BEFORE THE

WORLD TRADE ORGANIZATION

EUROPEAN COMMUNITIES – SELECTED CUSTOMS MATTERS

(WT/DS315)

COMMENTS OF THE UNITED STATES OF AMERICA ON THE REPLIES OF THE EUROPEAN COMMUNITIES TO THE QUESTIONS OF THE PANEL AFTER THE SECOND SUBSTANTIVE MEETING

December 14, 2005

1. The United States appreciates this opportunity to comment on the EC's replies to the questions posed by the Panel following the second substantive meeting with the parties. Many of the points the EC raises already have been addressed by the United States in prior written and oral submissions or are not relevant to the resolution of this dispute. In the comments below, the United States will focus primarily on new points that the EC raises that are pertinent to the resolution of this dispute and/or that have not been addressed in prior U.S. submissions. The United States does not comment on the reply to every question that the Panel posed to the EC following the second substantive meeting with the parties. The U.S. decision not to comment on the EC's reply to any particular question should not be understood as agreement with the EC's reply.

Question 146

In its reply to Panel question No. 42, the European Communities argues that, as a matter of EC law, both the institutions of the European Communities and the authorities of the member States, each of them acting within their respective spheres of competence, are responsible for the administration of: (a) Council Regulation (EEC) No. 2913/92 of 12 October 1992; (b) Commission Regulation (EEC) No. 2454/93 of 2 July 1993; and (c) the Integrated Tariff of the European Communities established by Council Regulation (EEC) 2658/87 of 23 July 1987. As a matter of EC law, please identify whether and the extent to which the European Communities and/or the member States are responsible for the enactment and the administration of, inter alia, laws and regulations in the following areas of customs administration:

> *(a) Tariff classification;*
>
> *(b) Customs valuation; and*
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> *(c) Customs procedures (particularly, audit following release for circulation; penalties for infringements of EC customs legislation; processing under customs control; and local clearance procedures).*

If the European Communities shares competence with the member States in any one or more of the above areas of customs administration, please clearly explain the delineation between their respective competences in the relevant areas. (Footnotes internal to the question omitted.)

2. In its reply to Question 146, the EC delineated a number of areas in which the administration of EC customs law is the responsibility of the independent authorities in each of the 25 EC member States.[1] An additional area that has been discussed in this dispute and that should be added to that delineation is the customs procedure concerning the recovery of customs debts. As discussed in the U.S. oral statement at the second Panel meeting,[2] Article 221(3) of the Community Customs Code (Exh. US-5) establishes a period of three years following importation during which a customs debt may be collected. The EC's 25 independent, geographically limited customs offices are each responsible for administering that rule and, as the United States showed, different customs offices administer it differently. France, for example, has enacted a law whereby the three-year period is suspended by any administrative proceeding (procès-verbal) investigating a possible customs infraction.[3] Despite divergence with other customs authorities in other parts of the EC, France's highest court (the Cour de Cassation) has declined to refer to the ECJ the question of this rule's consistency with EC law.[4]

Question 147

Please explain in practical terms how Article 10 of the EC Treaty is enforced and by whom in the following areas of customs administration:

(a) Tariff classification;

(b) Customs valuation; and

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[1]Replies of the European Communities to the Questions of the Panel After the Second Substantive Meeting, paras. 3-7 (Dec. 7, 2005) ("EC Replies to 2d Panel Questions").

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

[3]Loi de finances rectificative pour 2002 (No. 2002-1576 du 30 décembre 2002), J.O. No. 304 du 31 décembre 2002, p. 22070 texte No. 2, Art. 44 (amendment to customs code, Art. 354) ("La prescription est interrompue par la notification d'un procès-verbal de douane.") (Exh. US-69).

[4]*See* Judgment of the Cour de Cassation, Case No. 143, June 13, 2001, pp. 439-40 (Exh. US-67); Judgment of the Cour de Cassation, Case No. 144, June 13, 2001, p. 448 (Exh. US-68).

> *(c) Customs procedures (particularly, audit following release for circulation; penalties for infringements of EC customs legislation; processing under customs control; and local clearance procedures).*

Please provide evidence of enforcement of Article 10 of the EC Treaty in the abovementioned areas of customs administration, such as ECJ judgements in which Article 10 EC Treaty has been invoked. (Footnotes internal to the question omitted.)

3. In its reply to Question 147, the EC states that "Article 10 EC is legally binding and directly applicable in all Member States."[5] It adds that Article 10 "inspires the interpretation of Community law by EC courts."[6] It then gives an overview of cases in which Article 10 has been invoked and concludes that "Article 10 EC is fully operational and can be applied by the ECJ and national tribunals."[7]

4. Whether Article 10 is "legally binding and directly applicable" is beside the point. The relevant question is whether the very broad, overarching obligation set forth in Article 10 translates into specific rules in the customs area that would ensure uniform administration by the EC's 25 independent, geographically limited customs offices. The answer is that it does not. Article 10 simply states:

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

Neither the EC Treaty nor other EC legislation states with particularity what "appropriate measures" member States must take in the area of customs law to achieve uniform

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[5]EC Replies to 2d Panel Questions, para. 8.
[6]EC Replies to 2d Panel Questions, para. 9.
[7]EC Replies to 2d Panel Questions, para. 15.

administration.

5. From the point of view of GATT 1994 Article X:3(a) it matters little that EC Treaty Article 10 is "legally binding" if (as is the case) it is not made operational in the customs area through particular rules or regulations. The United States has demonstrated this point in its prior submissions. For example, where the customs authority in one part of the EC has classified a good in a particular way, the "legally binding" nature of EC Treaty Article 10 does not compel the customs authority in another part of the EC to classify a materially identical good in the same way.[8] A very concrete illustration of the inability of EC Treaty Article 10 to secure uniform administration of the customs laws is the case of LCD monitors. As the United States explained at the second Panel meeting,[9] even though the Customs Code Committee issued a non-binding conclusion regarding classification of these goods in July 2004, the administration of the classification rules with respect to LCD monitors is in a state of disarray. Thus, the authority in one member State (the United Kingdom) follows that conclusion; another authority (in Germany) evidently rejects it, having recently issued BTI classifying a monitor under heading 8471 based on its *principal* use, even though the conclusion called for such classification based only on *sole* use; and a third authority (in the Netherlands) has promulgated its own set of classification criteria out of concern that the practices of other authorities were resulting in "a diverted flow of business, which is harmful to the competitiveness of Dutch industry in the logistics and services

[8]The one narrow exception is the case in which the classification by the first authority is set forth in binding tariff information ("BTI") which is then invoked before the second authority by the very same person to whom the BTI was issued, and only that person (*i.e.*, "the holder").

[9]U.S. Second Oral Statement, paras. 53-56.

sector."[10]

6. Moreover, the cases cited by the EC in its reply to Question 147 do nothing to affect the conclusion that EC Treaty Article 10 does not secure the uniform administration of EC customs law by the EC's 25 independent, geographically limited customs offices. For example, the EC discusses the ECJ judgment in *Commissioners of Customs & Excise v. SmithKline Beecham* (Exh. EC-142). The question in that case was what a member State court should do upon finding that the classification of a good (nicotine patches) set forth in BTI, which had been consistent with a World Customs Organization ("WCO") opinion, was not in fact the correct classification under the EC Tariff. Not surprisingly, the ECJ found that the member State court was "obliged to nullify the unlawful consequences" of the breach of EC law brought about by the issuance of incorrect BTI.[11] However, the Court went on to say (in a portion of its decision not cited by the EC in its reply to Question 147) that how an authority goes about remedying a case of non-compliance with EC customs law is a matter "within the ambit of domestic law."[12] The only limitation is that member States follow the very general "principles of equivalence and effectiveness."[13] Thus, different authorities confronted with the same issue confronted by the UK court are free to address the problem in different ways "within the ambit of domestic law."

7. Another case that the EC discusses in its reply to Question 147 is the case of *Kühne & Heitz v. Productschap voor Pluimvee en Eieren* (Exh. EC-61). This was a case in which an

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[10]Douanerechten. Indeling van bepaalde LCD monitoren in de gecombineerde nomenclatuur, No. CPP2005/1372M (July 8, 2005) (original and unofficial English translation) (Exh. US-77).

[11]Case C-206/03, *SmithKline Beecham*, Order of the Court of Jan. 19, 2005 (not yet reported), para. 51 (Exhibit EC-142) ("*SmithKline*")

[12]Case C-206/03, *SmithKline*, para. 57 (Exhibit EC-142); *see also id.*, para. 53.

[13]Case C-206/03, *SmithKline*, para. 57 (Exhibit EC-142).

administrative proceeding concerning an exporter's entitlement to certain refunds had closed. The exporter had lost, due to a finding regarding classification of the exported goods. Subsequently, in an unrelated proceeding, the ECJ rendered a decision regarding the classification of materially identical goods. Had that decision been available sooner, the result of the Kühne & Heitz refund request would have been different (*i.e.*, favorable to the exporter). Following the ECJ decision, the exporter started a new proceeding, which eventually led to referral to the ECJ of the question whether the original Kühne & Heitz administrative proceeding should be reopened in light of the ECJ classification decision. The ECJ found that *in the circumstances of that case*, the Dutch customs authority was required "to review the decision in order to take account of the interpretation of the relevant provision of Community law given in the meantime by the Court."[14]

8. Notably, the circumstances of that case included the fact that "under national law, [the customs authority] ha[d] the power to reopen [its original] decision."[15] In fact, the ECJ recognized that "Community law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which becomes final [due to expiry of reasonable time-limits or exhaustion of remedies]."[16] Thus, while the Dutch administrative authority in the *Kühne & Heitz* case itself was required to reopen an administrative decision in light of a subsequent ECJ decision, Article 10 of the EC Treaty did not compel other EC administrative authorities to do so if the laws in their respective member States contained stricter rules on the finality of administrative decisions. As a result, EC customs authorities in the 25

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[14]Case C-453/00, *Kühne & Heitz*, [2004] ECR I-837, para. 27 (Exh. EC-61).
[15]Case C-453/00, *Kühne & Heitz*, para. 28 (Exh. EC-61).
[16]Case C-453/00, *Kühne & Heitz*, para. 24 (Exh. EC-61).

different parts of the EC's customs territory may take different approaches to the effects of an ECJ customs classification judgment on prior administrative proceedings. This is yet another example of a lack of uniform administration by the EC of its customs law.

9. The EC also discusses the *de Andrade* case (which the United States has discussed in prior submissions),[17] as well as other cases involving EC Treaty Article 10 in the context of customs penalties. As the United States has previously explained, these cases confirm that penalty provisions may vary significantly from customs authority to customs authority in different parts of the EC. As the ECJ explained in *de Andrade*, EC Treaty Article 10 simply requires customs authorities to "take all the measures necessary to guarantee the application and effectiveness of Community law."[18] It imposes no requirement that different customs authorities "guarantee the application and effectiveness of Community law" in a uniform manner.

10. Further, these decisions on customs penalties confirm that penalties are tools for administering the rules of EC customs law with respect to classification, valuation, and customs procedures, as the United States has argued. Thus, as just noted, the *de Andrade* decision refers to penalties as measures "to guarantee the application and effectiveness of Community law." That characterization by the ECJ is consistent with the ordinary meaning of the term "administer"[19] and contradicts the EC's argument that penalty provisions are not tools used to administer EC customs laws.

11. A similar characterization is articulated in the *Hannle + Hofstetter* case (Exh. EC-143).

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[17]*See, e.g.*, U.S. First Written Submission, para. 100; U.S. First Oral Statement, para. 51; U.S. Answers to 1st Panel Questions, paras. 111-12.

[18]Case C-213/99, *de Andrade*, [2000] ECR I-11083, paras. 19-20 (Exh. US-31).

[19]*See* U.S. First Written Submission, para. 34; *see also* U.S. Answers to 1st Panel Questions, para. 158.

That case concerned an Austrian law that imposed as a penalty an increase in duty to be paid in certain situations involving delay in the payment of a customs debt. The ECJ found that "member States are empowered to choose the penalties which seem appropriate to them" as long as they are within the very general bounds of proportionality and effectiveness.[20] The Court went on to observe that "[t]he objective of the measure is to prevent disadvantage to traders who respect Community legislation and whose conduct ensures that the customs debt can be entered into the accounts and settled rapidly."[21] Again, the ECJ portrays a penalty measure as a tool for giving effect to EC customs law (in this case, in the area of customs procedures) by enforcing compliance with that law. This confirms that penalty provisions "administer" EC customs law within the ordinary meaning of that term.[22]

12. One final comment concerning the EC's reply to Question 147 concerns its assertion that a tribunal of last instance must refer to the ECJ a question regarding the application of Community law that arises in a proceeding before it.[23] As has been shown, that obligation on the part of tribunals of last instance is not absolute. Thus, the ECJ explained in *Intermodal Transports* that a court of last instance is not required to refer a question to the ECJ if, for example, it finds the correct classification of the goods in question to be "so obvious as to leave no scope for any reasonable doubt."[24] Moreover, it is the court of last instance itself that has "sole responsibility" for determining whether the correct classification of goods is "so obvious as

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[20]Case C-91/02, *Hannl + Hofstetter*, Judgment of Oct. 16, 2003 (not yet reported), para. 18 (Exh. EC-143).
[21]Case C-91/02, *Hannl + Hofstetter*, para. 21 (Exh. EC-143).
[22]*See* U.S. Answers to 1st Panel Questions, paras. 156-60; U.S. Second Written Submission, paras. 85-98.
[23]EC Replies to 2d Panel Questions, para. 9.
[24]*Intermodal Transports*, paras. 33 & 45 (Exh. US-71).

to leave no scope for any reasonable doubt."[25] Indeed, as noted above, the question of whether the three-year period for recovery of customs debts may be suspended by the initiation of an administrative proceeding is a question that a court of last instance (in France) has declined to refer to the ECJ, presumably believing the answer to be obvious, even though initiation of an administrative proceeding does not suspend the three-year period in other parts of the EC.[26]

Question 149

In its reply to Panel question No. 79, the European Communities submits that obligations of mutual consultation between customs authorities of member States may arise in specific situations. Please provide details of all such obligations and the circumstances when they apply in the following areas of customs administration:

> *(a) Tariff classification;*
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> *(b) Customs valuation; and*
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> *(c) Customs procedures (particularly, audit following release for circulation; penalties for infringements of EC customs legislation; processing under customs control; and local clearance procedures).* (Footnotes internal to the question omitted.)

13. The EC's reply to Question 149 is notable for at least two reasons. First, the EC persists in referring to "obligations" of cooperation among customs authorities that are extremely general and/or non-binding in nature. Second, the examples of specific obligations of mutual consultation that the EC provides all pertain to situations in which some specific administrative action must be taken by two or more customs authorities, usually because a good or conveyance is necessarily moving between two or more EC member States during a time when the authorities continue to have a regulatory interest in the good or conveyance. In effect, these are the exceptions that prove the rule. That is, as the only examples of *binding* provisions on mutual

[25] *Intermodal Transports*, para. 37 (Exh. US-71).
[26] *See* U.S. Second Oral Statement, para. 31.

consultation the EC can provide are examples involving situations that necessarily involve regulatory action by two or more customs authorities, the logical inference to be drawn is that in other situations there are no specific, binding provisions on mutual consultation. Surely the EC would have cited such provisions if they existed for other situations. Thus, in the routine case of a good being imported into the territory of the EC, clearing customs, and entering the stream of commerce in the EC (*i.e.*, attaining the status of a Community good), there are no specific, binding provisions on mutual consultation.

14. The EC begins its reply by alluding again to Article 10 of the EC Treaty.[27] On this point, the United States refers to its comment on the EC's reply to Question 147. Later in its reply, the EC refers to its replies to the Panel's Question 55 and 56.[28] Those replies discussed the Administrative Guidelines on the European Binding Tariff Information (EBTI) System and its Operation. At the outset, the EC confirmed that those guidelines "are not legally binding."[29] The EC then went on to state that, taken in conjunction with EC Treaty Article 10, customs authorities must take "due account of the administrative guidelines" and must "use all tools available to ensure the proper and uniform administration of EC customs law."[30] However, what this entails and who decides whether "due account" has been taken of the non-binding administrative guidelines, the EC never explains.

15. In its reply to the Panel's Question 56, the EC stated that where two or more member States disagree on the correct classification of a good they "*should* consult with one another."[31]

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[27]EC Replies to 2d Panel Questions, para. 19.
[28]EC Replies to 2d Panel Questions, para. 20.
[29]EC Replies to 1st Panel Questions, para. 44.
[30]EC Replies to 1st Panel Questions, para. 45.
[31]EC Replies to 1st Panel Questions, para. 47.

Nowhere does the EC explain which customs authority should initiate such consultations or within what time period. Nor does the EC explain what happens if a customs authority in a given member State declines to consult. Nor does it explain what happens if a member State believes that there is no actual disagreement on classification because (despite an importer's assertions) it believes that the goods that it is considering are materially different from the goods that other member States are considering.

16. The EC went on to state that "[i]f the disagreement persists, the matter must be raised to the Customs Code Committee." It asserted that "[i]n practice, the responsible official in the Member State concerned will submit the issue to the Commission."[32] Again, the EC gave no explanation as to the time period within which such submission "will" be made. Nor did it explain which of the member States is "the Member State concerned" that "will submit the issue to the Commission" when there is a disagreement among two or more member States.

17. Further in its reply to Question 149, the EC refers to "a best practice guide which deals with the exchange of information (i.e., consultation) between Member States in relation to valuation advice, rulings and audit (**Exhibit EC-144**)."[33] However, the document to which the EC refers appears to be simply a report on "possible working tools to assist information exchange in customs valuation matters." It is not evident from the report that the ideas discussed therein actually acquired the status of a "best practice guide," let alone that they became binding in any sense.

18. Additionally, the EC refers to a regulation that sets out "a general framework for mutual

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[32]EC Replies to 1st Panel Questions, para. 58.
[33]EC Replies to 2d Panel Questions, para. 21.

cooperation and assistance" under which customs authorities have "the general right to request relevant information" from one another.[34] As the EC's own description of that regulation makes clear, it is not a specific operationalization of a duty to administer EC customs law uniformly. It is simply, in the EC's words, "a general framework."

19. The EC's reply to Question 149 does refer to some specific obligations of mutual consultation among customs authorities. However, as noted above, these all involve situations in which two or more customs authorities necessarily have a regulatory interest in a good or conveyance. For example, the EC refers to its reply to the Panel's Question 79.[35] There, the EC cited six instances in which the CCCIR requires mutual consultation between customs authorities.[36] The first instance it cited was Article 292(2) of the CCCIR. That article concerns the situation in which a good is accorded preferential tariff treatment on entering the EC "subject to end-use customs supervisions." In other words, the preferential tariff treatment is dependent on the good's end use, which is subject to customs authority verification. Because the end use may occur in the territory of a member State other than the member State into which the good was imported, according the treatment at issue may require coordination between customs authorities.

20. Another instance cited by the EC in which the CCCIR requires consultation between customs authorities is Articles 313a-313b. Those provisions concern the status of a "regular shipping service." A service may acquire that status if it "carries goods in vessels that ply only

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[34]EC Replies to 2d Panel Questions, para. 24 (referring to Regulation 515/97 (Exh. EC-42)).
[35]EC Replies to 2d Panel Questions, para. 19.
[36]EC Replies to 1st Panel Questions, para. 148.

between ports situated in the customs territory of the Community."[37] Verifying compliance with that requirement necessarily requires coordination among customs authorities in different parts of the territory of the EC. In this respect, the requirement of mutual consultation associated with the regular shipping service provision is like the requirement of mutual consultation associated with the provision on preferential treatment subject to end-use customs supervision. The other provisions cited in the EC's reply to Question 79 are to similar effect.

21. Likewise, the examples of specific mutual consultation requirements that the EC provides in the areas of valuation and customs procedures all involve situations in which multiple customs authorities are involved in a given transaction.[38]

22. The EC's reply to Question 149 makes clear that customs authorities in the EC may not even be aware of how other customs authorities in other parts of the EC are administering EC customs laws. Traders are under no obligation to inform one authority of decisions made by another authority, except in the narrowest of circumstances. In the absence of such information, it is almost impossible to imagine how the 25 independent, regionally limited customs authorities in the EC could administer EC customs laws in a uniform manner.

23. In sum, the EC's reply to Question 149 shows that, with certain very narrow exceptions, there are no binding provisions specifically requiring mutual consultation between authorities in the customs context. There are very general requirements (such as that set forth in EC Treaty Article 10) and non-binding guidelines (such as the administrative guidelines on the EBTI

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[37]CCCIR, Art. 313a(1) (Exh. US-6).

[38]*See* EC Replies to 2d Panel Questions, paras. 21, 23. With respect to local clearance procedures and processing under customs control, the EC notably states that "where such a procedure involves more than one Member State, exchange of information *is practiced*." *Id.*, para. 23 (emphasis added). The EC identifies no specific requirement for such information exchange; it simply asserts that such exchange "is practiced."

system). But, these general requirements and non-binding guidelines are not given operational effect through specific requirements applicable in the customs context. Therefore, as has been seen, where a customs authority in one member State classifies a good in a particular way, for example, and that classification is brought to the attention of another authority in a different member State, there is no rule requiring the latter authority to take any particular action in light of that information on what the former authority has previously done.

Question 151

What is the European Communities' definition of the term "uniform" in Article X:3(a)?

24. In its reply to Question 151, the EC refers once again to the supposed requirement that to establish a breach of GATT 1994 Article X:3(a) a party must show not only that there is an absence of uniform administration, but also that the non-uniform administration exhibits a "pattern."[39] As the United States has shown in previous submissions, Article X:3(a) contains no such "pattern" requirement.[40]

Question 152

In its reply to Panel question No. 110, the European Communities submits that the granting of discretion in a particular legislative provision may be necessary where complex factual aspects have to be taken into account or where conflicting interests need to be weighed and balanced. The European Communities further submits that, typically, the exercise of such discretion will be limited by law and will be governed by certain principles, such as the principle of non-discrimination.

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> *(b) Which principles other than the principle of "non-discrimination" apply in the context of the application of discretionary provisions in the area of customs*

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[39]EC Replies to 2d Panel Questions, para. 31; *see also id.*, para. 37 (reply to Question 153).

[40]*See* U.S. First Oral Statement, paras. 17-19; U.S. Answers to 1st Panel Questions, paras. 36-41; U.S. Second Written Submission, paras. 26-38.

administration by member State customs authorities?

25. In responding to Question 152(b), the EC asserts that EC customs law "does not leave a large measure of discretion to Member States' customs authorities."[41] The EC thus appears to be using the term "discretion" in a very narrow sense, which fails to appreciate that when a customs authority decides how to classify a good or how to value a transaction it necessarily exercises discretion in the sense that it must use judgment.[42] As detailed as the EC's customs rules may be, they are not so detailed as to exclude the possibility of differences of view as to how they should be applied in particular cases. While in theory there may well be a single "right answer" as to how a given good should be classified or valued, it is not the case that every customs authority will necessarily and automatically always reach that theoretically right answer. Administering the EC's customs laws requires the EC customs authorities to exercise judgment. Within the EC's customs territory, there are 25 independent, geographically limited authorities, with different legal traditions, applying such judgment, and there is an absence of institutions or procedures that ensure that these authorities exercise their judgment in the same way. The combination of these features necessarily results in non-uniform administration by the EC of its customs laws, in breach of GATT 1994 Article X:3(a).

Question 155

In paragraph 432 of its first written submission, the European Communities submits that penalty laws are governed by fundamental rules of due process to which the disciplines of Article X:3(a) of the GATT 1994 are ill-adapted. Can this argument be reconciled with the submission made by the European Communities in paragraph 231 of its first written submission to the effect that

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[41]EC Replies to 2d Panel Questions, para. 33.

[42]*See New Shorter Oxford English Dictionary*, Vol. I, pp. 688-89 (1993) (defining "discretion," as relevant here, to mean "[t]he action of discerning or judging; judgment; decision, discrimination"); *see also* U.S. Second Written Submission, paras. 59-61.

Article X:3(a) only lays down minimum standards of transparency and procedural fairness? If so, please explain how.

26. In its reply to Question 155, the EC asserts that the applicability of GATT 1994 Article X:3(a) to penalty provisions "depends on whether penalty provisions are among the laws referred to in Article X:1 GATT."[43] As the United States has explained in prior submissions, this argument confuses the distinction between a measure that is being administered and a measure that is doing the administering, in the sense that the latter gives effect to the former. For a measure to be within the scope of Article X:3(a), the measure being administered must be within the scope of Article X:1, and it is not relevant whether the administering measure is also within the scope of Article X:1. What is relevant is whether such administering measures (*i.e.*, the tools of administration) differ from customs authority to customs authority within the territory of a WTO Member. To the extent that they do (as is the case in the EC), they demonstrate non-uniform administration of the Member's customs laws.

27. Moreover, the EC's contention that "the substantive standards of Article X:3(a) GATT are ill adapted to the application of penalties"[44] misses the relevance of Article X:3(a) to the issue of penalties. The EC explains that the application of penalties requires that the relevant authority have flexibility to take account of degree of guilt and other factors. However, the question of flexibility in the application of penalties is not at issue in this dispute. What is at issue is the disparity in the tools available to different authorities within the Member's territory to respond to identical infractions. It is that disparity that demonstrates non-uniformity of administration of the customs laws, regardless of how penalty provisions are applied in any particular case.

[43]EC Replies to 2d Panel Questions, para. 40.
[44]EC Replies to 2d Panel Questions, para. 41.

28. Finally, the EC continues to seek support from the contrast between the explicit reference to penalties in Article VIII:3 of the GATT 1994 and the absence of such a reference in Article X. However, as the United States explained in its second written submission, the fact that Article VIII:3 sets substantive parameters for penalties for certain types of breaches of customs regulations or procedural requirements – *i.e.*, "minor breaches" – has nothing to do with whether penalties may be considered to be tools for administering a Member's customs laws. There, the United States explained that the EC's argument would lead to absurd results as, for example, justifying discrimination among WTO Members in the application of penalties in view of the absence of any reference to penalties in GATT 1994 Article I.[45] Similarly, the logic of the EC's argument would seem to preclude Article X claims regarding the imposition of antidumping duties or of fees or other charges commensurate with the cost of services rendered, since both of those types of charges are explicitly addressed in other GATT Articles (Articles VI and II:2(c), respectively) but not in Article X. As these outcomes plainly would be absurd, the EC's argument that penalties are not covered by Article X because they are addressed in other GATT articles should be rejected.

Question 156

In its reply to Panel question No. 48, the European Communities submits that the obligation of uniform administration under Article X:3(a) of the GATT 1994 means that the trader should have "reasonable assurance" as to the way in which the WTO Member in question will administer its laws and regulations. Please elaborate in practical terms what is meant by the reference to "reasonable assurance".

29. In its reply to Question 156, the EC states that "[r]easonable assurance means that the treatment a trader can expect from the authorities of such member should be reasonably

[45]U.S. Second Written Submission, paras. 96-97.

predictable."[46] At the outset, the Panel should note that there is no "reasonable assurance" test in GATT 1994 Article X:3(a). A Member could administer its customs laws in a non-uniform manner in breach of Article X:3(a), regardless of whether it gives traders "reasonable assurances" as to how it will administer its laws and regulations.

30. Having asserted without support a "reasonable assurances" test that it equates to a test of whether the treatment a trader can expect is "reasonably predictable," the EC then goes on to state that predictability should be examined in terms of "the overall pattern of administration."[47] The United States does not see how the existence of a "pattern" relates to the question of reasonable predictability of treatment. The treatment that authorities will accord traders may lack reasonable predictability whether or not the authorities' administration of the customs laws exhibits a pattern.

31. The United States agrees that, as a factual matter, where a Member administers its customs laws in a uniform manner, the treatment the Member accords traders should be reasonably predictable. It should be emphasized that the reasonable predictability that a trader should expect under a system of uniform administration is reasonable predictability as to how the *Member* will administer its laws. It is irrelevant that the customs authority in one region within a Member's territory may administer the Member's laws in a reasonably predictable manner. There would be little point in an obligation to administer customs laws uniformly if it could be satisfied simply by the customs authority in one region within a Member's territory according reasonably predictable treatment, regardless of the actions of authorities outside that region. For

[46]EC Replies to 2d Panel Questions, para. 43.
[47]EC Replies to 2d Panel Questions, para. 43.

example, if a customs authority in one region predictably behaves in one way, and a customs authority in another region predictably behaves in another way, that predictability changes nothing about the fact that the overall behavior is not uniform. If a Member is satisfying its obligations under GATT 1994 Article X:3(a), a trader will have its reasonable expectations met that it will be accorded the same treatment for the same situation across the Member's territory, not just in one or another part of it. The EC's system of customs administration does not satisfy that altogether reasonable expectation.

Question 157

In its reply to Panel question No. 78, the European Communities submits that a member State may only act to supplement provisions contained in a Community regulation if it is explicitly authorised to do so or if a specific issue is not covered by Community legislation. Does this mean that member States are prohibited from taking any action – whether binding or non-binding – in cases where a Community regulation does not explicitly authorise the member State to do so or if a specific issue is covered by Community legislation? If not, please explain what action member States are authorised to take.

32. In its reply to Question 157, the EC notes that "Member States' authorities are not prevented from issuing administrative guidelines or other non-binding documents for administrative purposes."[48] While the EC goes on to state that such guidelines and administrative documents cannot derogate from the application of EC customs law, this does not change the fact that the guidelines and administrative documents are particular to the member State issuing them, as is the interpretation of EC customs law that the member State is applying.

33. An illustration of this point is the guidance issued by the customs authority in the United Kingdom and the customs authority in France, respectively, regarding administration of the EC law on processing under customs control. As the United States has demonstrated, these two sets

[48]EC Replies to 2d Panel Questions, para. 45.

of guidance, on their face, take different approaches to the administration of that law.[49] Whether or not that guidance is characterized as binding or non-binding, and whether or not the guidance can be said to derogate from EC customs law, an applicant for authorization to engage in processing under customs control reasonably would understand that the customs authority in the United Kingdom will follow the steps identified in the UK guidance and the customs authority in France will follow the steps in the French guidance. It is for this reason that the United States maintains that the differences in the guidance are evidence of non-uniform administration.

Question 158

In paragraph 68 of its second written submission, the European Communities submits that it doubts that Article X:3(a) of the GATT 1994 requires the establishment of a central customs agency because this could not be regarded as a "reasonable measure" within the meaning of Article XXIV:12 of the GATT 1994. Does this mean that the European Communities considers that one of the effects of Article XXIV:12 when read with Article X:3(a) is that Members are only required to take "reasonable measures" to fulfil their obligations under the latter provision? If so, please provide support for such a view, making reference to the terms of Articles X:3(a) and XXIV:12 respectively.

34. The EC's reply to Question 158 begins by recalling the statement by the panel in *Canada – Gold Coins* that "the purpose of Article XXIV:12 GATT is to 'qualify the basic obligation to ensure the observance of the General Agreement by regional and local government authorities in the case of contracting parties with a federal structure.'"[50] That statement is important, because it highlights why Article XXIV:12 of the GATT 1994 is *not* relevant to the present dispute. Article XXIV:12 is relevant to "the observance of the General Agreement by regional and local government authorities." This dispute, by contrast, does not concern the observance of an

[49]*See* U.S. Answers to 2d Panel Questions, paras. 71-72, 73-78.

[50]EC Replies to 2d Panel Questions, para. 46 (quoting GATT Panel Report, *Canada – Gold Coins*, para. 53). The Panel should note that the GATT panel report in *Canada – Gold Coins* was never adopted.

obligation under the GATT 1994 by regional and local government authorities but, rather, by the EC itself.[51] It is the EC that has an affirmative obligation under GATT 1994 Article X:3(a) to administer EC customs law in a uniform manner. For that reason, this dispute is distinguishable from *Canada – Gold Coins*, which involved a provincial government adopting a measure for the raising of provincial revenue – a power that Canada's constitution vested exclusively in the provincial legislature[52] – in a manner that put Canada in breach of its obligation under GATT 1994 Article III. In that dispute, South Africa complained that Canada had breached its GATT 1994 Article III obligation by virtue of the provincial legislation. Here, by contrast, the United States is not arguing that the action of any single member State itself brings about a breach by the EC of its obligation under GATT 1994 Article X:3(a). Rather, the United States is arguing that the EC has breached its obligation under GATT 1994 Article X:3(a) by virtue of its failure to administer its customs law – "federal" law, to use the EC's term – in a uniform manner.

35. Second, even if Article XXIV:12 were relevant to this dispute, it would not excuse the EC from its obligation under Article X:3(a) or in any way affect its obligation under that Article. As paragraph 13 of the *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994* ("Understanding on Article XXIV") makes clear, "Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994. . . ." That is, Article XXIV:12 imposes an *obligation* on Members with federal structures to take "reasonable measures" to "ensure observance" by local or regional governments of a Member's obligations, but Article XXIV:12 does not purport to alter the content of any GATT

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[51] *See* U.S. Second Written Submission, paras. 13-17.

[52] *See* GATT Panel Report, *Canada – Measures Affecting the Sale of Gold Coins*, L/5863, para. 8 (17 September 1985, unadopted) ("*Canada – Gold Coins*").

1994 obligation for such Members. Additionally, even where observance of WTO obligations by regional or local governments is at issue, paragraph 14 of the Understanding on Article XXIV and Article 22.9 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") provide that "[t]he provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the [DSU]" and "[t]he provisions of the covered agreements and [the DSU]," respectively, "relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance." Therefore, even if, pursuant to Article XXIV:12, the EC's only obligation under Article X:3(a) were to take "reasonable measures" to secure uniform administration of EC customs law, its failure to actually administer its customs law in a uniform manner would not excuse it from relevant provisions on compensation and suspension of concessions.[53]

36. Third, the United States notes that the EC states that it "has not invoked Article XXIV:12 GATT *as a primary defence* in the present case."[54] That statement is important, because it implies that the EC in fact has invoked Article XXIV:12 as a defense, just not a "primary" defense. Previously, the EC had not actually "invoked Article XXIV:12 GATT as a . . . defence," but merely referred to it as "support" for its proposed interpretation of GATT 1994 Article X:3(a).[55] This distinction is significant, because actually invoking Article XXIV:12 as a defense would carry with it a burden to demonstrate that lapses in the uniform administration of EC customs law concern matters "which the central government cannot control under the

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[53]*See* GATT Panel Report, *Canada – Gold Coins*, paras. 61-65 (discussing Canada's obligation to compensate South Africa until efforts pursuant to Article XXIV:12 bring Canada into compliance with Canada's obligation under Article III).

[54]EC Replies to 2d Panel Questions, para. 49 (emphasis added).

[55]EC Replies to 1st Panel Questions, para. 113.

constitutional distribution of powers."[56] If the EC is now arguing that it is not able to control the administration of customs law by the customs authorities in the member States under its constitutional distribution of powers, this only reinforces the point that the EC is not meeting its obligation to administer its customs law uniformly under Article X:3(a).

37. Finally, the EC's reply to Question 158 assumes that the U.S. claims demand "creation of an EC customs agency, and [sic] EC customs court, and the harmonisation of Member States law notably in the area of penalties," and proceeds to argue that these are not reasonable measures.[57] In fact, the EC mischaracterizes the U.S. claims and thus responds to an argument the United States does not make. The United States has never insisted that the EC must create an EC customs agency and an EC customs court and harmonize member States' laws. The United States simply argues that the EC, like other WTO Members, must administer its customs laws in a manner consistent with GATT 1994 Article X:3(a) and provide tribunals or procedures for the prompt review and correction of administrative action relating to customs matters that comply with Article X:3(b).

Question 159

With respect to the Customs Code Committee:

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> *(b) In its reply to Panel question No. 58, the European Communities submits that opinions of the Customs Code Committee typically reflect a common approach agreed by all member States, which is normally observed by the member States. Please provide proof to support this assertion.*

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[56]GATT Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, BISD 39S/206, para. 5.79 (adopted 19 June 1992); *see also* U.S. Second Written Submission, para. 17 & n.17.

[57]EC Replies to 2d Panel Questions, para. 50.

38. In its reply to Question 159(b), the EC states that "[i]t is not for the EC, but for the US as the complainant in the present case, to provide evidence" that conclusions of the Customs Code Committee do *not* typically reflect a common approach of the member States or that they are *not* adopted by consensus.[58] The EC's characterization of the burden of proof is wrong. It is "the party who asserts a fact, whether the claimant or the respondent, [that] is responsible for providing proof thereof."[59] In this case, it is the EC in rebuttal that has asserted that issuance of conclusions of the Customs Code Committee is a procedure for ensuring uniform administration because the conclusions are adopted by consensus. Therefore, it is the EC that has the burden to substantiate that proposition. Indeed, the EC is uniquely positioned to demonstrate whether opinions of the Customs Code Committee typically reflect a common approach agreed by all member States since it alone has access to the full documentation evidencing the deliberations of the Committee.

39. In any event, to the extent the evidence in this dispute has addressed the relationship between opinions of the Customs Code Committee and the approach of member States, the evidence has shown a prominent example of the two *not* being in accord. Specifically, in the LCD monitors case, the customs authorities in at least two member States have taken approaches to classification of the goods at issue that are at odds with the corresponding Customs Code Committee conclusion.[60]

> *(d) In paragraph 266 of its first written submission, the European Communities submits that it is incorrect to refer to the Customs Code Committee as an institution of the*

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[58]EC Replies to 2d Panel Questions, para. 53.

[59]Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, p. 14 (adopted May 23, 1997).

[60]*See* U.S. Second Oral Statement, paras. 54-56.

European Communities. How does/should this characterisation of the Customs Code Committee affect the Panel's consideration of the institutions, instruments and mechanisms in place in the European Communities to fulfil the requirements of Article X:3(a) of the GATT 1994?

40. In its reply to Question 159(d), the EC states that it "is not sure how the characterisation of the Customs Code Committee will affect the Panel's analysis" since the United States "[is] not challenging the manner in which the Customs Code Committee operates."[61] As the United States explained in its answer to Question 134, the way in which the Customs Code Committee operates is relevant to the U.S. Article X:3(a) claim because the Committee is one of the institutions that the EC holds out as ensuring that the EC administers its customs laws uniformly. The United States refers the Panel to its answer to that question for a fuller discussion of this issue.[62]

Question 161

Regarding the tariff classification of network cards for personal computers and drip irrigation products in the European Communities, does the European Communities accept that, at one point in time, one or more EC member States did not treat as binding BTI issued by the other EC member States?

41. In reply to Question 161, the EC states that it is not aware of customs authorities in certain member States declining to treat as binding BTI issued by other customs authorities for network cards and for drip irrigation products. The Panel should note, however, that the EC's reply focuses narrowly on whether BTI issued to a particular "holder" for the products at issue were ever not honored by customs authorities other than the issuing authority. More relevant is the undeniable fact that these products were subject to divergent classification by different

[61]EC Replies to 2d Panel Questions, para. 60.
[62]U.S. Answers to 2d Panel Questions, paras. 42-44.

customs offices within the EC, and these divergences were not resolved promptly and as a matter of right. Thus, in the *Peacock* case, the Advocate General observed that "customs authorities of various Community Member States issued conflicting BTIs classifying items of LAN equipment variously under headings 8471, 8473 and 8517."[63] Likewise, with respect to drip irrigation products, the EC does not deny that there was a divergence of classification between different customs authorities. Rather, it simply characterizes the divergence as "a case of temporarily diverging BTI."[64] "Temporarily diverging BTI" means that customs authorities in different member States classified materially identical products differently, such that the EC was undeniably not administering EC customs law uniformly.

Question 165

In paragraph 167 of its second written submission, the European Communities submits that the European Ombudsman is a mechanism that contributes to the "proper" administration of EC law. Please identify the number of instances the European Ombudsman's advice has been sought in the area of customs administration and the action taken by the Ombudsman in each of those instances.

42. The EC's reply to Question 165 concerning the role of the European Ombudsman in the area of customs administration should be understood in the context of the Ombudsman's mandate. In particular, as the guide entitled "The European Ombudsman at a Glance" explains, "The Ombudsman cannot investigate complaints against national, regional or local authorities in the Member States, even when the complaints are about European Union matters."[65] This point is confirmed in a recent Ombudsman decision (presumably one of the four to which the EC

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[63] *Peacock AG* v. *Hauptzollamt Paderborn*, Case C-339/98, Opinion of the Advocate-General, 2000 ECR I-08947, para. 15 (Oct. 28, 1999) (Exh. US-17).

[64] EC Second Written Submission, para. 141.

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

referred in its reply to Question 165).[66] The decision involved the purchase by a company in the Netherlands of shoes from a seller in Finland which were accompanied by certificates of origin issued by the Finnish authority that read "Hong Kong, China." The customs authority in the Netherlands was unsure whether this meant that the shoes originated in Hong Kong or in China (a significant difference, as shoes originating in China would be liable for antidumping duties). The authority in the Netherlands began an investigation into the origin of the goods. Subsequently, the authority in Finland issued revised certificates of origin that read "Hong Kong." However, rather than simply accept those certificates, the authority in the Netherlands continued its investigation, ultimately concluding that the shoes were of Chinese origin. This led to an assessment of antidumping duties and then to a series of transactions between the Dutch company, the Dutch customs authority and the EC Commission. The Commission's actions ultimately led the company to file a complaint with the Ombudsman. In its decision, the Ombudsman made clear that the company's inquiry "does not concern the decision taken by the Dutch customs authorities or the allegedly erroneous certificates of origin delivered by the Finnish Chamber of Commerce. Regarding these matters, the complainant has the possibility to lodge complaints with the respective national ombudsmen in the Netherlands and in Finland."[67]

Question 168

Please comment on and respond to the following submissions by the United States:

> *(a) In paragraph 50 of its second written submission, the United States argues that the European Communities does not refer to any measures making Article 10 of the EC*

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[66]Decision of the European Ombudsman on complaint 1817/2004/OV against the European Commission (Nov. 7, 2005) (Exh. US-83).

[67]Decision of the European Ombudsman on complaint 1817/2004/OV against the European Commission, The Decision, para. 1.2 (Nov. 7, 2005) (Exh. US-83).

Treaty operational in the area of customs administration nor to any rules giving effect to this general obligation vis-à-vis member States in particular situations.

43. In reply to Question 168(a), the EC states that "the duty of cooperation is legally binding and directly applicable on all Member States. It can and has been enforced."[68] As the United States explained in its comment on the EC's reply to Question 147, the relevant question is not whether EC Treaty Article 10 is "legally binding and directly applicable." The relevant question is whether the very broad, overarching obligation set forth in Article 10 is made operational in the customs area through specific rules that would ensure uniform administration. The answer is that it is not. For a full discussion of this issue, the United States refers the Panel to its comment on the EC's reply to Question 147.

(b) In paragraph 86 of its second written submission, referring to the panel's Report, Argentina – Hides and Leather, the United States submits that, while a law providing for penalties or audit procedures may be considered as something to be administered, that does not exclude the possibility of considering the same law as a tool for administering other laws, for example, by putting those laws into effect through verification and enforcement. The United States submits that the European Communities itself recognized this point in Argentina – Hides and Leather, where it challenged the same Argentinean measure from the perspective of its substance and from the perspective of its character as a tool for administering other laws.

44. In its reply to Question 168(b), the EC purports to describe what the panel "held" in *Argentina – Hides*. Specifically, it asserts that "[t]he Panel held that [Argentina's Resolution 2235] constituted a violation of Article X:3(a) GATT because it made it impossible for Argentina to administer its customs laws in a manner that was reasonable and impartial."[69] Notably, the portion of the *Argentina – Hides* report that the EC cites in support of this proposition is not the

[68]EC Replies to 2d Panel Questions, para. 78.
[69]EC Replies to 2d Panel Questions, para. 79.

panel's finding, but rather, the panel's summary of the EC's argument.[70] It was the EC as complainant, not the panel, that contended that the Argentinian measure at issue made the "impartial application of the relevant customs rules impossible." Indeed, the very fact that the panel did *not* adopt the EC's characterization that the Argentinian measure made it "impossible" for Argentina to meet its Article X:3(a) obligation suggests that the panel did not rely on that characterization. This point is supported by the fact that, although the panel ultimately concluded that Argentina's administration of its customs law was not impartial, it did so for reasons other than that urged by the EC. Significantly, it did not accept the EC's argument that the mere presence of representatives of the domestic tanning industry at the port upon the exportation of raw hides necessarily resulted in a breach of the obligation of impartial administration.[71]

45. Second, the EC's reply to Question 168(b) indicates that the EC disagrees with the U.S. statement that in *Argentina – Hides*, the EC challenged the same Argentinean measure from the perspective of its substance and from the perspective of its character as a tool for administering other laws. On this point, the United States refers the Panel to paragraph 4.203 of the panel report in *Argentina – Hides*, which substantiates the U.S. statement.[72]

46. Finally, with respect to the EC's statement that "[n]owhere does the Panel Report in *Argentina – Hides* indicate that the Argentinean measure administered some other measure,"[73] the United States refers the Panel to paragraph 11.72 of the *Argentina – Hides* report. There, the

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[70]Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1, para. 11.58 (adopted Feb. 16, 2001) ("*Argentina – Hides*").

[71]*See* Panel Report, *Argentina – Hides*, para. 11.99 ("Much as we are concerned in general about the presence of private parties with conflicting commercial interests in the Customs process, in our view the requirement of impartial administration in this dispute is not a matter of mere presence of ADICMA representatives in such processes.").

[72]*See also* U.S. Second Written Submission, para. 86.

[73]EC Replies to 2d Panel Questions, para. 79.

panel concludes that the measure at issue "merely provides for a certain manner of applying those substantive rules [*i.e.*, Argentina's customs laws]. This measure clearly is administrative in nature."

> *(c) In its reply to Panel question No. 93, the United States submits that matters described in Article X:1 of the GATT 1994 other than customs matters – such as measures of general application affecting the sale, distribution, transportation, and insurance of imports – can be distinguished from penalty provisions and audit procedures inasmuch as they are objects of administration rather than measures that serve an administrative function.*

47. In its reply to Question 168(c), the EC states that "Article X GATT does not distinguish between 'laws' which are of 'substantive' character and others which are of 'administrative' character."[74] However, Article X:3(a) plainly does refer to certain "laws, regulations, decisions and rulings" and to the manner in which a Member must administer such "laws, regulations, decisions and rulings." A relevant question, therefore, is how the manner of administration of those laws, regulations, decisions and rulings is evidenced. As the panel in *Argentina – Hides* recognized, the manner of administration may be evidenced by other measures that prescribe the way in which the laws, regulations, decisions and rulings are given effect. Such other measures may appropriately be described as being administrative in character. From this perspective, the laws, regulations, decisions and rulings that are being administered may be described as being substantive in character. To the extent that a measure that is administrative in character is evidence of the non-uniform administration of laws, regulations, decisions and rulings that are substantive in character, the administrative measure can be considered as part of a challenge to a

[74]EC Replies to 2d Panel Questions, para. 80.

Member's failure to administer its laws uniformly under Article X:3(a).[75]

48. The EC next proceeds to introduce a new argument in which it contends that all of the laws in Article X:1 could be considered administrative in character in the sense that they "need to be administered."[76] The EC thus attempts to make a *reductio ad absurdum* type argument. However, its premise that what makes a law "administrative" is the "need to be administered" is incorrect. In fact, what makes a law administrative is that it provides for a certain manner of applying substantive rules. For further discussion on this point, the United States refers the Panel to its answer to Question 130.[77]

49. The EC goes on to argue that penalty provisions cannot be administrative in nature because they are "themselves laws to be administered."[78] In this regard, the EC makes the error of assuming that a law that is administrative in character cannot itself be administered. That simply is not true.[79]

50. Finally, the EC professes confusion with regard to the U.S. discussion of audit procedures as tools, like penalty provisions, that administer EC customs laws in a non-uniform manner. The EC states that it fails to see "the parallel" between audit procedures and penalty provisions.[80] In fact, the United States has been quite clear in articulating the parallel. Like penalty provisions, audit procedures do not prescribe substantive customs rules, but rather, they are tools for verifying and enforcing compliance with substantive rules, which are set forth elsewhere. To the

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[75]*See* U.S. Second Written Submission, paras. 85-95; U.S. Answers to 2d Panel Questions, paras. 25-28, 35-41.

[76]EC Replies to 2d Panel Questions, para. 81.

[77]U.S. Answers to 2d Panel Questions, paras. 25-28.

[78]EC Replies to 2d Panel Questions, para. 82.

[79]*See* U.S. Second Oral Statement, paras. 76-77; U.S. Answers to 2d Panel Questions, para. 26 n.22.

[80]EC Replies to 2d Panel Questions, para. 83.

extent that different customs authorities in the EC use very different audit procedures, they administer substantive EC customs rules differently, just as is the case with different penalty provisions.[81] Indeed, the EC does not even assert that its 25 independent, geographically limited customs authorities administer EC customs law uniformly through the use of audit procedures. It merely states quite vaguely that they "have the necessary audit capacities, and are guided by the Community Customs Audit Guide."[82]

> *(d) In paragraph 25 of its second written submission, the United States argues that it is unclear how the European Communities' characterization of Article X:3(a) of the GATT 1994 as a "minimum standards provision" translates into a legal standard that may be applied by the Panel.*

51. In its reply to Question 168(d), the EC states that it has referred to Article X:3(a) as a "minimum standard" provision to clarify "the object and purpose of the provision."[83] The United States disagrees with the EC's suggestion that an object and purpose can or need be attributed to an individual treaty provision. Article 31(1) of the Vienna Convention on the Law of Treaties ("VCLT") provides that "[a] treaty shall 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 the light of its object and purpose." It is apparent that the "its" before "object and purpose" refers to the singular "treaty," rather than to the plural "terms of the treaty." This view has been confirmed, for example, by the panel in *US – Corrosion-Resistant Steel Sunset Review*, which refers explicitly to the "object and purpose of the *treaty*,"[84] and the Appellate Body in *EC – Hormones*,

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[81] *See* U.S. First Written Submission, paras. 97-99.

[82] EC Replies to 2d Panel Questions, para. 83.

[83] EC Replies to 2d Panel Questions, para. 84.

[84] Panel Report, *United States – Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, para. 7.44 (adopted Jan. 9, 2004, as modified by Appellate Body report) (emphasis added) ("*US – Corrosion-Resistant Steel Sunset Review*").

which discusses "the *treaty's* object and purpose."[85]

52. Having purported to identify what it calls the "object and purpose" of Article X:3(a), the EC goes on to state that "[i]n accordance with customary rules of treaty interpretation, this limited object and purpose of Article X:3(a) GATT must guide the interpretation of the provision by the Panel."[86] However, as already noted, the EC's approach is not in accordance with customary rules of treaty interpretation, which provide for interpretation of a treaty in light of the *treaty's* object and purpose. The EC's approach, in fact, turns customary rules of interpretation on their head. Rather than ascertaining the meaning or "purpose" of an individual treaty provision by examining the ordinary meaning to be given to the terms of the treaty in their context and in the light of treaty's object and purpose, the EC attempts *first* to identify *a priori* what it calls "the object and purpose" of Article X:3(a) and *then* urges that this supposed "object and purpose" "guide the interpretation of the provision."

53. The EC's approach also is troubling in that it invites the possibility of adding to or diminishing rights and obligations under the covered agreement at issue. It should not be left to parties to a dispute to divine "purposes," since a party may simply use this as an opportunity to re-write the provision – which is precisely what the EC is doing in characterizing Article X:3(a) as a "minimum standard" provision.

54. Nowhere does Article X:3(a) or any other provision of the GATT 1994 articulate an "object and purpose" that supports a characterization of Article X:3(a) as a "minimum standard"

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[85]Appellate Body Report, *EC – Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R, para. 104 (adopted Feb. 13, 1998) (emphasis added) ("*EC – Hormones*").

[86]EC Replies to 2d Panel Questions, para. 84 (citing Article 31(1) of the Vienna Convention on the Law of Treaties).

provision. In construing WTO agreements, the Appellate Body has consistently looked to the text of the relevant agreement to identify its object and purpose.[87] Here, however, the EC purports to derive an "object and purpose" not from agreement text, but from a passing reference in an Appellate Body report in a context unrelated to that of the present dispute, and in which the phrase "minimum standard" was not in fact used to describe any supposed "object and purpose" of Article X:3(a). This is a perfect example of the danger of pursuing treaty interpretation in the manner the EC has proposed. The EC has selected an isolated statement about Article X:3(a) from outside the text of the GATT 1994, labeled that statement as the "object and purpose" of Article X:3(a), and then attempted to leverage that statement to an entirely self-serving end. Because it is contrary to customary rules of treaty interpretation, the EC's characterization of this "object and purpose" should be rejected.

> *(e) In paragraph 42 of its oral statement at the first substantive meeting, the United States submits that the European Communities' contention that appeals of customs decisions to national courts, coupled with the possibility of national courts making preliminary references to the ECJ, constitutes a critical instrument of ensuring uniform administration of customs law is at odds with its contention that the obligation of uniform administration under Article X:3(a) of the GATT 1994 and the obligation to provide remedies in respect of administrative action under Article X:3(b) of the GATT 1994 are discrete obligations without any inherent link*

55. The EC's reply to Question 168(e) repeats the EC's position that preliminary references

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[87] *See, e.g.*, Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, para. 92 (adopted Apr. 20, 2004) (object and purpose identified through examination of preamble of WTO Agreement and text of Enabling Clause); Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, para. 311 (adopted Jan. 27, 2003) (overall object and purpose of DSU expressed in Article 3.3 of that agreement); Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, paras. 140-42 (adopted Oct. 23, 2002) (referring to Articles 3.4 and 3.7 of DSU to describe its object and purpose); Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, para. 95 (adopted Jan. 12, 2000) (referring to preamble of Safeguards Agreement to identify its object and purpose).

to the ECJ are an instrument of ensuring uniform administration, but it does not show how that position can be reconciled with the EC's view that Articles X:3(a) and X:3(b) set forth discrete obligations without any inherent link. In fact, in prior submissions, the EC has portrayed the ECJ as an entity that has a "cooperative relationship" with and "helps" the review courts in the member States, working with them to ensure that they interpret and apply EC law correctly.[88] The ECJ thus would appear to play an integral role in the review process. At the same time, the EC describes the decisions of the ECJ as important instruments for ensuring uniform administration. In this sense, the EC appears to acknowledge a clear link between the function of uniform administration and the function of review of administrative action. As the EC's own characterizations support the existence of a link between uniform administration and the review and correction of administrative action, its contention that Article X:3(a) does not provide context for Article X:3(b) should be rejected.

Question 169

What is the specific legal basis under EC law according to which the following bodies are considered as organs of the European Communities:

(a) the bodies established in the member States to review at the first instance customs decisions taken by member State customs authorities; and

(b) national courts of the member States which are charged to review at the first instance customs decisions taken by member State customs authorities?

56. In its reply to Question 169, the EC explains that tribunals in the EC member States are "organs of the EC" by virtue of "the preliminary reference procedure to the ECJ and . . . the basic

[88]EC Replies to 1st Panel Questions, para. 174 ("[preliminary reference] procedure is based on a cooperative relationship between the Court of Justice and national courts"); EC Second Written Submission, para. 244 ("ECJ does not review national customs administration decisions, but it helps the national courts in such a review."); EC First Written Submission, para. 470 (same).

principles of primacy of Community law and direct effect."[89] It follows, according to the EC's argument, that these features qualify member State tribunals as the tribunals for prompt review and correction that the EC provides to fulfil its obligation under GATT 1994 Article X:3(b).

57. What is notable about this line of reasoning is that it implies that the actions that the EC takes to fulfil its Article X:3(b) obligation are indistinguishable from the actions that the EC's member States take to fulfill their Article X:3(b) obligations. The very same tribunals that the EC member States maintain for the prompt review and correction of administrative action relating to customs matters are the tribunals that the EC maintains for that same purpose, according to the EC. Thus, the EC appears to reason that if the individual member States are complying with their obligations under Article X:3(b) then the EC necessarily is complying with its obligation under Article X:3(b).

58. However, the fact that the same tribunal may be considered, as a matter of internal EC law, as both a member State tribunal and an EC tribunal does not mean that it meets the requirements of GATT 1994 Article X:3(b) with respect to both the EC and the member State's obligations. As the United States has discussed in prior submissions, one of characteristics that a tribunal must have to satisfy a WTO Member's obligation under Article X:3(b) is that its decisions must "govern the practice of" "the agencies entrusted with administrative enforcement."[90] Plainly, "the agencies entrusted with administrative enforcement" means something different from the point of view of an EC member State than it does from the point of view of the EC.

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[89]EC Replies to 2d Panel Questions, para. 87.

[90]*See* U.S. Answers to 2d Panel Questions, para. 81; U.S. Second Oral Statement, paras. 83-85; U.S. Second Written Submission, paras. 102-09; U.S. Answers to 1st Panel Questions, paras. 135-40.

59. With respect to France, for example, "the agencies entrusted with administrative enforcement" are the French customs authorities. With respect to the EC, "the agencies entrusted with administrative enforcement" are the 25 independent, geographically limited customs offices of the EC. It may well be that the decisions of a French review tribunal govern the practice of the agencies entrusted with administrative enforcement in France. However, they indisputably do *not* govern the practice of the agencies entrusted with administrative enforcement of EC customs law throughout the EC. In this sense, the fact that the French tribunal may satisfy France's obligation under Article X:3(b) does not mean that it also satisfies the EC's obligation. In sum, although as a matter of EC law a tribunal may serve a dual function as both a member State tribunal and an EC tribunal, this does not mean that it also satisfies both the member State's obligation under Article X:3(b) and the EC's obligation under Article X:3(b).

Question 173

Making reference to the relevant terms of Article X:3(a) of the GATT 1994 and any other supporting material, please explain whether or not the design and structure of a customs administration system as a whole, or relevant components thereof, can be considered as such in determining whether or not Article X:3(a) has been violated for want of uniform administration. Additionally or alternatively, is it necessary to have regard to specific instances of non-uniform administration in order to demonstrate a violation of Article X:3(a)?

60. In its reply to Question 173, the EC starts by drawing a distinction between "the administration of customs law" and "measures of general application which constitute the EC's system of customs administration," as if these two things were entirely unrelated.[91] In fact, they are not unrelated at all. To the extent that measures of general application which constitute the EC's system of customs administration (or the absence of certain measures) result in non-

[91]EC Replies to 2d Panel Questions, para. 93.

uniform administration, they establish that the EC administers its customs laws in a manner inconsistent with GATT 1994 Article X:3(a). As discussed in the U.S. response to Question 126, the design and structure of the EC's system of customs administration establish that very conclusion.[92]

61. The EC proceeds to assert that to establish that the EC's system of customs administration "as such" leads to non-uniform administration, the United States must provide "evidence regarding the consistent application of the law,"[93] citing the Appellate Body reports in *US – Carbon Steel*, *US – Oil Country Tubular Goods Sunset Reviews*, and *US – Oil Country Tubular Goods from Mexico*.[94] However, that is not what the reasoning in these reports demonstrates. Even in the quotation from *US – Carbon Steel* which the EC cites, it is clear that, in looking at the meaning of a municipal law, it is *not* required to produce evidence of the law's application; rather, evidence from the text of the law itself "may be supported, *as appropriate*, by evidence of the consistent application of such law[]."[95] The fact that in the disputes cited by the EC the complaining parties introduced such evidence (because other, more direct, evidence did not support their position), and that the quality of that evidence therefore had to be examined, does not mean that such evidence is required (given, in particular, the Appellate Body statement in *US – Carbon Steel*).

62. In contrast to disputes in which other types of evidence may have been "appropriate," in

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[92]U.S. Answers to 2d Panel Questions, paras. 9-16.

[93]EC Replies to 2d Panel Questions, para. 96.

[94]EC Replies to 2d Panel Questions, paras. 95-98.

[95]Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, para. 157 (adopted Dec. 19, 2002) (emphasis added) ("*US – Carbon Steel*").

the present dispute, the United States has demonstrated that the design and structure of the EC's system of customs administration necessarily results in the non-uniform administration of EC customs law, in breach of Article X:3(a). In particular, the fact that the EC administers its customs laws through 25 independent, regionally limited offices, without any institution or procedure that ensures that divergences of administration do not occur or that promptly reconciles them as a matter of course when they do occur, necessarily results in non-uniform administration in breach of GATT 1994 Article X:3(a).

63. Further, the United States notes that the EC's discussion of *US – Oil Country Tubular Goods from Mexico* relates not to Article X:3(a) of the GATT 1994, but rather, to Mexico's claim under Article 11.3 of the *Antidumping Agreement*. In fact, Mexico had asserted a GATT 1994 Article X:3(a) claim in addition to its *Antidumping Agreement* claim. In addressing that claim, the Appellate Body stated,

> In our view, an assessment of the USDOC's determinations for the purpose of determining whether the USDOC administers United States laws and regulations on sunset reviews in a uniform, impartial, and reasonable manner in accordance with Article X:3(a) of the GATT 1994 *entails an inquiry much different from that involved in determining whether the SPB instructs the USDOC to treat certain scenarios as conclusive or determinative contrary to Article 11.3 of the Anti-Dumping Agreement*. Therefore, in the absence of any consideration by the Panel of this claim, we are not in a position to rule on it.[96]

For this reason as well, the report in *US – Oil Country Tubular Goods from Mexico* fails to support the EC's characterization of what is required to support a claim under GATT 1994 Article X:3(a).

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[96]Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, para. 218 (adopted Nov. 28, 2005) ("*US – Oil Country Tubular Goods from Mexico*").

Question 174

Please comment on the practical relevance, if any, of the following comment made by the panel in Argentina – Hides and Leather at paragraph 11.77 of its report: "Article X:3(a) [of the GATT 1994] requires an examination of the real effect that a measure might have on traders operating in the commercial world" (emphasis added).

64. In its reply to Question 174, the EC acknowledges that "the effect of administration on traders is a relevant consideration in the interpretation of Article X:3(a) GATT," but then states that "this does not mean that individual instances of administrative error, which can be corrected through administrative and judicial mechanisms provided by a WTO Member's system, can be regarded as constituting a violation of Article X:3(a) GATT."[97] However, a central issue in this dispute is *not* whether "individual instances of administrative error . . . can be regarded as constituting a violation of Article X:3(a) GATT." The United States has not made any such allegation. Rather, with respect to errors, the issue is *who decides* what is error.[98] In the EC, each of 25 independent, geographically limited customs authorities, with different legal traditions, decides for itself what is the correct interpretation of EC customs law and what is error. That is, there is no EC institution or procedure that makes the EC's customs offices take these decisions uniformly across all of its 25 member States. If, in a given case, an affected person believes that one of these 25 authorities has erred, he may appeal to a tribunal which, again, is geographically limited. Only if a Commission or member State representative exercises his discretion to refer a matter to the Customs Code Committee, or if a member State court exercises its discretion to refer a question to the ECJ, might an entity with EC-wide authority say definitively what is correct and what is error. This aspect of the EC system of customs

[97]EC Replies to 2d Panel Questions, para. 100.
[98]*See generally* U.S. Second Written Submission, para. 60.

administration – the EC does not administer its customs law uniformly across its customs territory in the first instance – is inconsistent with GATT 1994 Article X:3(a).

65. Additionally, the EC asserts that effects on traders are relevant to burden of proof and then states that the United States has failed to show effects on traders and therefore failed to discharge its burden of proof.[99] This charge is wrong for at least two reasons. First and foremost, as the EC acknowledges in its reply to Question 175, the United States has no obligation to prove damages in order to prevail on its Article X:3(a) claim.[100] Second, the EC's discussion of trade effects mis-reads the panel report in *Argentina – Hides*. As relevant here, that report noted that consideration of an Article X:3(a) claim requires "an examination of the real effect that a measure *might* have on traders operating in the commercial world."[101] The panel was referring not necessarily to measurable effects, such as increased customs duties, but to a qualitative impact on the competitive environment. This is evident from the next two sentences in the panel report. The panel acknowledged that there is no requirement to show trade damage. But, it said, determining whether there has been of breach of Article X:3(a) "can involve an examination of whether there is a *possible* impact on the competitive situation due to alleged partiality, unreasonableness or lack of uniformity in the application of customs rules, regulations, decisions, etc."[102]

66. In *Argentina – Hides* itself, it was not evident from the panel report that the right of domestic industry representatives to be present during the completion of customs formalities

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[99]EC Replies to 2d Panel Questions, para. 101.
[100]EC Replies to 2d Panel Questions, para. 103.
[101]Panel Report, *Argentina – Hides*, para. 11.77 (emphasis added).
[102]Panel Report, *Argentina – Hides*, para. 11.77 (emphasis added).

prior to the export of raw hides increased costs to exporters or to foreign purchasers of those hides. Nevertheless, this right did alter the competitive environment, inasmuch as domestic industry representatives were able to see exporters' confidential business information. Similarly, the non-uniformity of administration of EC customs laws alters the competitive environment without necessarily affecting traders' liability for customs duties in a given case. For example, a trader may effectively be compelled to modify its shipping patterns to account for the non-uniform administration. This has been the case, notably, with respect to imports into the EC of LCD monitors.[103]

67. In fact, the EC's reply to Question 174 refers to the case of LCD monitors, offering this as an example of the absence of any effect on traders, in view of the temporary duty suspension regulation. However, as the United States pointed out in its answer to Question 137(b), to view the LCD monitors case as a case involving no effects on traders requires an observer to take an exceedingly narrow view of what constitutes effects on traders.[104]

Question 175

In paragraph 11.77 of the report in Argentina – Hides and Leather, the panel stated that "trade damage" need not be demonstrated in order to prove a violation of Article X:3(a). Please comment.

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[103]*See* U.S. First Written Submission, para. 74 n.70; U.S. Second Oral Statement, para. 52; *see also id.*, para. 21 (divergence in classification of drip irrigation products effectively compelled exporter to modify shipping practices).

[104]U.S. Answers to 2d Panel Questions, paras. 56-60; *see also* U.S. Second Oral Statement, paras. 52-59. In its reply to Question 174 (para. 101) the EC suggests (as it has in prior submissions) that the number of responses that the United States received to its invitation for public comment on the issues in this dispute is a relevant consideration for the Panel. In fact, it is entirely irrelevant, which is why the United States has refrained from answering such statements. The United States simply would remark that there are multiple ways in which traders communicate with U.S. government agencies. Written submissions in response to formal calls for comment are only one such way. Not surprisingly, given the public nature of such comments and the fact that stakeholders must deal with EC customs authorities on a day-to-day basis, some stakeholders prefer to convey their views through other channels.

68. The EC's reply to Question 175 begins with the observation that "there is no requirement to show 'trade damage' in order to prove a violation of Article X:3(a) GATT,"[105] a point with which the United States agrees.[106] The EC then turns to the question of "whether the complainant has suffered nullification and impairment within the meaning of Article XXIII GATT."[107] The EC then wrongly describes nullification and impairment as being limited to effects on traders' duty liability.[108] In fact, there are other ways in which benefits accruing to the United States under the GATT 1994 may be nullified or impaired as a result of the EC's non-uniform administration of its customs laws. For example, benefits accruing to the United States are nullified or impaired if traders effectively are compelled to alter shipping patterns or incur additional costs as a result of the EC's non-uniform administration.

69. Further, the EC's reply makes reference to paragraph 54 from the EC's oral statement at the second Panel meeting.[109] There, the EC asserted that if traders "achieve optimal classification of their goods" under the EC's system of non-uniform administration, then there is no nullification or impairment to speak of. However, the EC has provided no reason to believe that traders do, in fact, "achieve optimal classification of their goods" under the EC's system of non-uniform administration. Therefore, the EC has failed to rebut the presumption that its infringement of its obligations under GATT 1994 Article X:3(a) constitute a case of nullification or impairment.[110]

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[105]EC Replies to 2d Panel Questions, para. 103.
[106]*See* U.S. Answers to 2d Panel Questions, para. 102.
[107]EC Replies to 2d Panel Questions, para. 103.
[108]EC Replies to 2d Panel Questions, para. 104.
[109]EC Replies to 2d Panel Questions, para. 104 n.87.
[110]*See* DSU, Art. 3.8.

70. Moreover, the EC's line of reasoning concerning traders achieving "optimal classification of their goods" leads to absurd results. Under a system of non-uniform administration of customs laws, as in the EC, there may be a theoretically optimal way to take advantage of the system. For a trader with time and resources, it may be possible to identify the region that offers the ideal approach to classification and valuation, with the lowest risk of imposition of penalties or other costs. Of course, for small exporters or exporters that ship on an infrequent basis, the costs of identifying how best to take advantage of the non-uniform system may be excessive. In short, just because it may be theoretically possible to identify optimal treatment under a system of non-uniform administration does not mean that there is a lack of nullification or impairment. Nor, of course, does it mean that there is no breach of the GATT 1994 Article X:3(a) obligation of uniform administration.

Question 176

In paragraph 15 of its oral statement at the second substantive meeting, the European Communities notes that it invokes Article XXIV:12 of the GATT 1994 to support the view that GATT commitments, including Article X:3(a) of the GATT, were undertaken by Contracting Parties in full respect of their constitutional systems. What significance, if any, should be attached to the fact that a customs union akin to the European Communities did not exist at the time the text of the GATT was concluded in 1947?

71. The EC's reply to Question 176 focuses on the relevance of GATT 1994 Article XXIV:12 to the EC's obligation under GATT 1994 Article X:3(a). The same issue is addressed in the EC's reply to Question 158. Accordingly, the United States refers the Panel to its comments on the EC's reply to that question, above. The only further comment that the United States adds is to note that in its reply to Question 176, the EC frames the relevant issue as whether "WTO Members, at the time of conclusion of the Marrakech Agreement, had wished to subject the EC

to any special standards."[111] The United States agrees that in concluding the Marrakesh Agreement the WTO Members did not subject the EC to "special standards." The implications of that fact are not only that the EC is subject to the same rights as other WTO Members but also that it is subject to the same obligations as other WTO Members. That is precisely why it would be inappropriate to construe GATT 1994 Article X:3(a) through the lens of the EC's unique constitutional structure.

[111]EC Replies to 2d Panel Questions, para. 109.