European Communities – Selected Customs Matters

(WT/DS315)

Additional Submission
of the
European Communities
in Rebuttal of
Part III
of the US Second Oral Statement

Geneva, 14 December 2005
TABLE OF CONTENTS

TABLE OF WTO AND GATT CASES REFERRED TO IN THIS SUBMISSION ...................... II

GLOSSARY ....................................................................................................................... III

I. INTRODUCTION ........................................................................................................ 1

II. PROCEDURAL OBJECTIONS ..................................................................................... 1

   A. The evidence presented by the United States in its Second Oral Statement is inadmissible ................................................................. 1

   B. Certain matters raised by the United States in Part III of its SOS are outside the Panel’s Terms of Reference .......................................................... 5

      1. The Panel may only examine the matters identified in the US Panel request ........................................................................................................ 6

      2. The US claim regarding the non-uniform application of Article 221 (3) CCC is not within the Panel’s terms of reference ............................... 8

III. THE EXAMPLES OF NON-UNIFORM ADMINISTRATION IN PART III OF THE US SOS ........................................................................................................ 12

   A. Camcorders ......................................................................................................... 12

   B. Sony PlayStation2 ............................................................................................. 15

   C. Intermodal Transport ......................................................................................... 20

   D. Overall Conclusion regarding the evidence presented by the US under Article X:3 (a) GATT ................................................................. 24

IV. CONCLUSION .......................................................................................................... 26
Table of WTO and GATT cases referred to in this submission

<table>
<thead>
<tr>
<th>Short Title</th>
<th>Full Case Title and Citation of Case</th>
</tr>
</thead>
</table>
GLOSSARY

BOI  Binding Origin Information
BTI  Binding Tariff Information
CCC  Community Customs Code
CIS  Customs Information System
CN  Combined Nomenclature

Comitology Decision  Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission

Commission, EC Commission  Commission of the European Communities
Council, EC Council  Council of the European Union
Court of Justice, European Court of Justice  Court of Justice of the European Communities

Customs Code Committee  Committee established by Articles 247a (1) and 248a (1) of the CCC

Customs Valuation Agreement  Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994

DSU  Understanding on Rules and Procedures Governing the Settlement of Disputes

EBTI  European Binding Tariff Information
EC  European Communities
ECR  European Court of Justice, Reports of Cases before the Court

EC Treaty  Treaty establishing the European Community
EU Treaty  Treaty on European Union
FOS  First Oral Statement
FWS  First Written Submission
GATT  General Agreement on Tariffs and Trade 1994
HS Convention  International Convention on the Harmonised Commodity and Coding System
HTSA  Harmonized Tariff Schedule of the United States Annotated
Implementing Regulation  Commission Regulation (EEC) No 2454 of 2 July 1993 laying down provisions for the Implementation of the CCC
Kyoto Convention  International Convention on the Simplification and Harmonisation of Customs Procedures
Member States, EC Member States  Member States of the European Union
Official Journal  Official Journal of the European Union
SOS  Second Oral Statement
SWS  Second Written Submission
Taric  Integrated Tariff of the European Communities
US  United States
USTR  United States Trade Representative
WCO  World Customs Organisation
WTO  World Trade Organization
WTO Agreement  Marrakesh Agreement Establishing the World Trade Organization
I. **INTRODUCTION**

1. In accordance with the Panel’s ruling of 23 November 2005, as well as the amended time-table communicated to the parties on 25 November 2005, the present submission presents the EC’s rebuttal to Part III of the US opening statement at the second meeting with the Panel (US Second Oral Statement). This submission at the same time constitutes the EC’s response to the Panel’s supplementary Question No. 172.

2. In this submission, the EC will first address some procedural objections regarding the US Second Oral Statement. Subsequently, the EC will respond in substance to the claims and arguments contained in Part III of the US SOS.

II. **PROCEDURAL OBJECTIONS**

3. In the present section, the EC will raise two procedural issues regarding the US SOS. First, the evidence presented by the United States with its Second Oral Submission is inadmissible due to its belated presentation. Second, certain of the matters raised in Part III of the US SOS fall outside the Panel’s terms of reference.

   **A. The evidence presented by the United States in its Second Oral Statement is inadmissible**

4. At the hearing with the Panel on 22 November 2005, the EC has already orally objected to the late submission of a substantial amount of new evidence with the US Second Oral Statement. The EC acknowledges the Panel’s ruling of 23 November 2005, and the decision to grant the EC additional time to respond to the matters raised and evidence submitted in Part III of the US SOS.

5. However, the EC maintains its view that the litigation tactics employed by the United States raise serious issues of due process and procedural fairness, as well as the orderly conduct of DSU dispute settlement proceedings in general. These issues have only partially been addressed by the Panel’s rulings. Moreover, the
implications of the US conduct go beyond the present case. For this reason, the EC wishes to restate, in the present submission, its views on this matter.

6. According to Article 12.1 DSU, the panel proceedings are in principle in accordance with the working procedures contained in Appendix 3 to the DSU. It is true that these working procedures do not establish specific time-limits for the presentation of evidence. Moreover, the Panel may, in consultation with the Parties to the dispute, adopt more specific procedures, and may also amend these procedures in consultation with the parties.

7. This notwithstanding, as the Appellate Body has remarked in *Argentina – Textiles and Apparel*, the working procedures contemplate two distinguishable stages in a proceeding before a Panel, namely the stage of the first hearing, which should serve the presentation of the facts, and the stage of the second hearing, which should serve the purpose of permitting rebuttals:1

   It is also true, however, that the Working Procedures in Appendix 3 do contemplate two distinguishable stages in a proceeding before a panel. Paragraphs 4 and 5 of the Working Procedures address the first stage in the following terms:

   4. Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.

   5. At its first substantive meeting with the parties, the panel shall ask the party which has brought the complaint to present its case. Subsequently, and still at the same meeting, the party against which the complaint has been brought shall be asked to present its point of view.

   The second stage of a panel proceeding is dealt with in paragraph 7 which states:

   7. Formal rebuttals shall be made at a second substantive meeting of the panel. The party complained against shall have the right to take the floor first to be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the panel.

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1 *Appellate Body Report, Argentina – Textiles and Apparel*, para. 79.
Under the Working Procedures in Appendix 3, the complaining party should set out its case in chief, including a full presentation of the facts on the basis of submission of supporting evidence, during the first stage. The second stage is generally designed to permit "rebuttals" by each party of the arguments and evidence submitted by the other parties.

8. In line with these general principles of DSU dispute settlement, paragraph 12 of the Panel’s working procedures contains the following rules on the submission of evidence:

   Parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttals, answers to questions or comments made for purposes of rebutting answers provided by others. Exceptions to this procedure will be granted upon a showing of good cause. In such cases, the other party shall be accorded a period of time for comment, as appropriate.

9. With its SOS, the US submitted 22 exhibits containing new factual evidence. In large part, this evidence related to matters which had not previously been raised in the submission of the parties. The EC considers that this approach is not in accordance with the requirements of due process and procedural fairness, as reflected in paragraph 12 of the Panel’s working procedures.

10. The evidence referred to in Section III of the US SOS refers to alleged instances of non-uniform application which have not before been raised by the United States, and therefore constitute entirely new evidence. As the EC will subsequently show, some of this evidence even relates to matters which are outside the Panel’s terms of reference.

11. Even to the extent that the evidence presented relates to cases of application which have been previously discussed between the parties, notably the evidence referred to in Section V of the US SOS, it is not clear why this evidence has not been presented in earlier submissions. In this context, it must be noted that whether the late submission of evidence is “necessary for the purposes of rebuttal” does not

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2 The EC notes that in its ruling of 23 November, the Panel left open whether the evidence in question constituted “new evidence” or “evidence that is necessary for the purposes of rebuttals”.

3 As regards the affidavit produced by the US in Exhibit US-79, the EC has already explained that this evidence is deprived of all useful evidentiary value.
just depend on whether it relates to a “rebuttal” of an argument made earlier, but also whether it could have been introduced earlier.

12. The EC sees no good cause for the late submission of this evidence by the US. The evidence contained in Part III refers to examples which in certain cases go several years back, and could have been introduced by the United States with its First Written Submission. The United States did not even attempt to indicate why the above evidence was not accessible to it by the date of the first substantive meeting, nor did the United States otherwise try to show good cause for the late submission of the new evidence.

13. The late submission of this new evidence is all the more unjustifiable given the strict refusal of the United State to submit evidence in its earlier submissions. Indeed, when requested by the Panel after the first hearing to provide evidence of further cases of non-uniform application, the US uniformly refused to submit such evidence. More strikingly still, in its SWS, the US abstained completely from submitting any factual evidence whatsoever.

14. This conduct by the United States gives the strong impression that the United States has been deliberately withholding the evidence until the last possible stage, when the possibilities for the EC to respond to it would be minimal. Such litigation tactics are not conducive to a proper conduct of dispute settlement proceedings under the DSU.

15. The Panel’s decision to grant the EC additional time to comment on Part III of the US SOS does not address these concerns. First, due to the late submission of this new evidence by the US, the EC has to present a third submission in parallel to the

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4 On camcorders, cf. US SOS, para. 26 et seq.; Sony Playstation, US SOS, para. 32 et seq. As regards the “DeBaere-Presentation” (Exhibit US-59), as the EC will explain below, this presentation has no evidentiary value whatsoever.

5 In Canada - Wheat Exports and Grain Imports, para 6.140, the Panel rejected a scholarly article submitted by the United States in an untimely manner, noting that the US did not even try indicating why the above evidence was not accessible to it by the date of the first substantive meeting, nor did the United States otherwise try to show good cause for the late submission of the new evidence. In particular, it rejected the U.S. argument that this article served only as rebuttal.

6 Cf. US Replies to the Panel’s Questions No. 14, 24, and 33; cf. also EC SWS, para. 45.
answers of the Panel and the comments on the US responses. Second, the Panel’s ruling only addresses Part III of the SOS, but not the additional evidence referred to in other parts of the US SOS. Finally, the US approach has already had implications for the Panel’s overall timetable, and may have further implications.

16. The US approach is of general concern for the WTO dispute settlement system. Panels have to work within very narrow timeframes, which imposes a considerable burden on the parties, the Panel and the Secretariat. Because of these constraints, it is important that the parties act in such a way that assists the Panel in respecting its timetable, rather than obstructing it.

17. The US approach is particularly disturbing in the context of the present case. The US is asking the Panel to make extremely sweeping findings, notably that the entire system of EC customs administration is incompatible with Article X:3 (a) GATT. It could have been expected that the substance of the evidence, as well as the way in which it is presented, would measure up to the gravity of the US claims and their implications. However, the opposite has been the case. Whereas the EC has participated constructively in the process, and already with its first written submission presented a comprehensive description of its system of customs administration and judicial review in order to provide the Panel with a solid factual basis, the US has approached this case as a game of litigation tactics. The EC submits that such an approach is not conducive to allowing the Panel to proceed to an objective evaluation of the facts as required by Article 11 DSU.

18. For these reasons, the EC maintains its view that the evidence submitted by the US with its Second Oral Statement is inadmissible.

B. Certain matters raised by the United States in Part III of its SOS are outside the Panel’s Terms of Reference

19. In Part III of its SOS, the US also raises an issue regarding the alleged non-uniform application of Article 221 (3) CCC, which concerns the period during
which the customs debt may be communicated to the debtor. The EC submits that this matter is not within the Panel’s terms of reference.

1. The Panel may only examine the matters identified in the US Panel request

20. The present Panel has been established by the DSB with standard terms of reference in accordance with Article 7.1 DSU. Accordingly, the mandate of the Panel is to examine the matter referred to it as identified in the Panel request of the United States.

21. As the Appellate Body has confirmed in _US – Carbon Steel_, the Panel request forms the basis of the Panel’s terms of reference under Article 7.1 of the DSU:

There are, therefore, two distinct requirements, namely identification of the specific measures at issue, and the provision of a brief summary of the legal basis of the complaint (or the claims). Together, they comprise the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.

22. Article 6.2 DSU sets out the following minimum requirements with which all Panel requests must comply:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

23. In _Korea – Dairy_, the Appellate Body held that Article 6.2 of the DSU imposes four separate requirements:

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7 US SOS, para. 27, para. 31. The US inaccurately refers to Article 221 (3) CCC as a provision "prescribing the period following importation during which a customs debt may be collected". As the EC will show in the following section, this is not accurate.

8 WT/DS315/9, para. 2.

9 WT/DS315/8.


11 Appellate Body Report, _Korea – Dairy_, para. 120.
When parsed into its constituent parts, Article 6.2 may be seen to impose the following requirements. The request must: (i) be in writing; (ii) indicate whether consultations were held; (iii) identify the specific measures at issue; and (iv) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In its fourth requirement, Article 6.2 demands only a summary – and it may be a brief one – of the legal basis of the complaint; but the summary must, in any event, be one that is "sufficient to present the problem clearly". It is not enough, in other words, that "the legal basis of the complaint" is summarily identified; the identification must "present the problem clearly".

24. The objective and purpose of Article 6.2 of the DSU is to guarantee a minimum measure of procedural fairness throughout the proceedings. This is of particular importance to the defendant, who must rely on the Panel request in order to begin preparing its defence. Similarly, WTO Members who intend to participate as third parties must be informed of the subject-matter of the dispute. This underlying rationale of Article 6.2 DSU has been explained by the Appellate Body in *Thailand - H-Beams*:\(^\text{12}\)

> Article 6.2 of the DSU calls for sufficient clarity with respect to the legal basis of the complaint, that is, with respect to the "claims" that are being asserted by the complaining party. A defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence. Likewise, those Members of the WTO who intend to participate as third parties in panel proceedings must be informed of the legal basis of the complaint. This requirement of due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings.

25. In *EC – Bananas*, the Appellate Body has clarified that the claims which are set out in the Panel request must be distinguished from the subsequent arguments of the parties in support of their claim. Consequently, the Appellate Body has held that a faulty Panel request cannot be subsequently “cured” by the written submission of the parties:\(^\text{13}\)

> We do not agree with the Panel that "even if there was some uncertainty whether the panel request had met the requirements of Article 6.2, the first written submissions of the Complainants


\(^\text{13}\) Appellate Body Report, *EC – Bananas III*, para. 143.
‘cured’ that uncertainty because their submissions were sufficiently detailed to present all the factual and legal issues clearly”. Article 6.2 of the DSU requires that the claims, but not the arguments, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint. If a claim is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently "cured" by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding.

26. As a consequence, the only basis on which to establish whether a Panel request is in conformity with the requirements of Article 6.2 is the text of the request itself. This has been confirmed by the Appellate Body in United States - Carbon Steel:14

As we have said previously, compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be "cured" in the subsequent submissions of the parties during the panel proceedings.15 Nevertheless, in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced.16 Moreover, compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances.

2. The US claim regarding the non-uniform application of Article 221 (3) CCC is not within the Panel’s terms of reference

27. According to the third paragraph of the US Panel Request, the US claims that there exists a lack of uniformity of administration of EC customs law with respect to the following areas of EC customs law:

- classification and valuation of goods;

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14 Appellate Body Report, United States –Carbon Steel, para. 127 (emphasis added).
15 Ibid., para. 143.
16 See, for example, Appellate Body Report, Korea – Dairy, para. 127; Appellate Body Report, Thailand – H-Beams, para.95.
• procedures for the classification and valuation of goods, including the provision of binding classification and valuation information to importers;

• procedures for the entry and release of goods, including different certificate of origin requirements, different criteria among member States for the physical inspection of goods, different licensing requirements for importation of food products, and different procedures for processing express delivery shipments;

• procedures for auditing entry statements after goods are released into the stream of commerce in the European Communities;

• penalties and procedures regarding the imposition of penalties for violation of customs rules; and

• record-keeping requirements.

28. The issue raised by the United States regarding the alleged non-uniform application of Article 221 (3) CCC does not concern any of these areas. Article 221 CCC is a provision which concerns the communication of the customs debt to the debtor. Article 221 CCC is drafted as follows:

1. As soon as it has been entered in the accounts, the amount of duty shall be communicated to the debtor in accordance with appropriate procedures.

2. Where the amount of duty payable has been entered, for guidance, in the customs declaration, the customs authorities may specify that it shall not be communicated in accordance with paragraph 1 unless the amount of duty indicated does not correspond to the amount determined by the authorities.

Without prejudice to the application of the second subparagraph of Article 218 (1), where use is made of the possibility provided for in the preceding subparagraph, release of the goods by the customs authorities shall be equivalent to communication to the debtor of the amount of duty entered in the accounts.

3. Communication to the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred. This period shall be suspended from the time an appeal within the meaning of Article 243 is lodged, for the duration of the appeal proceedings.

4. Where the customs debt is the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings, the amount may, under the conditions set out in the provisions in force, be communicated to the debtor after the expiry of the three-year period referred to in paragraph 3.
29. Article 221 is contained in Title VII of the CCC, entitled “Customs Debt”, and more specifically in Chapter 3 thereof, dealing with the recovery of the amount of the customs debt. In this context, Article 221 CCC establishes that the amount of duty must be communicated to the debtor. Article 221 (3) sets out a time limit of three years within which this communication of the debt may occur, but provides that this period is suspended for the period of appeal proceedings. Article 221 (4) provides that where the customs debt is the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings, the amount may, under the conditions set out in the provisions in force, be communicated to the debtor after the expiry of the three-year period referred to in paragraph 3.

30. The question of the post-clearance recovery of customs duties, and more specifically during which period a customs duty may be communicated to the debtor, does not fall within any of the issues raised in the US Panel request. It does not concern the classification or valuation of goods; it is not a procedure for the entry and release of goods; it is not a procedure for auditing entry statements; nor does it concern the imposition of penalties or record-keeping requirements.

31. The United States has submitted that the issues referred to in paragraph 3 of its Panel request are merely “illustrations”, and that its claim is related to the lack of uniform administration of “EC customs law as a whole”. As the EC has already remarked in its SWS, such an interpretation of the US Panel request is not in accordance with the requirements of Article 6 (2) DSU. EC customs law is a vast body of law. It is therefore not sufficient for the description of the “specific measure at issue” to simply refer to the “administration of EC customs law” as a whole.

32. The US has implicitly acknowledged this in the third paragraph of its Panel request by referring to the specific issues where it claims a lack of uniform administration exists. This listing must have a useful purpose. In particular, it should allow the Panel to know which issues are precisely within its terms of


18 EC SWS, para. 13-14.
reference. Similarly, it should allow the EC, as the defendant in the present proceedings, to adequately prepare its defence. Laying down a list of measures and then vaguely refer to “including but not limited to” should be considered a failed attempt to have an “open ended” case. In the reading of the United States, it would be possible for a complainant to keep a Panel request extremely vague, raise a few issues as “illustrations”, and then bring a case regarding completely different issues. Moreover, the US seems to believe that such issues can even be introduced at the very last stage of the proceedings. Such “surprise tactics” are not compatible with the due process requirements of Article 6 (2) DSU.

33. The EC’s interpretation finds further confirmation in the attendant circumstances of the present case, and notably in the subsequent submissions of the US. Until its SOS, the US never referred to a problem of non-uniform application of Article 221 CCC. More specifically, when asked by the Panel after the first hearing to provide an exhaustive list of all customs procedures challenged under Article X:3 (a) GATT, the US declined to do so. If the US believed that non-uniform application of Article 221 (3) CCC was part of its claims, it should have raised this issue then.

34. The EC finds further confirmation of this in the US Reply to the Panel’s question No. 124, where the US lists a number of provisions in respect of which it claims to have established a lack of uniform administration. Significantly, this list does not include Article 221 CCC, nor any other provision from Title VIII of the CCC. This implies that the United States either does not believe it has established any claim regarding the non-uniform administration of Article 221 CCC, or it concedes that this claim does not fall within the Panel’s terms of reference.

35. For these reasons, the EC submits to the Panel that the US claim regarding non-uniform application of Article 221 (3) CCC does not fall within the Panel’s terms of reference.

19 It is noted that post-clearance recovery of customs debt is not a “customs procedure” within the meaning of Article 4 (16) CCC. However, the EC understands the Panel to have used the term in a wider sense.

20 US Reply to the Panel’s Question No. 6, para. 31.

21 US Reply to the Panel’s Question No. 124, para 4.
III. **The Examples of Non-Uniform Administration in Part III of the US SOS**

36. In this section, the EC will proceed to rebut the substantive examples of alleged non-uniform administration submitted by the United States in Part III of its SOS, i.e. the Camcorder case, the Sony Playstation case, and the Judgment of the ECJ in Intermodal Transports.\(^{22}\) On this basis, the EC will add an overall conclusion regarding the evidence presented by the US in support of its claims under Article X:3 (a) GATT.

37. With respect to the classification of camcorders, the United States alleges that there is a problem regarding the non-uniform administration of EC customs law in respect of the “retrospective effect” of EC explanatory notes.\(^{23}\) These allegations are unfounded. Moreover, the US allegations seem to be primarily related to the issue of the post-clearance recovery of the customs debt, which, as the EC has already shown,\(^{24}\) is not within the Panel’s terms of reference.

38. The US has presented its reference to the camcorders case as a rebuttal to the EC’s reference to EC explanatory notes as a tool for securing uniform administration of EC classification rules.\(^{25}\) However, it subsequently discusses the question as to whether Member States, subsequent to the adoption of an EC explanatory note,

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\(^{22}\) The EC notes that two out of the three examples are drawn from a presentation made by Mr Philippe de Baere, whom the US describes as a “seasoned customs law practitioner” (US SOS, para. 24 and Exhibit US-59). Mr de Baere is Member of a Brussels law firm with an extensive practice in the field of customs law, who frequently represents industry and traders against the EC customs authorities and institutions. Mr de Baere has also been involved personally in the two cases referred by the United States. The EC would remark that it is not surprising that a practising trade lawyer would defend a position that serves the interests of his clients. The EC considers, however, that a presentation by an interested attorney cannot be regarded as an objective statement on the facts. The evidential value of the de Baere presentation for the purposes of the present dispute is therefore *nil*.

\(^{23}\) US SOS, para. 26 et seq.

\(^{24}\) Above Section II.B.

may reach back to collect additional duty on importations made prior to the issuance of the explanatory note.\textsuperscript{26}

39. This issue has nothing to do with the value of explanatory notes as tools for securing the uniform administration of tariff classification rules. It goes without saying that an explanatory note can be effective for the purposes of securing uniform tariff classification only once it has been adopted. The question of what effect it may have for the collection of customs duties which relate to importations which took place before the adoption of the explanatory note is a question which relates to the post-clearance recovery of customs debt, which is an issue distinct from tariff classification.

40. The US has not shown that there has been any lack of uniformity as regards tariff classification in the EC following the issuance of the explanatory note submitted as \textbf{Exhibit US-61}. The BTI issued by the Spanish authorities submitted as \textbf{Exhibit US-65} are all in full accordance with EC classification rules. The US has not provided any evidence of any other Member States having classified Camcorders contrary to EC classification rules. It has simply stated, without any further supporting evidence or documentation, that “the French 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”.\textsuperscript{27} It thus appears that the question addressed by the French authorities was one of post-clearance recovery of customs duties, and not one of tariff classification. Moreover, the US does not provide any evidence as to when the importation in question took place, and whether indeed they related to products corresponding to those referred described in the BTI issued by the Spanish authorities.

41. Since the question is therefore not one regarding the uniform administration of tariff classification rules, but rather of the post-clearance recovery of customs debts, the EC considers that the issue is outside the Panel’s terms of reference. The EC will therefore not respond to these allegations in detail. The EC would note,\textsuperscript{26} US SOS, para. 29, 31.\textsuperscript{27} US SOS, para. 30.
however, that the substance of the US presentation of the facts is so confused and incomplete that a meaningful rebuttal at this stage anyways would be very difficult, if not impossible. Moreover, the US has not provided any information as to the concrete circumstances of the cases in which recovery of the customs duty was sought. For this reason, the EC will limit itself hereafter to some general remarks.

42. First, the US has referred to a problem regarding the uniform administration of Article 221 (3) CCC, which it describes as a provision “prescribing the period following importation during which a customs debt may be collected”. However, this is not accurate. Article 221 (3) CCC covers the question of the post-clearance recovery of customs duties, including the issue of the effect of the post-importation adoption of explanatory notes, only very partially. In fact, Article 221 (3) addresses only the period during which a customs debt may be communicated to the debtor. In contrast, the question of the substantive conditions under which the customs debt may be retroactively recovered is addressed in Article 220 CCC, and in particular in Article 220 (2) (a) thereof.

43. This confusion on the part of the US is further illustrated by the reference the US makes to an administrative guideline issued by Germany which it claims illustrates its allegation of non-uniform administration of Article 221 (3) CCC. However, this administrative guideline does not refer to Article 221 CCC, but to Articles 220 and 236 CCC. Moreover, contrary to what the US suggests, this guideline is not a German invention, but is the transposition of a letter that had been addressed by the European Commission in 1996 to the customs authorities of all Member States, including Germany. There also exists an information paper elaborated by the services of the European Commission on the application of Articles 220 (2) (b)

28 US SOS, para. 27.
29 US SOS, para. 29 and Exhibit US-63.
30 As Exhibit EC-153, the EC attaches the letters addressed to Germany and the UK. But for the addresses, both letters are identical.
CCC and 239 CCC, which provides further guidance to the Member States authorities.\textsuperscript{31}

44. Second, the US claims that the only permitted exception to Article 221 (3) CCC is the lodging of an appeal, which suspends the three-year period for communicating the customs debt.\textsuperscript{32} This is equally incorrect. Another relevant exception is Article 221 (4) CCC, according to which, where the customs debt is the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings, the amount may, under the conditions set out in the provisions in force, be communicated to the debtor after the expiry of the three-year period. As the Court of Justice has clarified, the question as to whether an act may give raise to criminal proceedings is a question of Member States law, not of Community law.\textsuperscript{33} Moreover, the length of the period during which the debt can be communicated in the case envisaged in Article 221 (4) CCC must equally be laid down in Member States’ law. Any resulting differences are thus differences between legislation, not examples of non-uniform administration.

45. In conclusion, the camcorders case does not show any lack of uniformity in the EC’s classification practice. As regards the issue of post-clearance recovery of customs debt, this question is outside the Panel’s terms of reference.

\textit{B. Sony PlayStation2}

46. In its SOS, the US raises an alleged problem of non-uniform administration relating to the classification of the Sony PlayStation2 (PS2).\textsuperscript{34} However, the US’ presentation of the facts is incomplete and misleading. While the US states that the UK proceedings demonstrate how the ECJ’s decision in Timmermans “can

\textsuperscript{31} Exhibit EC-154. The Paper is also available on the website of DG TAXUD (http://europa.eu.int/comm/taxation_customs/resources/documents/customs/procedural_aspects/general/debt/guidelines_en.pdf)

\textsuperscript{32} US SOS, para. 31.

\textsuperscript{33} Case C-273/90, Meico-Fell, [1991] ECR I-5569, para 13 (Exhibit EC-155).

\textsuperscript{34} US SOS, para. 32-34.
detract from rather than promote uniform administration”, 35 the reliance on the case by the UK High Court of Justice to uphold an interpretation advanced by the CFI and other key Community institutions actually shows how Timmermans can operate to promote uniformity.

47. Ultimately, a more detailed examination of the facts in that case is necessary to demonstrate how the rule in Timmermans actually contributed to, rather than detracted from, a uniform interpretation and application of Community law. That case involved an application by Sony Europe Ltd. to the UK authorities for a BTI classifying its PS2. On its first application, the UK customs authority classified it pursuant to CN 9504 1000, which covers “video games of a kind used with a television receiver”, 36 because it concluded that the PS2 was not freely programmable. 37 This classification was confirmed on departmental review. 38

48. Subsequently, the issue reached the EC Customs Code Committee (Nomenclature Section). 39 The Committee unanimously considered that PS2 indeed fell under the CN 9504 1000, but for different reasons. In particular, while it considered that the PS2 was properly classified under CN 9504 1000, it concluded that the device was freely programmable. Subsequently, the Commission adopted, on 10 July 2001, a classification regulation classifying the PS2 under heading 9504. 40 Relying on general rule 3 (b), the regulation gave as a reason that “playing video games gives the apparatus its essential character”.

49. On appeal, the UK Tribunal annulled the decision of the UK authorities in light of the fact that the legal basis underlying the denial of the requested BTI classification was incorrect. 41 Therefore, pending publication of the Commission

35 US SOS, para. 32.
36 Exhibit EC-156.
37 Exhibit US-70, para. 4.
38 Exhibit US-70, para.4.
39 Case T-243/01, Sony (Exhibit EC-24).
41 Exhibit US-70, para. 4.
regulation, Sony requested a new BTI and the UK Commissioners issued a BTI classifying the PS2 under CN 8471 49 00 (covering automatic data processing machines and parts thereof), but making it clear that its classification would have to be revoked when the classification regulation would enter into force.

Following the entry into force of the Regulation, on July 25, 2001, the UK authority revoked the BTI and, in conformity with Community law, the PS2 was classified under CN 9504 1000, the same classification as the original BTI.

Following the revocation of the BTI classifying the PS2 in 8471 49 90 00, Sony challenged the validity of the Regulation at the Court of First Instance (CFI). In its judgment of 30 September 2003, the CFI invalidated the Regulation. However, as regards the substantive classification, the CFI explicitly confirmed that the article could be classified under heading 9504 1000. Rather, it determined that the reasons given for the classification, namely reliance on General Interpretative Rule 3 (b), had been erroneous. It also specifically noted that classification of the PS2 under CN 9504 1000 could be properly based on the objective characteristics of the product. In particular, the Court found that:

Such reasoning can also be applied to a case such as this one. Thus, in the absence of a definition of “video games” for the purposes of subheading 9504 10, it is appropriate to consider as video games any products which are intended to be used, exclusively or mainly, for playing video games, even though they might be used for other purposes.

It is, moreover, undeniable that, both by the manner in which the PlayStation2 is imported, sold and presented to the public and by the way it is configured, it is intended to be used mainly for

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42 Exhibit EC-156.
43 Exhibit US-70, para. 5, 50-51.
44 Exhibit US-70, para. 6.
45 Exhibit US-70, para. 6.
46 Exhibit EC-24, para. 119.
47 Exhibit EC 24, para. 133.
48 Exhibit EC-24, para. 110.
49 Exhibit EC-24, para. 111-112.
playing video games, even though, as is apparent from the contested regulation, it may also be used for other purposes, such as playing video DVDs and audio CDs, in addition to automatic data processing.

51. Following this judgment, the UK customs authorities in a letter dated 21 October 2003, requested the advice of the European Commission on the classification of the Sony PS2. In response, the Commission sent a letter to all EC customs authorities (including the customs authorities of the new Member States) on 8 January 2004 which confirmed that on the basis of the judgment of the CFI, the PS2 cannot be classified in heading 8471, but must be classified in heading 9504.50

52. Following the CFI decision, Sony sought to have the BTI issued under CN 8471 49 90 00 by the UK authorities before the entry into force of the new classification regulation "revived". It is worth noting that Sony did not apply for a new BTI, but merely attempted to "revive" the old BTI. Accordingly, before the UK VAT and Duties Tribunal, Sony concentrated its arguments exclusively on the revival of the revoked BTI, and did not address the substantive classification issue.51 The UK Tribunal rejected Sony’s appeal, and maintained the revocation of the BTI in force.52

53. On appeal, the UK High Court equally declined to revive the BTI for CN 8471 49 90 00. Its reasons were based on Community objectives and principles.53 In particular, on a more detailed examination of the issue and taking account of, inter alia, the CFI decision, a Commission letter advocating the CFI interpretation, the unanimous conclusions of the Customs Code Committee, and other international organization interpretations following the decision – all of which classified it under heading 9504 100054 - it was obvious to the UK High Court that the BTI classifying the PS2 under CN 8471 49 90 00 was wrong and therefore, the

50 Exhibit EC-158.
51 Exhibit EC-159.
52 Exhibit EC-159.
53 See Exhibit US-70, para. 118.
54 See Exhibit US-70, paras. 141-46.
applicant was not entitled to revive that BTI.\footnote{Exhibit US-70, paras. 97 and 147.} With respect to the original revocation of the BTI classifying PS2 in CN 8471 49 90 00, the Court concluded, based on \textit{Timmermans}, that the national authorities were entitled to revoke the classification as a separate action from the Regulation and therefore the revocation of the BTI for 8471 49 90 00 stood in light of the fact that the rationale for revoking it remained applicable.\footnote{Exhibit US-70, paras. 132-33.}

54. Ultimately, the US’ statement alluding to the fact that the High Court of Justice revoked the BTI based on its “own re-evaluation of the classification rules”\footnote{US SOS, para. 33.} is highly misleading. The revocation, on 25 July 2001, took place on account of the entry into force of an EC classification regulation. Accordingly, rather than following its “own interpretation of classification rules”, the UK authority in fact duly applied Community law. The UK High Court upheld the validity of the revocation with explicit reliance on the \textit{Timmermans} judgment of the Court of Justice and on the basis of clear evidence supporting the reasoning behind that revocation.\footnote{Exhibit US-70, para. 118.} This is yet another illustration of the fact that the \textit{Timmermans} case law, rather than detract from uniformity, actually promotes it.

55. In addition, the US has also criticised the UK High Court for not having referred the question to the ECJ.\footnote{US SOS, para. 34.} This criticism is entirely unjustified. First of all, the High Court is not a court of last instance, and therefore not obliged to refer questions to the ECJ. Second, as regards the substantive classification issue, the issue had sufficiently been clarified through the judgment of the Court of First Instance. Moreover, the supporting elements, such as the Commission’s letter, the Committee’s opinion, and WCO opinions, all pointed in that same direction.\footnote{Exhibit US-70, para. 143-144.} Presumably recognising this, Sony had not even tried to directly argue the
classification question. Accordingly, the UK court was not wrong to consider that the issue was sufficiently clear, and that it could decide the issue on its own.

56. In conclusion, the Sony PlayStation2 case is not a case of lack of uniformity in the EC’s system of tariff classification. Rather, it is a case where a “seasoned customs law practitioner”, through unprecedented legal contortions, has unsuccessfully tried to revive a BTI which would have been contrary to the uniform classification practice in the EC. It speaks for the efficiency of the EC’s system that this attempt failed. In contrast, it is ironic that the US makes itself the advocate for behaviour which would manifestly detract from the uniform application of EC law.

C. Intermodal Transport

57. The US presents the ECJ judgement in Intermodal Transports as leaving “broad discretion” to the Member States’ courts whether or not they refer a question to the ECJ. According to the US, this discretion would reinforce divergences in Members States’ administration of customs law.

58. However, these two arguments rest on an incomplete and incorrect reading of the judgement.

59. Concerning the first argument (about discretion), the EC has already explained in its FWS, the different positions of national courts or tribunals depending on whether there is or is not a judicial remedy under national law.

60. With respect to national courts or tribunals against whose decisions there is a judicial remedy under national law, they are entitled, but in principle not required, to refer a question to the Court of Justice for a preliminary ruling on

62 US SOS, para. 37, in fine.
63 Also in US SOS, para. 37, in fine.
64 EC FWS, para. 180.
interpretation.\textsuperscript{65} The rationale behind this rule is obviously that, in case the court or tribunal decides not to refer the question, the decision of the court or tribunal can still be appealed and that the obligation to refer will be upon the court or tribunal against whose decisions there is not a judicial remedy under national law.

61. Indeed, in respect of national courts or tribunals against whose decisions there is no judicial remedy under national law, the Court affirms again in \textit{Intermodal Transports} that “the third paragraph of Article 234 EC must, following settled case-law, be interpreted as meaning that such courts or tribunals are required, where a question of Community law is raised before them, to comply with their obligation to make a reference”.\textsuperscript{66}

62. \textit{Intermodal Transport} is precisely a case showing that this obligation is respected by the highest national courts of tribunals. The “Hoge Raad” is the last instance in the Netherlands for classification in customs matters and, when confronted with the classification of a vehicle, it referred to the ECJ asking about the correct classification of the good in question.\textsuperscript{67} The US makes no reference to this issue in its SOS.

63. Although there are exceptions to the obligation to refer, these exceptions are subject to strict conditions, which were laid down by the ECJ in the \textit{Cilfit} case.\textsuperscript{68} These exceptions are:\textsuperscript{69}

- the question raised is irrelevant; or,
- the Community provision in question has already been interpreted by the Court; or,

\textsuperscript{65} The statement made by Mr. Vermulst in the article quoted by the US at para. 38 of its SOS refers particularly to the position of first instance national courts (\textit{Exhibit US-72}). This article, therefore, does not support the overall and exaggerated argument employed by the US in its SOS that there is a “broad discretion” open to the Member States’ courts whether or not they refer a question to the ECJ.

\textsuperscript{66} At para. 33.

\textsuperscript{67} At paras. 3 and 46 to 64.

\textsuperscript{68} Case 283/81, \textit{Cilfit}, [1982], ECR p. 3415 (\textit{Exhibit EC-160}).

\textsuperscript{69} At para. 33 in \textit{Intermodal Transport} and, more in detail, at paras. 10 to 16 in \textit{Cilfit}. 
- the correct application of Community law is so obvious as to leave no scope for any reasonable doubt.

64. In relation to the latter criterion (no scope for any reasonable doubt), which has attracted the US attention, the ECJ has repeated in *Intermodal Transport* that:  

[...] before the national court or tribunal comes to the conclusion that the correct application of a provision of Community law is so obvious that there is no scope for any reasonable doubt as to the manner in which the question raised is to be resolved and therefore refrains from submitting a question to the Court for a preliminary ruling, it must in particular be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice (*Cilfit and Others*, paragraph 16).

65. However, as already stated, the exceptions are subject to strict conditions. Generally speaking, they “must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community”.  

66. The two first general conditions have already been developed by the ECJ in *Cilfit*.  

[...] it must be borne in mind that Community legislation is drafted in several languages and that the different languages versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.

It must also be borne in mind that, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. [...].

Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.

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71 Exhibit US-71, para. 33.

72 Exhibit EC-160, para. 18-20.
Moreover, *Intermodal Transport* adds that the exceptions to the obligation to refer must be applied very strictly in tariff classification cases where a BTI has been issued to a third party by another Member State. The Court notes that: 73

The fact that the customs authorities of another Member State have issued to a person not party to the dispute before such a court a BTI for specific goods, which seems to reflect a different interpretation of the CN headings from that which that court considers it must adopt in respect of similar goods in question in that dispute, most certainly must cause that court to take particular care in its assessment of whether there is no reasonable doubt as to the correct application of the CN, taking into account, in particular, of the three criteria cited in the preceding paragraph” (emphasis added).

It is therefore, misleading to assert, as the US does, that *Intermodal Transports* “shows […] the broad discretion that member State courts have to refer or not refer questions to the ECJ”. 74 This level of discretion is limited to national courts or tribunals against whose decisions there is a judicial remedy under national law. In the case of national courts or tribunals against whose decisions there is no judicial remedy under national law, the general rule is that there is an obligation on them to refer, with some very specific and limited exceptions, to the ECJ. These exceptions have been rendered even stricter in the customs classification sector by *Intermodal Transports*.

Finally, with respect to the second argument presented by the US in its SOS, it is worth noting that, contrary to what the US claims, the *Intermodal Transport* case does not demonstrate any absence of uniformity in the EC’s tariff classification practice, but on the contrary perfectly shows how preliminary rulings contribute to the EC uniform administration of its laws.

Indeed, the ECJ has clarified in the judgment that heading 8709 of the Combined Nomenclature must be interpreted as not covering the vehicle in question. This means that, according to the *Timmermans* case law, any BTI issued for that vehicle at that heading by any national customs authority must be revoked. 75 Moreover,

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73 Exhibit US-71, para. 34 (emphasis added).
74 US SOS, para 37, *in fine*.
75 EC FWS, para. 326 et seq. and EC SWS, para. 99.
due to the binding effects of preliminary rulings\(^{76}\) and in the absence of a change in the relevant classification rules, national customs authorities are not entitled to classify that good under heading 8709 any longer.

71. In the actual case, the BTI issued by Finland on 14 May 1996 had expired, in accordance with Article 12 (4) CCC, in May 2002, and had not been renewed. Accordingly, there was no issue of non-uniform administration to be resolved. In contrast, had the Finnish BTI still been valid, or had it been renewed, the Finnish authorities would then have revoked it in accordance with the \textit{Timmermans} case law.

72. In conclusion, contrary to the US submissions, the Intermodal case illustrates that the preliminary reference procedure provides an effective tool for ensuring uniform tariff classification.\(^{77}\)

D. \textit{Overall Conclusion regarding the evidence presented by the US under Article X:3 (a) GATT}

73. Already in its closing remarks at the second hearing of the Panel, the EC has pointed to the lack of factual evidence supporting the US claims of non-uniform administration.\(^{78}\) In the area of tariff classification,\(^{79}\) the US initially referred to two cases, in neither of which it succeeded in establishing a lack of uniformity. In its second oral statement, the US has made a belated effort to provide three further examples of alleged non-uniformity. However, as the EC has shown, none of these examples is an example of non-uniformity, and one of the cases is not even within the panel’s terms of reference. More ironically still, in certain cases and most

\(^{76}\) EC Reply to Question 73, paras. 131 and 132, and Question 163, para. 67.

\(^{77}\) It is worth noting that this is also supported by the article by Mr Vermulst only very selectively quoted by the US in para. 38 of its SOS. Right after the passage quoted by the US, Mr Vermulst states as follows: “Evidently, the ECJ is therefore prepared to thoroughly delve into this area of EC trade law. [...] An explanation for this difference might be that a correct uniform customs classification is one of the pillars of a successful customs union.” (Exhibit US-72, p. 21).

\(^{78}\) EC Closing Statement, para. 19-20.

\(^{79}\) In the area of customs valuation, the evidentiary basis of the US claim is completely missing, since the US claims seem to be almost entirely based on suppositions and extrapolations from the 2000 Report of the EC Court of Auditors.
notably the Sony Playstation2 case, the US makes itself the advocate of behaviour that would actually detract, rather than promote, uniformity.

74. Throughout its submissions, the EC has stressed that it falls on the United States to prove that the EC system entails a lack of uniform administration. In response to the Panel’s question No. 173, the EC has also commented on the evidential requirements to be fulfilled in order for it to be established that the EC’s system “as such” leads to a lack of uniform administration.

75. A useful point of reference for the present case remains the report of the Appellate Body in US – Oil Country Tubular Goods from Mexico. In this case, the Appellate Body reversed the Panel’s findings that the US Sunset Policy Bulletin as such violated the Anti-Dumping Agreement because it considered that a sample of more than 20 cases of application taken out of over 200 cases submitted by Mexico was not sufficient for an objective establishment of the facts.

76. In the present case, the US asks the Panel to come to a finding that the EC’s entire system of customs administration is incompatible with Article X:3 (a) GATT. It asks the Panel to come to this result on the basis of less than a handful of cases which the US has itself selected. It is submitted that such a small and highly selective sample is not a sufficient basis for evaluating whether the EC’s system, or individual components thereof, are compatible with Article X: 3 (a) GATT. This result is even more compelling when it is noted that out of the handful of cases selected by the US, not a single one actually shows a lack of uniformity in the EC’s system of customs administration.

77. Overall, the EC therefore submits that the US has failed to establish that there is a lack of uniformity in the administration of EC customs law in the areas referred to in its Panel request.

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80 EC Reply to the Panel’s Question No. 173, para. 98.
IV. CONCLUSION

78. For the above reasons, the EC reiterates the conclusion stated in its First Written Submission.
LIST OF EXHIBITS

Exhibit EC – 153  Letters of the Commission of 1996 concerning the repayment and recovery of customs duties where a tariff classification regulation has been published

Exhibit EC – 154  Information paper on the application of Articles 220 (2) (b) and 239 of the Community Customs Code

Exhibit EC – 155  Judgment of the European Court of Justice, Case C-273/90, Meico-Fell

Exhibit EC – 156  Commission Regulation 1810/2004 (Excerpts)

Exhibit EC – 157  Commission Regulation 1400/2001

Exhibit EC – 158  Commission letters to the Member States’ customs authorities concerning the classification of the Sony Playstation2

Exhibit EC – 159  Judgment of the UK VAT and Duties Tribunal

Exhibit EC – 160  Judgment of the European Court of Justice, Case 283/81, CILFIT