EUROPEAN COMMUNITIES – SELECTED CUSTOMS MATTERS

WT/DS315

OPENING STATEMENT OF THE UNITED STATES OF AMERICA
SECOND MEETING OF THE PANEL

November 22, 2005

I. Introduction

1. Mr. Chairman and members of the Panel, the United States is pleased to appear again before you to present its arguments in this dispute.

2. As at the first Panel meeting, we begin by distinguishing the actual questions in dispute from various other issues that the EC has raised but that are not germane. We must begin in this fashion, regrettably, because the EC persists in arguing points that have no bearing on the dispute at hand. This dispute is not about customs procedures in the United States;[1] nor is it about the motives of the United States for calling attention to the lack of uniform administration of customs law in the EC;[2] nor is it about the number of formal responses the United States received to its invitation for comments on customs administration in the EC;[3] nor is it about "the executive federalism of the EC legal order."[4] I would add, in light of the EC's statements this morning, that this dispute is not about whether Article X:3(a) requires a single, centralized customs agency; nor is it about the customs administration and review systems of other WTO

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[1] *See, e.g.*, EC First Written Submission, paras. 205-10, 345, 362; EC First Oral Statement, para. 79; EC Second Written Submission, paras. 102-03, 129.

[2] *See, e.g.*, EC First Written Submission, paras. 229-30; EC Second Written Submission, para. 31.

[3] *See, e.g.*, EC First Written Submission, para. 10; EC First Oral Statement, para. 33; EC Second Written Submission, para. 54.

[4] EC Second Written Submission, para. 69.

Members, as the EC says from time to time.

3. This dispute is about two things: *first*, the fact that the EC, through its 25 different customs authorities, does not administer EC customs law in a uniform manner; and, *second*, the fact that the EC fails to provide tribunals and procedures for the prompt review and correction of customs administrative actions as required by Article X:3(b) of the GATT 1994. In our written submissions and oral interventions, we have supported these propositions in detail.

4. With respect to Article X:3(a), we have shown that EC customs law is administered by 25 separate, independent customs authorities. Absent some process or institution to prevent divergences among these authorities or reconcile them when they occur, such a system plainly would not satisfy the EC's obligation of uniform administration. And, indeed, such a process or institution does not exist. Thus, for example, when Spain interprets the EC Tariff and classifies a good under heading "X" there is no process or institution that requires other member States to either classify similar goods under heading "X," distinguish those goods from the goods presented to the Spanish authority, or reconcile their interpretation of the Tariff with the Spanish interpretation.

5. The EC asserts that such processes and institutions do exist. However, we have shown that the processes and institutions that the EC holds out as securing uniform administration do nothing of the sort. They are either extremely general (as, for instance, the overarching duty of cooperation in EC Treaty Article 10), non-binding (as, for instance, explanatory notes, guidance, and other "soft law" instruments to which the EC has referred), or discretionary in nature (as, for instance, the possibility that a question may or may not be referred to the Customs Code

Committee).[5] The one process of a binding nature that the EC holds out as securing uniform administration – that is, appeals to member State courts with the possibility of referral to the Court of Justice – in effect puts a heavy burden on the trader to seek out uniform administration, rather than providing for uniform administration in the first instance, as GATT Article X:3(a) requires.[6] And, even this process does not actually secure uniform administration, as we will discuss later in our statement.

6. We have shown that the EC and individual EC officials acknowledge that the instruments purported to secure uniform administration do not in fact do so.[7] We have shown that traders share this view.[8] We have shown that in some areas (in particular, penalties and audit procedures) the tools of administration differ from member State to member State such that administration of EC customs law is undeniably non-uniform.[9] And, we have supported our demonstration of a lack of uniform administration with illustrations of particular instances in which member States have administered EC customs law in a non-uniform way and the EC has failed to effectively and timely reconcile the divergences.[10] Accordingly, we have established that the EC fails to meet its obligation of uniform administration under GATT Article X:3(a).

7. Moreover, we have shown that the only tribunals or procedures available for the prompt

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[5]*See, e.g.*, U.S. Second Written Submission, paras. 45-52; U.S. First Written Submission, paras. 120-137; U.S. Oral Statement at First Panel Meeting., paras. 32-45.

[6]*See, e.g.*, U.S. First Oral Statement, para. 42; paras. 63-71.

[7]*See, e.g.*, U.S. First Written Submission, paras. 2, 44, 58 n.50.

[8]*See, e.g.*, U.S. First Written Submission, paras. 76, 128.

[9]*See, e.g.*, U.S. First Written Submission, paras. 96-101; U.S. Answers to Panel Questions, paras. 110-14, 118-20; U.S. Second Written Submission, paras. 72-98.

[10]*See, e.g.*, U.S. First Written Submission, paras. 66-76, 90-92.

review and correction of customs administrative action in the EC are member State courts. The decisions of these courts govern only the actions of the customs authorities in the member States concerned. As there is no tribunal for the prompt review and correction of customs administrative actions whose decisions govern the practice of customs authorities throughout the EC, the EC fails to meet its obligation under Article X:3(b) of the GATT 1994.[11]

8. It is important to keep in mind that this dispute stems from the fact that the EC is a Member of the WTO in its own right. This dispute could not have been brought under the GATT 1947, as the EC itself (as distinct from individual member States) was not a Contracting Party to the GATT 1947. EC arguments ranging from the timing of the U.S. claim to the intentions of the drafters of Article X:3 need to be understood with this fact in mind.

9. In our statement today, we will address the following points:

- First, with respect to Article X:3(a), we will demonstrate that each of the approaches the EC takes to responding to U.S. evidence and arguments fails to rebut U.S. claims.
- Second, we will provide several recent illustrations confirming that, contrary to the EC position, the U.S. claims are not theoretical but, in fact, reflect actual problems encountered by actual traders.
- Third, we had intended to address our request that the Panel exercise its authority under Article 13.1 of the DSU. However, in light of the Chairman's statement this morning that the Panel will not grant the U.S. request at this time, we will touch on this point only briefly, since the EC has made reference to it.
- Fourth, we will respond to particular errors the EC has made in characterizing U.S. arguments under the headings of classification, valuation, and customs procedures.
- Finally, we will show that the EC has failed to counter the U.S. argument that the

[11] *See* U.S. First Written Submission, paras. 133-54; U.S. Answers to Panel Questions, paras. 135-40; U.S. Second Written Submission, paras. 99-116.

provision of member State courts whose decisions bind only the customs authorities in their respective member States fails to discharge the EC's obligation under GATT Article X:3(b).

II. The EC Fails To Rebut Evidence Supporting U.S. Claims

10. The EC mistakenly asserts that there is a lack of evidence to support the U.S. claims.[12] In fact, the U.S. claims are amply supported by evidence of: the manner of operation of the very "procedures and institutions of the EC legal system" that the EC claims "provide for a uniform application and interpretation of EC law;"[13] admissions by the EC and EC officials; statements of traders; and illustrations of particular cases of non-uniform administration. The EC fails to rebut this evidence.

A. *EC admissions of non-uniform administration.*

11. Somewhat awkwardly, the EC attempts to distance itself from its own past admissions or admissions by senior EC officials. In some cases, the EC dismisses such statements as irrelevant on the theory that the speaker was not addressing the consistency of EC actions with GATT Article X:3 *per se*.[14] In the EC's view, it seems that an admission is relevant evidence only if the speaker actually draws the legal conclusion that the action or inaction in question breaches Article X:3.

12. Thus, even though the EC Court of Auditors made a number of critical findings demonstrating lack of uniform administration of EC customs valuation rules, the EC dismisses those findings because "the Court of Auditors did not in any way make judgments as to whether

[12] *See, e.g.*, EC First Written Submission, para. 3; EC Second Written Submission, paras. 48.

[13] EC Second Written Submission, para. 76.

[14] *See, e.g.*, EC Second Written Submission, paras. 150, 153 & 212.

the EC was in compliance with Article X:3(a) GATT."[15] Likewise, even though the explanatory note accompanying the EC's draft Modernized Customs Code observed that "[s]pecific offences may be considered in one Member State as a serious criminal act possibly leading to imprisonment, whilst in another Member State the same act may only lead to a small – or even no – fine,"[16] the EC asserts that acknowledgment to be irrelevant because it did not draw a legal conclusion with respect to GATT Article X:3(a).[17]

13. The United States submits that an admission by the EC or an EC official need not state a legal conclusion in order to constitute relevant evidence. What matters is that the representations concerning factual matters tend to support a legal conclusion relevant to the dispute. Accordingly, the Panel should decline the EC's suggestion that it simply toss aside the EC's own acknowledgments of divergences among member States in the administration of customs law.

14. Similarly, the Panel should decline the EC's suggestion that it pay no heed to the statements of individual officials simply because they were not speaking officially on behalf of the EC.[18] The point that the EC consistently misses is that in each of these cases, a senior official with extensive knowledge of the administration of EC customs law – whether the

[15]EC Second Written Submission, para. 150.

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

[17]EC Second Written Submission, para. 212.

[18]*See* EC First Written Submission, paras. 294-95; EC Replies to Panel Questions, paras. 29-31; EC Second Written Submission, para. 75.

Commission's Head of Customs Legislation Unit[19] or an Advocate General of the Court of Justice,[20] for example – was speaking authoritatively on that subject. For that reason, these statements should be accorded considerable weight.

15. Yet another instance of the EC distancing itself from its own admissions is its discussion of the *EC - Chicken* dispute. In that dispute, Brazil and Thailand contended that EC member States had consistently classified the product at issue under Tariff subheading 02.10, as evidenced by various issuances of binding tariff information (BTI). The EC – which was trying to defend classification under heading 02.07 – countered that "this interpretation was not followed in other EC customs offices,"[21] and that "substantial quantities" of the product were "always classified under heading 02.07."[22] So, where it was convenient to its interests in the *Chicken* dispute, the EC asserted an absence of uniform administration. The panel rejected (for lack of evidence) the assertion that some member States had classified the product under heading 02.07.[23] And now, where a lack of uniform administration does *not* serve the EC's immediate purpose, it latches onto the panel's finding of consistent classification under heading 02.10 and

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[19]*See* Michael Lux, Head of Customs Legislation Unit, European Commission, *EU enlargement and customs law: What will change?* (Taxud/463/2004, Rev. 1) (June 14, 2004) (Exh. US-15).

[20]*Wiener S.I. GmbH* v. *Hauptzollamt Emmerich*, Case C-338/95, Opinion of the Advocate-General, 1997 ECR I-06495 (July 10, 1997) (Exh. US-16); *Timmermans Transport & Logistics BV* v. *Inspecteur der Belastingdienst - Douandedistrict Roosendaal* and *Hoogenboom Production Ltd* v. *Inspecteur der Belastingdienst – Douanedistrict Rotterdam*, Joined Cases C-133/02 & C-134/02, Opinion of the Advocate-General, 2003 ECJ CELEX LEXIS 663 (Sep. 11, 2003) (Exh. US-21).

[21]Panel Report, *European Communities - Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/R, para. 7.260 (adopted Sep. 27, 2005, as modified by Appellate Body report) ("Panel Report, *EC - Chicken*").

[22]Panel Report, *EC – Chicken*, para. 7.264.

[23]Panel Report, *EC – Chicken*, para. 7.275.

disavows its earlier statements to the effect that member States' classification of this good was non-uniform.[24] The Panel should reject this sudden reversal of position and take account of the EC's statements in the *Chicken* dispute as a further admission of non-uniform administration.

B. *There is no requirement to show a "pattern" of non-uniform administration.*

16. In addition to distancing itself from its own admissions, the EC responds to U.S. evidence in support of its Article X:3(a) claim by arguing that the evidence does not exhibit a "pattern."[25] Thus the EC argues that for there to be a breach of Article X:3(a) it is not sufficient that the evidence demonstrate non-uniform administration – as the text of that article would seem to suggest. Rather, in the EC's view, "the statistical incidence of instances of non-uniform administration" must show "the existence of a pattern."[26] However, as we demonstrated at length in our second written submission, such a "pattern" requirement has no basis in Article X:3(a). Nor is it supported by the panel report in *US - Hot-Rolled Steel*, on which the EC heavily relies.[27] Article X:3(a) is breached when a Member fails to administer its customs laws and regulations in a uniform manner. There is no additional requirement that such non-uniform administration manifest a "pattern." Therefore, the EC's assertion that the evidence of non-uniform administration provided by the United States does not exhibit a pattern is not a valid rebuttal of the U.S. Article X:3(a) claim.

C. *Difficulty of certain customs administration questions does not counter evidence*

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[24]*See* EC Second Written Submission, para. 138.

[25]*See, e.g.*, EC First Written Submission, para. 241; EC First Oral Statement, para. 27; EC Replies to Panel Questions, paras. 6-12; EC Second Written Submission, para. 152.

[26]EC Second Written Submission, para. 152.

[27]*See* U.S. Second Written Submission, paras. 26-38.

of non-uniform administration and, in fact, highlights the problem.

17. A further line of EC argument asserts that the cases identified by the United States as illustrating non-uniform administration concerned "difficult" or "complex" matters of customs administration and that U.S. Customs, too, has encountered problems in grappling with these matters. This is an assertion the EC makes, for example, with respect to the LCD monitor, blackout drapery lining, Reebok, and repair costs covered by warranty illustrations.[28] But Article X:3(a) does not excuse non-uniform administration in difficult or complex cases. In fact, it is precisely the difficult or complex cases that highlight most prominently the lack of uniform administration in the EC.

18. In dealing with simple, commodity-type products, for example, the risk of non-uniform administration of classification rules would seem to be less than for more sophisticated products. Even though EC customs law is administered by 25 different authorities, these authorities would be less likely to diverge in their classification of such products. But, when confronted with more sophisticated products or products embedding new technologies – that is, products that may be relatively difficult to classify – the fact that classification decisions are being made by 25 different authorities increases the likelihood of divergent administration. In these cases, the trader is even less likely to know whether it will receive the same treatment from member State to member State.

19. Moreover, far from supporting the EC's argument, its assertion that U.S. Customs has

[28] *See, e.g.*, EC First Written Submission, paras. 345 (classification of blackout drapery lining) & 362-63 (classification of LCD monitors); EC First Oral Statement, para. 46 (Reebok valuation case); EC Second Written Submission, paras. 137 ("classification of network equipment is a complex technical question") & 156 (time taken to reconcile differences among member States on customs valuation treatment of repair costs covered by warranty explained as being due to fact that this is "a complex issue").

encountered difficulty in grappling with certain issues actually underscores the difference between non-uniform administration of EC customs law and uniform administration of U.S. customs law. Whatever challenges U.S. Customs may have encountered in dealing with difficult-to-classify products, its decisions applied throughout the customs territory of the United States. Even when U.S. Customs made a decision and then revised it upon further evaluation, the original decision applied on a territory-wide basis and, subsequently, the revised decision applied on a territory-wide basis. By contrast, in the illustrations discussed, where EC member States encountered difficulties, the result was different classifications in different member States – in other words, non-uniform administration. By way of example, we will elaborate on this point shortly in our discussion of the LCD monitors illustration.

D. *Resolution of divergences among member States after months or years does not counter evidence of non-uniform administration.*

20. Another EC line of argument is that illustrations of non-uniform administration identified by the United States are inapposite, because the non-uniformities at issue were resolved. The EC makes this argument, for example, with respect to the classification of network cards,[29] the classification of drip irrigation products,[30] and the customs valuation treatment of repair costs covered by warranty.[31]

21. This argument does not rebut evidence of non-uniform administration, because in each instance non-uniform administration existed and, moreover, was allowed to persist for months or years. The divergence in the network cards case occurred in 1995 and was not resolved until

[29]EC Second Written Submission, para. 136.

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

[31]EC Second Written Submission, para. 156.

five years later, when the ECJ rendered a decision in 2000.[32] The divergence in the drip irrigation case occurred in February 2001 and was not resolved until 15 months later, in May 2002. During that time, the divergence effectively compelled the exporter to modify its shipping practices, sending its product to France rather than Spain. The divergence in the case of repair costs covered by warranty evidently took 12 years to resolve. Although the EC disputes this point,[33] the EC Court of Auditors states that it brought the matter to the Commission's attention in 1990,[34] and the Commission did not resolve it until 2002.[35]

22. It cannot be the case that a Member fulfills its obligation of uniform administration under Article X:3(a) as long as it reconciles instances of non-uniform administration eventually, even if it takes many months or years to do so. Such a construction would deprive Article X:3(a) of any meaning, as a Member could respond to any instance of non-uniform administration simply by asserting that it was in the process of resolving it. The obligation under Article X:3(a) is an obligation to "*administer* in a uniform . . . manner," not an obligation to take action that may or may not eventually result in uniform administration over time.

23. The United States does not dispute that it may take time for customs authorities to address complex questions. But, contrary to what the EC contends,[36] the complexity of a

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[32]*See Peacock AG* v. *Hauptzollamt Paderborn*, Case C-339/98, Opinion of the Advocate-General, 2000 ECR I-08947, paras. 7-9 (Oct. 28, 1999) (describing factual background) (Exh. US-17).

[33]EC Second Written Submission, para. 156.

[34]Court of Auditors, Special Report No 23/2000 concerning valuation of imported goods for customs purposes (customs valuation), together with the Commission's replies, reprinted in *Official Journal of the European Communities* C84, para. 73 (Mar. 14, 2001) ("Court of Auditors Valuation Report") (Exh. US-14).

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

[36]EC Second Written Submission, para. 143.

question is not an excuse for non-uniform administration during the time it takes to do that. Article X:3(a) requires uniform administration at all times, not only at the end of a months- or years-long process of working through a difficult question.[37]

III. Recent Cases Confirm That Processes EC Holds Out As Securing Uniform Administration Fail To Do So

24. The illustrations that the United States has put before the Panel demonstrate that the problem of non-uniform administration of EC customs law is a real one encountered by actual traders. Nevertheless, the EC accuses the United States of basing its claims on "theoretical" scenarios.[38] A poignant rebuttal of that critique is evident in the presentation made by a seasoned EC customs law practitioner at a recent forum sponsored by the American Bar Association (ABA). By way of further illustration, we have included as an exhibit the presentation materials prepared by that practitioner, Mr. Philippe De Baere.[39]

25. The De Baere presentation confirms that the problems identified by the United States are not theoretical, but real problems faced by actual traders that have to navigate the non-uniformity encountered in dealing with 25 different customs authorities. A few examples will illustrate the point.

26. The EC has referred to explanatory notes and conclusions of the Customs Code

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[37]*See* Korea Replies to Panel Questions to Third Parties, p. 6 (reply to Panel Question 17); Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu Replies to Panel Questions to Third Parties, p. 4 (reply to Panel Question 17).

[38]*See, e.g.*, EC First Written Submission, para. 314.

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

Committee as instruments to secure the uniform administration of EC customs law.[40] In fact, what Mr. De Baere's presentation shows is just the opposite. The presentation points out (at page 14) that the consequences of an explanatory note, for example, may vary from member State to member State. In some member States, an explanatory note may be treated the same as a regulation and given prospective effect only. In other member States, an explanatory note may be treated as a clarification of the state of the law and given retrospective effect.[41]

27. In particular, Mr. De Baere describes a recent case involving the classification of video camera recorders (*i.e.*, camcorders) which demonstrates not only differences among member States in the treatment of EC explanatory notes, but also the problem of non-recognition of BTI from member State to member State, the problem of non-uniform administration of the EC law (CCC Article 221(3)) prescribing the period following importation during which a customs debt may be collected, and the problem of recourse to member State courts as a supposed tool of securing uniform administration. At issue in this case is the question whether certain camcorders should be classified under Tariff heading 8525.40.91 (attracting a 4.9 percent tariff) or 8525.40.99 (attracting a 14 percent tariff). A camcorder qualifies under the former heading if it is "[o]nly able to record sound and images taken by the television camera."[42] "Other" camcorders qualify under heading 8525.40.99.

28. In July 2001, the Commission adopted an amendment to an earlier explanatory note

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[40]*See, e.g.*, EC First Written Submission, paras. 99-104.

[41]De Baere Presentation, p. 14 (Exh. US-59).

[42]Commission Regulation 1810/2004 of 7 September 2004 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and the Common Customs Tariff, *Official Journal of the European Union*, Oct. 30, 2004, p. 573 (Exh. US-60).

covering heading 8525.40.99. The amendment provided that this heading includes "'camcorders' in which the video input is obstructed by a plate, or in another way, or in which the video interface can be subsequently activated as video input by means of software."[43] In other words, pursuant to the amended explanatory note, if a camcorder was susceptible to certain modifications, it should be classified under heading 8525.40.99, even if at the time of importation it appeared to be classifiable under heading 8525.40.91. The amended explanatory note led to non-uniform administration of the customs laws in at least three respects.

29. First, in view of the amended explanatory note, two member States (France and Spain) reached back to collect additional duty on certain camcorders imported prior to the amendment and classified under heading 8525.40.91. By contrast, other member States (in particular, the United Kingdom and Germany) have expressly declined to give retroactive effect to explanatory notes.[44]

30. Second, subsequent to issuance of the amended explanatory note, in June 2004, the Spanish customs authority issued BTI classifying 19 camcorder models produced by a particular company under heading 8525.40.91.[45] In July 2004, the French affiliate of the Spanish importer informed the French customs authority of the existence of these BTI during the course of an audit by the French authority. Notwithstanding this information, in November 2005, the French

[43]Uniform Application of the Combined Nomenclature (CN), *Official Journal of the European Communities*, July 6, 2001, p. C 190/10 (Exh. US-61); *see also* Explanatory Notes to the Combined Nomenclature of the European Communities, *Official Journal of the European Communities*, July 13, 2000, p. 316 (Exh. US-62).

[44]HM Customs & Excise, Tariff Notice 19/01 (July 2001) (Exh. US-63); Vorschriftensammlung Bundesfinanzverwaltung, VSF-Nachrichten N 46 2003 (Aug. 5, 2003) (German customs notice on application of the EC provisions on reimbursement/remission and recovery of import duties, together with unofficial English translation) (Exh. US-64).

[45]BTI issued by Spanish customs authority classifying camcorders under heading 8525.40.91, with start date of validity in June 2004 (Exh. US-65).

authority informed the company that it intended to collect additional duty retroactively on certain camcorders, including cameras, that is, models covered by the Spanish BTI.

31. Third, in deciding to give retroactive effect to the July 2001 explanatory note, the French authority followed an interpretation of EC rules not followed by other member States on the period after importation during which a customs debt may be collected. Article 221(3) of the Community Customs Code (Exh. US-5) sets that period as three years. The only exception to this rule is the lodging of an appeal, which suspends the three-year period. However, beginning with a 1998 judgment of the French Cour de Cassation concerning the predecessor to Article 221(3), the French customs authority has taken the position that any administrative proceeding (procès-verbal) investigating a possible customs infraction also has the effect of suspending the three-year period.[46] In appeals from decisions following that position, litigants have consistently failed to persuade the French court to refer to the ECJ the question of whether this position is consistent with CCC Article 221(3).[47] And, indeed, as of December 2002, France's national interpretation of Article 221(3) has become entrenched through an amendment to France's customs law.[48] The refusal of even France's court of last instance to refer this question to the ECJ, even in the face of evidence that other member States interpret Article 221(3) differently, is further demonstration that the availability of appeals to member State courts is not the instrument of securing uniform administration that the EC claims. In the camcorders case, France's unique

[46]Judgment of the Cour de Cassation, Case No. 35, Jan. 29, 1998 (Exh. US-66).

[47]*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).

[48]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) (Exh. US-69).

interpretation of Article 221(3) leaves the importer vulnerable to additional duty collections on imports that occurred six years ago, even though other member States would consider such additional collection to be barred.

32. A second illustration in the De Baere presentation reinforces the point that, contrary to the EC's argument, the opportunity to appeal customs administrative decisions to member State courts, with the possibility of eventual referral to the ECJ, does not secure uniform administration. In particular, it demonstrates how the ECJ's decision in *Timmermans* – in which the Court held that a member State authority may revoke or amend BTI based on its own reevaluation of the classification rules – can detract from rather than promote uniform administration, as the Advocate General in that case had anticipated.

33. Mr. De Baere refers (at pages 12 to 13) to the case involving classification of the Sony PlayStation2 (PS2).[49] The UK customs authority had issued BTI for a good and then revoked it based on an EC Commission regulation adopting a different classification for the good. When that regulation was annulled by the EC Court of First Instance, rather than restore the BTI, the authority kept it revoked based on a reevaluation of its original classification decision. It confirmed the BTI's continued revocation on new, national grounds only weeks after the ECJ's *Timmermans* decision. But for that action, the PS2 would have been subject to classification instruments with (in theory) uniform EC-wide effect continuously, beginning with issuance of the UK BTI, continuing with issuance of the Commission regulation, and continuing after the annulment of that regulation with restoration of the BTI. The *Timmermans* judgment permitted the UK to disrupt that presumably continuous uniformity by keeping the BTI revoked on

[49]De Baere presentation, pp. 12-13 (Exh. US-59).

grounds other than the Commission regulation that had led to its revocation in the first place.

34. Compounding this disruption of uniform administration is the fact that the UK High Court of Justice declined to refer to the ECJ the question of whether the customs authority could do this.[50] Indeed, the UK court expressly took heed of guidance from the Court of Appeal which, in turn, relied on the urging of the Advocate General in *Wiener* that national courts exercise "a greater measure of self-restraint."[51]

35. A third recent case that calls into question the effectiveness of appeals to member State courts with the possibility of referral to the ECJ as a tool of uniform administration is the judgment of the ECJ in *Intermodal Transports*.[52] That case concerned the classification of certain tractors by the Dutch customs authority. Contrary to the importer's request, the authority had classified the tractors under heading 8701 rather than heading 8709. In its appeal, the importer called to the Dutch court's attention the fact that the Finnish customs authority had classified similar goods under heading 8709. Despite the apparent divergence, the court declined to refer the matter to the ECJ. When the appeal reached the Supreme Court of the Netherlands, that court referred to the ECJ the question of whether a member State court should make a preliminary reference to the ECJ when a party brings to its attention conflicting BTI for similar goods issued by another member State authority to a third party and the court believes that the

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[50]*Sony Computer Entertainment Europe Ltd.* v. *Commissioners of Customs and Excise*, Judgment of the High Court of Justice, Chancery Division, [2005] EWHC 1644 (Ch), paras. 117-33 (July 27, 2005) (Exh. US-70) ("*Sony* v. *Commissioners*").

[51]*Sony* v. *Commissioners*, para. 150; *see also* US First Written Submission, para. 42; EC First Written Submission, para. 282 (dismissing significance of call for greater self-restraint).

[52]*Intermodal Transports BV* v. *Staatssecretaris van Financiën*, Case C-495/03 (Sep. 15, 2005) (Exh. US-71).

BTI wrongly classified those goods.[53]

36. The ECJ found that a national court is under no such obligation to refer. With respect to courts other than courts of last instance, the ECJ said that evidence of divergent BTI "cannot limit the freedom of assessment thus vested in [the national] court under Article 234 EC."[54] Moreover, it said that even a court of last instance is under no obligation to refer if, for example, it finds correct classification of the goods in question to be "so obvious as to leave no scope for any reasonable doubt."[55] It went on to note that the national court has "sole responsibility" for determining whether the correct classification of goods is "so obvious as to leave no scope for any reasonable doubt."[56]

37. In sum, under *Intermodal Transports*, even when a member State court is confronted with a direct conflict between different member States' administration of EC classification rules, it is under no obligation to refer a preliminary question to the one tribunal with authority to resolve that conflict. Even if the court is one from which there is no recourse, it need not make such a reference if it believes the correct classification to be "so obvious as to leave no scope for any reasonable doubt." This ruling directly contradicts the EC's assertion that appeals to member State courts are a key mechanism for securing uniform administration. To the contrary, *Intermodal Transports* shows that the broad discretion that member State courts have to refer or not to refer questions to the ECJ can reinforce rather than alleviate divergences in member

[53] *Intermodal Transports*, para. 25 (Exh. US-71).

[54] *Intermodal Transports*, paras. 32 & 45 (Exh. US-71).

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

[56] *Intermodal Transports*, para. 37 (Exh. US-71).

States' administration of customs law.

38. Perhaps the EC's advisor, Mr. Vermulst, put it best in his article, "EC Customs Classification Rules: Does Ice-Cream Melt?" when he said:

> The EC system with respect to judicial review in classification matters and, more in general, all customs issues is not only expensive and time-consuming for affected parties, it also may lead to inconsistent judgments by national courts, at least in first instance. This problem is exacerbated by the fact that courts of certain Member States are much less likely to request preliminary rulings than those of other Member States.[57]

This is exactly as we have described the EC system in our earlier submissions and in our statement today.

39. We turn now to particular assertions the EC has made under the headings of classification, valuation and customs procedures.

IV. It Is Appropriate For The Panel To Exercise Its Authority Under DSU Article 13

40. We had intended to speak first to the EC's objection to the U.S. suggestion under each of these headings that the Panel exercise its authority under DSU Article 13.1 to gather certain facts. As the Panel has declined this suggestion, I will simply say that the purpose of the suggestion had been to facilitate the Panel's evaluation of evidence already adduced by the United States.

41. The United States was not asking the Panel to make its *prima facie* case. The United States has already done that with the evidence and arguments it has put before the Panel. Rather, the United States was suggesting that if an understanding of the statistical incidence of non-uniform administration of EC customs law would help the Panel to evaluate the evidence

[57]Edwin A. Vermulst, *EC Customs Classification Rules: Does Ice-Cream Melt?*, p. 21, posted at http://www.vvg-law.com/publications.htm (Exh. US-72).

adduced by the United States, it should exercise its authority under Article 13.1 to obtain certain information, which is exclusively in the hands of the EC or EC member States. As the panel in the *United States - Cotton Subsidies* dispute recently explained, "Any suggestion that a panel 'makes the complainant's case', when it merely exercises its powers under the *DSU*, is entirely inaccurate."[58]

V. The EC Fails to Rebut Evidence That Classification Rules Are Administered in a Non-Uniform Manner

A. *BTI does not secure uniform administration.*

42. We turn now to arguments the EC makes in response to our evidence and arguments showing lack of uniform administration of EC rules on customs classification. In our previous submissions and interventions, we have shown that binding tariff information (BTI) – a mechanism that the EC identifies as a key instrument in securing uniform administration with respect to classification[59] – does not in fact secure uniform administration. The EC makes a number of assertions in response.

43. First, the EC denies that the ability of an importer to obtain BTI from any of 25 different member State customs authorities, without any centralized control, encourages "BTI shopping."[60] In particular, it contends that its acknowledgment in the *EC - Chicken* dispute that "it is possible under EC law to withdraw an application for BTI where the outcome is considered

[58]Panel Report, *United States - Subsidies on Upland Cotton*, WT/DS267/R, para. 7.633 (adopted Mar. 21, 2005, with Appellate Body report) ("*US - Cotton Subsidies*").

[59]*See, e.g.*, EC First Oral Statement, para. 38.

[60]EC Second Written Submission, paras. 82-87.

unfavourable by the importer"[61] does not indicate that BTI shopping occurs.[62] But that contention is illogical. In a system in which the administration of customs law was uniform, there would be little point in an importer's withdrawing a request for a classification ruling upon learning the authority's proposed decision. It is the possibility of getting a favorable decision from a different authority that makes withdrawal attractive. For upon withdrawing the application from the authority that was inclined to make an unfavorable decision, the importer can start fresh with another member State's authority.

44. The EC also contends that the heavy skewing of BTI issuance in favor of certain member States does not indicate BTI shopping, but merely differences in various commercial factors from member State to member State.[63] Such factors might be a logical explanation if the skewing were not as dramatic as it actually is. However, it seems remarkable that in a system which, according to the EC, does not encourage BTI shopping, a single member State (Germany), representing just over 19 percent of imports into the EC by value in 2004,[64] issued about 37 percent of all BTI with a start date in 2004,[65] while, for example, another member State (Italy), representing about 11 percent of imports, issued less than one percent of all BTI with a start date in 2004, and a member State representing almost 2 percent of imports into the EC (Greece), issued only a single BTI with a start date in 2004 (and only 10 with a start date in 2003

[61]Panel Report, *EC - Chicken*, para. 7.261.

[62]EC Second Written Submission, para. 84.

[63]EC Second Written Submission, para. 85.

[64]European Commission, *External and intra-European Union trade*, p. 94 (Sep. 2005) (Exh. US-73).

[65]According to the EBTI website, Germany issued 12,469 BTI with a start date in 2004, out of a total 33,687 BTI issued by all member States with a start date in 2004. http://europa.eu.int/comm/taxation_customs/dds/cgi-bin/ebtiquer?Lang=EN (last consulted Nov. 21, 2005).

and 17 with a start date in 2002).

45. We are not alone in noting the unusual skewing of BTI issuance. As the EC's advisor, Mr. Vermulst, has remarked:

> Unfortunately, the same disparity with respect to the origin of preliminary rulings is reflected in the requests for BTI, with several times more rulings issued by Germany than by any other country. Such a disparity of numbers of proceedings has several regrettable consequences. It implies that Germany has proportionally too much influence in this part of customs law. Moreover, the authority of a procedure is not enhanced if most Member States barely apply it.[66]

46. Moreover, it is not just the opportunity to shop for a favorable classification that makes BTI an inadequate instrument for securing uniform administration of customs classification rules. The lack of narrative explanation in BTI makes it difficult to see how a given member State authority came to its classification decision and thus for other authorities to determine whether they should follow that decision in classifying similar goods. The EC attributes this to "a question of style which has nothing to do with the EC's compliance with Article X:3(a) GATT."[67] In fact, however, it has much to do with the EC's compliance (or, more accurately, lack of compliance) with Article X:3(a). The EC points to BTI as an instrument for securing uniform administration of customs rules as required by Article X:3(a). In theory, one of the ways in which it should do this is by enabling a customs authority confronted with the question of how to classify a particular good to understand the reasoning that underlay other member

[66]Edwin A. Vermulst, *EC Customs Classification Rules: Should Ice Cream Melt?*, 15 Mich. J. Int'l L. 1241, 1314-15 (1994) (Exh. US-74). (This is an earlier publication of the article as currently posted on the website of Mr. Vermulst's law firm, an excerpt of which is included as Exhibit US-72. The article as it appears on the website does not include the "Conclusions and Recommendations" section, which is included in Exhibit US-74.).

[67]EC Second Written Submission, para. 90.

State authorities' classification of similar goods. But, where a BTI simply identifies by number the interpretive rule relied upon, it does not accomplish this.

47. Further limiting the utility of BTI as a means of securing uniform administration is the very narrow sense in which BTI issued by one member State authority governs the actions of other member State authorities. The EC repeatedly points out that BTI issued by one member State authority is binding on other member State authorities only to the extent that the person invoking the BTI is the person to whom it was issued (the "holder") and the goods at issue are identical to those described in the BTI.[68] It is not surprising that only the holder of BTI has a *right* to invoke it in other member States and only with respect to the goods described in the BTI. What *is* surprising, however, is the lack of any obligation on the part of one member State authority to take account of BTI issued by other member State authorities for similar goods when such BTI is brought to its attention. For example, where the member State authority declines to follow the classification applied by other member State authorities there is no obligation to distinguish the goods at issue or otherwise justify the decision not to follow it. This is inconsistent with the EC's obligation of uniform administration.

48. This problem is evident in the EC's response to the U.S. discussion of the *Chicken* dispute. We called attention to the fact that in that dispute, where complainants argued that the goods at issue had been consistently classified under one heading, the EC countered that "this interpretation was not followed in other EC customs offices."[69] In response, the EC states that "[n]owhere in the Panel Report in *EC - Chicken Cuts* has the EC said that BTI was not

[68] *See, e.g.*, EC Second Written Submission, paras. 95-97.

[69] U.S. Answers to Panel Questions, para. 51 (quoting Panel Report, *EC - Chicken*, para. 7.260).

recognised when presented by the holder."[70] But the problem to which the United States has called attention is not simply member States' lack of recognition of BTI issued by other member States when presented by the holder. That certainly is a problem. But, of more general significance is that BTI issued by one member State authority need have no effect at all on the classification decision by another member State authority – either as precedent or as something to be distinguished.

49. The point is illustrated again by the EC's discussion of the blackout drapery lining case. We called attention to the fact that the German customs authority had acknowledged the existence of BTI for comparable goods but made no effort to explain why it was declining to follow the classification decisions reflected in that BTI. It did not, for example, explain that it thought that the BTI was incorrect or that the goods before it were materially distinguishable from the goods at issue in the BTI.[71] Rather than address this approach, which plainly is contrary to uniform administration, the EC simply states that "BTI is binding on the customs authorities only as against the holder of the BTI."[72] In other words, for anyone but the holder, a given member State customs authority may start from a blank slate, even if the producer is the same as the producer of the good covered by BTI, and even if the importer is an affiliate of the holder of the BTI (as the camcorders case shows).

50. In its defense, the EC attempts to draw a comparison to the practice of U.S. Customs. Thus, it asserts that under U.S. law, an advance ruling is specific to the person to whom it is

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[70]EC Second Written Submission, para. 96.

[71]*See* Hauptzollamt Brement, Letter Decision to Bautex-Stoffe GmbH, Sep. 22, 2004 (original and English translation), p. 1 (Exh. US-23).

[72]EC Second Written Submission, para. 97.

addressed, that it is subject to revocation or amendment, and that it is not entitled to deference.[73] While we note again the EC's attempt to change the subject by focusing on administration of U.S. customs law rather than EC customs law, the EC's effort is easily disposed of.

51. The very regulation that the EC cites as evidence of U.S. practice illustrates the difference between the U.S. advance ruling system, which promotes uniformity, and the EC BTI system, which does not. Thus, section 177.9(a) of the regulation states that where U.S. Customs issues a ruling letter with respect to a particular transaction or issue, "the principle of the ruling set forth in the ruling letter . . . may be cited as authority in the disposition of transactions involving the same circumstances."[74] As just noted, the EC's BTI system contains no such provision.

B. *LCD monitors.*

52. We have already touched on several significant errors the EC makes in its characterization of various illustrations the United States provided of non-uniform administration of classification rules. Before leaving this subject, we wish to revisit two of the illustrations that the EC has failed to refute. We turn first to the EC's attempt to rebut the evidence showing that the LCD monitors case is an important example of the lack of uniform administration of EC rules on customs classification. The EC first asserts that the duty suspension regulation concerning LCD monitors with DVI has resolved the lack of uniformity of administration with respect to this particular classification question and that the trading community is satisfied with the

[73]EC Second Written Submission, paras. 101-103.

[74]19 C.F.R. 177.9(a) (Exh. EC-129).

outcome.[75] In fact, this assertion is quite misleading. It simply glosses over the fact that the suspension regulation applies only to monitors below a certain size threshold, that it does not actually resolve the underlying classification question, and that, for monitors above the size threshold, a state of non-uniformity with serious financial consequences remains.[76] Moreover, the implication that the trading community is satisfied is belied by recent statements from the very industry concerned with this classification question. Thus, in a September 2005 letter to the Commission's Director for International Affairs and Tariff Matters, the industry association that has focused on this matter ("EICTA") stated that

> [w]ithout such clarification [of the classification of monitors above the size threshold set forth in the duty suspension regulation], the industry is faced with an unacceptable situation were [sic] various Member States are applying classification rules in an inconsistent manner, causing competitive disadvantage for some importers and making the consequences of sourcing and routing decisions almost impossible to predict.[77]

53. The EC next contests the U.S. argument that an EC Customs Code Committee conclusion that conflicts with an applicable chapter note in the Combined Nomenclature detracts from rather than promotes uniform administration.[78] It will be recalled that the Committee's conclusion stated that a monitor should not be classified under Tariff heading 8471 unless an importer can show that it is "*only* to be used with an ADP machine," whereas the applicable chapter note states that a monitor is classifiable under heading 8471 if "it is of a kind solely *or principally*

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[75]*See* EC Second Written Submission, paras. 121-124.

[76]*See* U.S. First Written Submission, para. 74; U.S. Answers to Panel Questions, paras. 68-72.

[77]Letter from Mark MacGann, Director General, EICTA, to Manuel Arnal Monreal, Director International Affairs and Tariff Matters, European Commission, p. 1 (Sep. 2, 2005) (Exh. US-75).

[78]EC Second Written Submission, paras. 125-128.

used in an automatic data-processing system." The United States pointed out that far from securing uniformity, the Committee's conclusion has put member State authorities in the quandary of having to decide what weight to give the conclusion in view of an apparently conflicting chapter note.

54. Indeed, this quandary is evidenced by the different approaches taken by different member State authorities. For example, in a Tariff Notice issued in 2004, the UK authority, evidently following the Customs Code Committee's conclusion, stated that "from October 2004, LCD/TFT Monitors that incorporate a DVI connector are to be classified in Combined Nomenclature (CN) code 8528 21 90."[79] Thus, the UK seems to have taken an absolute approach, making no reference whatsoever to sole or principal use.

55. The Netherlands, by contrast, has taken a very different approach. In a decree of July 2005, the Dutch customs authority explained that since April 2004 it had been classifying LCD monitors with DVI under Tariff heading 8528, in view of a Commission regulation concerning plasma monitors. It then went on to state that

> [n]ot all member states are following this policy. The result is a diverted flow of business, which is harmful to the competitiveness of Dutch industry in the logistics and services sector. For this reason, The Netherlands is making the policy as regards classification of certain LCDs in the Combined Nomenclature more precise.[80]

Accordingly, the decree set forth criteria that the Netherlands follows as of November 22, 2004 for determining whether LCD monitors with DVI should be classified under heading 8471 or heading 8528. These criteria, which cover a number of factors, including how a good is

[79]HM Customs & Excise, Tariff Notice 13/04 (Exh. US-76).

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

presented in brochures, are evidently unique to the Netherlands, appearing in no EC regulation or even in EC guidance.

56. Moreover, despite the Customs Code Committee's conclusion, the German authority, too, appears to have continued classifying LCD monitors with DVI under heading 8471, even where they are principally though not solely for use with computers.[81]

57. Finally, the EC once again tries to divert the focus from its own practice to the practice of U.S. Customs.[82] As we already have noted, the possibility that classifying particular goods, such as LCD monitors, may have proven difficult for both U.S. Customs and the 25 EC member State customs authorities actually highlights the point of the U.S. argument. Where U.S. Customs found LCD monitors difficult to classify, its rulings still applied throughout the territory of the United States. Where EC member States found LCD monitors difficult to classify, the result was a somewhat different approach in each member State, as we have shown.

58. Moreover, the EC is highly misleading in its reference to classification rulings by U.S. Customs. Those rulings do not automatically classify monitors under heading 8528 irrespective of their sole or principal use. Rather, they look at each monitor separately, applying the law to the facts in each case and providing detailed analysis. This is far different from the approach taken in EC member State BTI, in which the analysis underlying the chosen classification is not at all evident.

[81]BTI DEM/2975/05-1 (start date of validity July 19, 2005) (Exh. US-78).

[82]EC Second Written Submission, para. 129.

59. In sum, the EC's assertions regarding classification of LCD monitors fail to rebut the U.S. demonstration that this case illustrates the lack of uniform administration of EC customs rules.

C. *Blackout drapery lining.*

60. Similarly, the EC fails to rebut evidence demonstrating that the blackout drapery lining case is yet another example of non-uniform administration of customs classification rules. The EC erroneously calls into question whether the lining produced by Rockland Industries at issue in the decision by the Main Customs Office in Bremen, which was classified under Tariff heading 3921, was materially identical to lining that other member States had classified under heading 5907. In particular, the EC asserts that the product before the Bremen Customs Office lacked a textile flocking, while the product at issue in other classification decisions contained flocking. In fact, however, as Rockland's President and Chief Executive Officer attests under oath, "All coated products produced by Rockland incorporate textile flocking as part of the coating process. Rockland has never produced a coated product that does not incorporate textile flocking. . . . Textile flocking is required to prevent the fabric from sticking together."[83]

61. Moreover, in context it appears that the Bremen Customs Office did not find an absence of flocking *per se* but, rather, that flocking did not constitute a distinct layer in the Rockland product at issue. What was relevant to the Bremen Customs Office was the existence of plastic in the coating, regardless of whether textile flocking or other elements were mixed into that coating. That the German customs authority takes this approach, contrary to the approach taken

[83]Affidavit of Mark R. Berman, President and Chief Executive Officer of Rockland Industries, Inc. (Nov. 10, 2005) (Exh. US-79).

by other member State authorities, is confirmed by the letter from the Hamburg customs office concerning Rockland's lining product.[84]

62. Having ruled out classification of the lining under heading 5907, apparently based on its view that the existence of plastic in the coating precluded such classification, the German authority then looked to a German interpretive aid, which the EC states was derived by analogy to an EC regulation classifying ski trousers. Though the EC states that the interpretive aid was "without any legally binding character,"[85] the German authority relied on it in a way that turned out to be determinative. In any event, we fail to see how the German authority's classification of a textile product based on the selection of one prong from a three-prong test for the classification of an apparel item, where no other member State authority has done this, can be seen as consistent with uniform administration.

63. Finally, the EC asserts without any basis that density of weave, the key criterion under Germany's interpretive aid, is relevant to determining whether textile fabric is present merely for reinforcing purposes.[86] In fact, the notes pertaining to Chapter 39 of the Tariff make no reference to density of weave as a relevant criterion, and the notes to Chapter 59 expressly provide that classification under that chapter is to be determined *regardless* of weight per square meter. The EC asserts without basis that the reference to weight per square meter is different from density of weave. In fact, however, weight per square meter necessarily is a function of density of weave.

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

[85]EC Second Written Submission, para. 114.

[86]EC Second Written Submission, paras. 112 & 115.

64. In sum, the EC has failed to refute that the blackout drapery lining case illustrates non-uniform administration of EC classification rules.

VI. The EC Fails To Rebut Evidence That Valuation Rules Are Administered In A Non-Uniform Manner

65. Nor does the EC succeed in rebutting evidence that EC valuation rules are administered in a non-uniform manner. We have already discussed why the EC's effort to explain away the findings of non-uniformity in the Court of Auditors report – by denying that they amount to admissions of non-uniform administration, by asserting that the non-uniformities do not constitute a pattern, and by asserting that over time certain of the non-uniformities were cured– are all to no avail. To this, we add brief comments on two additional points.

66. First, we have demonstrated that one of the ways in which member States administer the EC's customs valuation rules non-uniformly is through different auditing practices. In response, the EC states that "under Article 76(2) CCC, every Member State may proceed to all necessary verifications in order to satisfy themselves of the accuracy of the particulars contained in the declaration."[87] But, the fact that member States "may" do this proves nothing. It does not change the fact that member States' audit practices in fact vary dramatically such that, as the EC Court of Auditors put it, "individual customs authorities are reluctant to accept each other's decisions."[88]

67. The EC also claims that the EC Customs Audit Guide "ensures a uniform practice across" the EC. However, given that the Guide was only "recently finalised,"[89] and, in any

[87]EC Second Written Submission, para. 157.

[88]Court of Auditors Valuation Report, para. 37 (Exh. US-14).

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

event, given that it is merely "intended as an aid to Member States,"[90] rather than a binding obligation on them, we see no basis for this assertion.

68. Second, with respect to the Reebok case, the EC fails to rebut that this is a stark illustration of non-uniform administration of valuation rules. The EC states that RIL's appeals to Spanish courts show that there is indeed a forum to which this trader can go to seek uniform administration.[91] But, as we have demonstrated, the possibility of an appeal to a member State court, which may or may not refer the matter to the ECJ, does not secure uniform administration. The EC cannot seriously contend that, from the point of view of uniform administration, the right to appeal a dispute to a member State court is comparable to a right to take a matter directly to an institution with authority to give an answer that is definitive for the entire EC – a right which does not now exist. GATT Article X:3(a) does not concern a trader's right to appeal adverse customs decisions; it concerns a Member's requirement to administer specified laws uniformly, whether or not traders appeal administrative actions in particular cases.

69. Further, the EC mistakenly suggests that because RIL withdrew its complaint to the EC Ombudsman the problem with respect to non-uniform administration has been resolved.[92] That simply is not so. RIL's decision to withdraw its complaint does not change the Commission's evident avoidance of the non-uniformity for over three years.[93] Nor does it change the fact that

[90]Community Customs Audit Guide, An introduction to the guide on post clearance and audit based controls, p. 1 (Exh. EC-90).

[91]EC Second Written Submission, para. 164.

[92]EC Second Written Submission, para. 166.

[93]U.S. Answers to Panel Questions, para. 100.

there is a divergence between the Spanish authority's administration of EC valuation rules and other member States' administration of those rules.

VII. The EC Fails To Rebut Evidence That Customs Procedures Are Administered In A Non-Uniform Manner

70. We turn next to certain erroneous statements the EC makes in responding to the U.S. demonstration of non-uniform administration of customs procedures.

A. *Processing under customs control.*

71. First, with respect to processing under customs control – the special customs procedure which in certain cases may be undertaken only when authorized by a member State based on an economic conditions assessment – we showed that certain member States approach that assessment in very different ways. We showed that the United Kingdom, for example, makes a two-prong assessment, looking first at whether processing under customs control will enable processing activities to be created or maintained in the EC, and second at whether it will harm essential interests of Community producers of similar goods.[94] In contrast, France applies only the first prong.[95]

72. The EC's response to this evidence is that the United States mis-reads the customs bulletin explaining how France applies the economic conditions assessment. The EC asserts that the bulletin in fact makes reference to harm to Community producers. However, as we pointed out, that reference is merely an introductory paraphrase of the CCC provision on processing

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

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

under customs control. The operative text of the French bulletin sets forth a one-prong test, referring only to the creation or maintenance of processing activity in the EC.[96]

73. In its second written submission, the EC replies with what essentially is a circular argument. It says that "the French guidance . . . has to be interpreted in the context of the EC legislation."[97] In other words, even though the text of the French guidance plainly says something different from the text of the UK guidance, the EC contends that in fact it should not be read as diverging from the UK guidance because that would be inconsistent with EC law. However, the EC fails to substantiate its assertion that inconsistency with the applicable EC regulation automatically causes non-uniformity in member State administration of that regulation to disappear.

74. The EC also faults the United States for not providing "evidence on the application of the guidance issued by the French authorities."[98] However, there was no need for the United States to do so. This is not a case in which the United States is alleging that either the French guidance or the UK guidance is itself inconsistent with WTO obligations and therefore, according to the EC, "has the burden of proving that the measure in question has the alleged content or meaning."[99] Rather, the inconsistency with WTO obligations that the United States is alleging is a lack of uniform administration on *the EC's* part and, in the case of processing under customs

[96]*See* U.S. Answers to Panel Questions, para. 106.

[97]EC Second Written Submission, para. 178.

[98]EC Second Written Submission, para. 181.

[99]EC Second Written Submission, para. 181.

control, the lack of uniformity is evident on the face of divergent guidance from two different member States.

B. *Penalties.*

75. The United States has already provided extensive argument demonstrating that differences in customs penalties from member State to member State constitute a significant non-uniformity in the way the EC administers its customs law.[100] The EC continues to respond with the same three erroneous arguments.

76. First, the EC asserts that the GATT Article X:3(a) obligation of uniform administration does not apply to penalties because penalties "are not among the matters referred to in Article X:1 GATT."[101] Contrary to the EC's claim,[102] the United States does not concede this point. On the contrary, as we noted in our second written submission, the terms of Article X:1 plainly encompass penalty provisions. For example, a law imposing a penalty for negligence in mis-declaring a good's classification or valuation certainly "pertain[s] to the classification or valuation of products for customs purposes." A penalty also may be considered an "other charge[] . . . on imports." Or, considered as a consequence for failing to make a truthful declaration, for example, a penalty pertains to "requirements . . . on imports."[103]

77. A key flaw in the EC's argument on penalties is that it assumes that a law or regulation must either be the thing being administered or a tool of administration. But, according to the EC,

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[100]*See* U.S. Answers to Panel Questions, paras. 110-14, 118-20; U.S. Second Written Submission, paras. 72-98.

[101]EC Second Written Submission, para. 190.

[102]EC Second Written Submission, para. 191.

[103]*See* U.S. Second Written Submission, para. 75 n.97.

it cannot have one aspect or the other, depending on one's perspective.[104] Thus, the EC mistakenly argues that the U.S. explanation that penalties are tools for administering other customs laws precludes the United States from also characterizing penalties as laws or regulations covered by Article X:1. That contention is groundless.

78. Further, with respect to the character of penalty laws as tools for the administration of other EC customs laws, the EC misconstrues the U.S. argument. Initially, the EC appears to admit that penalties "ensur[e] compliance with EC law,"[105] which is another way of saying that they administer EC law by giving effect to that law. However, the EC goes on to avoid the U.S. argument, which is that the diversity of member State penalty laws for giving effect to EC customs law is an important instance of non-uniform administration of EC customs law.

79. Instead, the EC responds to an argument that the United States does not make. It contends that "Article X:3(a) GATT does not create an obligation to harmonise laws which may exist within a WTO Member at the subfederal level."[106] The United States asserts no such generic requirement. The United States simply argues that Article X:3(a) requires that the EC's customs law be administered uniformly. Since different member States deploy different tools – that is, different penalty provisions – to give effect to EC customs law, the EC does not administer its customs law uniformly. In stating that Article X:3(a) does not require harmonization of sub-federal laws or that the only obligation with respect to penalties is for each

[104]*See, e.g.*, EC Second Written Submission, para. 193.

[105]EC Second Written Submission, para. 198.

[106]EC Second Written Submission, para. 200.

EC member State to administer its own penalties uniformly, the EC simply is avoiding the U.S. argument.

80. Additionally, the EC errs in arguing that penalties are outside the scope of Article X:3(a) because they apply to actions that violate customs laws.[107] As we have noted previously, Article X:3(a) does not make the distinction between "illegitimate actions" and "legitimate trade" that the EC posits.[108] In any event, contrary to the EC's assertion, penalty provisions *do* "establish the conditions for legal trade."[109] In a system that relies heavily on the actions of traders at every step of the way, penalty provisions administer the customs laws – that is, they give effect to those laws – by setting consequences for the breach of those laws. The problem is that in the EC those consequences vary dramatically from member State to member State. In this sense, EC customs law is administered differently in different member States.

81. In fact, the EC recognizes that penalty provisions are tools for administering customs laws.[110] Accordingly, it argues in the alternative that while penalty provisions vary from member State to member State, this does not mean that there is a lack of uniform administration. Its basis for this statement is the proposition that to the extent member State penalty laws must meet the test of being "dissuasive and effective," pursuant to ECJ "guidelines," they administer EC customs law uniformly, regardless of differences among them.[111] The EC's theory seems to be

[107]*See* EC First Written Submission, para. 432; EC Second Written Submission, paras. 193-98.

[108]*See* U.S. First Oral Statement, para. 51.

[109]EC Second Written Submission, para. 196.

[110]EC Second Written Submission, para. 192.

[111]EC Second Written Submission, paras. 206-09.

that as long as two different penalty provisions both secure compliance with EC customs laws, any differences between them simply are irrelevant.

82. But, the possibility that traders generally comply with the customs laws in two different member States, despite differences in penalties, is beside the point. It does not change the fact that the possibility of criminal sanctions in one member State and a minor fine in another for the same offense are part of the legal backdrop against which traders decide how to enter goods into the EC. A trader must take this difference into account, much the same way that it takes into account the likelihood that a given member State authority will interpret EC classification or valuation rules in a favorable way.[112] Therefore, even if the EC were correct in its assertion that the penalty provisions of all member States meet ECJ "guidelines" of dissuasiveness and effectiveness – notwithstanding its own recognition that the same offense may draw imprisonment in one member State and a minor fine in another[113] – that in itself would not constitute uniform administration.

VIII. Member State Courts, Whose Decisions Govern Only The Customs Authorities In Their Respective Territories, Do Not Fulfill The EC's Obligation Under Article X:3(b) Of The GATT 1994

83. We come, finally, to the EC's contention that it fulfills its obligation under Article X:3(b) of the GATT 1994 through the existence of member State tribunals that review and correct customs administrative decisions. In our prior submissions and interventions, we have shown that the EC fails to meet its Article X:3(b) obligation, because the decisions of member State courts "govern the practice" of only a subset of the agencies entrusted with enforcement of EC

[112] *See* U.S. Second Written Submission, paras. 93-95.

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

customs laws, and because the fragmentation of review is inconsistent with the context of Article X:3(b), which includes the requirement of uniform administration of EC customs law.[114] The EC fails to rebut the U.S. Article X:3(b) claim.

84. In response to the U.S. argument that member State courts fail to meet the EC's Article X:3(b) obligation because their decisions do not "govern the practice" of "*the* agencies entrusted with administrative enforcement" – as opposed to a subset of such agencies – the EC argues that "govern the practice" means nothing more than "implement in fair terms."[115] However, Article X:3(b) already contains a separate requirement that agencies "implent[]" the decisions of review tribunals or procedures. The EC's construction of "govern the practice" would make it redundant with the separate "implement[]" requirement. As we discussed in our second written submission, it is clear from the ordinary meaning of "govern" that the "govern the practice" provision requires something different from simple implementation. It requires that a tribunal's decision "control, influence, regulate or determine" the practice of or "constitute a law, rule, standard, or principle for" "the agencies entrusted with administrative enforcement" of the customs laws going forward.[116]

85. As some of the cases we discussed earlier in our presentation illustrated, the decisions of an EC member State court govern the practice only of agencies within that member State. Even where a court is presented with a clear divergence between practice within its member State and practice in other member States – as was the case in *Intermodal Transport* and the French cases

[114]*See* U.S. First Written Submission, paras. 133-54; U.S. First Oral Statement, paras. 56-64; U.S. Answers to Panel Questions, paras. 135-40; U.S. Second Written Submission, paras. 99-116.

[115]EC Second Written Submission, para. 230.

[116]U.S. Second Written Submission, para. 104.

on CCC Article 221(3) – there is no obligation to make a reference to the ECJ. Moreover, as the EC has acknowledged, there is no mechanism in the EC for courts to be kept apprised of customs review decisions of other member State courts, much less a mechanism for customs authorities to be kept apprised of the decisions of courts other than those in their respective member States.[117]

86. The EC also argues incorrectly that Article X:3(b) should not be read in the light of Article X:3(a) as context. In the EC's view, the absence of an "explicit link" or a "chapeau" means the latter is not context for the former, even though the two provisions are adjoining subparagraphs.[118] We have already noted that this position is in stark contrast to the EC's invocation of Article XXIV:12 as context for the interpretation of Article X:3(a).[119] And, while there is no rule of treaty interpretation that requires an "explicit link" or a "chapeau" for one provision to constitute context for the interpretation of another, there is in fact an explicit link between the provisions at issue here.

87. Article X:3(a) requires a Member to administer its customs laws in a uniform manner. Article X:3(b) requires that the decisions of review tribunals or procedures "govern the practice" of the agencies entrusted with administrative enforcement. The "govern the practice" requirement means that review court decisions must control the way agencies administer the customs laws. In this sense, the two provisions are linked. Accordingly, it is appropriate to read Article X:3(b) in light of the context of a Member's obligation to administer its laws uniformly. As review tribunals and procedures the EC provides detract from rather than promote uniform

[117]EC Replies to Panel Questions, para. 129.

[118]EC Second Written Submission, para. 223.

[119]U.S. Second Written Submission, para. 100 n.142.

administration in view of their territorial limitations, they fail to meet the EC's Article X:3(b) obligation.

88. The EC rejects the proposition that review of customs decisions by member State courts whose decisions govern only certain customs agencies is inconsistent with the obligation of uniform administration.[120] However, its argument in this respect is in conflict with its Article X:3(a) argument. It states that review by member State courts "is perfectly compatible with the obligation of uniform administration, *provided that the latter is ensured by other means that are appropriate to this aim.*"[121] In fact, the EC repeated that proposition this morning. Yet, in its Article X:3(a) argument the EC itself contends that review by member State courts is a key means to achieving the aim of uniform administration. Now it is arguing that that aim must be achieved by "other means" and that review by member State courts is merely "compatible" with that aim.

89. Additionally, as in other areas, the EC resorts to hyperbole in making its Article X:3(b) argument. It purports to draw from the U.S. argument an implicit requirement for "the establishment of a central court of first instance with jurisdiction over the whole territory of any WTO Member."[122] However, that is not the logical implication of the U.S. argument. The logical implication of the U.S. argument is that under Article X:3(b), every WTO Member must give effect throughout its territory to the decisions of its review tribunals. As we have explained in prior submissions, where a Member has a single customs administration it may well be able to

[120]EC Second Written Submission, para. 224.

[121]EC Second Written Submission, para. 224 (emphasis added).

[122]EC Second Written Submission, para. 225.

do this even though it provides for multiple regional customs courts.[123] In the EC, perhaps uniquely, fragmented administration is coupled with fragmented review, and the result is inconsistent with Article X:3(b). Far from implying a new requirement applicable to "any WTO Member," the U.S. argument simply shows how the review tribunals and procedures now available in the EC fail to comply with an existing requirement.

90. The EC also wrongly accuses the United States of "interpreting Article X:3(b) through the glass of its own legal system. . . ."[124] Ironically, in the very next breath the EC urges an interpretation of Article X:3(b) through the glass of *its* own legal system. It asserts that establishing an EC customs court – assuming that this would be the only way for the EC to comply with its Article X:3(b) obligation – would "run[] contrary to one of [the EC's] fundamental constitutional principles. . . ."

91. Finally, while the EC has consistently professed that creating an EC customs court would breach "fundamental constitutional principles," we note with interest that the Treaty of Nice in fact laid the groundwork for the establishment of new EC courts. Thus, its insertion of Article 225a into the EC Treaty actually contemplates the creation of "judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas."[125] Also, its amendment of EC Treaty Article 220 contemplates that "judicial panels may be

[123]*See* U.S. Answers to Panel Questions, para. 147; U.S. Second Written Submission, para. 112.

[124]EC Second Written Submission, para. 226.

[125]Treaty of Nice, Amending the Treaty on European Union, the Treaties Establishing the European Communities, and Certain Related Acts, reprinted in *Official Journal of the European Communities*, p. C80/24 (Mar. 10, 2001) (Exh. US-80).

attached to the Court of First Instance under the conditions laid down in Article 225a."[126] In fact, just over a year ago, the Council of the European Union exercised the foregoing authority to establish a special Civil Service Tribunal. In light of the authority to create special courts established by the Treaty of Nice, it seems that establishment of a court as one option that would bring the EC into compliance with its GATT Article X:3(b) obligation would not breach "fundamental constitutional principles."

IX. Conclusion

92. Mr. Chairman, members of the Panel, this concludes our oral statement. We thank you for your attention. We would be pleased to receive any questions you may have.

[126]Treaty of Nice, p. C80/22 (Exh. US-80).

Table of Exhibits

Exhibit Number	Document
59	Philippe De Baere, *Coping with customs in the EU: The uniformity challenge: Judicial review of customs decisions and implementing legislation*, Presentation at ABA International Law Section (Oct. 27, 2005).
60	Commission Regulation 1810/2004 of 7 September 2004 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and the Common Customs Tariff, *Official Journal of the European Union*, Oct. 30, 2004, p. 573.
61	Uniform Application of the Combined Nomenclature (CN), *Official Journal of the European Communities*, July 6, 2001, p. C 190/10.
62	Explanatory Notes to the Combined Nomenclature of the European Communities, *Official Journal of the European Communities*, July 13, 2000, p. 316.
63	HM Customs & Excise, Tariff Notice 19/01 (July 2001).
64	Vorschriftensammlung Bundesfinanzverwaltung, VSF-Nachrichten N 46 2003 (Aug. 5, 2003) (German customs notice on application of the EC provisions on reimbursement/remission and recovery of import duties, together with unofficial English translation).
65	BTI issued by Spanish customs authority classifying camcorders under heading 8525.40.91, with start date of validity in June 2004.
66	Judgment of the Cour de Cassation, Case No. 35, Jan. 29, 1998.
67	Judgment of the Cour de Cassation, Case No. 143, June 13, 2001.
68	Judgment of the Cour de Cassation, Case No. 144, June 13, 2001.
69	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).

70 *Sony Computer Entertainment Europe Ltd.* v. *Commissioners of Customs and Excise*, Judgment of the High Court of Justice, Chancery Division, [2005] EWHC 1644 (Ch) (July 27, 2005) ("*Sony* v. *Commissioners*").

71 *Intermodal Transports BV* v. *Staatssecretaris van Financiën*, Case C-495/03 (Sep. 15, 2005).

72 Edwin A. Vermulst, *EC Customs Classification Rules: Does Ice-Cream Melt?*, pp. 20-21, posted at http://www.vvg-law.com/publications.htm.

73 European Commission, *External and intra-European Union trade*, pp. 94-95 (Sep. 2005).

74 Edwin A. Vermulst, *EC Customs Classification Rules: Should Ice Cream Melt?*, 15 Mich. J. Int'l L. 1241, 1314-15 (1994).

75 Letter from Mark MacGann, Director General, EICTA, to Manuel Arnal Monreal, Director International Affairs and Tariff Matters, European Commission (Sep. 2, 2005).

76 HM Customs & Excise, Tariff Notice 13/04.

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

78 BTI DEM/2975/05-1 (start date of validity July 19, 2005).

79 Affidavit of Mark R. Berman, President and Chief Executive Officer of Rockland Industries, Inc. (Nov. 10, 2005).

80 Treaty of Nice, Amending the Treaty on European Union, the Treaties Establishing the European Communities, and Certain Related Acts, reprinted in *Official Journal of the European Communities*, pp. C80/22 to C80/24 & C80/80 (Mar. 10, 2001).