

***EUROPEAN COMMUNITIES - SELECTED CUSTOMS MATTERS***

***(WT/DS315)***

**FIRST WRITTEN SUBMISSION OF THE  
UNITED STATES OF AMERICA**

**July 12, 2005**

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	PROCEDURAL BACKGROUND .....	3
III.	FACTUAL BACKGROUND .....	4
IV.	SUMMARY OF ARGUMENT .....	9
V.	ARGUMENT .....	15
A.	Article X:3(a) of the GATT 1994 Requires the EC to Administer Its Customs Law in a Manner That Is Uniform Across the Territory of the EC .....	15
B.	The EC Fails to Administer Its Customs Law in a Uniform Manner with Respect to Classification, Valuation, and Customs Procedures .....	19
1.	Customs Classification .....	19
2.	Customs Valuation .....	40
3.	Customs Procedures .....	49
C.	The Commission, Acting Through the Customs Code Committee, Does Not Provide Uniformity to the Administration of EC Customs Law, as Required by Article X:3(a) of the GATT 1994 .....	64
D.	The EC Does Not Provide Tribunals or Procedures for the Prompt Review and Correction of Administrative Action Relating to Customs Matters, as Required by Article X:3(b) of the GATT 1994 .....	72
1.	The Opportunity for Review and Correction on a Member State-by-Member State Basis Does Not Fulfill the EC's Obligation Under Article X:3(b) .....	76
2.	Availability of Ultimate Recourse to the ECJ Does Not Satisfy the Requirements of Article X:3(b) of the GATT 1994 .....	80
VI.	CONCLUSION .....	83
	Table of Exhibits .....	following page 83

## I. INTRODUCTION

1. This dispute raises two questions: First, does the European Communities (“EC”) administer its customs laws, regulations, judicial decisions and administrative rulings of general application in a uniform, impartial and reasonable manner, as required by Article X:3(a) of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”)? Second, does the EC have in place judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters, as required by Article X:3(b) of the GATT 1994?

2. The answer to both questions is, No. Indeed, with respect to the first question, the most vocal critics of the EC frequently have been the EC’s own officials. Thus, in a speech this past March, the EC’s Commissioner for Taxation and Customs Union (its highest ranking official on customs matters) stated, “Some of the current customs procedures are so complicated that they penalise traders who are doing business in more than one [member State]. In some cases, the current [Community Customs] Code leaves some margin of interpretation which may result in divergent application of the common rules.”<sup>1</sup> That is precisely the concern that prompted the United States to pursue this dispute.

3. Instead of administering its basic customs law (the Community Customs Code, the Commission regulation implementing the Code, the Common Customs Tariff, and related measures) in a uniform way, the EC administers it in 25 different ways. As administration is the responsibility of each member State, questions of classification and valuation may be subject to as many as 25 different interpretations, and traders are subject to 25 different procedural regimes

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<sup>1</sup>László Kovács, Commissioner for Taxation and Customs Union, Speech delivered at the International Conference on the Modernised Customs Code, p.1 (Mar. 9-11, 2005) (Exh. US-1).

for bringing goods into free circulation in the EC. The net result is an administration that distorts rather than facilitates trade and that imposes transaction costs that should not exist where administration is uniform.

4. This problem is magnified by the absence of EC tribunals or procedures for the prompt review and correction of administrative action relating to customs matters. Like the administration of EC customs measures, appeals from customs decisions are a matter for each member State. As a result, there are 25 different appellate regimes in the EC, none of which can yield a decision with EC-wide effect, unless and until a question is referred to the Court of Justice of the European Communities (“the ECJ”). To the extent that a member State’s appeals tribunals affirm, reverse, or modify the decisions of its customs authorities, they may well reinforce the applicability of particular interpretations of EC measures within a particular geographic region of the EC. The first opportunity that the EC itself provides for a tribunal to review and correct administrative action is at the ECJ. However, it may take years for a question of EC law raised by an administrative decision to be referred to and decided by the ECJ, making that opportunity for review and correction less than prompt. Thus, while individual member States may provide opportunities for review and correction of customs actions, the EC itself fails to meet its obligation to provide for prompt review and correction, as required by Article X:3(b).

5. In responding to the request of the United States for the establishment of a panel in this dispute, the EC identified the European Commission and the ECJ as the entities in place to enforce “harmonised customs rules and institutional and administrative measures . . . to prevent

divergent practices.”<sup>2</sup> Yet, as the United States will show, neither of these entities fulfills the obligations of the EC under Articles X:3(a) and (b). As a systemic matter, the EC does not afford traders access to either entity so as to ensure uniform administration of customs laws and prompt review and correction of customs decisions. In short, the problem is an *absence* of mechanisms to achieve what Articles X:3(a) and (b) require the EC to achieve.

## II. PROCEDURAL BACKGROUND

6. On September 21, 2004, the United States requested consultations with the EC pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) and Article XXII:1 of the GATT 1994, with respect to

(a) the non-uniform administration by the European Communities of laws, regulations, judicial decisions and administrative rulings of the kind described in Article X:1 of the GATT 1994 pertaining to the classification and valuation of products for customs purposes and to requirements, restrictions or prohibitions on imports, and

(b) the failure of the European Communities to institute judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters.

This request was circulated to WTO Members on September 27, 2004 (WT/DS315/1). Six other Members (Argentina, Australia, Brazil, India, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu) notified the United States and the EC of their desire to be joined in the consultations, pursuant to Article 4.11 of the DSU. However, the EC rejected each of those requests, asserting that none of the Members had a substantial trade interest in the consultations. Pursuant to the request of the United States, the United States and the EC held

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<sup>2</sup>*Dispute Settlement Body: Minutes of the Meeting Held on 21 March 2005*, WT/DSB/M/186, para. 29.

consultations on November 16, 2004. These consultations provided helpful clarification, but failed to resolve the dispute.

7. On January 13, 2005, the United States requested the establishment of a panel pursuant to Article 6 of the DSU (WT/DS315/8). The Dispute Settlement Body (“DSB”) considered this request at its meeting on January 25, 2005, at which time the EC objected to the establishment of a panel.

8. On March 21, 2005, the United States renewed its request for the establishment of a panel. The Panel was established at the DSB meeting of March 21, 2005, with the following standard terms of reference:

To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS315/8, the matter referred to the DSB by the United States in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.<sup>3</sup>

9. The Panel was constituted on May 27, 2005.<sup>4</sup>

### **III. FACTUAL BACKGROUND**

10. The administration of customs law is a process involving discrete decisions on matters including classification, valuation, origin, and treatment of goods pending release for free circulation in the territory of a WTO Member. Even after imported goods are released for free circulation, additional customs decisions pertaining to the goods may have to be made. This may

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<sup>3</sup>*Dispute Settlement Body: Minutes of the Meeting Held on 21 March 2005*, WT/DSB/M/186, para. 30; *Note by the Secretariat: Constitution of the Panel Established at the Request of the United States*, WT/DS315/9, circulated 30 May 2005, para. 2.

<sup>4</sup>*Note by the Secretariat: Constitution of the Panel Established at the Request of the United States*, WT/DS315/9, circulated 30 May 2005, para. 4.

be the case, for example, if goods are re-exported or if it is determined that information supplied to customs authorities on importation of the goods was erroneous.

11. Generally, it is the importer that proposes to the customs authorities how imported goods should be treated for customs purposes. The importer supplies the authorities with a declaration identifying how it believes the goods should be classified, how valued, and so forth. It then is the responsibility of the customs authorities either to accept the importer's declaration or to accord a different treatment to the goods.

12. In the EC, the basic elements of the customs system are laid out in three pieces of legislation. The first is the Community Customs Code ("CCC"), which takes the form of a regulation of the Council of the European Communities ("the Council") (*i.e.*, the main decision-making body of the EC, consisting of ministers of each of the EC's 25 member States).<sup>5</sup> As is plain from the recitals introducing the CCC, it is designed to be a comprehensive regulation, setting out in one place the rules governing the customs treatment of goods that enter into the territory of the EC. The CCC consists of 253 articles, organized under nine titles, covering: general provisions; factors on the basis of which duties are to be applied (*i.e.*, classification, origin, and valuation); provisions on the treatment of goods entering the EC pending assignment of a customs-approved treatment or use; customs-approved treatment or use; provisions on goods leaving the EC; privileged operations (*e.g.*, special cases that may warrant relief from customs duties); provisions on the customs debt incurred by traders (*e.g.*, how customs debt is incurred,

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<sup>5</sup>Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, including all annexes thereto, as amended ("Community Customs Code" or "CCC") (Exh. US-5).

secured, and ultimately collected); appeals from customs decisions; and final provisions (including, importantly, establishment of the Customs Code Committee, which will be discussed below).

13. The second key piece of customs legislation is the CCC Implementing Regulation (“Implementing Regulation” or “CCCIR”).<sup>6</sup> The Implementing Regulation is a regulation of the Commission of the European Communities (“the Commission”) (*i.e.*, the EC institution responsible for implementing common EC policies). Consisting of 915 articles organized in five parts, along with 113 annexes, it elaborates on provisions set forth in the CCC. As explained in its recitals, the CCCIR is designed to consolidate in one regulation customs implementing provisions that, prior to the CCCIR’s initial adoption in July 1993, had been scattered across numerous regulations and directives.

14. The third key piece of customs legislation is the Common Customs Tariff (“the Tariff”). The Tariff is, in fact, provided for by Article 20(3) of the CCC, which delineates the components of the Tariff (principally, the nomenclature applicable to the classification of goods, the rates of duty applicable to goods, preferential tariff measures, and measures suspending the application of tariffs).<sup>7</sup> What currently is referred to as the Tariff was initially promulgated as a regulation issued by the Council in 1987 (Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff). Annex I to that regulation is entitled

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<sup>6</sup>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 (“Implementing Regulation” or “CCCIR”) (Exh. US-6).

<sup>7</sup>CCC, Art. 20(3) (Exh. US-5).



“Combined Nomenclature” and lays out the EC’s tariff schedule. Pursuant to Article 12 of the original Tariff regulation, the Commission is required to publish the updated Tariff annually in the *Official Journal of the European Union*.

15. Separately, and also pursuant to the original Tariff regulation, the Commission publishes annually the Integrated Tariff of the European Communities (known as “TARIC” from its French title, “tarif intégré de la Communauté”). As explained in the introduction to the TARIC, it is “designed to show the various rules applying to specific products when imported into the customs territory of the Community or, in some cases, when exported from it.”<sup>8</sup> The TARIC incorporates the Harmonized System (the international convention-based system on which the Tariff is based), the Combined Nomenclature, and specific provisions of EC law (*e.g.*, tariff quotas, preferences, duty suspensions).<sup>9</sup>

16. The foregoing elements of EC customs legislation (as well as related measures) are administered separately by the customs authorities in each of the 25 member States of the EC. There is no EC customs authority to speak of. Nor, as we will explain in this submission, is there an EC institution to systematically reconcile divergences that may arise among member States in the administration of EC customs legislation. There is a Customs Code Committee (“the Committee”), established in accordance with Articles 247a and 248a of the CCC. The

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<sup>8</sup>Integrated Tariff of the European Communities (TARIC), established by virtue of Article 2 of Council Regulation (EEC) 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, Introduction, *Official Journal of the European Union* C103, p. 7 (Apr. 30, 2003) (Exh. US-7).

<sup>9</sup>Given the volume of the Tariff, and given the fact that the present dispute is not concerned with the contents of the Tariff, we refer to it by way of background but do not attach it as an exhibit.

Committee consists of representatives of each of the member States and is chaired by a representative of the Commission. It operates through various sections (*e.g.*, customs valuation section, tariff and statistical nomenclature section, origin section). Ostensibly, one of the functions of the Committee is to reconcile divergences that emerge in member State administration of EC customs law. However, for reasons we discuss below,<sup>10</sup> serious institutional constraints prevent it from fulfilling that function on a systematic basis.

17. Under the EC system, where a trader disputes a decision by a member State’s customs authorities, its only recourse is to appeal that decision through the courts or other review tribunals of the member State. There is no EC forum to which a trader can appeal a decision by a member State’s customs authorities, including a decision that diverges from decisions of other member State authorities. A question of EC law ultimately can be referred to the ECJ. However, the decision whether to refer a question generally is in the discretion of the member State court. Only a court from which there is no further appeal (*i.e.*, a court of last resort) is *required* to refer a question of EC law to the ECJ.<sup>11</sup>

18. In practical terms, what the EC system of customs law administration means to traders is that when they bring goods into the EC, they do so through one of 25 different customs regimes. This fact has real costs associated with it. A trader may face higher or lower duties, depending,

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<sup>10</sup>*See infra*, Section V.C.

<sup>11</sup>Consolidated Version of the Treaty Establishing the European Community, *reprinted in Official Journal of the European Communities* C325/33, Art. 234 (Dec. 24, 2002) (“EC Treaty”) (Exh. US-42). Article 234 of the EC Treaty confers jurisdiction on the ECJ “to give preliminary rulings concerning . . . the validity and interpretation of acts of the institutions of the Community. . . .” A court other than a court of last resort may refer a question to the ECJ “if it considers that a decision on the question is necessary to enable it to give judgment.” *Id.*

for example, on how a given member State administers the EC Tariff and rules on customs valuation. The potential liability a trader may have to bear for violating EC customs law is another cost that will vary depending on the member State through which it enters its goods. As the Commission itself has acknowledged, “Economic operators have complained for a long time about the lack of harmonisation with regard to penalties against infringements of the customs rules. Specific offences may be considered in one Member State as a serious criminal act possibly leading to imprisonment, whilst in another Member State the same act may only lead to a small – or even no – fine.”<sup>12</sup> Of course, a trader may seek to minimize duties and penalties by its choice of member State through which to enter its goods. However, the fact of planning shipping to take account of non-uniform administration of customs law itself carries costs. For example, non-uniform administration may force a trader to choose between higher duties and higher transportation costs, depending on the member State through which it imports its goods. Moreover, because the EC itself does not provide a tribunal or procedure for prompt review and correction of customs decisions, leaving this instead to each member State, the burden to traders of non-uniform administration is not alleviated through the appeals process.

#### **IV. SUMMARY OF ARGUMENT**

19. As a Member of the WTO in its own right, that is, separately from its constituent member States, the EC has an obligation to provide for administration of its customs laws and to provide for the prompt review and correction of administrative action relating to customs matters in the

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<sup>12</sup>European Commission, Directorate-General for Taxation and Customs Union, TAXUD/447/2004 Rev 2, *An Explanatory Introduction to the modernized Customs Code*, p. 13 (Feb. 24, 2005) (Exh. US-32); *see infra*, para. 101.

manner prescribed by GATT Articles X:3(a) and (b), respectively. In this submission, we demonstrate that it has failed to do so. In particular, the EC's customs laws are administered by 25 different authorities, among which divergences inevitably occur, and the EC does not provide for the systematic reconciliation of such divergences. Moreover, the EC does not provide an EC forum for the prompt review and correction of customs decisions. Individual member State tribunals perform the function of review and correction which, we will show, does not fulfill the obligation of *the EC* under Article X:3(b).

20. We begin (in section V.A) by identifying the legal provision relevant to the first part of our complaint, Article X:3(a) of the GATT 1994. We demonstrate, in particular, that the obligation of uniform administration under Article X:3(a) includes uniform administration across the territory of a WTO Member. For example, 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.

21. We then demonstrate how the EC fails to meet the Article X:3(a) standard in three areas of customs law administration: classification, valuation, and customs procedures. With respect to classification, the central question is whether products will be classified in the same way regardless of the member State through which they enter the territory of the EC. In section V.B.1, we show that with 25 different member State authorities interpreting the Tariff, divergent classifications can and do occur. This problem is compounded by the EC's failure to maintain a mechanism for systematic reconciliation of such divergences. The EC institution that might be expected to reconcile divergent classification decisions – the Commission acting through the

Customs Code Committee – does not do so on a systematic basis. The Commission’s relationship to member State authorities does not lend itself to the routine identification of divergences. On the other hand, where a trader is aware that a divergence exists, it has no right to have the Commission reconcile that divergence. And, even when a question of divergent classification does get placed on the agenda of the Customs Code Committee, there is no guarantee of a decision at all, let alone a decision within a specified time period.

22. In our discussion of classification, we focus in particular on the EC’s so-called “binding tariff information” (“BTI”) system. The Code provides for the issuance by member State authorities of advance rulings – BTI – informing traders of the classification that will be assigned to particular goods on importation. In theory, one might expect the BTI system to impose a degree of uniformity in the area of classification, in the sense that BTI issued by one member State would govern the classification of the goods at issue throughout the EC. But, this is not the case. The 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.

23. To illustrate the problem of non-uniform administration of EC customs classification law, we examine two recent cases of divergent classification. The first involves a specialized textile product, known as blackout drapery lining. In this case, German customs authorities issued BTI that conflicted with BTI issued by other member States. Yet, after five years, the conflict remains unreconciled. The second illustration involves liquid crystal display flat monitors that contain a digital video interface. The issue here is whether the products should be classified as

computer monitors or video monitors. As in the case of blackout drapery lining, this case involves one member State – in this case, the Netherlands – diverging from others, and the EC failing to reconcile the difference.

24. In section V.B.2, we turn to the administration of EC law on customs valuation.

Uniformity of administration in this area is critical, since the vast majority of tariffs in the EC are applied on an *ad valorem* basis. Yet, as in the area of classification, decisions on valuation are made by 25 different member State administrations with no mechanism in place to reconcile differences. Indeed unlike classification, the law on valuation does not even provide for a system of advance rulings that might, if properly designed and applied across member States, impose a degree of uniformity.

25. Differences in administration of EC law on customs valuation were catalogued by the EC's own Court of Auditors in a special report issued in December 2000, and we review certain of the highlights from that report. The critical question when it comes to valuation is what methodology to use in determining the customs value of goods on importation. The general rule is that customs value is based on the transaction value, *i.e.*, the price actually paid or payable for the goods when sold for export. However, value may be calculated in a different manner in certain circumstances, for example, when the buyer and seller are related entities. And, even when transaction value is used, it may be appropriate to make additions to the transaction price or to exclude certain elements of cost from the price. These rules are spelled out in the Code and Implementing Regulation but, as in the area of classification, the potential exists for divergent interpretations. For example, as the EC Court of Auditors discusses, different member States have taken different positions on whether the costs of automobile repair that are covered by a

seller's warranty should be deducted from customs value.<sup>13</sup> Similarly, in one illustration we discuss, different member States have taken different positions on whether an importer is related to the non-EC companies that manufacture its products and, accordingly, on how those products should be valued. As in the area of classification, the fact that divergences occur is not problematic in and of itself. What is problematic is the inability of EC institutions to reconcile divergences on a systematic basis.

26. The third area we explore, in section V.B.3, is customs procedures. This is a vast area, covering hundreds of articles in the CCCIR. We do not purport to catalogue every aspect of customs procedures in which member State practices diverge. Rather, we focus on a few key areas as a way to illustrate the more general point. For example, we call attention to the question of penalties for customs law violations, an area in which it is well recognized that, as a matter of EC law, different member States are entitled to impose, and do impose, different sanctions.

27. We also call attention to the procedure known as "processing under customs control." This is a procedure for imported materials that are processed into some further manufactured product. Under the procedure, the duty (if any) is assessed on the further manufactured product rather than the imported materials. Eligibility to use the procedure is determined according to certain tests set out in EC law and, as we show, different member States apply these tests differently, which can have a significant commercial impact.

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<sup>13</sup>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 *Official Journal of the European Communities* C84, paras. 73-74 (Mar. 14, 2001) ("Court of Auditors Valuation Report") (Exh. US-14).

28. Finally, we discuss differences in administration of what are known as “local clearance procedures” – *i.e.*, procedures whereby importers may cause goods to enter into free circulation in the EC at their place of business, rather than presenting the goods for inspection by the customs authorities. However, as we demonstrate, 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.

29. In section V.C, we demonstrate that the Customs Code Committee – the EC institution ostensibly tasked with ensuring that there is uniformity in the administration of EC customs law – does *not* provide for the systematic reconciliation of divergent member State administration of customs law. A trader does not have a right to have an alleged divergence considered by the Committee. Even where a question of divergent member State administration does get put before the Committee, there is no guarantee that the process will yield a decision. The members of the Committee include representatives of the very States whose practices may be diverging and, as Commission officials themselves have acknowledged, obtaining the majorities necessary to make decisions in the Committee will be more difficult with 25 member State representatives than with 15.<sup>14</sup>

30. We conclude our argument, in section V.D, by demonstrating that the EC fails to meet its obligation under Article X:3(b) of the GATT 1994 to provide an EC forum for the prompt review and correction of administrative action relating to customs matters. We first show that the

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<sup>14</sup>*See, e.g.*, Michael Lux, Head of Customs Legislation Unit, European Commission, *EU enlargement and customs law: What will change?*, Taxud/463/2004, Rev. 1, p. 4 (June 14, 2004) (“[O]rganising a majority decision will be more difficult, since one will have to negotiate with 25 – instead of 15 – Member States.”) (Exh. US-15).



“tribunals or procedures” required by Article X:3(b) must be tribunals or procedures whose decisions have effect throughout the territory of the WTO Member.

31. Yet, in the EC, the only tribunals or procedures available for prompt review and correction of customs decisions are tribunals or procedures at the member State level. There is no EC forum to which a trader can promptly appeal a decision by a member State authority, even where that decision diverges from decisions of other member State authorities. This fragmentation of the review process compounds the lack of uniformity in the administration of customs law in the first instance and is thus inconsistent with Article X:3(b).

## V. ARGUMENT

### A. Article X:3(a) of the GATT 1994 Requires the EC to Administer Its Customs Law in a Manner That Is Uniform Across the Territory of the EC

32. The first question raised by this dispute is whether the EC administers its customs law in a uniform manner, as required by Article X:3(a) of the GATT 1994. Article X:3(a) states:

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

Paragraph 1 of Article X, in turn, refers to

[l]aws, regulations, judicial decisions and administrative rulings of general application, made effective by any 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.

33. To answer the question presented, it is necessary to understand what is meant by uniform administration.<sup>15</sup> In accordance with the customary rules of treaty interpretation of public international law, a treaty must be interpreted in accordance with the ordinary meaning to be given to its terms in their context and in the light of the object and purpose of the treaty.<sup>16</sup> Accordingly, we start by considering the ordinary meaning of the terms at issue here – “administer in a uniform . . . manner” – in their context and in light of the object and purpose of the GATT 1994.

34. The ordinary meaning of “administer,” as relevant here, is, “carry on or execute (an office, affairs, etc.).”<sup>17</sup> 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.”<sup>18</sup> Thus, the question is whether the EC manages, carries on, or executes its customs law in a manner that is the same in different places or circumstances, or at different times. Of particular relevance in this dispute is uniformity with respect to different places. As we will demonstrate in the sections that follow, the EC fails to manage, carry on, or

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<sup>15</sup>The United States is not taking a position in this submission on whether the EC’s administration of its customs law is impartial or reasonable. With respect to Article X:3(a), the claim of the United States in this submission focuses exclusively on the requirement of uniform administration.

<sup>16</sup>*Vienna Convention on the Law of Treaties*, done at Vienna, May 23, 1969, 1155 U.N.T.S. 331, 8 ILM 679 (Jul. 1969) (“VCLT”), Article 31(1).

<sup>17</sup>*The New Shorter Oxford English Dictionary*, Vol. I at 28 (1993) (Exh. US-3).

<sup>18</sup>*The New Shorter Oxford English Dictionary*, Vol. II at 3488 (1993) (Exh. US-4).

execute its customs law in a manner that is the same in different places. Rather, the manner of administration varies from member State to member State.

35. The Appellate Body and prior panels have had only a handful of occasions to consider Article X:3(a). In most disputes in which they have been raised, Article X:3(a) claims have been presented almost as afterthoughts to the principal claims presented (often involving antidumping and countervailing duty measures), and panels have dismissed them with little discussion.<sup>19</sup> One of the few panels to probe this provision in any detail was the panel in *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather* (“*Argentina – Hides*”).<sup>20</sup> The panel report in that dispute supports the proposition that the requirement of uniform administration in Article X:3(a) includes administration that is uniform across the territory of a WTO Member.

36. As relevant here, *Argentina – Hides* involved a claim by the EC that Argentina had breached its obligation of uniform, impartial and reasonable application of customs measures through a regulation that authorized representatives of the Argentinian tanning industry to be present during customs’ export verification procedures of raw hides.<sup>21</sup> In particular, the EC

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<sup>19</sup>See, e.g., Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, adopted Jan. 9, 2004, para. 7.292; Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted Aug. 23, 2001, paras. 7.267, 7.277; Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted Feb. 1, 2001, paras. 6.50–6.51.

<sup>20</sup>WT/DS155/R, adopted Feb. 16, 2001.

<sup>21</sup>Panel Report, *Argentina – Hides*, para. 4.162.

argued that Argentina’s administration of its customs laws was not uniform, given the different treatment of raw hides as compared with other products.<sup>22</sup>

37. In examining the EC’s claim, the panel first rejected the proposition that the requirement of uniformity in Article X:3(a) refers only to uniform treatment as between different WTO Members. Article X:3(a) is not merely a most-favored-nation (“MFN”) provision, requiring nothing more than uniform treatment of identical products regardless of their origin or destination.<sup>23</sup>

38. The panel went on to examine the word “uniform” as used in Article X:3(a). It referred to the same dictionary definition quoted above: “Of one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times.”<sup>24</sup> Relying on this definition, the panel found it “obvious” that the uniformity requirement in Article X:3(a) means that

Customs laws should not vary, that every exporter and importer should be able to expect treatment of the same kind, in the same manner both over time *and in different places* and with respect to other persons. Uniform administration requires that Members ensure that their laws are applied consistently and predictably and is not limited, for instance, to ensuring equal treatment with respect to WTO Members. That would be a substantive violation properly addressed under Article I. 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*.<sup>25</sup>

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<sup>22</sup>Panel Report, *Argentina – Hides*, para. 4.173.

<sup>23</sup>Panel Report, *Argentina – Hides*, paras. 11.67-11.68, 11.76.

<sup>24</sup>Panel Report, *Argentina – Hides*, para. 11.80 (quoting *The New Shorter Oxford English Dictionary*, Vol. II at 3488 (1993)).

<sup>25</sup>Panel Report, *Argentina – Hides*, para. 11.83 (emphases added).

39. As we will demonstrate in the following sections, the EC does not administer its customs law in a manner that is uniform across different places in the EC, as Article X:3(a) requires. It administers its customs law in a manner that varies from member State to member State and fails to provide an EC mechanism for the systematic reconciliation of such variations.

**B. The EC Fails to Administer Its Customs Law in a Uniform Manner with Respect to Classification, Valuation, and Customs Procedures**

**1. Customs Classification**

40. An area in which divergent administration of EC customs law is especially troubling is customs classification. To determine the duty that applies to a good on its importation into the EC (as well, potentially, as other customs treatment) it is essential to determine the good's classification. Classification is determined in the EC according to the Combined Nomenclature, included in the Common Customs Tariff. Because customs processing is the responsibility of each member State's authorities, each of those authorities must interpret the Tariff as it applies to the goods presented. The Tariff contains certain interpretive rules, which necessarily are written at a high level of generality, as they cannot anticipate every particular situation that may be presented.

41. Not surprisingly, when 25 different authorities are tasked with interpreting a complex nomenclature system, the possibilities for divergent interpretations are substantial. This is particularly the case where new technologies generate new products that do not yet have a clearly established subheading in the Common Customs Tariff, where a product is potentially classifiable under more than one subheading, or where a product's classification may depend in

part on its intended use, which may be perceived differently from member State to member State, based on different customs, practices, etc.

42. The difficulties presented are well-described in an often cited opinion by the ECJ’s Advocate General in the case of *Wiener S.I. GmbH v. Hauptzollamt Emmerich*.<sup>26</sup> That case asked the EC’s high court to decide whether certain apparel imported ten years earlier should be classified as “nightdresses” if they are intended mainly, but not exclusively, to be worn in bed.<sup>27</sup> In advising the Court on how to respond to this question, the Advocate General took the opportunity to discuss the general problem of the ECJ being overwhelmed with referrals of customs classification questions from member State courts. He referred to the “numerous occasions this Court has interpreted the successive regulations on the Common Customs Tariff with a view to achieving a uniform interpretation of their provisions, indispensable not only because they are pieces of Community legislation directly applicable in all Member States but also in order to safeguard the uniform application of the Common Customs Tariff and thus to avoid deflections of trade.”<sup>28</sup> Later in his opinion, the Advocate General described the different types of customs classification questions that have come before the Court and observed that “[a] large majority of cases concern the classification of a specific product, and in effect require the

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<sup>26</sup>*Wiener S.I. GmbH v. Hauptzollamt Emmerich*, Case C-338/95, Opinion of the Advocate-General, 1997 ECR I-06495 (July 10, 1997) (“*Wiener*, Op. AG”) (Exh. US-16).

<sup>27</sup>*Wiener*, Op. AG, para. 2 (Exh. US-16).

<sup>28</sup>*Wiener*, Op. AG, para. 9 (Exh. US-16); *see also id.*, para. 40 (“deflections of trade [due to divergent classifications] are inconsistent with the very idea of a common customs tariff”).

Court itself to classify the product.”<sup>29</sup> After describing the problem, the Advocate General went on to recommend that both member State courts and the ECJ exercise a greater degree of self-restraint in, respectively, referring and addressing questions of customs classification.<sup>30</sup>

43. The Advocate General’s opinion in *Wiener* is relevant here for two reasons. First, it illustrates the complexity of customs classification – and thus, the susceptibility to divergent interpretations – as evidenced by the fact that a sufficiently high number of classification questions had been put to the Court to cause the Advocate General to perceive a general problem and urge national courts to exercise greater self-restraint. Second, it illustrates that the ECJ as an institution is ill-equipped to bring uniformity to the administration of the Tariff, given the fact-intensive nature of classification questions; the answer the Court gives to a particular classification question often will be of limited value, as it will be confined to the product before the Court and cannot anticipate questions that might be raised in the future with respect to similar but not identical products.<sup>31</sup> The Advocate General suggested that the Commission is better suited to that role.<sup>32</sup> Though, for reasons we will discuss presently and in section V.C *infra*, the Commission processes currently in place do not fill that role either.

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<sup>29</sup>*Wiener*, Op. AG, para. 29 (Exh. US-16).

<sup>30</sup>*Wiener*, Op. AG, para. 18 (Exh. US-16).

<sup>31</sup>*See Wiener*, Op. AG, para. 16; *id.*, para. 30 (quoting P. Vander Schueren, “Customs classification: One of the cornerstones of the Single European market, but one which cannot be exhaustively regulated,” 28 CMLRev 855, 856 (1991)) (Exh. US-16); *id.*, para. 41 (“it is clear that the Court’s contribution to uniform application of the Common Customs Tariff by deciding on the classification of particular products will always be minimal”).

<sup>32</sup>*See Wiener*, Op. AG, para. 41 (Exh. US-16).

44. Neither the Code, nor any other provision of EC law of which we are aware, requires one member State to follow another member State's interpretation of the Tariff. If one member State classifies a product under a particular tariff subheading, there is no requirement that other member States classify it under the same subheading. *A fortiori*, there is no requirement that other member States follow the rationale of the first member State in classifying *similar* goods. That member States do from time to time diverge in their interpretation of the Tariff is evident.<sup>33</sup> Indeed, the EC evidently was quite candid about this in its dispute with Thailand and Brazil over the classification of frozen boneless chicken cuts. According to the recently issued report of the panel in that dispute, the EC acknowledged that certain member States had issued binding tariff information classifying the product at issue there one way, but asserted that "this interpretation was not followed in other EC customs offices."<sup>34</sup>

45. To see the systemic inability of the Commission to bring about uniformity in the administration of EC customs classification law, it is instructive to consider one of the main tools available to traders to gain a degree of certainty with respect to the customs treatment of goods,

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<sup>33</sup>We discuss below two recent cases in which member State interpretations of the Tariff have diverged. *See infra*, paras. 66-76 (discussing cases of LCD flat panel monitors and blackout drapery lining). Another recent, prominent case concerned the classification of network cards for personal computers. *See generally Peacock AG v. Hauptzollamt Paderborn*, Case C-339/98, Opinion of the Advocate-General, 2000 ECR I-08947, paras. 7-8 (Oct. 28, 1999) (describing divergence in classification of network cards for personal computers between Denmark, Netherlands, and United Kingdom, on the one hand, and Germany, on the other) (Exh. US-17). In another recent case of which we are aware, customs authorities in France and Spain differed over whether a drip irrigation product should be classified as an irrigation system or a pipe.

<sup>34</sup>Panel Report, *European Communities - Customs Classification of Frozen Boneless Chicken Cuts* (Complaint by Brazil), WT/DS269/R, WT/DS286/R, circulated May 30, 2005, para. 7.260 (currently on appeal).



thereby enabling them to conduct their transactions in the most beneficial way. The Code provides for an instrument known as binding tariff information (“BTI”). BTI is a form of advance ruling that lets a trader know how particular goods will be classified upon importation into the territory of the member State issuing the BTI. We will first explain how the BTI system operates and then demonstrate how the operation of that system evinces a lack of uniformity in administration from member State to member State.

46. The provisions on BTI are set forth in Article 12 of the Code and Articles 5 through 14 of the Implementing Regulation. Under the BTI system, an importer or other interested party applies to a member State’s customs authorities for issuance of BTI confirming the classification that will be assigned to particular goods on importation into the territory of that member State. The application may be made by the “holder” of the BTI (*i.e.*, the person in whose name it is issued), or by another “applicant” (defined as any person who applies for BTI).<sup>35</sup> The holder or other applicant chooses the member State to which it will make the application. In particular, the application may be filed in the member States where the BTI is proposed to be used or in the member State where the applicant is established.<sup>36</sup> Thus, an importer established in (for instance) Germany may seek BTI from Germany, even though the goods at issue are expected to be entered into the EC through Italy and France.

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<sup>35</sup>CCCIR, Art. 5 (Exh. US-6).

<sup>36</sup>CCCIR, Art. 6.1 (Exh. US-6).

47. Once issued, BTI is “binding on the customs authorities as against the holder of the information.”<sup>37</sup> 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.”<sup>38</sup> However, in reality member States do not always treat BTI issued by other member States as binding,<sup>39</sup> and the BTI system does not ensure uniform administration of customs classifications. Moreover, pre-existing BTI issued by one member State does not prevent an applicant from trying to persuade a second member State that the classification in the original BTI was mistaken. In issuing the new BTI, nothing in the Code or the Implementing Regulation requires the authorities of the member State to adhere to the findings contained in the previously issued BTI.

48. Ordinarily, BTI is valid for a period of six years.<sup>40</sup> However, it is possible for BTI to expire sooner, under circumstances described in the Code and Implementing Regulation. Where BTI turns out to be “based on inaccurate or incomplete information from the applicant,” it may be annulled.<sup>41</sup> In that case, the BTI is treated as having been void *ab initio*. In addition, the Code describes three circumstances under which BTI may be revoked or amended:

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<sup>37</sup>CCC, Art. 12(2) (Exh. US-5).

<sup>38</sup>CCCIR, Art. 11 (Exh. US-6). It may be that this obligation also derives from Article 12(2) of the Code itself.

<sup>39</sup>*See infra*, para. 76 (discussing trade association survey, in which respondents noted that “[b]inding tariff information from German authorities is still not accepted by other EU countries, especially Greece and Portugal”).

<sup>40</sup>CCC, Art. 12(4) (Exh. US-5).

<sup>41</sup>CCC, Art. 12(4) (Exh. US-5).

(i) where a regulation is adopted and the information no longer conforms to the law laid down thereby;

(ii) where it is no longer compatible with the interpretation of one of the nomenclatures referred to in Article 20(6) [of the Code]:

– at Community level, by reason of amendments to the explanatory notes to the combined nomenclature or by a judgment of the Court of Justice of the European Communities,

– at the international level, by reason of a classification opinion or an amendment of the explanatory notes to the Nomenclature of the Harmonized Commodity Description and Coding System, adopted by the World Customs Organization . . . ;

(iii) where it is revoked or amended in accordance with Article 9, provided that the revocation or amendment is notified to the holder.<sup>42</sup>

49. The first two of these three scenarios refer to circumstances in which action by an EC entity (the Commission or the ECJ) or by the World Customs Organization (“WCO”) may result in revocation or amendment of BTI. The third scenario refers to other circumstances, which may have nothing to do with action by EC entities or the WCO. In particular, Article 12(5)(a)(iii) makes reference to Article 9 of the Code. Article 9, in turn, requires revocation or amendment of BTI (or other “decision favourable to the person concerned”) where “one or more of the conditions laid down for its issue were not or are no longer fulfilled.”<sup>43</sup> Article 9 permits revocation “where the person to whom it is addressed fails to fulfil an obligation imposed on him under that decision.”

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<sup>42</sup>CCC, Art. 12(5)(a) (Exh. US-5).

<sup>43</sup>CCC, Art. 9(1) (Exh. US-5).

50. Where BTI is revoked under clause (ii) or (iii) of Article 12(5)(a), the holder generally may rely on a six-month transition period, “provided that he concluded binding contracts for the purchase or sale of the goods in question, on the basis of the [BTI], before [the measure in question] was adopted.”<sup>44</sup> Where BTI is revoked under clause (i), the regulation resulting in its revocation may provide for a transition period.<sup>45</sup>

51. Having laid out the basic parameters of the BTI system, we can now examine the ways in which that system fails to achieve uniform administration with respect to classification. The first way is that it results in BTI shopping. The opportunity for BTI shopping is a function of the fact that (1) BTI issuance is a responsibility of member State authorities; (2) BTI is binding on customs authorities where invoked by the holder, but is not binding on the holder, in the sense that it need not be invoked by the holder; (3) BTI is specific to each holder, even if the same applicant applies for BTI on behalf of several different holders; and (4) the Implementing Regulation expressly allows the applicant to pick and choose among member States according to where the BTI will be used and where the applicant is established.

52. This set of factors creates an opening for a number of different scenarios. A given applicant may apply for BTI concurrently in several different member States, relying only on those results that are favorable to it. The applicant might apply on its own behalf, as “holder,” in each of the several member States, or it might apply on behalf of a different holder in each member State. Alternatively, an applicant may apply for BTI in one member State and, if it is

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<sup>44</sup>CCC, Art. 12(6) (Exh. US-5).

<sup>45</sup>CCC, Art. 12(6) (Exh. US-5).

not favorable, simply decline to invoke it and apply for BTI in another member State. Or, having received unfavorable BTI in one member State, the applicant may ignore it, not apply for BTI in another State, and simply attempt to import merchandise through another member State asserting the more favorable classification without relying on BTI at all.

53. In theory, the Commission should be able to control BTI shopping by exercising its authority to reconcile inconsistent BTI. Thus, Article 9 of the Implementing Regulation provides that “[w]here different binding information exists . . . the Commission shall, on its own initiative or at the request of the representative of a Member State” take steps to eliminate the difference.<sup>46</sup> However, there are several impediments to the Commission performing this function. First, it may be difficult to detect whether, in fact, “different binding information exists.” As Article 10 of the Implementing Regulation makes clear, BTI is particular to the holder. Thus, it is possible for two different holders to possess conflicting BTI for identical merchandise. That “different binding information exists” would not be readily apparent in that case. Even where the same holder possesses conflicting BTI, the existence of the conflict may not be readily apparent to the Commission or the representative of a member State. The holder of the BTI may choose not to bring the conflict to the attention of the Customs Code Committee. Other persons interested in having the difference reconciled (*e.g.*, competitors of the BTI holder) would not necessarily be aware of the conflict.

54. Conversely, where a holder or other interested person is aware of conflicting BTI and wants to see the conflict resolved, it has no right to have the matter put before the Customs Code

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<sup>46</sup>CCCIR, Art. 9 (Exh. US-6).

Committee for resolution within a prescribed period of time. The decision to put matters before the Committee is entirely within the hands of the Commission and the member State representatives on the Committee.<sup>47</sup>

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

56. The EC does have in place an electronic database available to the public for searching BTI. However, the existence of that database does not readily facilitate the reconciliation of conflicting BTI. The database can be found on the Internet, and we attach for reference the search page that one encounters on accessing the database.<sup>48</sup>

57. The database permits searches by issuing country, BTI reference number (*i.e.*, the unique number assigned to each BTI), nomenclature code, keyword (*i.e.*, search terms entered into the database either by the Commission or by member State authorities), and product description. In theory, one might be able to use the database to determine whether different member States had issued conflicting BTI for identical products. However, as a practical matter, such a search is

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<sup>47</sup>*See infra*, paras. 127-129.

<sup>48</sup>European Commission, Taxation and Customs Union Directorate-General, BTI Consultation Page, [http://europa.eu.int/comm/taxation\\_customs/dds/cgi-bin/ebtiquer?Lang=EN](http://europa.eu.int/comm/taxation_customs/dds/cgi-bin/ebtiquer?Lang=EN), last consulted on July 10, 2005 (Exh. US-19).

extremely difficult, if not impossible. One way to conduct such a search would be to use the product description field. However, to identify conflicting BTI this way, the applicant or applicants would have to have used the same description of the goods at issue in the different member States at issue. That condition is unlikely to occur, not least due to language differences from member State to member State. The “keywords” field in the database might enable a searcher to overcome some differences in language and product description. However, even a keyword search is limited in its ability to enable the searcher to determine whether identical products have been assigned different tariff classifications by different member States. Once the searcher calls up a given keyword or series of keywords and isolates all BTI containing those keywords, he still must compare the product descriptions in those BTI, which may well differ from BTI to BTI depending on language and identity of the applicant.

58. We understand that the version of the BTI database accessible to the Commission and member State authorities contains certain confidential information not available to the public. In particular, that version of the database apparently includes the name of the holder of BTI and commercial information supplied by the holder or other applicant.<sup>49</sup> In theory, this may make it somewhat easier to detect conflicting BTI. However, that is likely to be the case only where the same holder possesses divergent BTI. Where different holders possess divergent BTI, it is not apparent that the BTI database would make it any easier for the Commission or member States to detect the inconsistency.<sup>50</sup>

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<sup>49</sup>See CCCIR, Art. 8(3) and Annex 1 (Exh. US-6).

<sup>50</sup>The EC in fact acknowledged the difficulty of monitoring divergences in BTI issued by different member States in the *EC – Frozen Boneless Chicken Cuts* dispute. The recently issued

59. Moreover, the inability to achieve uniform application of the Tariff through the BTI system is further demonstrated by the relative autonomy that each member State has with respect to revocation or amendment. The recent ECJ decision in *Timmermans* illustrates this point.<sup>51</sup>

60. *Timmermans* involved two cases in which the Netherlands customs authorities had issued BTI classifying goods (glass chandeliers in one case, and preserved fruits and nuts in the other) one way and later, on further review, rescinded the BTI after determining that the goods should have been classified differently. In both cases, the rescission was prompted by a change in the authorities' interpretation of EC law, as opposed to the revelation of new or different facts. The question before the Court was as follows:

‘Does Article 9(1) of the Community Customs Code, read in conjunction with Article 12(5)(a)(iii) thereof, provide the customs authorities with a legal basis for withdrawing a [BTI] where those authorities change the interpretation given therein of the legal provisions applicable to the tariff classification of the goods concerned, even where the change is made within the six-year period referred to?’<sup>52</sup>

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report of the panel in that dispute notes the EC's statement that “roughly 30,000 BTIs are issued each year, that there were substantial problems communicating BTIs as a result of a lack of interoperability of computer systems and that the EC Commission only had one official and two administrative assistants monitoring all issues with respect to the first 40 chapters of the [Combined Nomenclature] during the period prior to 2001.” Panel Report, *European Communities - Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/R, WT/DS286/R, circulated May 30, 2005, para. 7.264 (currently on appeal).

<sup>51</sup>*Timmermans Transport & Logistics BV v. Inspecteur der Belastingdienst - Douanedistrict Roosendaal and Hoogenboom Production Ltd v. Inspecteur der Belastingdienst - Douanedistrict Rotterdam*, Joined Cases C-133/02 and C-134/02, 2004 ECR I-01125 (Jan. 22, 2004) (“*Timmermans*”) (Exh. US-2).

<sup>52</sup>*Timmermans*, para. 18 (Exh. US-2).



61. As quoted above, Article 12(5)(a)(iii) of the CCC provides for revocation or amendment of BTI “in accordance with Article 9.” Article 9, in turn, provides in relevant part that “[a] decision favourable to the person concerned, shall be revoked or amended where, in cases other than those referred to in Article 8, one or more of the conditions laid down for its issue were not or are no longer fulfilled.”<sup>53</sup> Thus, the question for the ECJ in *Timmermans*, in effect, was whether, in the case of BTI, the “conditions” referred to in Article 9 of the Code include the member State customs authorities’ own interpretation of the Combined Nomenclature. If the answer were affirmative, then a change of interpretation by the customs authorities would mean that a condition for the issuance of BTI was no longer fulfilled, and the authorities would be authorized to withdraw the BTI pursuant to Article 12(5)(a)(iii).

62. In fact, the Court answered the question presented in the affirmative. As a result, a member State’s customs authorities may amend or revoke BTI based on their own reconsideration of EC law on customs classification. Seemingly, they may do so at any time during the life of the BTI, whether on their own initiative or on the request of an interested party.

63. The implications of the *Timmermans* decision for the uniform application of EC law on customs classification are quite remarkable, as the Advocate General explained in his opinion recommending that the Court reach the opposite conclusion.<sup>54</sup> There, the Advocate General referred to the basic principle that

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<sup>53</sup>CCC, Art. 9(1) (Exh. US-5).

<sup>54</sup>*Timmermans Transport & Logistics BV v. Inspecteur der Belastingdienst - Douanedistrict Roosendaal and Hoogenboom Production Ltd v. Inspecteur der Belastingdienst - Douanedistrict Rotterdam*, Joined Cases C-133/02 & C-134/02, Opinion of the Advocate-General, 2003 ECJ CELEX LEXIS 663 (Sep. 11, 2003) (“*Timmermans*, Op. AG”) (Exh. US-21).

the tariff classification of equivalent goods cannot vary from one Member State to another according to the differing assessments given by the various national customs authorities, as this would fail to take into account the objective of securing the uniform application of the customs nomenclature within the Community, which is intended, inter alia, to avoid the development of discriminatory treatment as between the traders concerned.<sup>55</sup>

64. The Advocate General went on to find that “the possibility of revoking BTI in this way is not readily compatible either with the objective of the uniform application of the customs nomenclature or with the objective of legal certainty pursued by the introduction of BTI.”<sup>56</sup> Indeed, this is precisely the problem from the point of view of GATT Article X:3(a). Whatever limited potential the BTI system might have to provide for some degree of uniformity across the EC with respect to the particular goods and holder that are the subject of the BTI is further undermined by the fact that revisions to BTI are not even ostensibly “binding.” The problem is that when the member State that initially issued the BTI reconsiders the BTI, as it may do under *Timmermans*, there is no mechanism to impose its reconsideration on a uniform basis. Member states that classified the goods under subheading “X” by virtue of the original BTI are not required to revoke that classification merely because the first member State has done so.

65. In sum, even if one member State is able to impose a small degree of uniformity in classification by issuing BTI that then is followed by other member States, there is no mechanism to preserve that uniformity in subsequent reconsideration of the BTI. The rule requiring member States to honor BTI issued by other member States is not accompanied by a rule requiring member States to follow the issuing States’ reconsideration of the classifications in their BTI.

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<sup>55</sup>*Timmermans*, Op. AG, para. 41 (Exh. US-21).

<sup>56</sup>*Timmermans*, Op. AG, para. 59 (Exh. US-21).

This aspect of administration of EC law on customs classification is entirely contrary to the requirement of uniform administration under Article X:3(a) of the GATT 1994.

66. To conclude this part of the discussion, it is useful to consider two current illustrations of how the EC system for administration of customs law fails to achieve uniform application in matters of classification. The first illustration concerns Rockland Industries, a U.S. exporter to the EC of a specialized textile product known as “blackout drapery lining” (BDL). In BTI issued from 1999 to 2002, customs authorities in the United Kingdom, Ireland, and the Netherlands classified similar drapery linings under tariff subheading 5907 (“Textile fabrics otherwise impregnated, coated or covered; painted canvas being theatrical scenery, studio back-cloths or the like”).<sup>57</sup> However, during this same period, customs authorities in Germany classified the product under tariff subheading 3921 (“Other plates, sheets, film, foil and strip, of plastics”). In the case of Germany, 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 entries of the subject merchandise in October and November 1999 were properly classified under subheading 3921.<sup>58</sup>

67. Despite an apparent divergence in interpretation between German authorities, on the one hand, and UK, Irish, and Netherlands authorities, on the other, dating as far back as August 2000 (when a German authority in Hamburg first classified the goods under subheading 3921), the

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<sup>57</sup>See BTI issued from 1999 through 2002 by customs authorities in the United Kingdom, Ireland, and the Netherlands (Exh. US-22).

<sup>58</sup>Hauptzollamt Bremen, Letter Decision to Bautex-Stoffe GmbH, Sep. 22, 2004 (original and English translation) (“Bautex-Stoffe Decision”) (Exh. US-23).

Commission does not appear to have gotten involved in this matter. In any event, in the intervening period of almost five years, the Commission has not adopted a regulation to address the divergence. And, the importer has no right to have the divergence reconciled by the Commission.<sup>59</sup>

68. Absent action by the Commission, the U.S. producer sought the assistance of the U.S. Government in seeking an opinion from the Secretariat of the Tariff and Trade Affairs Directorate of the World Customs Organization (“WCO”). In October 2004, the WCO Secretariat issued an opinion agreeing that the product in question should be classified under subheading 5907 of the Harmonized System (which is the basis for the EC’s Combined Nomenclature, as included in the Common Customs Tariff).<sup>60</sup> Shortly thereafter, the Belgian customs authorities issued a decision classifying the goods under subheading 5907.<sup>61</sup> However, the German decision remains unchanged.

69. This case is notable for several reasons. First, it is a straightforward instance of customs authorities of different member States reaching divergent conclusions on the classification of an

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<sup>59</sup>The Customs Code Committee presumably would be the forum in which to resolve the divergence. However, only a Member State representative or the chair has the right to bring questions before the Committee. CCC, Art. 249 (Exh. US-5). *See infra*, paras. 127-129.

<sup>60</sup>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, Oct. 26, 2004 (Exh. US-24).

<sup>61</sup>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. (Nov. 26, 2004) (original and English translation) (Exh. US-25).

identical product and the Commission not stepping in to reconcile the divergence during the five-year period in which the divergence was evident.

70. Second, it demonstrates that a case of divergent application of EC law on customs classification may arise other than as a simple conflict between BTI – the scenario contemplated by Article 9 of the Implementing Regulation. Here, the classification decision by the German authorities was not a decision on whether to issue BTI. Rather, it was a decision on whether to accept the classifications asserted in declarations filed by importers of BDL. Thus, the divergence illustrated here would not have come to the Commission’s attention automatically through the transmittal of BTI in the ordinary course of business. As a private party had no right to have the matter considered by the Commission, there was no process to automatically reconcile the divergence.

71. Third, although the importers in Germany had attempted to rely on the BTI issued by United Kingdom, Irish, and Netherlands authorities, the decision by the German customs authority makes scant reference to the BTI issued by other member State authorities. It does make passing reference to the fact that “[n]umerous binding customs tariff decisions have been handed down regarding comparable goods.”<sup>62</sup> However, it makes no attempt to distinguish the goods covered by the United Kingdom, Irish, and Netherlands BTI from the goods presented to the German authorities.

72. Fourth, the German decision appears to make reference to interpretive aids that are particular to Germany and are nowhere to be found in the EC’s Combined Nomenclature. This is

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<sup>62</sup>Bautex-Stoffe Decision at 4 (Exh. US-23).

evident from an earlier decision by the Hamburg Customs Office, which was upheld by the Main Customs Office in Bremen.<sup>63</sup> There, the German authority purported to distinguish the product at issue from the product considered in Belgian BTI on the grounds that “the fiber of the merchandise in question is not dense.”<sup>64</sup> In support of that distinction, the German authority referred to a note to Chapter 59 of the Tariff (“Erl. Zu Kap. 59 NEH Rz. 02.0 ff”). That note, in turn, sets out a complex, German-specific matrix for determining whether a good should be classified as a “cellular plastic” or a “fabric.”<sup>65</sup> In upholding the decision of the Hamburg Customs Office, the Main Customs Office in Bremen repeated the rationale that the BDL “web” was not “not fine,” a factor apparently drawn from the foregoing matrix, but not plainly relevant under the EC interpretive rules applicable to the Tariff, thus reinforcing a member State-specific interpretation of the Tariff.<sup>66</sup>

73. A second illustration of the problem of lack of uniform administration of customs law in the area of classification concerns imports into the EC of liquid crystal display (LCD) flat monitors that contain a digital video interface (“DVI”) and are shipped separately from computers. An LCD flat monitor with DVI is designed and marketed principally as a display for a computer but may also be capable of non-principal use as a video monitor for viewing movies

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<sup>63</sup>Letter from Oberfinanzdirektion Hamburg to HZA Bremen regarding Protest of Bautex-Stoffe GmbH, Feb. 3, 2003 (original and English translation) (Exh. US-41).

<sup>64</sup>*Id.*

<sup>65</sup>*See* National Decisions and Indications accompanying Chapter 59 of the German Tariff Schedule (original and English translation) (Exh. US-43).

<sup>66</sup>Bautex-Stoffe Decision at 4 (Exh. US-23).

or other video material. The question is whether these goods should be classified as principally computer monitors or video monitors. The answer has significant financial implications for traders. Video monitors are covered by subheading 8528 in the 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”). Computer monitors are covered by subheading 8471 (“Automatic data processing machines and units thereof. . .”). Products classified under subheading 8528 are subject to a 14 percent *ad valorem* duty rate.<sup>67</sup> By contrast, products classified under subheading 8471 enter the EC duty-free.<sup>68</sup>

74. Until 2004, it appears that member State customs authorities had consistently classified LCD flat panel monitors with DVI as computer monitors. Indeed, at least one member State (Germany) had issued BTIs classifying these goods as computer monitors. However, in 2004, customs authorities in the Netherlands began classifying the goods as video monitors. This matter was brought to the attention of the Customs Code Committee. The 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 (monitors with a diagonal measurement of 19 inches or less and an aspect ratio of 4:3 or

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<sup>67</sup>Commission Regulation 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, *Official Journal of the European Union*, Oct. 30, 2004 at 575-76 (Exh. US-26).

<sup>68</sup>Commission Regulation 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, *Official Journal of the European Union*, Oct. 30, 2004 at 544-45 (Exh. US-27).

5:4).<sup>69</sup> However, that regulation merely suspends duties on this subset of monitors until December 31, 2006 (although finding them to be classifiable under subheading 8528, as video monitors) and, meanwhile, leaves unresolved the classification of monitors with a diagonal measurement of greater than 19 inches, which at least one member State (the Netherlands) continues to classify as video monitors. For traders, the only recourse is to appeal the decisions of the Netherlands customs authority through that State's court system or to divert their trade to avoid member States, such as the Netherlands, that apply the less favorable interpretation of the Tariff.<sup>70</sup>

75. The case of LCD monitors with DVI teaches several lessons about the administration of EC customs law with respect to classification. First, this case demonstrates the inadequacy of the Customs Code Committee to reconcile differences in member State interpretations. Here, the question of how to classify LCD monitors with DVI was brought to the Committee's attention in 2004, and more than a year later, the Committee has failed to definitively resolve the matter. Instead, the matter was referred to the Council, which instituted a temporary suspensive measure. Simply put, there appears to be no process in place. There is no deadline for a decision by the Committee, let alone any assurance that there actually will be a decision. While we understand that the Committee has made some outreach to industry trade associations, there is no formal

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<sup>69</sup>Council Regulation (EC) No 493/2005 of 16 March 2005, *Official Journal of the European Union* L82/1 (Mar. 31, 2005) (Exh. US-28).

<sup>70</sup>Reportedly, importers of LCD monitors with DVI have considered diverting imports from the Netherlands to other member States in order to avoid the unfavorable interpretation of the Tariff by Netherlands authorities. *See Additional tax assessments again reveal the Netherlands to be the odd one out in the EU*, Press Release issued by Greenberg Traurig (May 24, 2005) (Exh. US-29).



process in place that lets traders know what to expect and when. Second, this case illustrates the trade-distorting impact of divergent classification, as some traders apparently have begun to bring goods into the EC through Germany rather than the Netherlands due to the divergence. Finally, as the only recourse for traders who have imported goods through the Netherlands and had them classified as video monitors appears to be appeal through the Dutch court system, the case illustrates that the lack of a mechanism for traders to obtain prompt EC-level review of customs decisions allows different ports to continue to treat the same goods differently for an indefinite period of time.<sup>71</sup>

76. Moreover, the LCD monitors case and the Rockland case are by no means isolated. Other traders have encountered the practical difficulties resulting from the systemic problem of non-uniform administration of customs classification law that we have described in this section. For example, in one recent survey among the membership of a trade association consisting of importers of products into the EC, companies observed that “[b]inding tariff information from German authorities is still not accepted by other EU countries, especially Greece and Portugal.”<sup>72</sup> Respondents also observed that “[u]nisex-articles or shorts have different classifications in Italy

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<sup>71</sup>This last point is relevant to the second aspect of the U.S. complaint, concerning the EC’s failure to comply with Article X:3(b) of the GATT 1994, which we address in section V.D, *infra*.

<sup>72</sup>Foreign Trade Association, Questionnaire on the topic “Trade Facilitation”: Facilitation of Trade in WTO States, response to question 1.4 (Mar. 2005) (“FTA Questionnaire”) (Exh. US-30).

and Spain to those in Germany. These articles have to be imported via Germany which causes additional costs.”<sup>73</sup>

## 2. Customs Valuation

77. In some respects, the problems of non-uniform administration of customs law are even more pronounced in the area of valuation than they are in the area of classification. Unlike classification, EC customs law on valuation does not even provide a system comparable to BTI – that is, an information system that is ostensibly binding (albeit in a very limited way) and that (depending on how designed and administered) could at least be a step towards achieving uniform administration. This despite the recommendation of the EC’s own Court of Auditors, in its report cataloguing divergences in member State application of EC law on valuation.<sup>74</sup> In general, the ability of EC institutions to step into the breach to impose uniformity is limited. The valuation section of the Customs Code Committee does not have the authority to examine individual cases with a view to reconciling differences in administration from member State to member State. Thus, as the Court of Auditors explained, “Under the rules of the Customs Code regarding the Valuation Committee the Commission has no power to ask Member States’ administrations to render account of the treatment applied to a given operator in each of these states.”<sup>75</sup>

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<sup>73</sup>FTA Questionnaire, response to question 1.4. A French company respondent to the same survey observed, “The different national classifications can not be integrated into the company’s **IT-system**. Therefore all goods have to be imported via France which causes additional costs. . . .” (Exh. US-30).

<sup>74</sup>Court of Auditors Valuation Report, para. 53 (Exh. US-14).

<sup>75</sup>Court of Auditors Valuation Report, para. 29 (Exh. US-14).

78. Valuation, of course, is a pillar of the EC customs regime. Since most tariffs are applied on an *ad valorem* basis,<sup>76</sup> an accurate determination of value is essential to determining the amount of duty owed by an importer. The principal valuation provisions in EC law are set out in Articles 28 to 36 of the CCC and Articles 141 to 181a and Annexes 23-29 of the Implementing Regulation. As will be seen, these provisions leave significant scope for discretion by member State authorities. To determine customs value, it may be necessary to answer a number of key questions concerning, for example, the basis for valuation (transaction or otherwise), additions to and subtractions from transaction price, the geographic point at which goods enter the EC customs territory for valuation purposes (which may affect the transportation costs added to the price), and relationship between buyer and seller. An inability to ensure that such questions will be answered uniformly from member State to member State or that EC institutions will be able to eliminate such differences as may arise in practice is inconsistent with the GATT Article X:3(a) obligation to administer EC customs law uniformly.

79. The Code provides that, ordinarily, “the customs value of imported goods shall be the transaction value,” which is defined as “the price actually paid or payable for the goods when sold for export in the customs territory of the Community,” subject to certain adjustments provided for in the Code.<sup>77</sup> The Code then identifies circumstances under which customs value is to be determined on a basis other than transaction value. This may be the case, for example,

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<sup>76</sup>Court of Auditors Valuation Report, para. 1 (observing that “95% of the duties on imports into the European Community” are assessed on an *ad valorem* basis) (Exh. US-14).

<sup>77</sup>CCC, Art. 29(1) (Exh. US-5).

when there are restrictions on the sale or use of the imported goods by the buyer, or when the buyer and seller are related persons.<sup>78</sup>

80. In the ordinary case, where transaction value is the basis for determining customs value, the Code specifies the elements of transaction value. This includes payments by the buyer to the seller, as well as payments by the buyer to a third party “to satisfy an obligation of the seller.”<sup>79</sup> The Code recognizes that “payment need not necessarily take the form of a transfer of money.”<sup>80</sup> However, the Code expressly excludes from transaction value the value of activities “undertaken by the buyer on his own account,” such as marketing activities, that may ultimately redound to the benefit of the seller.<sup>81</sup> The Code goes on to identify elements to be added to the price actually paid or payable for imported goods. This may include, for example, commissions other than buying commissions, the value of materials used in production of the imported good that were provided by the buyer of the imported good free of charge, and the value of transport and insurance of the imported good.<sup>82</sup>

81. Where transaction value is determined not to be the appropriate basis for establishing customs value, the Code sets forth a hierarchy of alternative bases for establishing customs value. In order of preference, these are: (a) transaction value of identical goods sold for export to the Community and exported at or about the same time as the goods being valued; (b) transaction

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<sup>78</sup>CCC, Art. 29(1) (Exh. US-5).

<sup>79</sup>CCC, Art. 29(3)(a) (Exh. US-5).

<sup>80</sup>CCC, Art. 29(3)(a) (Exh. US-5).

<sup>81</sup>CCC, Art. 29(3)(b) (Exh. US-5).

<sup>82</sup>CCC, Art. 32(1) (Exh. US-5).

value of similar goods sold for export to the Community and exported at or about the same time as the goods being valued; (c) value based on the unit price at which the imported goods or identical or similar goods are sold within the Community in the greatest aggregate quantity to persons not related to the sellers; and (d) computed value.<sup>83</sup>

82. In addition to laying out the basic scheme for determining which methodology to use to establish customs value, the Code specifies additions to and exclusions from customs value, as well as special rules (*e.g.*, for currency conversion).<sup>84</sup> Some of the additions specified are noted above, in connection with the discussion of transaction value. Exclusions include, for example, charges for transport after entry into the customs territory of the EC, interest under a financing arrangement, and buying commissions.<sup>85</sup>

83. The Implementing Regulation elaborates on certain of the valuation rules set out in the Code. For example, it deems certain specified persons to be related for purposes of determining whether transaction value may be an inappropriate basis for determining customs value.<sup>86</sup> It contains rules on taking account of adjustments to sale price after goods are released for free circulation in the EC.<sup>87</sup> It elaborates on special rules for taking account of royalties and license fees, determining the geographic point at which goods are introduced into the territory of the EC,

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<sup>83</sup>CCC, Art. 30(2) (Exh. US-5).

<sup>84</sup>CCC, Art. 35 (Exh. US-5).

<sup>85</sup>CCC, Art. 33 (Exh. US-5).

<sup>86</sup>CCCIR, Art. 143 (Exh. US-6).

<sup>87</sup>CCCIR, Art. 145(2) (Exh. US-6).

allocating transport costs, and taking account of exchange rates. And, it provides a simplified regime for valuing certain perishable goods.

84. However, as detailed as the Code and the Implementing Regulation are, they do not ensure uniform administration in the sense that similar transactions will be treated similarly throughout the territory of the EC. In fact, the ways in which the valuation provisions of the Code and Implementing Regulation have been applied differently in different member States were catalogued in great detail in the December 2000 Court of Auditors report. We will highlight certain key findings of that report here to illustrate the lack of uniform administration of EC customs law in the area of valuation.

85. The Court of Auditors report was based on an examination of “[f]iles and documentation concerning customs valuation procedures for more than 200 companies and groups of companies.”<sup>88</sup> The Court found that “Member States have not been able to reach uniform conclusions on the valuation decisions to be applied to identical imports by the same companies in different parts of the customs union.”<sup>89</sup>

86. One highlight of the Court’s report is differential treatment of royalty payments. Under Article 32(1)(c) of the Code, royalties and license fees related to the goods being valued are supposed to be added to the price actually paid or payable, to the extent not already included. The Court found that in a number of cases, different member States apportioned royalties differently to the customs value of identical goods imported by the same company. Significantly,

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<sup>88</sup>Court of Auditors Valuation Report, para. 10 (Exh. US-14).

<sup>89</sup>Court of Auditors Valuation Report, para. 49 (Exh. US-14).

it 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 the matter was not examined by the Committee.<sup>90</sup>

87. Another issue the Court examined was application of the rule that allows imported goods, in certain cases, to be valued on a basis other than the transaction of the last sale which led to the introduction of the goods into the customs territory of the EC.<sup>91</sup> The Court found that authorities in some member States required importers to obtain prior approval for valuation on a basis other than the transaction value of the last sale, whereas authorities in other States imposed no such requirement.<sup>92</sup>

88. A third issue identified by the Court was differential treatment of vehicle repair costs covered under warranty. In at least one member State – Germany – the Court found that customs authorities reduced the customs value of imported vehicles by the value of repairs undertaken in the territory of the EC and reimbursed by the foreign seller. Other member States – in particular, Italy, the Netherlands, and the United Kingdom – declined requests for similar customs value reductions.<sup>93</sup> Of particular note, the Court observed that the Commission had been aware of differential treatment among member States for at least ten years and had not taken any steps to reconcile the difference.<sup>94</sup>

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<sup>90</sup>Court of Auditors Valuation Report, paras. 58-61 (Exh. US-14).

<sup>91</sup>*See* CCCIR, Art. 147 (Exh. US-6).

<sup>92</sup>Court of Auditors Valuation Report, para. 64 (Exh. US-14).

<sup>93</sup>Court of Auditors Valuation Report, paras. 73-74 (Exh. US-14).

<sup>94</sup>Court of Auditors Valuation Report, para. 73 (Exh. US-14).

89. The Commission’s response to the latter findings of the Court gives a particularly telling insight into the difficulties the Customs Code Committee encounters in reconciling differences in the administration of EC customs law. The Commission stated, in short, that it agreed with the approach taken by the German authorities. It went on to state, however, that since 1997 it had “attempted to align by means of implementing legislation diverging practices in the Community. In the absence of a qualified majority in the Code Committee in favour of a legal text confirming the position outlined above, a case study was initiated and is close to finalisation.”<sup>95</sup> Thus, here, where the Committee in fact took up a question of how the Code should be administered, inability to attain the necessary majorities amounted to an insurmountable impasse, which prevented the Commission from taking binding legal action that would impose a uniform mode of administration on the member State authorities.

90. A further illustration of the problem of non-uniform administration of EC customs law on valuation is a case in which one member State (Spain) has applied a different customs valuation than other member States (in particular, the Netherlands) to imports of identical goods. At issue in this case is Reebok International Limited (“RIL”), which contracts with various suppliers outside the EC to manufacture shoes, which then are imported and sold to customers in the EC. The question is 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 EC and that should be taken into account in customs valuation. Article 143(1)(e) of the Implementing Regulation

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<sup>95</sup>Court of Auditors Valuation Report, Commission Response to Report paras. 71-75 (Exh. US-14).



defines parties to be related where “one of them directly or indirectly controls the other.”<sup>96</sup> The provision does not elaborate on what constitutes a control relationship.

91. In this case, the Spanish authorities found that RIL’s contracts with non-EC suppliers established a control relationship vis-à-vis those suppliers. The relevant aspects of the contracts related to quality approval, pricing conditions, and restrictions on delivery conditions. The contracts did not allow RIL to direct or restrain the management or activities of its suppliers. Other member State authorities did not consider the contracts to have established a control relationship.

92. This different interpretation of whether supply contracts give rise to a control relationship has significant consequences. Member State authorities that agreed with RIL that it did not have a control relationship with its suppliers allowed it to declare the customs value of its goods on the basis of the “sale for export” transaction value rule set out in Article 29 of the Code. On the other hand, the Spanish authorities required RIL to apply a different methodology. The net impact on RIL was an additional customs liability of 350,000 Euros per year (390,000 Euros when value-added tax and interest are included). RIL is in the process of appealing the valuation decisions of the Spanish authorities – a process that already has taken years and is expected to take even more years. Coping with these inconsistencies has added costs to RIL’s operations, costs that would not be necessary if EC customs law were administered uniformly.

93. In sum, valuation, like classification, is an area in which the EC does not provide for uniform administration of its customs law. Each member State’s authorities make their own

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<sup>96</sup>CCCIR, Art. 143(1)(e) (Exh. US-6).

interpretations of the Code and Implementing Regulation’s provisions on valuation. There is no requirement that one State’s authorities follow the interpretation of another State’s authorities, even where the transactions at issue involve the identical importer and identical merchandise. Thus, in the illustrative case just described, an importer’s contracts with non-EC manufacturers may be treated by one State as establishing a control relationship and by another State as not establishing a control relationship, with substantially different consequences for the importer. The only recourse for the importer is to challenge the unfavorable interpretation in the courts of the member State concerned (an aspect of the system we discuss in greater detail in section V.D, below), though that avenue of relief will not necessarily lead to uniformity. The importer has no right to appeal to the Commission to reconcile the disparity.

94. Even where differences between member States are identified, the EC lacks the capacity systematically to reconcile them. As the Court of Auditors observed, “Many complex subject matters within the valuation area are not brought before the Valuation Committee [*i.e.*, the valuation section of the Customs Code Committee]. Besides that the Valuation Committee is too cumbersome a vehicle to achieve the Commission objectives. In any case, the Commission has not the authority to enforce the results of the Valuation Committee’s work.”<sup>97</sup> In response, the Commission simply acknowledged, “Under the rules of the Customs Code regarding the Valuation Committee the Commission has no power to ask Member States’ administrations to render account of the treatment applied to a given operator in each of these States. The Code

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<sup>97</sup>Court of Auditors Valuation Report, para. 29 (Exh. US-14).

Committee tries to establish rules, guidelines or other conclusions usually without examining individual cases.”<sup>98</sup>

95. Here, it bears recalling the finding of the panel in *Argentina – Hides*. In interpreting Article X:3(a), that panel stated that it is “obvious” 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.”<sup>99</sup> In other words, Article X:3(a) “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*.”<sup>100</sup> In the case of valuation, as in the case of classification, an importer of goods into the EC *cannot* expect treatment of the same kind in different places within the territory of the EC. Accordingly, the EC system fails to comport with the requirement of Article X:3(a). As we will see in the next section, this is the case not only with respect to the classification and valuation functions, but also with respect to the procedures that apply to goods from the moment they arrive at a port in the territory of the EC to the moment they are released for free circulation or otherwise disposed of (and even afterwards, as, for example, in the case of penalties for customs law infractions).

### 3. Customs Procedures

96. Non-uniform application of customs procedures is evident in various phases of the customs process. It comes up, for example, in the audits that different member State authorities

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<sup>98</sup>Court of Auditors Valuation Report, Commission Reply to findings at para. 29 (Exh. US-14).

<sup>99</sup>Panel Report, *Argentina – Hides*, para. 11.83 (emphasis added).

<sup>100</sup>*Id.* (emphasis added).

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

97. 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.<sup>101</sup> Even among States in which authorities are permitted to perform post-importation audits, the Court found differences among working practices, including the balance between reliance on examinations of goods at time of importation and post-release audits. Significantly, the Court found that differences in working procedures mean that “individual customs authorities are reluctant to accept each other’s decisions.”<sup>102</sup>

98. One audit procedure that the Court highlighted was the issuance of written valuation decisions. The Court noted that authorities in Belgium and the Netherlands routinely provide the importer with a written valuation decision at the conclusion of each audit. Such written decisions are binding for five years, evidently providing the importer with a degree of legal certainty similar to BTI (albeit capable of being invoked only within the territory of a single member State).<sup>103</sup> Thus, for example, if the authorities performed an audit and agreed with the

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<sup>101</sup>Court of Auditors Valuation Report, para. 33 (discussing case of Greece) (Exh. US-14).

<sup>102</sup>Court of Auditors Valuation Report, para. 37 (Exh. US-14).

<sup>103</sup>Court of Auditors Valuation Report, para. 46 (Exh. US-14).

importer that it was not related to the seller of the goods in question, the importer would receive a written decision, which it could rely on for five years, assuming that its relationship with the seller remained unchanged during that period.

99. 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.”<sup>104</sup> Thus, whereas an importer in Belgium can expect to receive a post-audit valuation decision on which it can rely for the next five years, an importer in France, for example, may receive such a decision only where the French customs authorities disagreed with the importer’s valuation declaration. If French customs found the importer to be related to the seller, contrary to the information provided in the importer’s declaration, the importer might receive a written decision to that effect, but not if French customs agreed with the information provided in the declaration.

100. Another area in which administration varies from member State to member State concerns penalties for violation of customs law. This area of divergence is one that has been noted by the ECJ on a number of occasions. For example, in its decision in *Jose Teodoro de Andrade v. Director da Alfândega de Leixões*, the Court stated: “As regards customs offences,

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<sup>104</sup>Court of Auditors Valuation Report, para. 46 (Exh. US-14). Indeed, in its response to this finding, the Commission acknowledged that “[w]hether the valuation factor can in itself be made the subject of separate decisions is a question of administrative practice in the Member States.” *Id.* at Commission Response to Court Findings, paras. 44-47 (Exh. US-14).

the Court has pointed out that in the absence of harmonisation of the Community legislation in that field, the Member States are empowered to choose the penalties which seem appropriate to them.”<sup>105</sup> That case concerned a penalty imposed by Portugal for an importer’s failure to clear goods through customs within the time-period provided by Article 49 of the Code. Under Portuguese law, the customs authorities in that case prepare to put the goods up for auction, without necessarily giving the importer prior notice, and the importer can retrieve the goods only by paying a five percent *ad valorem* surcharge on top of other duties and fees that it owes.<sup>106</sup> That procedure is not prescribed by EC law, and there is no evidence that other member State authorities apply the same procedures to deter importers from delaying the clearance of imported goods. Nevertheless, the Court found that such differences would not be inconsistent with EC customs law.<sup>107</sup>

101. The Commission itself has recognized the disparities within the EC with respect to penalties for customs law violations. Thus, in its explanatory note accompanying a recent proposed revision to the Code it states: “Economic operators have complained for a long time about the lack of harmonisation with regard to penalties against infringements of the customs rules. Specific offences may be considered in one Member State as a serious criminal act possibly leading to imprisonment, whilst in another Member State the same act may only lead to

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<sup>105</sup>*Jose Teodoro de Andrade v. Director da Alfândega de Leixões*, Case C-213/99, 2000 ECR I-11083 (Dec. 7, 2000), para. 20. (Exh. US-31). The only limitations on a State’s choice of penalties is compliance with the general EC law principles of “equivalence” and “effectiveness.” *Id.*

<sup>106</sup>*Jose Teodoro de Andrade*, para. 4 (Exh. US-31).

<sup>107</sup>*Jose Teodoro de Andrade*, paras. 18-20 (Exh. US-31).

a small – or even no – fine.”<sup>108</sup> While the Commission plainly acknowledges the problem, the only step it has proposed to resolve the problem is far from complete. Thus, Article 19 of the Commission’s proposed revised Code simply would put in place a process for establishing “the criteria and conditions for the application of administrative penalties for infringements of the customs rules.”<sup>109</sup>

102. Yet another area in which the administration of EC customs law differs among member States is the procedure for permitting what is known as “processing under customs control.” The Code identifies eight different “customs procedures” that may apply to goods on importation into the EC.<sup>110</sup> The most common procedure is “release for free circulation.” Under that procedure, customs formalities are completed, duties are charged to the importer, and the good enters the EC stream of commerce, effectively becoming a “Community good.”<sup>111</sup> However, release for free circulation is not the only disposition of imported goods contemplated by the Code.

103. “Processing under customs control” is one of the other possible dispositions. Article 130 of the Code provides that this procedure “shall allow non-Community goods to be used in the customs territory of the Community in operations which alter their nature or state, without their

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<sup>108</sup>European Commission, Directorate-General for Taxation and Customs Union, TAXUD/447/2004 Rev 2, *An Explanatory Introduction to the Modernized Customs Code*, p. 13 (Feb. 24, 2005). (Exh. US-32).

<sup>109</sup>European Commission, Directorate-General for Taxation and Customs Union, TAXUD/458/2004 – Rev 4, *Draft Modernized Customs Code*, Art. 19(3) (Nov. 11, 2004) (Exh. US-33).

<sup>110</sup>CCC, Art. 4(16) (Exh. US-5).

<sup>111</sup>CCC, Art. 79 (Exh. US-5).

being subject to import duties or commercial policy measures, and shall allow the products resulting from such operations to be released for free circulation at the rate of import duty appropriate to them.”<sup>112</sup> Thus, an economic operator may wish to use this procedure where duties on the processed product are lower than duties on the input that is imported from outside the EC.<sup>113</sup> Article 133 of the Code sets out conditions that must be met for the granting of authorization for processing under customs control. Among these is the fulfillment of “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.”<sup>114</sup> This is referred to in the Code and Implementing Regulation as the “economic conditions” assessment.

104. 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 application is made.<sup>115</sup> Although the assessment to be made is an EC-wide assessment, EC law makes no provision for uniform application of that assessment. Thus, some member States may take a more favorable view towards applications for processing under customs control, seeing them as a way to generate greater economic activity in

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<sup>112</sup>CCC, Art. 130 (Exh. US-5).

<sup>113</sup>CCCIR, Art. 551(1) (Exh. US-6).

<sup>114</sup>CCC, Art. 133(e) (Exh. US-5).

<sup>115</sup>CCCIR, Art. 552(1) (Exh. US-6).



certain parts of the EC, whereas others may take a more skeptical view, seeing them as a threat to existing domestic production of competing products.

105. The Implementing Regulation provides little help towards achieving uniformity in making the economic conditions assessment. The relevant provision, Article 502(3), simply states that “the examination shall establish whether the use of non-Community sources enables processing activities to be created or maintained in the Community.” Nevertheless, at least one member State’s authorities appear to apply tests that go beyond this basic guideline. Guidance issued by the United Kingdom customs authorities states that the agency responsible for making the economic conditions assessment “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.”<sup>116</sup>

106. Thus, 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 Article 502(3) of the Implementing Regulation provides), but also that the proposed processing will not “harm[ ] the essential interests of Community producers of similar goods.” Indeed, the United Kingdom authorities’ guidance goes on to set out detailed

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<sup>116</sup>HM Customs & Excise, Notice 237, “Processing Under Customs Control (PCC),” § 15 (June 2003) (emphasis added) (Exh. US-34).

illustrations of evidence that importers should provide in order to demonstrate eligibility for processing under customs control under various rationales.<sup>117</sup>

107. In contrast to the United Kingdom requirements for satisfying the economic conditions test, French regulations, for example, simply require an importer to satisfy the condition set out in Article 502(3) of the Implementing Regulation.<sup>118</sup> That is, the French regulations do not impose the additional test of demonstrating the absence of harm to competitors in the EC. The fact that different member States explicitly apply different tests, with at least one member State requiring affirmative evidence of no harm to competitors in the EC and others simply requiring evidence of the creation or maintenance of processing within the EC, is stark evidence of a lack of uniformity in administration.

108. It would be impractical to catalogue all of the ways in which the Code and Implementing Regulation result in member States employing different procedures in administering EC law. Such an exhaustive listing is not necessary to make the basic point that in the absence of a common customs authority it is inevitable that different member State authorities fill the gaps in the Code and Implementing Regulation with respect to customs procedures through different national modes of administration. However, before leaving this part of the discussion, it is useful

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<sup>117</sup>*Id.*

<sup>118</sup>*See* Bulletin officiel des douanes no. 6527 at para. 83 (Aug. 31, 2001, as modified by BOD no. 6609, Nov. 4, 2004) (“En ce qui concerne la transformation sous douane, la rubrique 10 du modèle de demande doit être complétée des informations démontrant que le recours à ce régime douanier crée ou maintient une activité de transformation dans la communauté. . . .”) (“With regard to processing under customs control, block 10 of the model request must be completed with information showing that use of this customs procedure will create or maintain processing activity in the Community. . . .”) (unofficial translation) (Exh. US-35).

to consider, by way of further illustration, differences among five member States when it comes to administering EC law on certain customs clearance procedures.

109. The Implementing Regulation provides for what is known as local clearance procedures (“LCP”).<sup>119</sup> Under LCP, an importer may have goods released for free circulation at its own premises or certain other designated locations. This amounts to a streamlined procedure whereby the importer avoids having to transport the goods to a customs office for clearance and release. LCP is particularly attractive to high-volume traders that need to be able to release goods quickly.

110. While the general concept of how LCP is supposed to operate is set forth in the Implementing Regulation, the particular requirements vary from member State to member State. For example, LCP in the United Kingdom is a relatively streamlined procedure that focuses on spot-check type audits performed after goods are released for free circulation, rather than requirements to provide detailed information before goods are released. Data from the manifest that accompanies a shipment is provided electronically to United Kingdom customs authorities before release, but strictly for anti-smuggling purposes (as opposed to duty collection purposes) and without any requirement that the manifest data be modified or supplemented in any way. The importer is free to release goods for free circulation upon arrival, without any intervention at all by the customs authorities. Following release, the importer is required to transmit supplementary declaration data to the customs authorities. This includes information about classification, valuation, and origin, and may be transmitted electronically within four working

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<sup>119</sup>CCCIR, Arts. 263-267 (Exh. US-6).

days after the month after release. No paperwork is actually transmitted to customs. Rather, invoices, licenses, and other relevant documentation are archived by the LCP importer for four years and are made available to customs as necessary for any post-release audits.

111. Procedures in other countries differ somewhat from the United Kingdom procedures, generally imposing more requirements on LCP importers either before release, after release, or both. For example, prior to release, an LCP importer in France is required to supplement manifest data with other data, including tariff classification, invoice value, origin, number and nature of packages, and net weight. The importer is required to register this information in its inventory system. That registration amounts to an “initial declaration.” The importer then informs French customs of its initial declaration. At its option, French customs may then come to inspect the goods prior to release. If customs declines to inspect within a specified time period, the goods may be released for free circulation.

112. Following release for free circulation, French customs, like United Kingdom customs, requires the importer to transmit a supplementary declaration. Unlike United Kingdom customs, however, French customs requires the importer to supply various supporting documentation, including the EC’s standard valuation form (the “DV1”), invoices, and any certificates (*e.g.*, with respect to origin) that accompanied the shipment. This information is supplied in hard copy, rather than electronically.

113. Similarly, in Germany, as in France, manifest data must be modified prior to release under LCP. In Germany, the description of the imported goods in the manifest must be translated into German and provided to customs prior to release. Also, as in France, an initial declaration including classification, valuation, and origin information must be made before goods are

released. Customs then may decide to perform an inspection within a specified time prior to release. Following release, the LCP importer in Germany must supply German customs with a DV1 valuation form, invoices, certificates of origin and other supplementary information.

114. In Italy, the procedure is similar to that in France and Germany prior to release, but is somewhat more streamlined after release. That is, an LCP importer is required to provide Italian customs with the full detail of a manifest before goods are released, and Italian customs, at its option, may perform an inspection within one hour, failing which the goods may be released. However, unlike France and Germany (and more like the United Kingdom), an LCP importer in Italy is not required to supply a DV1 valuation form with its supplementary declaration. Following LCP release in Italy, supplementary declaration information is supplied to customs electronically. The supplementary declaration need not be accompanied by all relevant paperwork, as in France and Germany. The Italian system is more like the United Kingdom system in that it relies on post-clearance audits without requiring LCP importers to provide supporting information with respect to every single entry to customs.

115. Finally, in the Netherlands, the LCP procedure is different still. There, an initial declaration must be made (through entry of certain information into the importer's inventory system) and customs advised of the declaration prior to clearance. The required contents of an initial declaration are negotiated locally and can include, among other details, product description, tariff classification, valuation and exchange rate information, freight charge information, and origin information. Customs may come to inspect goods within a specified period of time prior to release. Following release, Netherlands customs requires the LCP importer to provide (electronically) a DV1 valuation form. It requires the importer to include

with its supplementary declaration certain documents, such as licenses and certificates showing entitlement to preferential tariff treatment. However, invoices and airwaybills need only be kept available for eventual inspection. The Netherlands procedure is also notable for the length of time importers are required to retain documents in connection with clearance (10 years) as compared with, for example, the United Kingdom (four years), Germany (six years), and Italy (five years).

116. The foregoing differences in administration of LCP are summarized in the following table:

**Differences in Member States' Administration of Local Clearance Procedures**

<b><u>Member State</u></b>	<b><u>Requirements prior to release</u></b>	<b><u>Customs involvement prior to release</u></b>	<b><u>Requirements after release</u></b>	<b><u>Document retention requirements</u></b>
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 ( <i>e.g.</i> , licenses and certificates showing entitlement to preferential tariff treatment) required with supplementary declaration, but not invoices or airwaybills.	Importer must retain supporting documents for 10 years.



117. In summarizing the various differences in LCP requirements in the United Kingdom, France, Germany, Italy, and the Netherlands, our point is not to criticize or praise any one country's process. Rather, our point is to demonstrate that serious differences do, in fact, exist. Their very existence illustrates lack of uniformity in the administration of EC customs law. As the panel correctly observed in *Argentina – Hides*, "Article X:3(a) requires an examination of the real effect that a measure might have on traders operating in the commercial world."<sup>120</sup> This is evident from the context of Article X:3(a), which includes (in Article X:1) an obligation to promptly publish certain customs measures and (in Article X:3(b)) 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.<sup>121</sup> To that end, "[e]very exporter and importer should be able to expect treatment of the same kind, in the same manner both over time *and in different places*. . . ."<sup>122</sup> Article X:3(a) thus acts as a check against certain distortions to trade that may come about through administration that varies depending on factors such as point of entry within the territory of a Member.

118. A system that subjects traders to different procedures and different interpretations of classification and valuation law depending on the member State through which goods are imported into the territory of the EC is contrary to this basic principle. At a minimum, it makes it difficult for a trader to have a reasonable expectation of the treatment goods will receive when

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<sup>120</sup>Panel Report, *Argentina – Hides*, para. 11.77.

<sup>121</sup>See Panel Report, *Argentina – Hides*, para. 11.76 (noting that "it is significant that Article X:1 . . . specifically references the importance of transparency to individual traders," and relying on this as context for interpreting Article X:3(a)).

<sup>122</sup>Panel Report, *Argentina – Hides*, para. 11.83 (emphases added).

they are imported into the EC. It may also cause traders to make decisions about how to bring goods into the EC based on known differences among member States. This appears to have been the case, for example, with some importers of LCD flat monitors, as described above.<sup>123</sup>

119. The requirement for a WTO Member to administer its customs law in a “uniform, impartial and reasonable manner” is clear. Equally clear is that the manner of administration of customs law in the EC today does not meet this standard. What we have shown in this section is that when it comes to administration of EC law with respect to classification and valuation and to the application of customs procedures, there is an absence of uniformity and an absence of legal mechanisms to achieve uniformity. Under EC law, each member State acts with a high degree of autonomy. The one EC institution that conceivably could bring about uniformity of administration is the Commission, acting through the Customs Code Committee. However, as we will see in the next section, the Commission acting through the Committee is constrained in several respects by virtue of the Committee’s composition, jurisdiction, and procedures.

**C. The Commission, Acting Through the Customs Code Committee, Does Not Provide Uniformity to the Administration of EC Customs Law, as Required by Article X:3(a) of the GATT 1994**

120. The EC’s stated view is that while its customs law is administered by 25 different member State authorities, uniform administration is enforced by the Commission and the ECJ.<sup>124</sup> However, neither institution functions in a way that results in uniform administration of EC

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<sup>123</sup>See *supra*, paras. 73-75.

<sup>124</sup>*Dispute Settlement Body: Minutes of the Meeting Held on 21 March 2005*, WT/DSB/M/186, para. 29.

customs law.<sup>125</sup> Here, we examine the role of the Commission. We will address the role of the ECJ in section V.D, below.

121. The mechanism provided in the Code for the Commission to address questions of administration of EC customs law is the Customs Code Committee.<sup>126</sup> In preceding sections, we have alluded to the operation of the Committee and, in particular, its inability to bring about uniform administration in particular cases.<sup>127</sup> Here, we will explain why, as an institutional matter, it is not set up to bring about such uniformity.

122. The Committee consists of representatives of each of the member States and is chaired by a representative of the Commission.<sup>128</sup> Individual traders have no right to raise matters with the Committee. That right is reserved to the chairman of the Committee and member State representatives. Thus, Article 249 of the Code provides: “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.”<sup>129</sup> A trader may petition a

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<sup>125</sup>As one prominent commentator on the administration of customs law in the EC recently observed, “In the field of customs law, considerable co-operation between the customs authorities of the Member States is required as well as an ability on their part to ensure that the law is interpreted and applied in an identical fashion throughout the Community. This is a state of affairs which has yet to be achieved.” Timothy Lyons, *EC Customs Law*, p. 85 (2001) (Exh. US-8).

<sup>126</sup>CCC, Arts. 247-249 (Exh. US-5).

<sup>127</sup>*See supra*, paras. 74-75, 77, 86, 89, 94.

<sup>128</sup>*See generally* European Commission, Rules of procedure of the Customs Code Committee adopted by the Section for General Customs Rules of the Customs Code Committee on 5 December 2001, TAXUD/741/2001 Final (“Customs Code Committee Rules”) (Exh. US-9).

<sup>129</sup>CCC, Art. 249 (Exh. US-5).

member State to bring a question before the Committee (though the Code does not require member States to have a petition process). However, the member State is under no obligation to respond favorably to such a petition.

123. For the most part, the Committee operates under the “regulatory procedure” laid down in the EC’s so-called “comitology” decision.<sup>130</sup> In matters relating to binding advance rulings that member States may issue on the classification or origin of goods, and in certain matters relating to preferential tariff treatment, the Committee operates under the comitology decision’s “management procedure.”<sup>131</sup>

124. Under the regulatory procedure, the Commission proposes to the Committee a draft of the measure to be taken. The Committee renders an opinion on the draft through a vote, in which a qualified majority is required in order to adopt the opinion. That is, the opinion must be supported by both (1) a majority of the member State representatives, and (2) at least 231 votes (out of a total of 321), based on the weighting of individual member State votes set out in Article 205(2) of the Treaty Establishing the European Community (read in conjunction with Article (3) of the Protocol on the Enlargement of the European Union and the Declaration on Enlargement of the European Union, included in the Final Act of the Conference which adopted the Treaty of Nice on February 14, 2000). Ordinarily, if the Committee opinion approves the Commission’s draft, then the Commission must adopt the proposed measure. If the Committee disapproves or

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<sup>130</sup>CCC, Art. 247a (Exh. US-5); Council Decision 1999/468/EC, laying down the procedures for the exercise of implementing powers conferred on the Commission (“Comitology Decision”) (Exh. US-10).

<sup>131</sup>CCC, Art. 248a (Exh. US-5).

fails to render an opinion, then the Commission must submit a proposal relating to the measure to the Council of the European Union. The Council then must decide by qualified majority whether to accept or reject the Commission’s proposal. If it accepts the proposal or fails to act within three months, then the proposal is adopted. If it rejects the proposal, then the Commission must re-examine the proposal.<sup>132</sup>

125. In practice, with respect to matters of customs administration, the Commission turns to the Council only on extremely rare occasions. Given institutional disincentives to refer matters to the Council, they may linger before the Committee indefinitely, as the Commission attempts to achieve the necessary majorities.<sup>133</sup> This may mean that in controversial cases, no decision at all is taken.<sup>134</sup> In other words, even though the regulatory procedure in theory affords an opportunity to answer questions, in practice there will be a need to obtain the necessary majorities, to avoid having to go to the Council. Thus, matters may be kept pending absent the necessary majorities.

126. The management procedure also starts with the Commission proposing a draft to the Committee and the Committee deciding by qualified majority whether to approve or disapprove the draft. If the Committee approves or fails to render an opinion, the Commission proceeds to adopt the measure at the end of the time period established in each case by the Chairman of the

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<sup>132</sup>Comitology Decision, Art. 5 (Exh. US-10).

<sup>133</sup>See Guenther F. Schaefer, “Committees in the EC Policy Process: A First Step Towards Developing a Conceptual Framework” in *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process*, p. 14 (Robin H. Pedler and Guenther F. Schaefer, eds., 1996) (“Observers have come to the conclusion that, within this type of procedure [*i.e.*, the regulatory procedure] as well as within all others, it is the consensual process which predominates by far.”) (Exh. US-11).

<sup>134</sup>See, *e.g.*, *supra*, paras. 73-75.

Committee (a representative of the Commission). If the Committee produces a qualified majority against the Commission proposal, the Commission must refer the proposed measure to the Council for further consideration. At the time a referral to Council is made, the Commission may still implement the proposal immediately, or it may defer its application for three months. The Council may, within three months, decide by qualified majority to support or reject the Commission proposal, and the Commission is bound by any Council decision. In cases where the Council does not act within three months, the Commission position prevails and is implemented.<sup>135</sup>

127. The Code provides for adoption by the Committee of its own rules of procedure.<sup>136</sup> The Committee's rules are set forth in document Taxud/741/2001.<sup>137</sup> Those rules are notable for purposes of the present dispute primarily for what they do *not* say. First, the rules do not contain any process for a trader affected by a member State's application of the Code to petition the Committee. Consistent with Article 249 of the Code, only a member State or the Commission has the right to raise a question with the Committee. Second, the rules contain no requirement that the Committee publish its agenda in advance of its meetings. Thus, a trader that may be affected by a question put before the Committee has no assurance that it will be made aware of the pendency of the matter.<sup>138</sup> Third, while the rules contain an article entitled "Admission of

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<sup>135</sup>Comitology Decision, Art. 4 (Exh. US-10).

<sup>136</sup>CCC, Arts. 247a(3) & 248a(3) (Exh. US-5).

<sup>137</sup>Customs Code Committee Rules (Exh. US-9).

<sup>138</sup>*See generally Sony Computer Entertainment Europe Ltd. v. Commission of the European Communities*, Case T-243/01, para. 25 (Court of First Instance of the European Communities, Sep. 30, 2003) (describing situation in which importer learned that product's

third parties,” that article does not establish a right for potentially affected parties to submit evidence and arguments to the Committee or even to be present at Committee meetings. It merely authorizes the Committee Chairman to invite experts to address the Committee and allows observers of certain third countries or organizations as specified in other EC instruments to be present at Committee meetings.<sup>139</sup> Finally, there is no requirement that records of the Committee’s proceedings be made public. In fact, Article 15 of the rules expressly provides that decisions on public access to the Committee’s documents are subject to the discretion of the Commission and that, in any event, “[t]he Committee’s discussions shall be kept confidential.”<sup>140</sup>

128. Not surprisingly, traders have expressed concern about reliance on the regulatory and management procedures to make decisions on the administration of customs law in the EC. For example, in commenting on recently proposed amendments to the Code, one trade association took note of the frequent referral of questions to the Committee for decision in accordance with the regulatory and management procedures. It expressed concern that these procedures are “the least transparent in law making as they allow a committee comprised of a chairman from DG TAXUD and 25 customs ‘experts’ to make decisions on rules that will have a direct impact on the profitability of traders in the EU without any consultation with the traders concerned.”<sup>141</sup>

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classification was under consideration by Customs Code Committee only after consideration had begun) (Exh. US-12).

<sup>139</sup>See Customs Code Committee Rules, Art. 9 (Exh. US-9).

<sup>140</sup>Customs Code Committee Rules, Art. 15 (Exh. US-9).

<sup>141</sup>AmCham EU, Customs & Trade Facilitation Committee Paper on the Draft of the Modernized Customs Code, p. 2 (Aug. 30, 2004) (Exh. US-13).

129. EC institutions also have acknowledged the limits of the Committee procedure’s ability to reconcile differences in administration among member State customs authorities. For example, in the EC Court of Auditors Valuation Report, discussed in section V.B.2, above, it was observed that in using the valuation section of the Customs Code Committee, the Commission “has to rely on discussion, persuasion and encouragement as the means of achieving common treatment of identical problems in Member States.”<sup>142</sup> In its replies to the Court’s findings in the same report, the Commission itself acknowledged that the Committee “can . . . only deal with a limited number of important cases that are brought before it.”<sup>143</sup>

130. A central question in this dispute is whether the EC achieves uniform administration of its customs law, as required by Article X:3(a) of the GATT 1994. The preceding sections have demonstrated various ways in which the EC fails to achieve such uniform administration as a result of the fact that administration is the responsibility of 25 different member State authorities. The EC’s stated answer to the question of how it achieves uniform administration given this state of affairs emphasizes the role of the Commission. But, the foregoing aspects of the Commission’s involvement in customs matters disprove that answer. In brief, the Commission’s mechanism for dealing with customs matters is systemically deficient when it comes to addressing divergent administration from member State to member State.

131. As we have discussed in the preceding sections, the questions susceptible to divergent interpretation are technical questions requiring expert consideration. Yet, the current process

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<sup>142</sup>Court of Auditors Valuation Report, para. 26 (Exh. US-14).

<sup>143</sup>*Id.* at Commission’s Replies, para. 86 (Exh. US-14).



subjects these questions to a vote by representatives of the very States whose administration may be diverging. And, the problem is only magnified by the recent expansion of the EC to 25 member States. As one senior EC official responsible for customs matters recently predicted, “[O]rganising a majority decision will be more difficult, since one will have to negotiate with 25 – instead of 15 – Member States.”<sup>144</sup>

132. Collectively, what these aspects of the Committee process mean is that the answer to the question, “Does the EC achieve uniform administration of its customs measures, as required by Article X:3(a) of the GATT 1994, when those measures are administered by 25 different member State authorities?” cannot be, “Yes. Through the Commission.” The Committee process through which the Commission operates in matters of customs administration is not designed to systematically achieve uniform administration where divergences are shown to exist. In this regard, it bears recalling the observation of the panel in *Argentina – Hides* that “Article X:3(a) requires an examination of the real effect that a measure might have on traders operating in the commercial world.”<sup>145</sup> From the point of view of “traders operating in the commercial world,” a WTO Member does not provide for uniform administration of its customs law where there is doubt as to whether the mechanism ostensibly available for bringing about uniformity will or will not operate in the case of any given divergence. In short, the mechanism theoretically available

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<sup>144</sup>Michael Lux, Head of Customs Legislation Unit, European Commission, *EU enlargement and customs law: What will change?*, Taxud/463/2004, Rev. 1, p. 4 (June 14, 2004) (Exh. US-15); see also Court of Auditors Valuation Report, para. 26 (“[I]nvariably, 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.”) (Exh. US-14).

<sup>145</sup>Panel Report, *Argentina – Hides*, para. 11.77.

for bringing uniformity to the administration of customs law in the EC lacks a process for doing so on a systematic basis, and this absence of a process leads back to the conclusion that the EC simply does not provide for the uniform administration of its customs law required by Article X:3(a).

**D. The EC Does Not Provide Tribunals or Procedures for the Prompt Review and Correction of Administrative Action Relating to Customs Matters, as Required by Article X:3(b) of the GATT 1994**

133. The second aspect of the U.S. claim concerns the EC's failure to provide for an EC court or other forum to which a member State customs decision can be promptly appealed. Under the EC system, review of a member State customs decision is available in the courts of that member State. The 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. The only court with jurisdiction to issue decisions with EC-wide effect on matters of customs administration is the ECJ. However, as discussed above,<sup>146</sup> the referral of questions to that court is not automatic, and even when a question does get referred to the ECJ, the time and steps necessary from the initial rendering of a customs decision by a member State's authorities to issuance of a decision by the ECJ makes review in that forum far from prompt.

134. The issue of reviewability of customs decisions is linked to the issue of uniform administration of customs law. To the extent that the administration of customs law is fragmented, the provision for review in the courts of each of 25 member States does not alleviate

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<sup>146</sup>See *supra*, para. 17.

the fragmentation and may well compound it. In contrast, a single system of review could alleviate the different initial results that may occur in different ports from time to time.

135. The system for appeals of customs decisions in the EC allows for the opposite result. A divergence in interpretation between the authorities in member State A and member State B cannot be addressed (and may be reinforced) by review through court systems that are particular to each member State. Thus, if the courts of member State A uphold the interpretation made by the customs authorities of member State A, the original divergence now will be overlaid with the stamp of approval of the courts of that state.

136. An illustration of this problem is the recent decision by an appellate court in the United Kingdom in *Customs & Excise Commissioners v. Bantex Ltd.*<sup>147</sup> There, the court began by finding that a Commission regulation issued in 1991 applied to Bantex's products (certain binder-type notebooks), and that those products, accordingly, should have been classified as plastics. Binding tariff information issued by the United Kingdom customs authority in 1999 that classified the goods as paperboard, in disregard of that regulation, therefore, was based on legal error. On the other hand, the court went on to find that, notwithstanding the error, Bantex should be allowed to rely on the erroneous BTI for its entire six-year period, and that the BTI was not overridden by BTI issued in 2001 that correctly took account of the 1991 regulation (classifying the goods as plastics). The court based that holding on an interpretation of Article 12(5) of the CCC which, it found, did not provide for revocation of BTI based on legal error made at the time

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<sup>147</sup>[2003] EWHC 3009 (CH) (Dec. 10, 2003) ("*Bantex*") (Exh US-36).

of its issuance.<sup>148</sup> The court pointedly stated, “The purpose of the BTI system is not to ensure that there is uniformity either at the national, Community, or international level but to ensure a modicum of certainty for the trader in relation to matters which might otherwise be subject to vagaries of shifting interpretation by the customs authorities.”<sup>149</sup> Accordingly, the court held, “The fact that the customs authority may have made a mistake of interpretation in issuing the BTI should not deprive the individual trader of the security and certainty intended to be afforded it by the BTI. If the BTI has been wrongly issued the remedy lies in subsequent action at the Community level.”<sup>150</sup>

137. What *Bantex* shows is the potential for review by a member State court to exacerbate a divergence made at the customs authority level. If another member State’s authorities had correctly classified Bantex’s products in 1999, it would have diverged from the erroneous classification by the United Kingdom customs authorities. Yet, rather than correct the divergence, the decision by the United Kingdom court actually mandated that the divergence continue, at least until expiration of the 1999 BTI in 2005. The matter becomes even more complex if a trader in Bantex’s position invokes the United Kingdom BTI in the territory of another member State. Are the customs authorities of that State now required to rely on the erroneous classification? Or, are they allowed to make their own determination of the correct classification? Neither result is particularly conducive to uniform administration of the customs

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<sup>148</sup>*See supra*, paras. 48-50.

<sup>149</sup>*Bantex*, para. 38 (Exh US-36).

<sup>150</sup>*Id.*

law. The dilemma underscores the problem of not maintaining a forum for review of customs decisions with jurisdiction throughout the territory of the EC.

138. The GATT 1994 provision pertinent to appellate review of customs decisions is Article X:3(b), which requires *each* WTO Member to “maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters.” The EC is a WTO Member in its own right and is subject to Article X:3(b). Accordingly, the *EC* must have such tribunals or procedures. Under ordinary rules of treaty interpretation, a treaty must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”<sup>151</sup> Here, the relevant context includes the immediately preceding subparagraph in the paragraph in which the obligation at issue appears. As we discussed at length in the preceding sections, that subparagraph calls for the “uniform, impartial, and reasonable” administration of customs laws. Thus, the decisions of the tribunals or procedures must provide for the review and correction of customs matters for the EC as a whole, not just within limited geographical regions within the EC.

139. It is inconsistent with Article X:3(b) to require a trader<sup>152</sup> who had received adverse customs decisions in three different member States, each at odds with the prevailing interpretation of EC customs law in other member States, to pursue separate appeals in each of those States.

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<sup>151</sup>VCLT, Article 31(1).

<sup>152</sup>*See generally* Panel Report, *Argentina – Hides*, paras. 11.68, 11.73, 11.77 (emphasizing that the beneficiaries of a Member’s obligations under Article X are traders).

140. Having considered the obligation to provide “tribunals or procedures for . . . the prompt review and correction” of customs decisions, we now examine the mechanisms for appeals from customs decisions in the EC and demonstrate their failure to meet that obligation.

**1. The Opportunity for Review and Correction on a Member State-by-Member State Basis Does Not Fulfill the EC’s Obligation Under Article X:3(b)**

141. The Community Customs Code says little on the question of appeals. It merely establishes that there shall be a right to appeal from customs decisions;<sup>153</sup> provides that, in the first instance, appeals may be exercised before a member State’s customs authorities and subsequently before a court or other independent body;<sup>154</sup> and provides that, except in certain specified circumstances, “the lodging of an appeal shall not cause implementation of the disputed decision to be suspended.”<sup>155</sup> Beyond that, the Code simply states that “[t]he provisions for the implementation of the appeals procedure shall be determined by the Member States.”<sup>156</sup>

142. Thus, the Code leaves wide discretion to the individual member States in establishing procedures for appeals from customs decisions, and that discretion is evidenced in the diversity of procedures in fact available in the different member States. Indeed, even if it could be argued (contrary to what the United States argues here) that the EC might fulfill its obligation under Article X:3(b) merely by requiring member States to have appellate procedures in place, it is

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<sup>153</sup>CCC, Art. 243(1) (Exh. US-5).

<sup>154</sup>CCC, Art. 243(2) (Exh. US-5).

<sup>155</sup>CCC, Art. 244 (Exh. US-5).

<sup>156</sup>CCC, Art. 245 (Exh. US-5).

notable that nothing in the Code requires that review by member State tribunals be prompt. The Code is silent on the question of timing.

143. In fact, appellate procedures vary from member State to member State with respect to factors such as the availability of first-level review by the customs authorities themselves, time-periods for first-level review by the customs authorities (where such review is mandatory before proceeding to court), requirements to post security in order to avoid immediate enforcement of the decision on appeal,<sup>157</sup> and availability of review by courts of superior jurisdiction.

144. For example, a number of member States require a trader appealing from a customs decision to first seek review by the customs authority itself, as permitted by Article 243(2) of the Code.<sup>158</sup> Ordinarily, decisions by member State customs authorities are subject to Article 6 of the Code, which requires certain basic elements of procedural fairness. Article 6 provides, for example, that where a person requests a customs decision, the authorities must make that decision within a period specified in existing law, and that they must notify the requester before the expiry of that period if they will need additional time.<sup>159</sup> However, Article 6 apparently does

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<sup>157</sup>See Court of Auditors, Special Report No. 8/99 on securities and guarantees provided for in the Community Customs Code to protect the collection of traditional own resources together with the Commission's replies, *reprinted in Official Journal of the European Communities C70/1*, para. 44 (Mar. 10, 2000) (noting that in three member States, "the provisions of national law allow many traders to bypass the administrative appeals procedure foreseen in Article 244 of the Community Customs Code. By following national law, traders can avoid the requirement to provide a security by making their appeals direct to the relevant courts of the respective Member States.") (Exh. US-37).

<sup>158</sup>We understand this to be the case in Austria, the Czech Republic, Finland, Germany, Greece, Ireland, Italy, Lithuania, the Netherlands, Sweden, and the United Kingdom. It may well be the case in other member States as well.

<sup>159</sup>CCC, Art. 6(2) (Exh. US-5).

not apply to decisions by the customs authorities acting in the capacity of reviewer (as opposed to original decision maker). This is evident from the fact that Article 245 of the Code makes the member States exclusively responsible for “[t]he provisions for the implementation of the appeals procedure,” and Article 247 excludes the matter of appeals from the Commission’s general authority to adopt measures necessary for implementation of the Code.

145. Thus, in the case of binding tariff information, a customs authority ordinarily must issue its decision within three months.<sup>160</sup> Under Article 6(2) of the Code, an authority that expects to exceed that period has an obligation to inform the requester before the end of the three-month period. However, if the requester receives the BTI and appeals the decision by first seeking review by the customs authority, this rule apparently does not apply. Whereas member States’ customs authorities are bound by the three-month period with respect to the original decision, they are bound by no common rule with respect to timing when it comes to review of that decision.

146. In fact, the time periods for first instance reviews conducted by member State customs authorities can vary widely. At one end of the spectrum, in Ireland, requests for review by the customs authorities are decided within 30 days.<sup>161</sup> In the United Kingdom, the customs authorities have 45 days to decide requests for review.<sup>162</sup> At the other end of the spectrum, in the

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<sup>160</sup>CCCIR, Art. 7(1)(a) (Exh. US-6).

<sup>161</sup>Office of the Revenue Commissioners, *Appeal Procedure Relating to Customs Matters* (Jan. 1996) (Exh. US-38).

<sup>162</sup>HM Customs and Excise, *Notice 990, Excise and Customs Appeals*, § 2.2 (Mar. 2003) (Exh. US-39).



Netherlands, the applicable time period is one year.<sup>163</sup> Moreover, differences among procedures for appellate review in the different EC member States are even more pronounced as one moves past the first stage of review by the customs authorities themselves, with some member States providing for a second level of administrative review, while others provide for immediate referral of matters to the courts following initial review by the customs authorities.

147. At the top of the structure for reviewing customs authorities' administration of EC customs law is the ECJ. Unlike the decisions of the courts in individual member States, the decisions of the ECJ do have effect throughout the territory of the EC. It is only at this stage, after a trader has pursued its appeal through a member State's court system, that the trader reaches a forum for review and correction provided by the EC itself. However, given the time it necessarily takes to reach this forum, it can hardly be considered to meet the EC's Article X:3(b) obligation to provide "tribunals or procedures for the purpose . . . of the *prompt* review and correction of administrative action relating to customs matters." Moreover, for the additional reasons set forth in the next section as well, the prospect of ultimate recourse to the ECJ does not amount to the provision of tribunals or procedures for prompt review and correction of administrative action that is required by GATT Article X:3(b).

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<sup>163</sup>See Wet van 2 juli 1959, houdende regelen, welke aan een aantal rijksbelastingen gemeen zijn, Art. 25(1) ("In afwijking van artikel 7:10, eerste lid, van de Algemene wet bestuursrecht doet de inspecteur binnen een jaar na ontvangst van het bezwaarschrift uitspraak daarop.") ("In derogation from Article 7:10, first recital, of the General Administrative Law, the inspector gives judgment within one year following receipt of the appeal.") (unofficial translation) (Exh. US-40).

## 2. Availability of Ultimate Recourse to the ECJ Does Not Satisfy the Requirements of Article X:3(b) of the GATT 1994

148. In commenting on the request for the establishment of a panel in this dispute, the EC referred to the ECJ as the second institution (alongside the Commission) that enforces “harmonised customs rules and institutional and administrative measures . . . to prevent divergent practices.”<sup>164</sup> That the EC views the ECJ as serving this function is instructive and cause for examining the role actually filled by the ECJ. What that examination reveals is significant institutional limitations on the ability of the ECJ “to prevent divergent practices” and a failure of the ECJ to constitute a tribunal or procedure for prompt review and correction of administrative action relating to customs matters, as required by Article X:3(b).

149. As discussed above, the principal manner in which a question of a member State’s administration of EC customs law is likely to come before the ECJ is through a referral by the court of a member State, pursuant to Article 234 of the EC Treaty. However, with the exception of courts of last resort, referral of questions by member State courts is discretionary.<sup>165</sup> Moreover, even when a question does get referred to the ECJ, the answer of the ECJ does not finally decide the matter. Rather the answer is sent back to the requesting court, which then decides the case before it in light of the ECJ’s guidance.

150. In section V.B.1, above, we discussed the opinion of Advocate General Jacobs in *Weiner S.I. GmbH v. Hauptzollamt Emmerich*.<sup>166</sup> The Advocate General took the opportunity of that

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<sup>164</sup>*Dispute Settlement Body: Minutes of the Meeting Held on 21 March 2005*, WT/DSB/M/186, para. 29.

<sup>165</sup>*See supra*, para. 17.

<sup>166</sup>*Wiener*, Op. AG (Exh. US-16).

case – which concerned whether certain articles of apparel should be classified as “nightdresses” or “dresses” – to address the systemic problem of routine customs classification questions being referred to the ECJ under the guise of being matters of interpretation of EC law. He noted that “[a]ny ‘application’ of a rule of law can be regarded as raising a question of ‘interpretation’ – even if the answer to the question of interpretation may seem obvious.”<sup>167</sup> He went on to observe that if this were to occur routinely, “[t]he net result is that the Court could be called upon to intervene in all cases turning on a point of Community law in any court or tribunal in any of the Member States. It is plain that if the Court were to be so called upon it would collapse under its case-load.”<sup>168</sup> To address this problem, he observed that “the only appropriate solution is a greater measure of self-restraint on the part of both national courts and this Court.”<sup>169</sup> The opinion goes on to outline how courts might apply rules and principles of interpretation in a way that should enable them to exercise such self-restraint. In conclusion, the opinion finds it “clear that the Court’s contribution to uniform application of the Common Customs Tariff by deciding on the classification of particular products will always be minimal.”<sup>170</sup>

151. In practice, the Advocate General’s urging of greater self-restraint on the part of member State courts may well have had the intended effect. In a number of cases, United Kingdom courts have declined to refer questions to the ECJ, citing the opinion in *Weiner* in support of their

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<sup>167</sup>*Id.*, para. 15 (Exh. US-16).

<sup>168</sup>*Id.* (Exh. US-16).

<sup>169</sup>*Id.*, para. 18 (Exh. US-16).

<sup>170</sup>*Id.*, para. 41 (Exh. US-16).

exercise of self-restraint.<sup>171</sup> Moreover, while the urging of greater self-restraint was made in the context of a customs classification case, its logic is not confined to that area, as the Advocate General himself recognized.<sup>172</sup> Indeed, that logic is easily transferrable to valuation and other areas in which member States' administration of EC law may diverge. Like classification, the questions likely to arise in these areas often will be questions of application of the law, even though they are capable of being re-cast as questions of interpretation.

152. A key lesson to be drawn from *Weiner* is that the ECJ is not suited to be the EC's tribunal or procedure for prompt review and correction of administrative action relating to customs matters required by Article X:3(b). Its place within the EC system – as the highest level adjudicator of questions of EC law – and the manner in which questions are put to it – typically, through discretionary referral by member State courts – make it incapable of serving that role.

153. As the ECJ is not set up to be an EC customs court – and, in any event, as the time it takes for a question raised in a member State's customs decision ultimately to get to ECJ review hardly qualifies such review as prompt – what is left is a patchwork of member State customs authorities whose work is reviewed by member State courts, with no EC tribunal or procedure providing prompt review and correction of customs decisions in a way that would bring about uniformity in the administration of EC customs law.

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<sup>171</sup>See, e.g., *Vtech Electronics (UK) plc v. Commissioners of Customs & Excise*, [2003] EWHC 59 (Ch), para. 117 (Exh. US-18); *Commissioners of Customs and Excise v. Anchor Foods, Ltd.*, [1999] V & DR 425 (1998) (at 12<sup>th</sup> page of exhibit) (Exh. US-20).

<sup>172</sup>*Weiner* Op. AG, para. 46 (Exh. US-16).

154. In sum, the EC provides no tribunal or procedure for the prompt review and correction of administrative action relating to customs matters, as required by Article X:3(b) of the GATT 1994. Instead, it defers to each of the member States to provide its own such tribunals or procedures. This is contrary to its obligation under Article X:3(b). Separate review mechanisms applicable in different member States in the EC is antithetical to the requirement of uniform application of laws, which is relevant context for the interpretation of Article X:3(b). As the EC does not provide an EC tribunal or procedure for the prompt review and correction of customs decisions, it is in breach of its obligation under Article X:3(b).

## **VI. CONCLUSION**

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

## Table of Exhibits

<u>Exhibit Number</u>	<u>Document</u>
1	László Kovács, Commissioner for Taxation and Customs Union, Speech delivered at the International Conference on the Modernised Customs Code, (Mar. 9-11, 2005).
2	<i>Timmermans Transport &amp; Logistics BV v. Inspecteur der Belastingdienst - Douanedistrict Roosendaal and Hoogenboom Production Ltd v. Inspecteur der Belastingdienst - Douanedistrict Rotterdam</i> , Joined Cases C-133/02 and C-134/02, 2004 ECR I-01125 (Jan. 22, 2004) (“ <i>Timmermans</i> ”).
3	<i>The New Shorter Oxford English Dictionary</i> , Vol. I at 28 (1993).
4	<i>The New Shorter Oxford English Dictionary</i> , Vol. II at 3488 (1993).
5	Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, including all annexes thereto, as amended (“Community Customs Code” or “CCC”).
6	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 (“Implementing Regulation” or “CCCIR”).
7	Integrated Tariff of the European Communities (TARIC), established by virtue of Article 2 of Council Regulation (EEC) 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, Introduction, <i>Official Journal of the European Union</i> C 103 (Apr. 30, 2003).
8	Timothy Lyons, <i>EC Customs Law</i> , p. 85 (2001).
9	European Commission, Rules of procedure of the Customs Code Committee adopted by the Section for General Customs Rules of the Customs Code Committee on 5 December 2001, TAXUD/741/2001 Final (“Customs Code Committee Rules”).
10	Council Decision 1999/468/EC, laying down the procedures for the exercise of implementing powers conferred on the Commission (“Comitology Decision”).

- 11 Guenther F. Schaefer, “Committees in the EC Policy Process: A First Step Towards Developing a Conceptual Framework,” in *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process*, p.14 (Robin H. Pedler and Guenther F. Schaefer, eds., 1996).
- 12 *Sony Computer Entertainment Europe Ltd. v. Commission of the European Communities*, Case T-243/01, para. 25 (Court of First Instance of the European Communities, Sep. 30, 2003).
- 13 AmCham EU, Customs & Trade Facilitation Committee Paper on the Draft of the Modernized Customs Code (Aug. 30, 2004).
- 14 Court of Auditors, Special Report No 23/2000 concerning valuation of imported goods for customs purposes (customs valuation), together with the Commission’s replies, reprinted in *Official Journal of the European Communities* C84 (Mar. 14, 2001) (“Court of Auditors Valuation Report”).
- 15 Michael Lux, Head of Customs Legislation Unit, European Commission, *EU enlargement and customs law: What will change?* (Taxud/463/2004, Rev. 1) (June 14, 2004).
- 16 *Wiener S.I. GmbH v. Hauptzollamt Emmerich*, Case C-338/95, Opinion of the Advocate-General, 1997 ECR I-06495 (July 10, 1997) (“*Wiener*, Op. AG”).
- 17 *Peacock AG v. Hauptzollamt Paderborn*, Case C-339/98, Opinion of the Advocate-General, 2000 ECR I-08947 (Oct. 28, 1999).
- 18 *Vtech Electronics (UK) plc v. Commissioners of Customs & Excise*, [2003] EWHC 59 (Ch) (Jan. 29, 2003).
- 19 European Commission, Taxation and Customs Union Directorate-General, BTI Consultation Page, [http://europa.eu.int/comm/taxation\\_customs/dds/cgi-bin/ebtiquer?Lang=EN](http://europa.eu.int/comm/taxation_customs/dds/cgi-bin/ebtiquer?Lang=EN), last consulted on July 10, 2005.
- 20 *Commissioners of Customs and Excise v. Anchor Foods, Ltd.*, [1999] V & DR 425 (1998).

- 21 *Timmermans Transport & Logistics BV v. Inspecteur der Belastingdienst - Douanedistrict Roosendaal and Hoogenboom Production Ltd v. Inspecteur der Belastingdienst - Douanedistrict Rotterdam*, Joined Cases C-133/02 & C-134/02, Opinion of the Advocate-General, 2003 ECJ CELEX LEXIS 663 (Sep. 11, 2003) (“*Timmermans*, Op. AG”).
- 22 BTI issued from 1999 through 2002 by customs authorities in the United Kingdom, Ireland, and the Netherlands.
- 23 Hauptzollamt Bremen, Letter Decision to Bautex-Stoffe GmbH, Sep. 22, 2004 (original and English translation) (“*Bautex-Stoffe Decision*”).
- 24 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, Oct. 26, 2004.
- 25 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. (Nov. 26, 2004) (original and English translation).
- 26 Commission Regulation 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, *Official Journal of the European Union*, Oct. 30, 2004 at 575-76.
- 27 Commission Regulation 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, *Official Journal of the European Union*, Oct. 30, 2004 at 544-45.
- 28 Council Regulation (EC) No 493/2005 of 16 March 2005, *Official Journal of the European Union* L82/1 (Mar. 31, 2005).
- 29 *Additional tax assessments again reveal the Netherlands to be the odd one out in the EU*, Press Release issued by Greenberg Traurig (May 24, 2005).



- 30 Foreign Trade Association, Questionnaire on the topic “Trade Facilitation”: Facilitation of Trade in WTO States (Mar. 2005) (“FTA Questionnaire”).
- 31 *Jose Teodoro de Andrade v. Director da Alfândega de Leixões*, Case C-213/99, 2000 ECR I-11083 (Dec. 7, 2000).
- 32 European Commission, Directorate-General for Taxation and Customs Union, TAXUD/447/2004 Rev 2, *An Explanatory Introduction to the Modernized Customs Code* (Feb. 24, 2005).
- 33 European Commission, Directorate-General for Taxation and Customs Union, TAXUD/458/2004 – Rev 4, *Draft Modernized Customs Code* (Nov. 11, 2004).
- 34 HM Customs & Excise, Notice 237, “Processing Under Customs Control (PCC)” (June 2003).
- 35 Bulletin officiel des douanes no. 6527 (Aug. 31, 2001, as modified by BOD no. 6609, Nov. 4, 2004).
- 36 *Customs & Excise Commissioners v. Bantex Ltd.*, [2003] EWHC 3009 (CH) (Dec. 10, 2003).
- 37 Court of Auditors, Special Report No. 8/99 on securities and guarantees provided for in the Community Customs Code to protect the collection of traditional own resources together with the Commission’s replies, *reprinted in Official Journal C 70/1* (Mar. 10, 2000).
- 38 Office of the Revenue Commissioners, Appeal Procedure Relating to Customs Matters (Jan. 1996).
- 39 HM Customs and Excise, Notice 990, Excise and Customs Appeals (Mar. 2003).
- 40 Wet van 2 juli 1959, houdende regelen, welke aan een aantal rijksbelastingen gemeen zijn.
- 41 Letter from Oberfinanzdirektion Hamburg to HZA Bremen regarding Protest of Bautex-Stoffe GmbH, Feb. 3, 2003 (original and English translation).

- 42 Consolidated Version of the Treaty Establishing the European Community, *reprinted in Official Journal of the European Communities* C325/33 (Dec. 24, 2002) (“EC Treaty”).
- 43 National Decisions and Indications accompanying Chapter 59 of the German Tariff Schedule (original and English translation).