities' second written submission, para. 186.
[820] European Communities' first written submission, para. 422.
[821] European Communities' first written submission, para. 424.
[822] European Communities' first written submission, para. 425.

7.471 In relation to the document retention requirements, the European Communities submits that the information provided by the United States regarding the Netherlands is wrong: the retention period is 7 years since 1 July 1998, under Article 8 (3) of the Douanewet (Customs Act). The European Communities submits that, besides, Article 16(1) of the Community Customs Code provides that the requisite documents shall be retained for a minimum period of three years, but leaves member States the possibility to stipulate longer periods taking into account their general administrative and fiscal needs and practices. The European Communities argues that the resulting time-frame differences between the four member States for which the United States submits evidence (from 4 to 7 years) are not fundamental. In this regard, the European Communities reiterates that Article X:3(a) of the GATT 1994 concerns the administration of customs laws, not the customs laws themselves and this provision does not impose an obligation to harmonise legislation within a WTO member. The existing time-frame differences for document retention between some EC member States pertain to the content of customs law, not to their administration. Therefore, according to the European Communities, these differences do not come within the scope of Article X:3(a) of the GATT 1994.[823] In addition, the European Communities argues that, in light of the GATT panel in *EEC – Dessert Apples*, any such differences are not substantial in nature and do not entail a lack of uniformity in the application of customs laws contrary to Article X:3(a) of the GATT 1994. The European Communities considers, therefore, that the United States' claim under Article X:3(a) of the GATT 1994 is not founded in relation to local clearance procedures.[824]

7.472 The **United States** submits that the European Communities' statements regarding local clearance procedures identify the outer parameters in which different customs authorities in the European Communities must operate. The United States submits that, while it does not dispute the European Communities' characterization of what those outer parameters are, it does contend that different customs authorities in the European Communities administer the local clearance procedures differently within those parameters.[825]

Analysis by the Panel

7.473 The Panel notes that the essence of the United States' challenge with respect to local clearance procedures is that the actual requirements users of this procedure must meet vary significantly from member State to member State, with the process being significantly more burdensome in some member States than in others.[826] The United States submits that such differences regarding the requirements imposed by customs authorities of the European Communities in the context of local clearance procedures amount to non-uniform administration of Articles 263 – 267 of the Implementing Regulation.

7.474 In the Panel's view, the imposition of requirements regarding local clearance procedures constitutes an act of administration within the meaning of Article X:3(a) of the GATT 1994. This act of administration is a matter within the Panel's terms of reference since it amounts to an instance of administration of Articles 263 – 267 of the Implementing Regulation with respect to procedures for the entry and release of goods.[827]

7.475 Regarding the question of whether or not the imposition of requirements for local clearance procedures is "uniform" within the meaning of Article X:3(a) of the GATT 1994, the Panel recalls its finding in paragraph 7.135 above that geographic uniformity is required under Article X:3(a) of the GATT 1994. That is, administration should be uniform in different places within a particular WTO

[823] European Communities' first written submission, para. 426.
[824] European Communities' first written submission, paras. 427 – 428.
[825] United States' reply to Panel question No. 137(e).
[826] United States' first written submission, paras. 28 and 110.
[827] In this regard, see paragraphs 7.188 – 7.190 above.

Member. The Panel also recalls its finding in paragraph 7.135 above that the form, nature and scale of the alleged non-uniform administration and the laws, regulations, judicial decisions and rulings that are allegedly being administered in a non-uniform manner should be taken into consideration when interpreting the term "uniform" in Article X:3(a) of the GATT 1994. The Panel considers that the United States' challenge with respect to the imposition of requirements regarding local clearance procedures is narrow in nature. It involves the application of a few provisions of the Implementing Regulation – namely, Articles 263 – 267 of the Implementing Regulation. Therefore, given the narrowness of this challenge, the Panel considers that a high degree of uniformity is required for the purposes of Article X:3(a) of the GATT 1994. We now turn to the facts to determine whether or not this high degree of uniformity has been achieved with respect to the imposition of requirements regarding local clearance procedures.

7.476 In support of its allegations of non-uniformity in violation of Article X:3(a) of the GATT 1994, the United States relies on a table which, it submits, proves the existence of differences among the member States in the context of local clearance procedures regarding requirements imposed prior to release, customs involvement prior to release, requirements imposed after release and document retention requirements. The Panel notes that the United States has not submitted any factual material to support what are, in essence, nothing more than assertions contained in the table of alleged differences upon which the United States relies.

7.477 Therefore, the Panel concludes that the United States has not proved that differences between member States exist regarding the actual requirements users of the local clearance procedures must meet between the member States. Consequently, the United States has not proved that Articles 263 – 267 of the Implementing Regulation are administered in a non-uniform manner in violation of Article X:3(a) of the GATT 1994.

(v) Summary and conclusions

7.478 In summary, the Panel finds that, with respect to the United States' allegations of non-uniform administration of the Community Customs Code and the Implementing Regulation in the area of customs procedures:

(a) The Panel finds no violation of Article X:3(a) of the GATT 1994 with respect to the manner of administration of Article 78(2) of the Community Customs Code regarding the requirements imposed for audit procedures[828] following the release of products for free circulation in the European Communities.

(b) The Panel finds no violation of Article X:3(a) of the GATT 1994 with respect to the substantive differences in penalty laws[829] between the member States.

(c) The United States has not proved that the manner of administration of Article 133 of the Community Customs Code and Articles 502(3) and 552 of the Implementing Regulation regarding processing under customs control is non-uniform in violation of Article X:3(a) of the GATT 1994.

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[828] The Panel recalls its conclusion in footnote 747 above that the Panel does not consider it necessary to determine whether or not audits following the release of goods for free circulation are properly categorised as "customs procedures".

[829] The Panel recalls its conclusion in footnote 776 above that the Panel does not consider it necessary to determine whether or not penalty laws are properly categorised as "customs procedures".

(d) The United States has not proved that the administration of Articles 263 – 267 of the Implementing Regulation regarding local clearance procedures is non-uniform in violation of Article X:3(a) of the GATT 1994.

(e) Allegations of non-uniform administration regarding Article 221(3) of the Community Customs Code

(i) Summary of the parties' arguments

7.479 The **United States** submits that Article 221(3) of the Community Customs Code prescribes a three-year period following the incurrence of a customs debt during which liability for the debt may be communicated to the debtor. It also provides for suspension of the three-year period during the pendency of an appeal. The United States argues that Article 221(3) of the Community Customs Code does not provide any other circumstance under which the three-year period may be suspended.[830] According to the United States, the customs offices of the 25 member States are each responsible for administering those rules but they administer those rules differently. The United States submits that the French customs authorities have taken the position that the three-year period may be suspended by the institution of any administrative proceeding (procès-verbal) investigating a possible customs infraction, even if that proceeding does not result in the imposition of any penalty against the debtor. According to the United States, despite divergence with other customs authorities in other parts of the European Communities, France's highest court (the Cour de Cassation) has declined to refer to the ECJ the question of this rule's consistency with EC law.[831] The United States submits that the *Camcorders* case illustrates the non-uniform administration of Article 221(3) of the Community Customs Code. Specifically, in the context of that case, the French customs authorities take the view that the amended explanatory note to the Common Customs Tariff can be applied to imports pre-dating the note but, additionally, unlike customs offices in other parts of the European Communities, French customs authorities take the view that the note can be applied to imports even if the customs debt attributable to those imports arose more than three years in the past. Thus, according to the United States, the camcorders importer in France remains vulnerable for additional duty collections on imports made in 1999, even though customs offices in other parts of the European Communities would consider such additional collection to be time-barred. The United States argues that, therefore, in the context of the *Camcorders* case, France's unique interpretation of Article 221(3) of the Community Customs Code leaves the importer vulnerable to additional duty collections on imports that occurred six years ago, even though other member States would consider such additional collection to be barred.[832]

7.480 The **European Communities** submits that the application of Article 221(3) of the Community Customs Code, which, according to the European Communities, concerns the period during which a customs debt may be communicated to the debtor, is not within the Panel's terms of reference because it does not fall within the scope of customs areas listed in the United States' request for establishment of a panel. The European Communities adds that the United States did not raise the alleged non-uniform application of Article 221(3) of the Community Customs Code until the Panel's second substantive meeting with the parties. Further, in a reply to a question from the Panel[833], the United States lists a number of provisions in respect of which it claims to have established a lack of uniform administration but does not include Article 221 of the Community Customs Code. According to the European Communities, this implies that the United States either does not believe it has

[830] United States' reply to Panel question No. 179.

[831] United States' comments on European Communities' reply to Panel question No. 146 referring Judgment of the Cour de Cassation, Case No. 143, 13 June 2001, pp. 439-40 (Exhibit US-67); Judgment of the Cour de Cassation, Case No. 144, 13 June 2001, p. 448 (Exhibit US-68).

[832] United States' oral statement at the second substantive meeting, para. 31.

[833] Panel question No. 124.

established its case regarding the non-uniform administration of Article 221 of the Community Customs Code or it concedes that this claim does not fall within the Panel's terms of reference.[834]

7.481 In response, the **United States** accepts that Article 221(3) of the Community Customs Code concerns the period during which a customs debt may be communicated. However, the United States disagrees with the implication that this has nothing to do with collection of the customs debt. According to the United States, the period during which the customs debt may be communicated to the debtor is obviously essential to collection of the debt. The United States clarifies that, if the period for such communication has expired, then so has the possibility of collecting any debt not previously communicated.[835] The United States also submits that the European Communities' assertion that Article 221(3) of the Community Customs Code does not concern any of the areas of customs administration referred to in the United States' request for establishment of a panel appears to confuse the claims made by the United States with arguments advanced by it in support of those claims. According to the United States, its claims under Article X:3(a) of the GATT are set out clearly and with specificity in the first paragraph of its panel request. There, the United States claims that "the manner in which the European Communities ('EC') administers its laws, regulations, decisions and rulings of the kind described in Article X:1 of the General Agreement on Tariffs and Trade 1994 ('GATT 1994') is not uniform, impartial and reasonable, and therefore is inconsistent with Article X:3(a) of the GATT 1994." The request then goes on to identify precisely the laws, regulation, decisions, and rulings of the kind described in Article X:1 the United States alleges the European Communities to have failed to administer in the manner required by Article X:3(a), including the Community Customs Code. The United States submits that Article 221(3) of the Community Customs Code forms a part of the Community Customs Code. Further, the subject-matter of Article 221(3) of the Community Customs Code falls within the illustrative, non-exhaustive list of customs areas contained in the United States' request. The United States adds that it discussed Article 221(3) of the Community Customs Code in its oral statement at the Panel's second substantive meeting.[836]

7.482 The **European Communities** also submits that Article 221(3) of the Community Customs Code only addresses the period during which a customs debt may be communicated to the debtor. In contrast, the question of the substantive conditions under which the customs debt may be retroactively recovered is addressed in Article 220 of the Community Customs Code. Moreover, the European Communities submits that it is incorrect to state that the only permitted exception to Article 221(3) of the Community Customs Code is the lodging of an appeal, which suspends the three-year period for communicating the customs debt. Another relevant exception is Article 221(4) of the Community Customs Code, according to which, where the customs debt is the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings, the amount may, under the conditions set out in the provisions in force, be communicated to the debtor after the expiry of the three-year period. The European Communities notes that the ECJ has clarified that the question as to whether an act may give raise to criminal proceedings is a question of member States' law, not of Community law.[837]

(ii) Analysis by the Panel

7.483 A preliminary question for the Panel's consideration is whether or not Article 221(3) of the Community Customs Code falls within the Panel's terms of reference. According to the European

[834] European Communities' reply to Panel question No. 172; European Communities' comments on the United States' reply to Panel question No. 124.

[835] United States' reply to Panel question No. 180, footnote 31.

[836] United States' reply to Panel question No. 178.

[837] European Communities' reply to Panel question No. 172, para. 42 referring to Case C-273/90, *Meico-Fell*, [1991] ECR I-5569, para 13 (Exhibit EC-155).

Communities, Article 221(3) of the Community Customs Code, which concerns the period during which a customs debt may be communicated to the debtor, is not within the Panel's terms of reference because it does not fall within the scope of customs areas listed in he United States' request for establishment of a panel. The United States accepts that Article 221(3) of the Community Customs Code concerns the period during which a customs debt may be collected but submits that it is within the Panel's terms of reference since it forms a part of the Community Customs Code, which is listed in the United States' request for establishment of a panel and the subject-matter of Article 221(3) of the Community Customs Code falls within the illustrative, non-exhaustive list of customs areas contained in the United States' request.

7.484 The Panel recalls its finding in paragraph 7.33 above that, under our terms of reference, we are only authorized to consider the manner of administration by the national customs authorities of the member States of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff, the TARIC and related measures in the areas of customs administration specifically identified in the United States' request for establishment of a panel – namely, the classification and valuation of goods, procedures for the classification and valuation of goods, procedures for the entry and release of goods, procedures for auditing entry statements after goods are released into free circulation, penalties and procedures regarding the imposition of penalties for violation of customs rules and record-keeping requirements. While it is clear that Article 221(3) is contained in one of the measures identified in the United States' request that are allegedly not being administered in a uniform manner in violation of Article X:3(a) of the GATT 1994 – namely, the Community Customs Code – it is also necessary to determine whether or not the subject-matter of Article 221(3) of the Community Customs Code is covered by the areas of customs administration specifically identified in that request. We turn, therefore, to the terms of Article 221 of the Community Customs Code.

7.485 Article 221 of the Community Customs Code is found in Chapter 3 of the Community Customs Code, which is entitled "Recovery of the amount of the Customs Debt". More particularly, Article 221 is found in Section 1 of Chapter 3, which is entitled "Entry in the accounts and communication of the amount of duty to the debtor." Article 221 provides that:

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

7.486 In the Panel's view, Article 221 of the Community Customs Code, including Article 221(3), relates to the recovery of and communication of customs debt. This is evident from the ordinary meaning of the terms of Article 221 as well as the context in which that Article is found such as the title of the Chapter and Section in which it is contained.

7.487 The Panel considers that Article 221 of the Community Customs Code, including Article 221(3), is not covered by any of the areas of customs administration specifically identified in the United States' request for establishment of a panel. In particular, the ordinary meaning of those areas does not appear to encompass the recovery and communication of customs debts.[838] Therefore, we conclude that Article 221(3) of the Community Customs Code is outside our terms of reference with regard to the United States' claim that the administration of that provision violates Article X:3(a) of the GATT 1994. More specifically, the United States is precluded from arguing in this dispute that the manner of administration of Article 221(3) of the Community Customs Code is in violation of Article X:3(a) of the GATT 1994. However, this does not mean that the United States is prevented from relying upon the manner of administration of Article 221(3) of the Community Customs Code to the extent that it is relevant to the United States' claim that measures in the areas of customs administration that have been specifically identified in its request for establishment of a panel (such as, tariff classification) are being administered in a manner that is in violation of Article X:3(a) of the GATT 1994.[839]

(f) Overall observations regarding the United States' allegations of non-uniform administration under Article X:3(a) of the GATT 1994

7.488 The Panel recalls the United States' argument that, the absence of a procedure or institution in the European Communities to ensure that divergences of administration among the customs authorities of the 25 member States do not occur or that promptly reconcile such divergences as a matter of course when they occur, necessarily results in non-uniform administration in breach of Article X:3(a) of the GATT 1994.[840] The Panel further recalls that the United States argued that these structural shortcoming result in non-uniform administration with respect to all areas of the EC system of customs administration.[841]

7.489 In paragraphs 7.156 – 7.192 above, the Panel explained its understanding of the manner in which the EC system of customs administration functions. The Panel recalls that it provided that explanation because it considers that such understanding provides important context for the examination of the particular instances of alleged violations of Article X:3(a) of the GATT 1994, which the Panel has been called upon to examine in the context of this dispute. In that explanation,

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[838] In this regard we note that the *Dictionary of International Trade*, 2000, defines the areas of customs administration specifically identified in the United States' request for establishment of a panel as follows: "Classification" is defined as "the categorization of merchandise" (page 40). "Valuation" is defined as "the appraisal of the worth of imported goods by customs officials for the purpose of determining the amount of duty payable in the importing country" (page 201). "Entry" is defined as "the process of, and documentation required for securing the release of imported merchandise" (page 72). "Audit" is defined as "a formal examination of records or documents" (page 20). "Penalties" is defined as the "charges assessed or action taken by customs in response to a violation of a customs-enforced regulation or law" (page 154). The meaning of the term "record-keeping" is self-explanatory. In addition, the World Customs Organization Glossary of International Customs Terms defines "release" as "action by the Customs to permit goods undergoing clearance to be placed at the disposal of the persons concerned".

[839] The Panel notes in this regard that the United States relied upon Article 221(3) of the Community Customs Code with respect to its allegation that the way in which an amendment to an explanatory note to the Common Customs Tariff concerning camcorders was interpreted and applied varied from member State to member State: See paragraph 7.344 *et seq* above.

[840] United States' reply to Panel question No. 126(a).

[841] United States' reply to Panel question No. 126(b).

the Panel considered each of the institutions and mechanisms referred to by the European Communities as playing an instrumental role in achieving uniform administration of EC customs law by the customs authorities of the member States. In its explanation, the Panel observed that certain features associated with a number of those institutions and mechanisms would not necessarily enhance uniform administration of EC customs law by the customs authorities of the member States and, at worst, might even cause non-uniform administration.

7.490 Nevertheless, the Panel is not authorized to make any findings on those institutions and mechanisms given that, as stated above in paragraph 7.64, the Panel's terms of reference preclude it from considering "as such" challenges of the design and structure of the EC system of customs administration, including components thereof. However, even if the Panel were authorized to make such findings, the Panel notes that the United States did not demonstrate that the design and structure of the EC system of customs administration, including components thereof necessarily result in a violation of Article X:3(a) of the GATT 1994. Rather, the United States referred to a number of apparently random instances of alleged violation of Article X:3(a) of the GATT 1994, without demonstrating to us that those examples are symptomatic and representative of underlying structural deficiencies in the EC system of customs administration. Moreover, the Panel recalls that the United States only proved to the Panel that Article X:3(a) of the GATT 1994 had actually been violated in three of the various instances of alleged violation of Article X:3(a) of the GATT 1994 to which it had referred in support of its claims.

E. CLAIMS UNDER ARTICLE X:3(B) OF THE GATT 1994

1. Article X:3(b) of the GATT 1994

7.491 Article X:3(b) of the GATT 1994 provides that:

> "Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures 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 unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts."

2. Findings requested by the United States under Article X:3(b) of the GATT 1994

(a) Summary of the parties' arguments

7.492 The **United States** submits that Article X:3(b) of the GATT 1994 requires the European Communities as a WTO Member to have in place certain "judicial, arbitral or administrative tribunals or procedures." It then defines certain qualities that these tribunals or procedures must have. The United States clarifies that, in the present dispute, its claim relates to the requirement under Article X:3(b) of the GATT 1994 that the decisions of the tribunals or procedures required by that Article "govern the practice of" the agencies entrusted with administrative enforcement "unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers."[842] In particular, the United States submits that the European Communities

[842] United States' second written submission, paras. 102-109; United States' reply to Panel question No. 141.

does not fulfil its obligation under Article X:3(b) of the GATT 1994 because each of the multiple review tribunals it provides renders decisions that govern the practice only of a subset of agencies entrusted with administrative enforcement within a particular region in the European Communities but does not "govern the practice" of the European Communities' agencies in other member States.[843]

7.493 The **European Communities** notes that it understands that the United States' claims under Article X:3(b) of the GATT 1994 do not concern the material scope of the control exercised by review tribunals or procedures under Article X:3(b) of the GATT 1994 nor the purpose of such review. The European Communities submits that, in its understanding, the United States' claim under Article X:3(b) of the GATT 1994 focuses on the nature of the review to be conducted under that Article.[844] More specifically, the European Communities submits that the United States' claims under Article X:3(b) of the GATT 1994 exclusively relate to the requirement that tribunals or procedures must govern the practice of the agencies entrusted with administrative enforcement.[845]

(b) Analysis by the Panel

7.494 The Panel notes that, in its request for establishment of a panel, the United States made its claim under Article X:3(b) of the GATT 1994 in the following terms:

> "... the European Communities has failed to maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. The above-identified measures, including in particular Articles 243 through 246 of the Code, expressly provide that EC member States are responsible for the implementation of procedures for appeals from decisions by member State customs authorities. Accordingly, the ability to obtain review of a customs decision by a tribunal of the European Communities does not arise until after an importer or other interested party has pursued review through national administrative and/or judicial tribunals. For this reason, the European Communities is in breach of Article X:3(b) of the GATT 1994."[846]

7.495 In a reply to a question posed by the Panel, the United States made it clear that its claim under Article X:3(b) of the GATT 1994 was confined to the allegation that the decisions of the tribunals or procedures in the European Communities do not "govern the practice of" all the "agencies entrusted with administrative enforcement" in the European Communities in violation of Article X:3(b) of the GATT 1994. More specifically, the United States alleges in the context of this dispute that the tribunals or procedures provided by individual member States for the review and correction of administrative action do not satisfy the European Communities' obligation under Article X:3(b) of the GATT 1994 because the decisions of such tribunals or procedures have effect only within the respective member States and not on EC agencies throughout the territory of the European Communities.[847]

7.496 In light of the United States' clarification of its claim under Article X:3(b) of the GATT 1994 in its reply to a question posed by the Panel, the Panel will confine its analysis to the question of whether or not Article X:3(b) of the GATT 1994 requires that the decisions of the tribunals or procedures for the review and correction of administrative action relating to customs matters govern the practice of *all* the agencies entrusted with administrative enforcement *throughout the territory* of a

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[843] United States' second written submission, para. 102.
[844] European Communities' second written submission, para. 215.
[845] European Communities' comment on the United States' reply to Panel question No. 141.
[846] WT/DS315/8, which is contained in Annex D of the Panel's report.
[847] United States' reply to Panel question No. 35.

particular Member, as has been asserted by the United States. For the purposes of resolving this dispute, the Panel will also consider whether or not the tribunals and procedures provided in the European Communities for the review and correction of administrative action fulfil the European Communities' obligation under Article X:3(b) of the GATT 1994 in this regard.[848]

3. Interpretation of Article X:3(b) of the GATT 1994

(a) Summary of the parties' arguments

(i) Relevant features of review bodies

7.497 The **United States** submits that it is "administrative" action that must be eligible for prompt review and correction under Article X:3(b) of the GATT 1994. The United States submits that this suggests that the obligation of prompt review and correction under Article X:3(b) of the GATT 1994 applies to the first tribunal or procedure that a Member provides for the purpose of review and correction. The United States submits that this interpretation is supported by the reference in Article X:3(b) of the GATT 1994 to appeals to a "court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers."[849]

7.498 Similarly, the **European Communities** submits that the review established by Article X:3(b) of the GATT 1994 only pertains to first instance review.[850] The European Communities reasons that, therefore, to require uniformity at the first instance would necessarily imply the establishment of a central court of first instance with jurisdiction over the whole territory of any WTO Member. According to the European Communities, this conclusion finds no support in the wording of Article X:3(b) of the GATT 1994.[851]

7.499 The European Communities also notes that Article X:3(b) of the GATT 1994 provides that tribunals or procedures ensuring the prompt review and correction of administrative action on customs matters must be independent of the agencies entrusted with administrative enforcement. According to the European Communities, provided that first instance administrative review fulfils the requirement of independence, such review may be considered consistent with the obligation to ensure prompt review and correction of administrative action contained in Article X:3(b) of the GATT 1994.[852] The European Communities submits that the requirement of independence in Article X:3(b) of the GATT 1994 imposes an external separation between the tribunals or procedures and the agencies.[853]

(ii) Geographical coverage and substantive effect of decisions of review bodies

General

7.500 The **United States** submits that the relevant context for the interpretation of Article X:3(b) of the GATT 1994 includes the immediately preceding subparagraph, namely Article X:3(a) of the GATT 1994. The United States notes that that sub-paragraph calls for the "uniform, impartial, and reasonable" administration of customs laws. The United States submits that, therefore, when read in the light of Article X:3(a) of the GATT 1994, Article X:3(b) of the GATT 1994 means that the

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[848] The Panel notes that it does not consider it necessary to determine whether or not the review provided in the European Communities in fulfilment of Article X:3(b) of the GATT 1994 is "prompt" within the meaning of that Article in order to resolve this dispute: United States' replies to Panel question Nos. 40, 142 and 144.

[849] United States' reply to Panel question No. 121.

[850] European Communities' second written submission, para. 225.

[851] European Communities' second written submission, para. 225.

[852] European Communities' reply to Panel question No. 121.

[853] European Communities' second written submission, para. 218.

decisions of the tribunals or procedures must provide for the review and correction of customs matters for the European Communities as a whole, not just within limited geographical regions within the European Communities.[854] More particularly, the United States submits that it is inconsistent with Article X:3(b) of the GATT 1994 to require a trader who had received adverse customs decisions in different member States, each at odds with the prevailing interpretation of EC customs law in other member States, to pursue separate appeals in each of those States.[855]

Significance of the term "shall govern the practice of"

7.501 The **United States** argues that the second sentence of Article X:3(b) of the GATT 1994 provides that the tribunals or procedures provided by a Member "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*. ..." According to the United States, the phrase "shall govern the practice of such agencies" requires that all enforcement agencies of a Member follow the reviewing tribunal's decisions.[856] The United States adds that the "govern the practice" requirement in Article X:3(b) of the GATT 1994 means that decisions by review bodies must control the way agencies administer customs laws.[857] In support, the United States submits that the ordinary meaning of the term "govern" in the context of Article X:3(b) of the GATT 1994 is "[c]ontrol, influence, regulate, or determine" or "[c]onstitute a law, rule, standard, or principle for."[858] The United States submits that, accordingly, the distinct "govern the practice" requirement in Article X:3(b) of the GATT 1994 looks beyond the simple implementation of a decision in the case at hand and requires that the decision "control, influence, regulate or determine" the practice of or "constitute a law, rule, standard, or principle for" "the agencies entrusted with administrative enforcement" of the customs laws going forward.[859] The United States further argues that, if Article X:3(b) of the GATT 1994, unlike Article X:3(a) of the GATT 1994, is not concerned with questions of uniformity, there would be no need for Article X:3(b) of the GATT to specify that the decisions of review tribunals must "govern the practice of" the agencies entrusted with administrative enforcement. It would suffice simply to require the provision of tribunals or procedures whose decisions are "implemented by" the agencies entrusted with administrative enforcement.[860]

7.502 In response, the **European Communities** submits that it considers that the reference to the term "govern" in Article X:3(b) of the GATT 1994 indicates that it is aimed at securing a fair implementation of tribunal decisions in administrative law matters.[861] According to the European Communities, if the term "govern" were to be interpreted to mean "control, regulate, determine, constitute a law, rule, standard or principle for", the decisions of first instance tribunals would be considered as having binding effect, contrary to a common element that is shared by most of the civil law and common law legal systems – namely, that only high level or last instance tribunals take decisions that are considered as binding and, therefore, a general source of law.[862] The European Communities submits that the United States' interpretation imposes very far-reaching obligations for all WTO Members, which do not correspond to the legal traditions of most WTO Members of both civil law or roman-germanic law and the common law families.[863] According to the European Communities, the decisions of a first instance tribunal are only binding for the specific cases decided

[854] United States' first written submission, para. 138.
[855] United States' first written submission, paras. 134 and 139.
[856] United States' reply to Panel question No.35.
[857] United States' oral statement at the second substantive meeting, para. 88.
[858] *The New Shorter Oxford English Dictionary*, 1993, pp. 1122-1123.
[859] United States' second written submission, para. 104.
[860] United States' second written submission, para. 103.
[861] European Communities' oral statement at the second substantive meeting, para. 93 and European Communities' second written submission, para 230.
[862] European Communities' oral statement at the second substantive meeting, para. 94.
[863] European Communities' closing statement at the second substantive meeting, para. 30.

by the same tribunal and, therefore, they are not an instrument ensuring uniform administration. The European Communities submits that a decision of a first instance review body plays the role of guidance to other first instance review bodies. Thus, the ordinary meaning of "govern" would be "influence".[864]

Significance of the reference to "the agencies"

7.503 The **United States** argues that it is "*the* agencies entrusted with administrative enforcement" whose practice is required to be governed by the decisions of review tribunals or procedures under Article X:3(b) of the GATT 1994. According to the United States, that requirement is not fulfilled where the decisions of review tribunals or procedures govern the practice of only some of the agencies entrusted with administrative enforcement. Rather, for the practice of "the agencies" to be governed by the decisions of review tribunals, those decisions must govern "the agencies" throughout the Member's territory.[865] The United States submits that this understanding is reinforced by the context provided by Article X:3(a) of the GATT 1994. In particular, where the decisions of review tribunals govern the practice of the agencies entrusted with administrative enforcement, they become part of the agencies' administration of the Member's customs laws in future cases. Since the Member's customs laws must be administered in a uniform manner, the decisions of review tribunals must govern the practice of "the agencies" throughout its territory. If they govern the practice of only some of the agencies then, by definition, the administration of the Member's laws will not be uniform; different interpretations of the Member's laws will govern the practice of different agencies within the Member's territory.[866]

7.504 The **European Communities** responds that the use of the term "the agencies" in Article X:3(b) of the GATT 1994 does not mean that those agencies are all the agencies throughout the WTO Member's territory. According to the European Communities, "the agencies" must be read in context with the term to which it relates – that is, "tribunals", which are tribunals of first instance. The European Communities submits that, therefore, "the agencies" must be understood as "the agencies" whose decisions are reviewed by these tribunals of first instance. The European Communities adds that "the agencies" are those established in each of its member States, not the agencies established in the other member States.[867]

Significance of the reference to the right to seek review by "the central administration of such agency"

7.505 The **United States** submits that further evidence for the proposition that the review and correction provided for pursuant to Article X:3(b) of the GATT 1994 must result in decisions that govern the administration of a Member's customs laws throughout its territory is the proviso in the second sentence of that Article, which states that "*the central administration of such agency* may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts." According to the United States, the proviso contemplates "the central administration" challenging a tribunal's decision collaterally – that is, "in another proceeding" – when the central administration determines that "the decision is inconsistent with established principles of law or the actual facts." In the United States' view, that possibility only makes sense if the decision in the original proceeding has effect outside that proceeding. If the decision's effects were confined to the proceeding in which it was rendered, there would be no need or basis for a collateral challenge.[868] The United States submits that, where a

[864] European Communities' oral statement at the second substantive meeting, para. 95.
[865] United States' second written submission, para. 106.
[866] United States' second written submission, para. 107.
[867] European Communities' oral statement at the second substantive meeting, para. 97.
[868] United States' second written submission, para. 113.

Member has no "central administration" (as is the case in the European Communities), the possibility set out in the proviso would appear not to exist. However, according to the United States, that simply means that, in the unusual situation of a Member without a central administration, the various regional customs authorities would have to take other steps to ensure that the decisions of review tribunals "govern the practice of" "the agencies entrusted with administrative enforcement" *and* that the Member continues to administer its customs laws in a uniform manner.[869]

7.506 In response, the **European Communities** submits that the possibility for the central administration of a customs agency to request review is not established to rectify the effects of the original decision in the practice of the agencies but to provide a remedy, based on limited grounds, against a decision that is no more challengeable through ordinary means because it is time-barred.[870] According to the European Communities, this is clear from the structure of Article X:3(b) of the GATT 1994. Specifically, the proviso refers to the time limits for appeals contained in the previous phrase in sub-paragraph (b), not to the "govern the practice" requirement, which is placed in the second phrase of the second sentence of that sub-paragraph.[871] In addition, the European Communities contends that the fact that the proviso is not intended to rectify the effects of the original decision in the practice of the agencies also derives from the nature of this type of exceptional review. When the review is based on a lack of consistency with established principles of law, its purpose is to protect the cornerstones of a legal system, with a view to eliminating conflicts with the case-law of the highest courts, which are responsible for refining those principles of law. When the review is based on a lack of consistency with the actual facts, its purpose is to annul a judicial decision on discovery of facts that were unknown to the court and to the party claiming the revision when the decision was given. According to the European Communities, neither of these two grounds of review is linked to the eventual effects of a first instance judicial decision on the practice of the customs agencies.[872]

Legal relationship between Articles X:3(a) and X:3(b) of the GATT 1994

7.507 The **United States** argues that Article X:3(b) of the GATT 1994 must be read in light of the obligation of uniform administration in Article X:3(a) of the GATT 1994. The United States submits that, accordingly, where review leads to decisions whose effect is limited to particular regions within a Member's territory, such review is inconsistent with Article X:3(b) of the GATT 1994.[873]

7.508 The **European Communities** submits that sub-paragraphs (a) and (b) of Article X:3 of the GATT 1994 lay down different obligations: one of uniform administration, the other on remedies. According to the European Communities, from a legal point of view, Article X:3 of the GATT 1994 does not make any link between sub-paragraphs (a) and (b), which should, therefore, be considered as separate obligations.[874] First, sub-paragraph (b) does not make any reference to sub-paragraph (a), unlike sub-paragraph (c), which contains an explicit link to sub-paragraph (b). Further, Article X:3 GATT 1994 is not introduced by a chapeau to indicate that the two sub-paragraphs are linked so that one has to be interpreted in light of the other.[875] The European Communities adds that the fact that sub-paragraphs (a) and (b) are both contained in Article X:3 of the GATT 1994 does not mean that they should be interpreted in such as way as to blur the distinction between the obligations which they contain. Obviously, the two provisions must be interpreted in a harmonious way, taking into account their respective object and purpose. However, this does not mean that obligations from one provision

[869] United States' second written submission, para. 115.
[870] European Communities' oral statement at the second substantive meeting, para. 106.
[871] European Communities' oral statement at the second substantive meeting, para. 107.
[872] European Communities' oral statement at the second substantive meeting, para. 108.
[873] United States' second written submission, para. 99.
[874] European Communities' first written submission, para. 461.
[875] European Communities' second written submission, para. 223.

can simply be imported into the other. The European Communities submits that, in particular, Article X:3(a) of the GATT 1994 does not concern the administration of laws concerning the judicial procedure and judicial organisation, since such laws are not among those referred to in Article X:1 of the GATT 1994.[876]

7.509 In response, the **United States** contends that the European Communities is wrong to assert that Article X:3 of the GATT 1994 does not make any link between sub-paragraphs (a) and (b). The United States submits that the second sentence of sub-paragraph (b) expressly states that the decisions of the tribunals or procedures maintained or instituted in accordance with that sub-paragraph "shall govern the practice of" "the agencies entrusted with administrative enforcement". According to the United States, the link derives from the fact that administrative enforcement, in turn, is the subject of sub-paragraph (a).[877]

7.510 The **European Communities** responds that it considers that the term "administrative enforcement" in Article X:3(b) of the GATT 1994 does not establish a link between sub-paragraphs (a) and (b). In the European Communities' view, Article X:3(b) of the GATT 1994 refers to "agencies entrusted with administrative enforcement" to identify the agencies that are subject to prompt review, and from which the tribunals or procedures must be independent.[878]

7.511 The **United States** submits that the European Communities itself argues that review of administrative actions by courts and uniform administration are inherently intertwined, such that the former, in its view, is a key tool for achieving the latter.[879] More specifically, the United States submits that a theme repeated throughout the European Communities' submissions is that appeals of customs decisions to national courts, coupled with the possibility of national courts making preliminary references to the ECJ, constitutes a critical instrument of ensuring uniform administration of customs law. The United States submits that that position supports interpreting the obligation to provide reviews of customs decisions under Article X:3(b) of the GATT 1994 in light of the obligation to administer customs laws uniformly under Article X:3(a) of the GATT 1994.[880]

7.512 In response, the **European Communities** argues that the fact that the European Communities has conceded that Articles X:3(a) and X:3(b) of the GATT 1994 must be interpreted in an harmonious way does not mean that the European Communities agrees to an interpretation that transforms Article X:3 of the GATT 1994 into a "totum revolutum" provision, where the various obligations in that Article are merged, with the unwarranted consequence that the obligation to grant independent review and correction of customs administrative decisions at first instance level is absorbed by the obligation to ensure uniform administration of the legislation.[881] The European Communities submits that the relevant context for the interpretation of Article X:3(a) of the GATT 1994 is not Article X:3(b) of the GATT 1994, but Article X:1 of the GATT 1994, to which Article X:3(a) of the GATT 1994 makes a specific reference. The European Communities notes that Article X:1 of the GATT 1994 includes "judicial decisions of general application" among the instruments to be administered uniformly in accordance with Article X:3(a) of the GATT 1994. According to the European Communities, this evidences that Article X of the GATT 1994 covers two types of judicial decisions: those of general application, whose uniform administration is required under Article X:3(a) of the GATT 1994 and those adopted by first instance review courts, where uniform administration through all the WTO Member is not required. According to the European Communities, this

[876] European Communities reply to Panel question No. 87.
[877] United States' oral statement at the first substantive meeting, para. 59.
[878] European Communities' Reply to Panel question No. 87
[879] United States' oral statement at the first substantive meeting, para 58, referring to the European Communities' first written submission, para. 185.
[880] United States' oral statement at the first substantive meeting, para. 58.
[881] European Communities' oral statement at the second substantive meeting, para. 100.

contextual interpretation explains why there is no link between sub-paragraphs (a) and (b) in Article X:3 of the GATT 1994.[882]

Significance of the reference to "tribunals" and "procedures" in the plural

7.513 The **European Communities** submits that Article X:3(b) of the GATT 1994 merely requires WTO Members to ensure that administrative decisions in customs matters are reviewed promptly by an independent tribunal or through an independent procedure.[883] According to the European Communities, this is supported by the literal and multi-linguistic interpretation of Article X:3(b) of the GATT 1994.[884] More specifically, the European Communities submits that, under Article X:3(b) of the GATT 1994, WTO members are obliged to have "tribunals or procedures" not "a tribunal" or "a procedure". According to the European Communities, the French and Spanish versions of the provision also use the equivalent terms in plural. This clearly allows the WTO Members to have several tribunals, each of them covering a part of its geography and being competent for the review of the administrative decisions taken by their respective customs offices.[885]

7.514 In response, the **United States** submits that the use of the plural form in Article X:3(b) of the GATT 1994 could indicate the permissibility of multiple fora for review of customs decisions for different types of review and/or by different types of review bodies, but it does not follow logically that separate and independent fora may be provided for each of several different regions within a Member's territory.[886] The United States submits that 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) of the GATT 1994. In the United States' view, 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. The United States submits that this might be accomplished where a Member has a single, centralized customs agency, required to give effect throughout the Member's territory to the decisions of any tribunals reviewing its actions. However, according to the United States, where review tribunals cover particular agencies and there is no other mechanism to give effect to the decisions of individual tribunals for the remaining agencies, the geographical fragmentation of review is inconsistent with Article X:3(b) of the GATT 1994.[887]

7.515 The **European Communities** submits that the United States' interpretation of the use of the plural in Article X:3(b) of the GATT 1994 can perfectly live together with the one proffered by the European Communities. According to the European Communities, the use of the plural form may indicate that a WTO Member is entitled to maintain geographically limited tribunals and it may also indicate that a WTO Member is allowed to maintain multiple fora for review of customs decisions.[888]

Decisions

7.516 The **United States** submits that the terms of Article X:3(b) of the GATT 1994 plainly provide that the decisions rendered by review tribunals or procedures must meet two independent requirements. Specifically, they must be implemented by the agencies entrusted with administrative enforcement, and they must govern the practice of those agencies. For decisions to govern the practice of the agencies entrusted with administrative enforcement, they must be given effect beyond

[882] European Communities' comments on the United States' reply to Panel question No. 142.
[883] European Communities' oral statement at the first substantive meeting, para. 57.
[884] European Communities' first written submission, para. 452.
[885] European Communities' first written submission, para. 454.
[886] United States' oral statement at the first substantive meeting, para. 60; United States' reply to Panel question No. 38.
[887] United States' reply to Panel question No. 38.
[888] European Communities' second written submission, para. 232.

simple implementation of the order in the case at hand.[889] The United States submits that whether "decisions" in Article X:3(b) of the GATT 1994 is understood to have a narrower meaning according to which they are limited to the final mandate or order or a broader meaning that encompasses the review body's reasoning, that does not affect the "govern the practice" requirement. That is, even in a legal system in which a decision is understood as pertaining only to the court's mandate or order and not to its reasons, Article X:3(b) of the GATT 1994 still requires that the decision both be implemented by *and* govern the practice of the agencies entrusted with administrative enforcement. In the view of the United States, it does not make a difference whether a given Member's legal system treats a "decision" as consisting of only the court's order or mandate, or including the court's reasons.[890]

7.517 The **European Communities** submits that the United States fails to give a proper meaning to the term "decision" in Article X:3(b) of the GATT 1994. The "decision" of a tribunal in a particular case must be distinguished from the reasoning which led it to this decision. For instance, if a tribunal decides on an action for the annulment of a decision of the customs authorities, then the decision will be to annul the decision or not. If the decision is to annul, then this decision will govern the practice of the agency. In contrast, there is no basis in Article X:3(a) of the GATT 1994 for assuming that all questions of interpretation which the tribunal may have considered in the course of its reasoning equally become binding on the agency. According to the European Communities, this would give a role to judicial precedent that would go far beyond the practice of numerous WTO Members which do not have a legal system based on case law.[891] The European Communities clarifies that this does not imply that the decisions of a tribunal of first instance, including the reasoning contained in the tribunal's judgement, do not produce any effects in the EC system. According to the European Communities, such reasoning will constitute relevant judicial practice, which will be taken into account by the customs agencies. Moreover, if a customs agency or a court in a member State does not share the interpretation of the EC legislation given by a court of another member State, it will take the initiatives that are appropriate given its respective position in the system: the customs agency shall consult and discuss the issue with the Commission and the other member States, the court in another member State will or shall refer to the ECJ.[892]

(b) Analysis by the Panel

7.518 The Panel recalls that, in order to resolve this dispute, the Panel needs only to address the question of whether or not Article X:3(b) of the GATT 1994 requires the decisions of the judicial, arbitral or administrative tribunals or procedures for the review and correction of administrative action relating to customs matters to govern the practice of *all* the agencies entrusted with administrative enforcement *throughout the territory* of a particular Member, as has been asserted by the United States. The Panel will interpret the various terms contained in Article X:3(b) of the GATT 1994 that would appear to have a bearing on this question. In so doing, the Panel will use as its legal framework Articles 31 and 32 of the *Vienna Convention*.

<u>Ordinary meaning</u>

"Independent"

7.519 The Panel recalls that the first sentence of Article X:3(b) of the GATT 1994 requires WTO Members to maintain or institute judicial, arbitral or administrative tribunals or procedures for the purpose of the prompt review and correction of administrative action relating to customs matters. The

[889] United States' second written submission, paras. 104-106.
[890] United States' reply to Panel question No. 142.
[891] European Communities' oral statement at the second substantive meeting, para. 98.
[892] European Communities' oral statement at the second substantive meeting, para. 99.

second sentence of Article X:3(b) of the GATT 1994 goes on to provide that such tribunals or procedures must "be *independent* of the agencies entrusted with administrative enforcement". In the Panel's understanding, when read in the light of the qualification contained in the second sentence of Article X:3(b) of the GATT 1994, it is clear that the tribunals or procedures for the prompt review and correction of administrative action required by the first sentence of that Article must be "independent" of the agencies whose administrative action is the subject of review.

7.520 The Panel notes that the term "independent" is defined as "not subject to the control or influence of another; not associated with another (often larger) entity".[893] On the basis of the ordinary meaning of the term "independent", the Panel understands that the judicial, arbitral or administrative tribunals or procedures for the review and correction of administrative action relating to customs matters under Article X:3(b) of the GATT 1994 must be free of control or influence from the administrative agencies whose decisions are the subject of review. More specifically, we understand that such tribunals and procedures must have the ability to conduct the review provided for under Article X:3(b) of the GATT 1994 with freedom in institutional and practical terms from interference by the agencies whose decisions are being reviewed.[894]

Level of review

7.521 Regarding the level of review of administrative action to be provided under Article X:3(b) of the GATT 1994, the Panel notes that the terms of Article X:3(b) of the GATT 1994 indicate that the review required under Article X:3(b) of the GATT 1994 need not necessarily be the *last* instance review to which an administrative decision is subject because the decisions of tribunals and procedures that undertake the review demanded by Article X:3(b) of the GATT 1994 may be the subject of a further appeal. In this regard, the Panel notes that Article X:3(b) of the GATT 1994 requires that the decisions of judicial, arbitral or administrative tribunals and procedures for the prompt review and correction of administrative action must "govern the practice of [administrative] agencies *unless an appeal is lodged with a court or tribunal of superior jurisdiction*" (emphasis added). In our view, this indicates that Article X:3(b) of the GATT 1994 contemplates the possibility that there may be appeals to bodies of "superior jurisdiction" from the decisions of the tribunals and procedures that provide the review required under Article X:3(b) of the GATT 1994. Moreover, the Panel notes that Article X:3(b) of the GATT 1994 refers to the possibility that the "central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts". In the Panel's view, the possibility that the central administration of an agency whose administrative action is the subject of review may seek further review of that action in another proceeding confirms the view that the review anticipated by Article X:3(b) of the GATT 1994 is not necessarily the last instance review to which the administrative action in question may be subject.

7.522 The Panel also notes that both parties to this dispute are of the view that that provision relates to *first* instance review.[895] Article X:3(b) of the GATT 1994 applies to review by the tribunals or

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[893] *Black's Law Dictionary*, 1999, p. 774.

[894] The Panel understands that, in some WTO Members, administrative action relating to customs matters may be reviewed by the same administrative authority that originally took the action. For example, two of the third parties to this dispute – namely, Japan and Chinese Tapei – indicated that administrative action may first be reviewed by the same administrative authority that took the action originally: Japan's reply to Panel question No. 105 and Chinese Taipei's reply to Panel question No. 105. Such review would not qualify under Article X:3(b) of the GATT 1994 because, in such cases, the reviewing body is not independent of the administrative authority whose decision is the subject of review.

[895] United States' reply to Panel question No. 121; European Communities' second written submission, para. 225. The Panel understands first instance review to mean review by the first body or procedure to consider a decision after that decision has been taken. By definition, we understand that first instance review may be the subject of subsequent review by higher level review bodies or procedures.

procedures that are "independent" of the agencies whose administrative action is the subject of review. This indicates that Article X:3(b) of the GATT 1994 applies to first instance review by tribunals and procedures that are independent from the administering authority that took the administrative action that is the subject of review.

"Tribunals or procedures"

7.523 The parties have raised the question in this dispute of the significance that should be attached, if any, to the fact that Article X:3(b) of the GATT 1994 refers to judicial, arbitral or administrative "tribunals" and "procedures" in the plural in all three authentic versions of the GATT 1994.

7.524 The Panel notes that the obligation to maintain or institute "tribunals or procedures" in the plural is imposed upon the "contracting party" in the singular. This suggests to the Panel that Article X:3(b) of the GATT 1994 does not oblige a Member to set up a single tribunal or procedure for the review of all administrative action. Further, in the Panel's view, this indicates that Article X:3(b) of the GATT 1994 expressly contemplates the possibility that there may be multiple tribunals or procedures in place in a single WTO Member for the review of administrative action.

7.525 The existence of the possibility under Article X:3(b) of the GATT 1994 that there may be multiple review tribunals or procedures in place in a single WTO Member for the review of administrative action may be explained in a number of different ways. One possible explanation could be that the various review tribunals or procedures maintained or instituted in a WTO Member have different areas of substantive competence. Other possible explanations could be that the various tribunals or procedures have responsibility for different geographical areas and/or for administrative action emanating from different administrative bodies.[896] In the Panel's view, the use of the plural when referring to the tribunals and procedures to which Article X:3(b) of the GATT 1994 relates does not clearly indicate which, if any, of these possible explanations is the appropriate interpretation of Article X:3(b) of the GATT 1994.

"Such agencies"

7.526 Article X:3(b) of the GATT 1994 provides that the decisions of judicial, arbitral or administrative tribunals and procedures should "govern the practice, of *such agencies*" (emphasis added). The question has arisen in the context of this dispute as to the significance, if any, that should be ascribed to the reference to "such agencies" in the plural in Article X:3(b) of the GATT 1994.

7.527 One possible interpretation is that the use of the plural when referring to "agencies" in Article X:3(b) of the GATT 1994 merely flows from the fact that the review tribunals and procedures required under Article X:3(b) of the GATT 1994 are also referred to in the plural. To recall, the second sentence of Article X:3(b) of the GATT 1994 provides that: "Such tribunals or procedures ... shall govern the practice of, such agencies". Further, the Panel notes that the use of the plural to refer to administrative agencies in the second sentence of Article X:3(b) of the GATT 1994 contrasts with the reference to agencies in the singular in the proviso at the end of that Article. In particular, the proviso in Article X:3(b) of the GATT 1994 states that: "*Provided* that the central administration of *such agency* may take steps to obtain review of the matter in another proceeding ..." (emphasis added).

7.528 The Panel considers that it is difficult to know what significance should be attached, if any, to the reference to agencies in the plural in the second sentence of Article X:3(b) of the GATT 1994,

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[896] In fact, the United States itself submits 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) of the GATT 1994: United States' reply to Panel question No. 38.

especially in light of the reference to the same term in the singular in the proviso to that Article. Nevertheless, the Panel is of the view that it is clear from the terms of Article X:3(b) of the GATT 1994 that the decisions of judicial, arbitral or administrative tribunals and procedures for the prompt review and correction of administrative action must govern the practice of the agency whose action was the subject of review by a tribunal or procedure in a particular case.

"Govern the practice of"

7.529 Article X:3(b) of the GATT 1994 requires that "tribunals or procedures [for the review and correction of administrative action relating to customs matters] 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). Regarding the ordinary meaning of the term "govern", the Panel notes that it is defined as "control, influence, regulate, or determine (a person, another's action, the course or issue of events)".[897] When considered in the light of this definition, it would appear that the term "govern" in Article X:3(b) of the GATT 1994 means that the decisions of judicial, arbitral or administrative tribunals and procedures, established for the review of administrative action relating to customs matters, must have binding effect.

7.530 The Panel recalls its conclusion in paragraph 7.528 that, under Article X:3(b) of the GATT 1994, the decisions of judicial, arbitral or administrative tribunals and procedures for the prompt review and correction of administrative action must govern the practice of the agency whose action was the subject of review by a tribunal or procedure in a particular case. Accordingly, when considered in the light of the ordinary meaning of the term "govern", the Panel understands that the decisions of tribunals or procedures for the review and correction of administrative action relating to customs matters must bind the administrative agency whose action is the subject of review pursuant to Article X:3(b) of the GATT 1994.

7.531 Moreover, it is the Panel's view that the ordinary meaning of the term "govern" when read in conjunction with the term "practice"[898] in Article X:3(b) of the GATT 1994 implies a prospective notion. More specifically, the Panel understands that the binding effect of a decision of a tribunal or procedure for the review and correction of administrative action means that the administrative agency whose action was the subject of review by a tribunal or procedure pursuant to Article X:3(b) of the GATT 1994 is bound by that decision with respect to the specific factual situation that was the subject of the review but also with respect to identical factual situations that may arise in the future concerning identical legal issues.[899]

[897] *The New Shorter Oxford English Dictionary*, 1993, p. 1122.

[898] The Panel notes that the Appellate Body's interpretation of the term "practice" in the context of the reference to "subsequent practice" under Article 31.3(c) of the *Vienna Convention* in *Japan – Alcoholic Beverages II* would appear to be relevant in this regard. In particular, the Appellate Body stated that "practice" entails the following features: "a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern...": Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 13.

[899] The Panel notes that Article X:3(b) of the GATT 1994 also provides that the decisions of tribunals and procedures for the review and correction of administrative action "shall be implemented by" administrative agencies. In the Panel's view, this means that, in addition to being bound to follow a decision of a tribunal or procedure for the review and correction of administrative action (which flows from the term "govern" in Article X:3(b) of the GATT 1994), the administrative agency is also obliged to *apply* the decision in practice, in accordance with the requirement to "implement" such decisions in Article X:3(b) of the GATT 1994.

Context

Legal relationship between Articles X:3(a) and X:3(b) of the GATT 1994

7.532 The Panel has been called upon to determine the relationship, if any, between Articles X:3(b) and X:3(a) of the GATT 1994, for the purposes of the interpretation of Article X:3(b) of the GATT 1994.

7.533 The Panel notes that Article X:3(b) of the GATT 1994 itself does not contain an express textual link between that Article and the obligation of uniform administration in Article X:3(a) of the GATT 1994. In this regard, Article X:3(b) of the GATT 1994 contrasts with Article X:3(c) of the GATT 1994, which, like Article X:3(b) of the GATT, is contained in Article X of the GATT, but which explicitly cross-refers to Article X:3(b).[900]

7.534 In considering whether or not a link between Articles X:3(a) and X:3(b) of the GATT 1994 can be inferred, the Panel notes that in *India – Patents*, the Appellate Body stated that the principles of treaty interpretation in the *Vienna Convention* "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[901] Given the absence of an express reference to Article X:3(a) of the GATT 1994 in Article X:3(b) of the GATT 1994, which contrasts with the explicit cross-reference between Articles X:3(b) and X:3(c) of the GATT 1994, the Panel considers that it is not possible to infer that the drafters of the GATT intended that the obligation to provide tribunals or procedures for the purpose of the prompt review and correction of administrative action relating to customs matters under Article X:3(b) of the GATT 1994 is to be read as simultaneously requiring uniform administration in accordance with Article X:3(a) of the GATT 1994. Indeed, such an interpretation would amount to merging different requirements that are currently contained in separate sub-paragraphs of Article X of the GATT 1994.

7.535 Nevertheless, the Panel does not wish to suggest that Articles X:3(a) and X:3(b) of the GATT 1994 are completely unrelated. In fact, we consider that they are related in the same way that each and every provision of the WTO Agreements is related. More specifically, we consider each provision of the WTO Agreements must be interpreted and applied in a manner that is harmonious with the interpretation and application of other provisions of the WTO Agreements. The Panel considers that, in practical terms, this means that the various provisions of the WTO Agreements should not be interpreted and applied in a manner that would undermine and/or circumvent any other provision of the WTO Agreements.[902]

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[900] Article X:3(c) of the GATT 1994 provides that: "The provisions of subparagraph (b) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement. Any contracting party employing such procedures shall, upon request, furnish the CONTRACTING PARTIES with full information thereon in order that they may determine whether such procedures conform to the requirements of this subparagraph."

[901] Appellate Body Report, *India – Patents (US)*, para. 45. Similarly, in interpreting the relationship between various provisions of the SCM Agreement, the Appellate Body stated that "we attach significance to the absence of any textual link between Article 21.3 reviews and the *de minimis* standard set forth in Article 11.9.": Appellate Body Report, *US – Carbon Steel*, para. 69.

[902] In this regard, the Panel notes that, in *Argentina – Footwear (EC)*, the Appellate Body stated that the provisions of the WTO Agreements "are all provisions of one treaty, the WTO Agreement. They entered into force as part of that treaty at the same time. They apply equally and are equally binding on all WTO Members.... a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously.": Appellate Body Report, *Argentina – Footwear (EC)*, para 81.

Article X of the GATT 1994

7.536 In addition, the Panel recalls its observation in the context of its interpretation of Article X:3(a) of the GATT 1994 in paragraphs 7.107 and 7.108 above that a due process theme underlies Article X of the GATT 1994. In the Panel's view, this theme suggests that an aim of the review provided for under Article X:3(b) of the GATT 1994 is to ensure that a trader who has been adversely affected by a decision of an administrative agency has the ability to have that adverse decision reviewed by a tribunal or procedure that is independent from the agency that originally took the adverse decision.

Overall summary and conclusions

7.537 In the Panel's view, neither the ordinary meaning of the various terms of Article X:3(b) of the GATT 1994 nor the legal context for the interpretation of Article X:3(b) of the GATT 1994 provide a clear answer to the specific question the Panel has been called upon to address – namely, whether Article X:3(b) of the GATT 1994 requires the decisions of the judicial, arbitral or administrative tribunals or procedures for the review and correction of administrative action relating to customs matters to govern the practice of *all* the agencies entrusted with administrative enforcement *throughout the territory* of a particular Member.

7.538 Having said that, the Panel considers that the interpretation of the relevant terms of Article X:3(b) of the GATT 1994 does clearly indicate that the decisions of the review tribunals and procedures required under Article X:3(b) of the GATT 1994 may be the subject of an appeal. Further, the Panel recalls the parties' understanding that Article X:3(b) of the GATT 1994 relates to first instance review.[903] In this regard, the Panel does not consider that it would be reasonable to infer that first instance independent review tribunals and bodies, whose jurisdiction in most legal systems is normally limited in substantive and geographical terms, should have the authority to bind all agencies entrusted with administrative enforcement throughout the territory of a Member. Further, the Panel recalls that the due process theme that underlies Article X of the GATT 1994, in which Article X:3(b) of the GATT 1994 is contained, indicates that Article X:3(b) of the GATT 1994 exists to ensure that a trader who has been adversely affected by a decision of an administrative agency has the ability to have that adverse decision reviewed. In the Panel's view, to require decisions issued by judicial, arbitral or administrative tribunals or procedures pursuant to Article X:3(b) of the GATT 1994 to apply and have effect throughout the territory of a Member would go beyond what is demanded by this due process objective.

7.539 The factors set out in the preceding paragraph, taken in conjunction, incline us to conclude that Article X:3(b) of the GATT 1994 does not necessarily mean that the decisions of the judicial, arbitral or administrative tribunals or procedures for the review and correction of administrative action relating to customs matters must govern the practice of *all* the agencies entrusted with administrative enforcement *throughout the territory* of a particular Member.

4. Specific alleged violations of Article X:3(b) of the GATT 1994

(a) Summary of the parties' arguments

7.540 The **United States** submits 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. The United States further submits that the decisions of such tribunals or procedures

[903] United States' reply to Panel question No. 121; European Communities' second written submission, para. 225.

must govern the practice of that Member's agencies – that is, in the context of this case, the European Communities' agencies, as a whole, not just individual member States' agencies – and that the Member's agencies must implement those decisions.[904]

7.541 The United States also submits that the provision of tribunals or procedures by individual member States within the European Communities does not satisfy the European Communities' obligation under Article X:3(b) of the GATT 1994, as the decisions of these tribunals or procedures have effect only within the respective member States and not on EC agencies generally.[905] More specifically, the United States submits that the European Communities does not fulfil its obligation under Article X:3(b) of the GATT 1994 because each of the multiple review tribunals it provides renders decisions that govern the practice only of a subset of agencies entrusted with administrative enforcement within a particular region in the European Communities but does not "govern the practice" of the European Communities' agencies in another member State.[906] The United States submits that, given that the ECJ is not set up to be an EC customs court, what is left is a patchwork of member State customs authorities whose work is reviewed by member State courts, with no EC tribunal nor procedure providing prompt review and correction of customs decisions in a way that would bring about uniformity in the administration of EC customs law.[907]

7.542 The **European Communities** argues that the United States has focused entirely on the absence of an EC customs court.[908] According to the European Communities, Article X:3(b) of the GATT 1994 is neutral as to the means which WTO Members employ for ensuring prompt review. In other words, that provision does not prescribe the specific bodies or instruments, structure and time periods which WTO Members should use to ensure prompt review of customs decisions.[909] The European Communities submits that the Appellate Body's interpretation of Article X of the GATT 1994 in *EC – Poultry* and *EC – Bananas III* further supports the view that that Article does not impose any specific structure for the review system.[910] The European Communities argues that, moreover, the panel in *EC – Trademarks and Geographical Indications (US)* confirmed that the European Communities may comply with its obligation under Article X:3(b) of the GATT 1994 through the courts of its member States.[911] According to the European Communities, where the tribunals of the member States provide judicial review of decisions taken by the member States' customs authorities, they act as organs of the European Communities, through which the European Communities discharges its obligations under Article X:3(b) of the GATT 1994.[912]

7.543 In response, the **United States** contends that the European Communities appears to reason that, if the individual member States are complying with their obligations under Article X:3(b) of the GATT 1994, then the European Communities is necessarily complying with its obligation under Article X:3(b) of the GATT 1994. However, the fact that the same tribunal may be considered, as a matter of internal EC law, as both a member State tribunal and an EC tribunal does not mean that it meets the requirements of Article X:3(b) of the GATT 1994 with respect to both the European Communities and the member States' obligations. The United States concludes that, as a matter of EC law, a tribunal may serve a dual function as both a member State tribunal and an EC tribunal. However, this does not mean that it also satisfies both the member State's obligation under Article X:3(b) of the GATT 1994 and the European Communities' obligation under Article X:3(b) of

[904] United States' reply to Panel question No. 35.
[905] United States' reply to Panel question No. 35.
[906] United States' second written submission, para. 102.
[907] United States' first written submission, para. 153.
[908] European Communities' oral statement at the second substantive meeting, para. 5.
[909] European Communities' oral statement at the first substantive meeting, para. 62.
[910] European Communities' first written submission, para. 455.
[911] European Communities' first written submission, para. 456.
[912] European Communities' oral statement at the first substantive meeting, para. 70 referring to Panel Report, *EC – Geographical Indications and Trademarks (US)*, para. 7.725.

the GATT 1994.[913] The United States clarifies that its complaint in this dispute is not about the review bodies provided by each of the member States. The United States has not argued, for example, that review at the member State level breaches member States' obligations under Article X:3(b) of the GATT 1994. Rather, the thrust of the United States' claim is that existing review at the member State level alone lacks features that would enable it to satisfy the European Communities' obligations under Article X:3(b) of the GATT 1994.[914] In particular, the United States submits that the appellate mechanism in each member State is different, and the decisions of each member State's courts apply only in the territory of that member State.[915] The United States submits that this arrangement does not meet the European Communities' obligation under Article X:3(b) of the GATT 1994.[916]

7.544 In response, the **European Communities** notes that decisions of the member States' customs authorities, which are based on EC law, are reviewed by the national courts and tribunals acting as the ordinary judges for EC law. Customs decisions adopted by the EC institutions are reviewed by the ECJ (and, in some cases, by the Court of First Instance) through direct actions or preliminary rulings on validity. The European Communities submits that there is, therefore, a complete system of judicial protection in place.[917] The European Communities submits that, further, in the European Communities, the review of customs decisions currently takes place as part of the general system for review of administrative decisions in the field of administrative law or tax law.[918] According to the European Communities, Article X:3(b) of the GATT 1994 does not require a central court or procedure to appeal administrative decisions in customs matters.[919] The European Communities also notes that, with respect to direct appeals to the Court of First Instance and to the ECJ, there is no prior administrative review of administrative decision adopted by the EC institutions on customs matters. Pursuant to Article 230(5) of the EC treaty, an action for annulment must be brought directly to the relevant Court within two months from the notification or the publication of the challenged decision.[920] With respect to the Court of First Instance and the ECJ, the European Communities submits that, pursuant to the second paragraph of Article 230 of the EC Treaty, the grounds of illegality which parties may plead in an action for annulment are lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application or misuse of powers.[921]

7.545 With respect to review by the ECJ pursuant to Article 230 of the EC Treaty, the **United States** submits that Article 230 of the EC Treaty pertains to review by the ECJ of the legality of acts adopted by EC institutions, including the Commission and Council. The United States notes that, in the context of the present dispute, the United States has not raised any issue with respect to ECJ review pursuant to Article 230 of the EC Treaty.[922]

(b) Analysis by the Panel

7.546 The main question for the Panel's consideration here is whether or not the European Communities is fulfilling its obligations under Article X:3(b) of the GATT 1994. In this regard, the Panel recalls that the United States alleges that decisions of the tribunals or procedures in the European Communities do not "govern the practice of" all the "agencies entrusted with administrative

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[913] United States' comments on the European Communities' reply to Panel question No. 169.
[914] United States' reply to Panel question No. 142.
[915] United States' first written submission, para. 133.
[916] United States' oral statement at the first substantive meeting, paras. 62 - 64.
[917] European Communities' first written submission, para. 465.
[918] European Communities' oral statement at the first substantive meeting, para. 61.
[919] European Communities' first written submission, para. 465.
[920] European Communities' reply to Panel question No. 70(a).
[921] European Communities' reply to Panel question No. 71(a) and (b).
[922] United States' reply to Panel question No. 143.

enforcement" in the European Communities in violation of Article X:3(b) of the GATT 1994.[923] The Panel also notes that the United States exclusively argues that the European Communities is in violation of Article X:3(b) of the GATT 1994; it does not claim that the individual member States of the European Communities are also in violation of Article X:3(b) of the GATT 1994. In addition, the United States does not challenge the review of acts jointly adopted by the European Parliament and the Council, the European Commission and the European Central Bank, or by the Council itself or the Parliament where the act is intended to produce legal effects *vis-à-vis* third parties pursuant to Article 230 of the EC Treaty.[924]

(i) Discharge of the European Communities' obligation under Article X:3(b) of the GATT 1994

7.547 A preliminary issue that has arisen with respect to the United States' claim that the European Communities is in violation of Article X:3(b) of the GATT 1994 is whether the European Communities is able to discharge its obligations under that provision through the member States. In particular, the United States argues that the provision of judicial, arbitral or administrative tribunals or procedures for the review and correction of administrative action by individual member States within the European Communities does not satisfy the European Communities' obligation under Article X:3(b) of the GATT 1994.

7.548 The Panel notes that the European Communities is a Member of the WTO.[925] In addition, all the constituent member States of the European Communities are Members of the WTO. The member States were either founding Members of the GATT[926]; they acceded to the GATT[927]; or they have since acceded to the WTO[928]. Therefore, it would appear that the European Communities as well as its constituent member States concurrently bear the obligations contained in the WTO Agreements, including those contained in Article X:3(b) of the GATT 1994. However, the Panel recalls that the United States exclusively argues that the European Communities is in violation of Article X:3(b) of the GATT 1994; it does not claim that the member States of the European Communities are also in violation of Article X:3(b) of the GATT 1994. Therefore, the Panel will confine its attention to the question of whether or not the European Communities is in violation of Article X:3(b) of the GATT 1994.

7.549 In this regard, the Panel recalls that the EC Treaty establishes a common commercial policy which, according to Article 133(1) of the EC Treaty, is based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy, and measures to protect trade such as those to

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[923] United States' reply to Panel question No. 35.

[924] United States' oral statement at the second substantive meeting, para. 85; United States' closing statement at the second substantive meeting, paras. 8-9.

[925] Articles IX, XI and XIV of the WTO Agreement recognise the European Communities as a WTO member. Article IX:1 of the WTO Agreement provides *inter alia* that: "Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States". Article XI:1 of the WTO Agreement provides that: "The contracting parties to GATT 1947 as of the date of entry into force of this agreement, and the European Communities, which accept this Agreement and the Multilateral Trade agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO." Article XIV:1 of the WTO Agreement provides that: "This Agreement shall be open for acceptance, by signature or otherwise, by contracting parties to GATT 1947, and the European Communities, which are eligible to become original Members of the WTO in accordance with Article XI of this Agreement."

[926] Belgium, France, Luxembourg, the Netherlands and the United Kingdom.

[927] Austria, Cyprus, Czech Republic, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Malta, Poland, Portugal, Slovak Republic, Spain and Sweden.

[928] Estonia, Latvia, Lithuania, Slovenia.

be taken in the event of dumping or subsidies. The ECJ has confirmed that the customs union and the common commercial policy, which includes administration of customs matters, fall within the exclusive competence of the European Communities.[929] One of the main instruments comprising the legislative framework for customs administration in the European Communities is the Community Customs Code, which covers, *inter alia*, review of decisions on customs matters.

7.550 The European Communities has informed the Panel that, where the tribunals of the member States provide review of decisions taken by the member States' customs authorities, they act as organs of the European Communities[930] and that the consideration of the member State courts as bodies entrusted with the ordinary application of EC law is based on the existence of the preliminary reference procedure to the ECJ and on the basic principles of primacy of EC law and direct effect.[931] We find support for this view in Article 243 of the Community Customs Code, which provides in relevant part that:

> 1. Any person shall have the right to appeal against decisions taken by the customs authorities which relate to the application of customs legislation, and which concern him directly and individually.
>
> ...
>
> The appeal must be lodged in the Member State where the decision has been taken or applied for.
>
> 2. The right of appeal may be exercised:
>
> (a) initially before the customs authorities designated for that purpose by the Member States;
>
> (b) subsequently, before an independent body, which may be a judicial authority or an equivalent specialized body, according to the provisions in force in the Member States.

7.551 The Panel understands that Article 243 of the Community Customs Code requires review of customs decisions to be undertaken, initially, by the customs authorities designated for that purpose by the member States and subsequently, before an independent body, which may be a judicial authority or an equivalent specialized body, according to the provisions in force in the member States.

7.552 It is the Panel's view that the European Communities may comply with its obligations under Article X:3(b) of the GATT 1994 through organs in its member States. We consider that this follows from the fact that Article X:3(b) of the GATT 1994 does not contain any requirements regarding the institutional structure of the review mechanism required by that Article other than the requirement that the review be undertaken by judicial, arbitral or administrative tribunals.[932]

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

[930] European Communities' oral statement at the first substantive meeting, para. 70.

[931] European Communities' reply to Panel question No. 169.

[932] The Panel considers that this also follows from Article 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, which provides that:

"1. The conduct of any State organ shall be considered as an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

7.553 In the light of the foregoing, the Panel concludes that the authorities in the member States – including customs authorities designated for that purpose by the member States and independent bodies, such as a judicial authority or an equivalent specialized body – act as organs of the European Communities when they review and correct administrative action taken pursuant to EC customs law.

(ii) Review of administrative action relating to customs matters by authorities in the member States

7.554 The United States challenges review by member State authorities under Article X:3(b) of the GATT 1994 on the ground that the decisions of such authorities only have effect within the respective member States. Indeed, there appears to be no dispute between the parties that this is a fact.[933] However, the Panel recalls that, in paragraph 7.539 above, it found that the decisions of tribunals or procedures established or maintained pursuant to Article X:3(b) of the GATT 1994 need not necessarily govern the practice of *all* the agencies entrusted with administrative enforcement *throughout the territory* of a particular Member, as has been asserted by the United States. Therefore, in the context of this dispute, the Panel considers that the European Communities does not violate Article X:3(b) of the GATT 1994 merely because the decisions regarding review of administration action relating to customs matters, which are taken by authorities in the member States acting as organs of the European Communities, do not apply and have effect throughout the territory of the European Communities.

7.555 On the basis of the explanations provided by the European Communities, which have not been disputed by the United States, we understand that, pursuant to Article 243(2)(b) of the Community Customs Code, member States have in place independent, administrative bodies and/or judicial bodies that perform the function of reviewing and correcting administrative action relating to customs matters. Specifically, the European Communities has indicated that, in the case of Spain, Italy, Ireland and Denmark, administrative review is carried out by a body that is independent of the agencies entrusted with administrative enforcement.[934] The European Communities has also submitted that the courts of all member States review and correct the legality of the administrative decisions relating to customs matters.[935]

(iii) Summary and conclusions

7.556 In summary, the Panel considers that, for the purposes of its obligations under Article X:3(b) of the GATT 1994, the authorities in the member States – namely, independent administrative and judicial bodies – act as organs of the European Communities when they review and correct administrative action taken pursuant to EC customs law. As a matter of fact, decisions of such member State authorities only have effect within the respective member States. However, the Panel considers that the European Communities does not violate Article X:3(b) of the GATT 1994 merely because the decisions regarding review of administration action relating to customs matters, which are taken by authorities in the member States acting as organs of the European Communities, do not apply to all agencies in the European Communities and do not have effect throughout the territory of the European Communities. The Panel recalls that the United States does not allege inconsistency with any other aspect of Article X:3(b) of the GATT 1994. Therefore, the Panel concludes that the European Communities is not in violation of Article X:3(b) of the GATT 1994.

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2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

[933] Indeed, the European Communities appears to acknowledge as much in European Communities' first written submission, para. 454; European Communities' second written submission, para 99; European Communities' second written submission, para. 224.

[934] European Communities' reply to Panel question No. 69(b).

[935] European Communities' reply to Panel question No. 69(a).

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 The Panel *concludes* that:

(a) With respect to the Panel's terms of reference in the context of the United States' claim under Article X:3(a) of the GATT 1994:

(i) The Panel's terms of reference authorise the Panel to consider the manner of administration by the national customs authorities of the member States of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff, the TARIC and related measures in the areas of customs administration specifically identified in the United States' request for establishment of a panel.

(ii) Article 221 of the Community Customs Code, including Article 221(3), is not covered by any of the areas of customs administration specifically identified in the United States' request for establishment of a panel. Therefore, Article 221(3) of the Community Customs Code is outside the Panel's terms of reference.

(iii) Under its terms of reference, the Panel is precluded from considering "as such" challenges of the design and structure of the EC system of customs administration as a whole and also the design and structure of the EC system in the areas of customs administration that have been specifically identified in the United States' request for establishment of a panel.

(b) With respect to the United States' claim of non-uniform administration of the Common Customs Tariff in the area of tariff classification in violation of Article X:3(a) of the GATT 1994:

(i) The European Communities is not currently administering the Common Customs Tariff regarding the tariff classification of network cards for personal computers in a manner that is non-uniform in violation of Article X:3(a) of the GATT 1994. Therefore, the Panel finds no violation of Article X:3(a) of the GATT 1994 with respect to the tariff classification of network cards for personal computers.

(ii) The tariff classification of drip irrigation products does not amount to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994. Therefore, the Panel finds no violation of Article X:3(a) of the GATT 1994 with respect to the tariff classification of drip irrigation products.

(iii) The United States has not proved that the tariff classification of unisex articles or shorts amounts to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994.

(iv) The administrative process leading to the tariff classification of blackout drapery lining amounts to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994. Therefore, the Panel finds a violation of Article X:3(a) of the GATT 1994 with respect to the tariff classification of blackout drapery lining.

(v) The tariff classification of liquid crystal display monitors with digital video interface amounts to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994. Therefore, the Panel finds a violation of Article X:3(a) of the GATT 1994 with respect to the tariff classification of liquid crystal display monitors with digital video interface.

(vi) The United States has not proved that customs authorities in the member States have failed to treat as binding BTI issued by customs authorities in other member States and that such failure amounts to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994.

(vii) The United States has not proved that the refusal to withdraw the revocation of BTI by the UK customs authorities with respect to the tariff classification of Sony PlayStation2 in the context of the *Sony PlayStation2* case amounts to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994.

(viii) The United States has not proved that the interpretation and application of the amended explanatory notes to the Common Custom Tariff concerning camcorders in the context of the *Camcorders* case amounts to non-uniform administration in violation of Article X:3(a) of the GATT 1994.

(c) With respect to the United States' allegations of non-uniform administration of the Community Customs Code and the Implementing Regulation in the area of customs valuation in violation of Article X:3(a) of the GATT 1994:

(i) The United States has not proved that differences between member States regarding the manner in which royalties are apportioned to the customs value of identical goods imported by the same company exist that amount to non-uniform administration of Article 32(1)(c) of the Community Customs Code within the meaning of Article X:3(a) of the GATT 1994.

(ii) The imposition by customs authorities in some member States of a form of prior approval with respect to the successive sales provision, which is inconsistent with EC customs laws and which is not imposed by customs authorities in other member States means that the European Communities does not administer its customs law concerning successive sales – in particular, Article 147(1) of the Implementing Regulation – in a uniform manner in violation of Article X:3(a) of the GATT 1994.

(iii) The European Communities is not currently administering Article 29(3)(a) of the Community Customs Code concerning vehicle repair costs covered under warranty in a manner that violates the uniformity obligation in Article X:3(a) of the GATT 1994. Therefore, the Panel finds no violation of Article X:3(a) of the GATT 1994 with respect to the administration of Article 29(3)(a) of the Community Customs Code concerning vehicle repair costs covered under warranty.

(iv) The United States has not proved that the manner of administration of Article 29 of the Community Customs Code and Article 143(1)(e) of the Implementing Regulation concerning the circumstances in which parties are to be treated as "related" for customs valuation purposes is non-uniform

among the member States within the meaning of Article X:3(a) of the GATT 1994.

(d) With respect to the United States' allegations of non-uniform administration of the Community Customs Code and the Implementing Regulation in the area of customs procedures in violation of Article X:3(a) of the GATT 1994:

(i) The Panel finds no violation of Article X:3(a) of the GATT 1994 with respect to the manner of administration of Article 78(2) of the Community Customs Code regarding the requirements imposed for audit procedures following the release of products for free circulation in the European Communities.

(ii) The Panel finds no violation of Article X:3(a) of the GATT 1994 with respect to the substantive differences in penalty laws between member States.

(iii) The United States has not proved that the manner of administration of Article 133 of the Community Customs Code and Articles 502(3) and 552 of the Implementing Regulation regarding processing under customs control is non-uniform in violation of Article X:3(a) of the GATT 1994.

(iv) The United States has not proved that the administration of Articles 263 – 267 of the Implementing Regulation regarding local clearance procedures is non-uniform in violation of Article X:3(a) of the GATT 1994.

(e) With respect to the United States' claim of violation of the obligation to provide prompt review and correction of administrative action relating to customs matter in Article X:3(b) of the GATT 1994, the Panel finds no violation.

8.2 Therefore, the Panel *concludes* that the European Communities has acted inconsistently with the requirements of Articles X:3(a) of the GATT 1994 and, thus, nullified or impaired benefits accruing to the United States. Accordingly, the Panel *recommends* that the Dispute Settlement Body request the European Communities to bring itself into conformity with respect to:

(a) the administration of the Common Custom Tariff regarding the administrative process leading to the tariff classification of blackout drapery lining;

(b) the administration of the Common Customs Tariff regarding the tariff classification of liquid crystal display monitors with digital video interface;

(c) the administration of Article 147(1) of the Implementing Regulation regarding the imposition by customs authorities in some member States of a form of prior approval with respect to the successive sales provision in the context of customs valuation.