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EUROPEAN COMMUNITIES – SELECTED CUSTOMS MATTERS

(AB-2006-4)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA

September 28, 2006

1. Mr. Chairman and Members of the Division, good morning. We are pleased to have this opportunity to present the views of the United States.

2. In this dispute, the United States raises two issues of fundamental importance to the world trading system. The first is whether the European Communities is in breach of Article X:3(a) of the GATT 1994 by maintaining a system in which 25 independent authorities administer its customs law, which necessarily results in divergent approaches, without any institution or mechanism to secure uniform administration. The second is whether the EC is in breach of Article X:3(b) of the GATT 1994 by failing to provide any tribunal or procedure for the review of customs administrative actions whose decisions govern the practice of "the agencies entrusted with administrative enforcement."

3. These two features of the EC system constitute substantial trade barriers. Non-uniform administration means that exporters face different costs and risks depending on the member State through which they bring goods into the EC. This can result in the diversion of trade from the member State that is the logical point of entry from a trade point of view, to the member State that is the logical point of entry from an administrative point of view. It also can result in the abandonment of exportation to the EC altogether – possibly in favor of moving production within the EC's borders to avoid the uncertainty associated with non-uniform administration.

4. The absence of any tribunal whose decisions govern the practice of the agencies entrusted

with administrative enforcement – as opposed to only one of those agencies – compounds the problem. It means, for example, that if a trader believes that a good has been classified incorrectly by the EC customs authorities in ten different member States, it must bring ten separate appeals. Even if the trader prevails in any one appeal, the decision of the tribunal will govern the practice only of the particular agency involved, not "the agencies entrusted with administrative enforcement."

5. The problems worsened when the EC went from 15 to 25 member States, and will worsen further with the impending enlargement to 27 member States and with any further enlargement.

6. Articles X:3(a) and X:3(b), respectively, set forth obligations to prevent WTO Members from maintaining such barriers. The Panel should have found the EC system to be in breach of those obligations.

7. I will first address certain overarching themes of the EC's arguments as both appellant and appellee. I then will respond to specific arguments in the EC's appellee submission. I will touch only briefly on the EC's appeal, as we already have responded to it in detail in our recent appellee submission.

Certain Overarching Themes

8. One theme throughout the EC's argument is the suggestion that "dramatic consequences" for the EC and for other WTO Members with federal systems would flow from sustaining the U.S. appeal.[1] For example, the EC asserts, incorrectly, that the U.S. argument on penalty provisions implies a general obligation for Members to "harmonise sub-federal laws." It also

[1] *See, e.g.*, EC Appellee Submission, paras. 185-186, 191, 214, 330, 338; EC Other Appellant Submission, paras. 147, 235-236.

warns that sustaining the U.S. appeal with respect to Article X:3(b) would "lead[] to a major conflict between the EC Treaty and the WTO Agreement."[2] The United States respectfully suggests that such hyperbole obscures the legal questions actually at issue and is inappropriate in this proceeding.

9. Moreover, to the extent that the EC's allusions to "dramatic consequences" are a projection of the difficulty the EC expects it will have in complying with its obligations under Article X:3, they are not relevant. Indeed, Article 27(1) of the *Vienna Convention on the Law of Treaties* notes that a State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty. There is no "difficulty waiver" applicable only to the EC.

10. In this regard, the EC has referred to Article XXIV:12 of the GATT 1994. As discussed in our appellee submission, that provision is not applicable to this dispute, was not actually invoked by the EC in the panel proceeding, and was never even mentioned in connection with the U.S. claim under Article X:3(b).[3] In addition, the EC's arguments concerning Article XXIV:12 are actually arguments in anticipation of a compliance proceeding and, for this reason too, have no relevance to this appeal.

11. A second theme woven throughout the EC's arguments is that the obligation of uniform administration under Article X:3(a) is a narrow, limited obligation. In the EC's view, it applies only to administration in "concrete cases," as opposed to a continuous course of administration.

[2] EC Appellee Submission, paras. 337 *et seq.*; *see also* EC Other Appellant Submission, para. 235

[3] *See* U.S. Other Appellee Submission, paras. 161-165.

It is not breached by legislation codifying non-uniform administration. Nor is it breached when non-uniform administration occurs pursuant to a legislative grant of discretion to customs agencies. Indeed, in the EC's view, the obligation is breached only when particular instances of non-uniform administration exhibit a "pattern," have a "direct and significant impact" on "administrative outcomes," and meet a "high evidentiary standard" corresponding to a supposed hierarchy of GATT 1994 obligations.[4] This view has no basis in the text of Article X:3(a) and, indeed, would severely undermine the commitment of uniform administration.

12. Related to the EC's narrow view of Article X:3(a) is its assertion that all of Article X is concerned only with transparency and predictability and that as long as traders know how a Member's customs law will be administered in each of several regions, the Member is not in breach of Article X:3(a), notwithstanding the differences in administration among those regions.[5] This remarkable assertion means that, for the EC, the obligation to administer uniformly does not include administering uniformly across a Member's territory. Again, the EC offers no basis for this view.

Panel's Terms of Reference

13. Turning to particular arguments in the EC's appellee submission, I first will address the Panel's terms of reference. The EC's discussion of this issue repeats the Panel's error of confusing measures at issue with claims. The Panel's determination of its terms of reference began with the flawed premise that the measure at issue in an Article X:3(a) dispute is "manner

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[4] *See, e.g.*, EC Other Appellant Submission, paras. 64, 76-81, 88-93; EC Appellee Submission, paras. 151-152, 211-212, 217, 248-250.

[5] *See* EC Appellee Submission, para. 218.

of administration." As the United States explained, "manner of administration" is not a measure; it is a characteristic of measures at issue that causes those measures to be inconsistent with Article X:3(a).

14. The EC correctly acknowledges that the U.S. panel request "clearly distinguishes the administration from the laws which are being administered." But, it does not follow from this clear distinction that "manner of administration" is the measure at issue.[6] Rather, that distinction separates the measures at issue – the instruments of EC customs law – from the legal basis for the U.S. complaint – the non-uniform administration of those instruments.

15. The Panel's error in identifying the measure at issue was significant, and not a "minor ambiguity in the Panel's terminology,"[7] because the Panel's mis-identification of "manner of administration" as the measure at issue contributed to its misunderstanding of the third paragraph of the panel request as a specification of the measure at issue, rather than an illustration of the claim.

16. Like the Panel, the EC fails to read the panel request as a whole. Furthermore, the EC reads the request in a way that assumes its own conclusion that it is not in breach of Article X:3(a) due to features of the EC system that are common to all areas of customs administration – namely, administration by 25 independent authorities and an absence of any institution or mechanism to prevent divergences, or to correct them promptly and as a matter of right when they occur. The EC argues that the third paragraph of the request has to be read as a specification

[6] EC Appellee Submission, para. 96.

[7] EC Appellee Submission, para. 92.

of the measures at issue because, in its view, uniform administration is achieved differently in different areas of administration.[8] That argument, however, is a response to the merits of the U.S. claim; it is not a basis for narrowly construing the panel request.

17. Similarly, the EC argues that the panel request did not include a claim with respect to the EC system of customs administration as a whole because it did not refer to components that the EC considers to be part of that system, including foundational legal instruments such as the EC Treaty.[9] This argument assumes in effect that to state a claim that the EC's system as a whole lacks needed mechanisms, the United States had to anticipate the EC's defense. That is, it had to anticipate that the EC would hold out particular institutions and mechanisms as securing uniform administration and cite those institutions and mechanisms in the panel request. However, the responding party's argumentation is no basis for determining the scope of a panel request. The simple answer to all of the EC's attempt to impose a selective reading on the panel request is the Appellate Body report in the recent *FSC 21.5* appeal. It is surprising that the EC would argue that a different approach should apply to the EC than to other Members.

18. Finally, the fact that the panel request encompassed a claim with respect to the EC system was confirmed by submissions and statements of both the United States and the EC. The United States refers to these submissions and statements not to override the text of the request, as the EC suggests,[10] but to demonstrate that the scope of the request, which was clear on its face, was confirmed by the way in which the parties presented their respective arguments.

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[8] *See* EC Appellee Submission, paras. 115-117.

[9] *See* EC Appellee Submission, paras. 128-129.

[10] EC Appellee Submission, para. 131.

Completing the Analysis

19. Regarding completing the analysis, as we explained in our appellant submission, the Panel made factual findings sufficient to enable the Appellate Body to find that the EC system as a whole is inconsistent with Article X:3(a). In particular, the Panel considered each of the institutions and mechanisms the EC held out as securing uniform administration and rejected the argument that they do so.

20. The EC disparages the Panel's discussion of these issues. It questions, in particular, whether the Panel made actual "findings."[11] However, the Panel's analysis clearly reflects determinations based on a weighing of the evidence. Whether or not the Panel used the label "findings" is not determinative.

21. The EC also suggests that the Panel did not consider the "interlocking" relationship among different systemic components identified by the EC.[12] However, the Panel unquestionably did so, as evidenced in particular by the conclusions at paragraphs 7.489 and 7.490 of its report.

22. The EC's discussion of whether the Appellate Body should complete the Panel's analysis is also flawed inasmuch as it reflects the EC's exceedingly narrow view of Article X:3(a),[13] and improperly invites the Appellate Body to second guess the Panel's factual findings.[14]

23. Finally, the EC suggests incorrectly that the Appellate Body should not complete the

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[11] EC Appellee Submission, paras. 158-161, 170, 173.

[12] *See, e.g.*, EC Appellee Submission, paras. 163-164.

[13] *See* EC Appellee Submission, paras. 151-156, 176, 183, 190.

[14] *See, e.g.*, EC Appellee Submission, paras. 165-169.

Panel's analysis because the relevant legal issues were not adequately explored by the Panel.[15] That argument ignores past instances in which the Appellate Body has completed a panel's analysis even when the panel did not reach the legal question at issue, as was the case in the *Canada - Aircraft (21.5)*, *US - Gambling Services*, and *US - Shrimp* disputes.[16]

Penalty Provisions

24. We turn now to the Panel's treatment of the undisputed existence of differences among penalty provisions that enforce EC customs law. The Panel erroneously found these differences not to breach Article X:3(a), on the ground that they constitute differences in substance rather than differences in manner of administration.

25. One of the ways that the EC gives effect to – that is, administers – its customs law is by ensuring compliance with the customs law and penalizing non-compliance. When different customs authorities use different means to ensure compliance and penalize non-compliance, they administer the customs law in a non-uniform manner. That these different means of administering the customs law happen to be codified in legal instruments that are themselves measures of general application does not alter this fact.[17]

26. The EC's argument to the contrary begins with the false premise that the United States does not "distinguish between the laws to be administered, and the administration of those

[15] *See* EC Appellee Submission, paras. 148-149, 188-191, 195.

[16] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, paras. 43-51 (adopted 4 August 2000); Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, paras. 322-327 (adopted 20 April 2005); Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, paras. 123-186 (adopted 6 November 1998).

[17] *See* U.S. Appellant Submission, paras. 124-133.

laws."[18] The United States does indeed make that distinction. Where we differ with the Panel and the EC is in the view that "administration" refers only to the law's "application in concrete cases," and that, with respect to penalties, administration occurs only "when a sanction is imposed."[19]

27. Contrary to the EC's view, the ordinary meaning of "administer" is not limited by the concept "in concrete cases."[20] Even apart from the application of penalties in concrete cases, the existence of non-uniform penalty provisions gives effect to EC customs law in a non-uniform manner. As a result of this non-uniform administration, traders face different costs and risks depending on the member State through which they bring goods into the EC. This understanding of what "administer" means is consistent with the understanding urged by the EC and accepted by the panel in the *Argentina - Hides* dispute.[21]

28. The EC further argues that differences among EC penalty provisions are not inconsistent with Article X:3(a) because all EC penalty provisions must conform to the EC standard of being "effective, proportionate and dissuasive."[22] The EC thus would substitute the GATT 1994 standard – "administer in a uniform . . . manner" – with its own municipal law standard – "effective, proportionate and dissuasive."

29. The EC reasons that if the different penalty provisions in different member States are all

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[18] EC Appellee Submission, para. 207.

[19] EC Appellee Submission, paras. 211, 217.

[20] *See Panel Report*, paras. 7.103-7.104.

[21] Panel Report, *Argentina - Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, para. 11.72 (adopted 16 February 2001).

[22] EC Appellee Submission, para. 222.

"dissuasive," the differences do not amount to non-uniform administration.[23] This is a variant on its erroneous contention that Article X:3(a) concerns only uniformity of administrative outcomes and not uniformity of administrative processes.

30. Furthermore, in our appellant submission, we pointed out that at paragraph 7.445 of its report, the Panel recognized that differences among penalty provisions may constitute non-uniform administration of certain measures. We explained that, logically, that conclusion could not be limited to administration of the particular measures identified by the Panel.[24] In its response, the EC speculates that the Panel might have been referring to "a scenario in which one Member State imposes effective, proportionate and dissuasive sanctions and another one does not."[25] However, the Panel plainly was not referring to this limited scenario. The predicate for its analysis was "the acknowledgement by the European Communities in the context of this dispute of substantive differences in penalty laws among member States."[26] In other words, the Panel was considering the norm in the EC, and not the exception.

31. Finally, the EC suggests that even if the Appellate Body were to reverse the Panel's findings regarding penalty provisions, it could not complete the Panel's analysis due to an absence of findings of fact or undisputed facts.[27] This suggestion simply ignores the Panel's express finding that "the existence of [substantive differences in penalty laws] is not disputed

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[23] EC Appellee Submission, para. 223.

[24] *See* U.S. Appellant Submission, paras. 140-149.

[25] EC Appellee Submission, para. 229.

[26] *Panel Report*, para. 7.445.

[27] EC Appellee Submission, para. 231.

between the parties."[28]

Audit Procedures

32. Like penalty provisions, audit procedures are tools that EC customs authorities use to give effect to EC customs law by ensuring compliance, and the existence of non-uniform audit procedures amounts to the non-uniform administration of EC customs law. In particular, some authorities routinely provide binding valuation decisions which importers may rely upon prospectively, others do so rarely or only in specific circumstances, and others do not do so at all.[29] These differences, which the EC did not dispute, mean that the EC administers its customs valuation rules in a non-uniform manner. Thus, contrary to the EC's assertion, the issues raised by the U.S. claim with respect to audit procedures were not "substantially different" from those raised by the U.S. claim with respect to penalty provisions.[30]

33. What is distinctive about the Panel's analysis of the audit procedures claim, as well as the EC's defense of that analysis, is the way they deal with the issue of discretion. The Panel's view was that because EC customs law grants customs authorities discretion in how they use audit procedures to administer substantive customs rules, the use of different procedures by different authorities is not inconsistent with Article X:3(a).[31]

34. By this logic, a Member could avoid its obligation to administer its customs law in a uniform manner simply by legislating a grant of discretion in administration of the customs law.

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[28] *Panel Report*, paras. 7.444, 7.445.

[29] *See* U.S. Appellant Submission, paras. 150-151.

[30] *See* EC Appellee Submission, para. 234.

[31] *Panel Report*, paras. 7.429 - 7.431.

In fact, while the Panel was focused on Article 78(2) of the Community Customs Code, which pertains specifically to audits, its reasoning would apply with equal force to Article 13 of the Code, which states that "[t]he customs authorities may . . . carry out all the controls they deem necessary to ensure that customs legislation is correctly applied." Following the Panel's and the EC's reasoning, it would not be inconsistent with Article X:3(a) for different authorities to administer numerous provisions of EC customs law in a non-uniform manner pursuant to this broad grant of discretion. Yet, such an exception would negate the uniform administration obligation.

35. Apparently recognizing this pitfall, the Panel found that "the existence and exercise of discretion should not unduly compromise the due process objective of Article X:3(a)."[32] However, the Panel offers no guidance as to when "the due process objective of Article X:3(a)" might be "unduly compromise[d]," such that the Panel's non-text-based exception to the obligation of uniform administration would not apply.

36. Finally, as we discussed in our appellant submission, the Panel erred in assuming that the U.S. claim with respect to non-uniform audit procedures was a claim about administration of Article 78(2) of the Community Customs Code.[33] While the EC defends that assumption, it points to no U.S. statement before the Panel indicating that the U.S. claim was about administration of Article 78(2).[34] In fact, the United States was quite clear in its panel submissions and statements that non-uniform audit procedures are inconsistent with Article

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[32] *Panel Report*, para. 7.431; *see also* EC Appellee Submission, para. 242.

[33] *See* U.S. Appellant Submission, para. 155.

[34] EC Appellee Submission, paras. 244-246.

X:3(a) in that they administer substantive customs rules – by verifying compliance with those rules – in a non-uniform manner.[35]

<u>Article X:3(b) of the GATT 1994</u>

37. We turn now to the Panel's findings regarding Article X:3(b). In addressing the U.S. Article X:3(b) claim, the Panel disregarded text and context and rested its core finding on what it viewed to be a "reasonable" inference about "most legal systems." Not only was this approach inconsistent with customary rules of interpretation of public international law, but the Panel's inference was not even a reasonable one. In particular, it considered only one aspect of "most legal systems" – the geographical reach of first instance review tribunals. It did not consider that in most legal systems, the customs law is administered by a centralized customs agency. Therefore, when the decision of a geographically limited first instance tribunal governs the practice of "the agencies entrusted with administrative enforcement," it is not governing the practice of a geographically limited agency – it is governing the practice of the agency whose practice applies throughout the Member's territory.

38. The EC's defense of the Panel's finding is flawed in a number of respects. First, the EC would deprive the plural terms "the agencies" and "such agencies" in Article X:3(b) of their ordinary meaning. The EC, like the Panel, would read those terms as referring to the single agency whose action happens to be under consideration by a review tribunal. Thus, according to this view, the tribunal's decision must govern the practice of only that agency and not any of the other 24 agencies entrusted with administrative enforcement of the EC's customs law.

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[35] *See, e.g.*, U.S. Answers to First Set of Panel Questions, paras. 2, 28, 109, 159, 167; U.S. Second Written Submission, paras. 81-84; U.S. Answers to Second Set of Panel Questions, paras. 28, 70.

39. The EC accuses the United States of reading the word "all" into the terms "the agencies" and "such agencies."[36] However, it actually is the EC that would read into Article X:3(b) a concept that is not there. Although the term "the agencies" is not qualified in any way, the EC would read it as referring to "some of" "the agencies."

40. In its recent report in *US - Softwood Lumber V (21.5)*, the Appellate Body confronted a similar interpretive question.[37] The EC argues that the context in that dispute was different.[38] However, the grammatical and interpretive issues are precisely the same. In fact, the reasoning in *Lumber* applies with even greater force here. Like the plural term "export prices" at issue in *Lumber*, the plural term "agencies" at issue here is not subject to "further qualification." But, in addition, the term "agencies" is preceded by the definite article "the," which makes its comprehensive scope unmistakable.

41. The EC cites an excerpt from the Appellate Body report in an earlier phase of the *Lumber* dispute to support the proposition that use of the plural of a term is meant to "ensur[e] a certain degree of flexibility in the requirements or obligations imposed by the relevant agreement."[39] However, the cited excerpt does not support that proposition at all. The Appellate Body said nothing about "flexibility." Its use of the word "may" simply reflected a recognition that investigating authorities sometimes include multiple companies or countries in a single antidumping investigation, as there is no obligation to conduct a separate investigation for each

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[36] EC Appellee Submission, para. 282.

[37] *See* U.S. Appellant Submission, para. 166.

[38] EC Appellee Submission, paras. 284-286.

[39] EC Appellee Submission, para. 288.

company or country.

42. The EC further contends that the drafters of Article X:3(b) could not have used the singular "agency," because doing so "would have removed the necessary flexibility in Article X:3(b) GATT" by excluding the possibility of administrative action involving more than one agency.[40] However, this is not so. Had the drafters intended the flexibility the EC posits, they might have used the term "each agency" or simply "agencies" without the definite article "the."

43. The U.S. argument with respect to Article X:3(b) referred not only to the article's text, but also to its context. In particular, we recalled the obligation of uniform administration in Article X:3(a) and argued that Article X:3(b) should be construed in light of the context provided by that obligation. A construction, such as that adopted by the Panel and supported by the EC, that would permit a tribunal's decision to govern the practice of only one of the 25 agencies entrusted with administrative enforcement would detract from uniform administration and, therefore, would be inconsistent with that context.

44. The Panel in effect avoided the question of whether Article X:3(a) provides context for Article X:3(b) and instead answered the different and irrelevant question of whether Article X:3(b) itself contains an obligation of uniform administration. In answering that question, the Panel focused on the absence of an "express textual link" between Articles X:3(a) and X:3(b).[41]

45. In defending the Panel's approach, the EC cites general statements by the Panel to the effect that all provisions of all WTO Agreements "'must be interpreted and applied in a manner

[40] EC Appellee Submission, para. 289.

[41] *Panel Report*, paras. 7.533 - 7.536.

that is harmonious.'"[42] However, these general statements are besides the point.

46. The Panel had an obligation to construe the terms of Article X:3(b) in their context. It did not do that. To the extent that it did not consider Article X:3(a) as context for Article X:3(b) because of the lack of an express textual link, that approach was inconsistent with the correct approach to the identification of context, which the Appellate Body took in the reports discussed at paragraph 179 of our appellant submission.

47. Moreover, we showed that even if the existence of textual links were relevant, there are such links between Articles X:3(a) and X:3(b). The EC dismisses those links by arguing that the two provisions deal with different activities.[43] The EC ignores that the different parts of Article X:3 constitute a coherent whole, addressing the complete life cycle of administration, from putting the law into effect in the first place, to review, to correction, to administrative practice following review. The EC in effect isolates different parts of that administrative life cycle from one another, contending illogically that provisions relevant to one part have no bearing on the interpretation of provisions relevant to other parts.

48. A further link between Articles X:3(a) and X:3(b) is the *proviso* in Article X:3(b), which deals in part with maintaining consistency with "established principles of law," a concept closely connected to administration in a uniform manner. The EC ignores this link and misunderstands the role of the *proviso*.[44]

49. The *proviso* establishes an exception to the ordinary rule of Article X:3(b) that a

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[42] EC Appellee Submission, para. 301.

[43] EC Appellee Submission, paras. 306-309.

[44] EC Appellee Submission, paras. 310-316.

tribunal's decisions must "govern the practice of" "the agencies entrusted with administrative enforcement." It envisions the scenario, for example, in which the agencies have been administering the law consistently in one way for a period of time, and a court then issues a decision which, if it were to govern the agencies' practice, would cause them to administer the law in a different way. The result would be a disruption in the consistent administration of the law. The *proviso* permits the central administration to restore uniform administration by "tak[ing] steps to obtain a review of the matter in another proceeding."

50. The EC contends that the *proviso* refers to the time limits for appeal rather than to the ordinary "govern the practice" rule and that, therefore, it has no link to the Article X:3(a) obligation of uniform administration. It relies selectively on the preparatory work of the GATT 1947. In particular, it refers to the May 22, 1947, U.S. proposal of the text that would become the *proviso*. What it ignores is the debate leading up to that proposal, in which the U.S. and other delegations expressed concern about an unqualified "govern the practice" rule, based on the fact that the principle of *res judicata* does not apply in customs litigation in some jurisdictions.[45]

51. Not only does the EC misunderstand the origins of Article X:3(b)'s *proviso*, it also misunderstands the origins of subparagraph (c) of Article X:3.[46] We referred to the preparatory work for subparagraph (c), because it shows that the drafters treated the obligations in subparagraphs (a) and (b) as a coherent whole and subdivided them only to clarify the import of a cross-reference in what became subparagraph (c). In particular, (c) was meant to set forth an

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[45] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Working Party on Technical Articles, E/PC/T/WP.1/SR.3, pp. 4-5 (12 May 1947).

[46] *See* EC Appellee Submission, paras. 317-323.

exception only to the obligations in (b), not to the obligations in (a). This would not have been clear if (a) and (b) had remained a single subparagraph.

52. The amendment that resulted in splitting the provisions also provided that review procedures maintained as an exception to the requirements of (b) must still conform to the requirements of (a). The EC puts much emphasis on the fact that the cross-reference to subparagraph (a) was ultimately deleted.[47] However, it ignores the drafters' explanation for the deletion that "[u]pon consideration by the Trade Agreements Committee it was decided that since sub-paragraph (a) sets out a general principle to which all members must subscribe there is no purpose in making reference to it in sub-paragraph (c)."[48] Far from showing that subparagraph (a) is irrelevant to understanding the rest of Article X:3, this history shows that the drafters understood subparagraph (a) to have an overarching relevance for the other obligations in Article X:3.

53. Finally, I will comment briefly on the EC's defense of the "inference" on which the Panel rested its finding with respect to Article X:3(b). In asserting that the Panel's inference was "reasonable," the EC makes the same mistake the Panel made of ignoring how the EC is different from "most legal systems." Like the Panel, it ignores that in most legal systems the decision of a first instance tribunal will be directed towards a customs agency that is centralized and whose practice applies throughout the Member's territory.[49]

54. The EC states that interpretation of Article X:3(b) "cannot depend on what other WTO

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[47] EC Appellee Submission, para. 323.

[48] United Nations Conference on Trade and Employment, E/Conf.2/11/Add.6 (Dec. 1, 1947).

[49] *See* EC Appellee Submission, para. 327.

Members do."[50] We agree. That is precisely why the Panel's approach, which was based not on the text or context of Article X:3(b), but on an inference about "most legal systems," was error. But, even on its own terms, the Panel's inference was not "reasonable," as it considered only one aspect of "most legal systems."

55. The EC also asserts that if the U.S. understanding of Article X:3(b) were correct, then all judicial decisions would become judicial decisions "of general application," which would render those words in Article X:1 redundant.[51] That assertion ignores that Article X:3(b) pertains to review of "administrative action relating to customs matters," whereas the judicial decisions of general application described in Article X:1 cover more than customs matters. Therefore, contrary to the EC's assertion, interpretation of Article X:3(b) according to the ordinary meaning of its terms in context does not create a redundancy with Article X:1.

EC's Other Appeal

56. Before concluding, I will say just a few words regarding the EC's appeal.

57. Many of the flaws in the EC's arguments as appellant stem from its exceedingly narrow view of the obligation of uniform administration. Thus, for example, its arguments with respect to the blackout drapery lining issue and the LCD monitors issue rest largely on the EC's erroneous view that "administration" concerns only the application of the law in "concrete cases" and does not encompass an ongoing process, and that Article X:3(a) concerns only administrative outcomes.

58. Additionally, we would highlight that in a number of places the EC misrepresents key

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[50] EC Appellee Submission, para. 328.

[51] EC Appellee Submission, para. 335.

facts or improperly asks the Appellate Body to engage in a re-weighing of the evidence.[52]

59. These are by no means the only flaws in the EC's argument as appellant. For a fuller discussion, we refer to our appellee submission.

Conclusion

60. Thank you for the opportunity to present our views. We look forward to responding to any questions the Division may have.

[52] *See* U.S. Appellee Submission, paras. 77-85, 101-105, 113, 118-120, 144-146, 148-151.