EUROPEAN COMMUNITIES - SELECTED CUSTOMS MATTERS

(WT/DS315)

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

July 19, 2005

1. This dispute raises two questions: First, does the European Communities ("EC") administer its customs laws, regulations, judicial decisions and administrative rulings of general application in a uniform, impartial and reasonable manner, as required by Article X:3(a) of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994")? Second, does the EC have in place judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters, as required by Article X:3(b) of the GATT 1994? The answer to both questions is, No.

2. Instead of administering its basic customs law in a uniform way, the EC administers it in 25 different ways. As administration is the responsibility of each member State, questions of classification and valuation may be subject to as many as 25 different interpretations, and traders are subject to 25 different procedural regimes for bringing goods into free circulation in the EC. The net result is an administration that distorts rather than facilitates trade and that imposes transaction costs that should not exist where administration is uniform.

3. This problem is magnified by the absence of EC tribunals or procedures for the prompt review and correction of administrative action relating to customs matters. Like the administration of EC customs measures, appeals from customs decisions are a matter for each member State. As a result, there are 25 different appellate regimes in the EC, none of which can yield a decision with EC-wide effect, unless and until a question is referred to the Court of Justice of the European Communities ("the ECJ").

4. In the EC, the basic elements of the customs system are laid out in three pieces of legislation: the Community Customs Code ("CCC"), the CCC Implementing Regulation ("Implementing Regulation" or "CCCIR"), and the Common Customs Tariff ("the Tariff"). These measures (as well as related measures) are administered separately by the customs authorities in each of the 25 member States of the EC. There is a Customs Code Committee ("the Committee"), consisting of representatives of each of the member States and chaired by a representative of the Commission. Ostensibly, one of its functions is to reconcile divergences that emerge in member State administration of EC customs law. However, serious institutional constraints prevent it from fulfilling that function on a systematic basis.

5. Where a trader disputes a decision by a member State's customs authorities, its only recourse is to appeal that decision through the courts or other review tribunals of the member State. There is no EC forum to which a trader can promptly appeal a decision by a member State's customs authorities, including a decision that diverges from decisions of other member State authorities.

6. As a Member of the WTO in its own right, that is, separately from its constituent member States, the EC has an obligation to provide for administration of its customs laws and to provide for the prompt review and correction of administrative action relating to customs matters in the manner prescribed by GATT Articles X:3(a) and (b), respectively. The first question raised by this dispute is whether the EC administers its customs law in a uniform manner, as required by Article X:3(a). Considering the ordinary meaning to be given to the terms of that article, the question is whether the EC manages, carries on, or executes its customs law in a manner that is

the same in different places or circumstances, or at different times. Of particular relevance here is uniformity with respect to different places.

7. One of the few panels to probe Article X:3(a) in any detail was the panel in *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather* ("*Argentina – Hides*"). The panel report in that dispute supports the proposition that the requirement of uniform administration in Article X:3(a) includes administration that is uniform across the territory of a WTO Member. The EC does not administer its customs law in a manner that is uniform across different places in the EC, as Article X:3(a) requires. It administers its customs law in a manner that varies from member State to member State and fails to provide an EC mechanism for the systematic reconciliation of such variations.

The EC fails to administer its customs law in a uniform manner.

8. ***Customs Classification***. One area in which divergent administration of EC customs law is especially troubling is customs classification. Not surprisingly, when 25 different authorities are tasked with interpreting a complex nomenclature system, the possibilities for divergent interpretations are substantial. Indeed, the EC evidently was quite candid about this in its dispute with Thailand and Brazil over the classification of frozen boneless chicken cuts (*European Communities – Customs Classification of Frozen Boneless Chicken Cuts*). Neither the Code, nor any other provision of EC law of which we are aware, requires one member State to follow another member State's interpretation of the Tariff. If one member State classifies a product under a particular tariff subheading, there is no requirement that other member States classify it under the same subheading. *A fortiori*, there is no requirement that other member States follow the rationale of the first member State in classifying *similar* goods.

9. It is instructive to consider administration of the EC's provision for advance classification rulings, known as binding tariff information ("BTI"). Under the BTI system, an importer or other interested party applies to a member State's customs authorities for issuance of BTI confirming the classification that will be assigned to particular goods on importation into the territory of that member State. The application may be made by the "holder" of the BTI (*i.e.*, the person in whose name it is issued), or by another "applicant" (defined as any person who applies for BTI). The holder or other applicant chooses the member State to which it will make the application.

10. Once issued, BTI is "binding on the customs authorities as against the holder of the information." Article 11 of the Implementing Regulation states that BTI issued by the authorities of one member State is "binding on the competent authorities of all the Member States under the same conditions." However, in reality member States do not always treat BTI issued by other member States as binding, and the BTI system does not ensure uniform administration of customs classifications. Moreover, pre-existing BTI issued by one member State does not prevent an applicant from trying to persuade a second member State that the classification in the original BTI was mistaken. In issuing the new BTI, nothing in the Code or Implementing Regulation requires the authorities to adhere to the findings contained in the previously issued BTI.

11. There are several ways in which the BTI system fails to achieve uniform administration with respect to classification. The first way is that it results in BTI shopping. In theory, the Commission should be able to control BTI shopping by exercising its authority to reconcile inconsistent BTI. However, there are several impediments to the Commission performing this function. First, it may be difficult to detect whether, in fact, "different binding information exists." BTI is particular to the holder. Thus, it is possible for two different holders to possess conflicting BTI for identical merchandise. That "different binding information exists" would not be readily apparent in that case. Even where the same holder possesses conflicting BTI, the existence of the conflict may not be readily apparent to the Commission or the representative of a member State. The holder of the BTI may choose not to bring the conflict to the attention of the Committee. Other persons interested in having the difference reconciled (*e.g.*, competitors) would not necessarily be aware of the conflict. Conversely, where a holder or other interested person is aware of conflicting BTI and wants to see the conflict resolved, it has no right to have the matter put before the Committee for resolution within a prescribed period of time.

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

13. The EC does have in place an electronic database available to the public for searching BTI. In theory, one might be able to use the database to determine whether different member States had issued conflicting BTI for identical products. However, as a practical matter, such a search is extremely difficult, if not impossible.

14. Moreover, the inability to achieve uniform application of the Tariff through the BTI system is further demonstrated by the relative autonomy that each member State has with respect to revocation or amendment of BTI. In a recent decision, in a case known as *Timmermans*, the ECJ held that a member State customs authority can revoke BTI based on its own reconsideration of the Tariff (as opposed to the revelation of facts not before it when the BTI was issued). The Court reached this conclusion, even though the Advocate General had recommended the opposite conclusion, observing that "the possibility of revoking BTI in this way is not readily compatible either with the objective of the uniform application of the customs nomenclature or with the objective of legal certainty pursued by the introduction of BTI." Indeed, this is precisely the problem from the point of view of GATT Article X:3(a). Whatever limited potential the BTI system might have to provide for some degree of uniformity across the EC with respect to the particular goods and holder that are the subject of the BTI is further undermined by the fact that revisions to BTI are not even ostensibly "binding."

15. Finally, the problem of non-uniform administration of EC law on customs classification is illustrated by two recent (but by no means isolated) cases. In one case, German customs authorities have diverged from other member State authorities in the classification of a specialized textile product (blackout drapery lining) for five years, and EC institutions have not reconciled the divergence. In the second case, involving liquid crystal display flat monitors with

digital video interface, the question of divergent classification (between the Netherlands, on the one hand, and other member States, on the other) was brought before the Committee in 2004 and, with respect to a major subset of the product concerned, remains unresolved today (and is subject to a temporary solution only with respect to the rest).

16. ***Customs Valuation.*** In some respects, the problems of non-uniform administration of customs law are even more pronounced in the area of valuation than they are in the area of classification. Unlike classification, EC customs law on valuation does not even provide a system comparable to BTI – that is, an information system that is ostensibly binding (albeit in a very limited way) and that (depending on how designed and administered) could at least be a step towards achieving uniform administration. In general, the ability of EC institutions to step into the breach to impose uniformity is limited. The valuation section of the Committee does not have the authority to examine individual cases with a view to reconciling differences in administration from member State to member State.

17. The ways in which the valuation provisions of the Code and Implementing Regulation have been applied differently in different member States were catalogued in great detail in a December 2000 report by the EC Court of Auditors. One highlight of the Court's report is differential treatment of royalty payments. Under Article 32(1)(c) of the Code, royalties and license fees related to the goods being valued are supposed to be added to the price actually paid or payable, to the extent not already included. The Court found that in a number of cases, different member States apportioned royalties differently to the customs value of identical goods imported by the same company. Significantly, it found that in the cases identified, the member States involved either did not bring the disparate treatment to the attention of the Committee, or the matter was not examined by the Committee.

18. Another issue the Court examined was application of the rule that allows imported goods, in certain cases, to be valued on a basis other than the transaction of the last sale which led to the introduction of the goods into the customs territory of the EC. The Court found that authorities in some member States but not others required importers to obtain prior approval for valuation on a basis other than the transaction value of the last sale.

19. A third issue identified by the Court was differential treatment of vehicle repair costs covered under warranty. In at least one member State – Germany – the Court found that customs authorities reduced the customs value of imported vehicles by the value of repairs undertaken in the territory of the EC and reimbursed by the foreign seller. Other member States – in particular, Italy, the Netherlands, and the United Kingdom – declined requests for similar customs value reductions. Of particular note, the Court observed that the Commission had been aware of differential treatment among member States for at least ten years and had not taken any steps to reconcile the difference. In response, the Commission noted that since 1997 it had "attempted to align by means of implementing legislation diverging practices in the Community" but was unable to attain the necessary majorities in the Committee.

20. A recent case involving non-uniform administration of EC customs valuation law concerns divergent approaches to the determination of whether an importer has a control relationship with its off-shore suppliers. In that case, Spanish customs authorities found Reebok

International Limited (RIL) to have a control relationship with suppliers outside the EC based on its contracts with those suppliers, while other member States (in particular, the Netherlands) found no such relationship. The different interpretation has significant consequences. Member State authorities that agreed with RIL that it did not have a control relationship with its suppliers allowed it to declare the customs value of its goods on the basis of the "sale for export" transaction value rule set out in Article 29 of the Code. On the other hand, the Spanish authorities required RIL to apply a different methodology. The net impact on RIL was an additional customs liability of 350,000 Euros per year (390,000 Euros when value-added tax and interest are included).

21. In sum, valuation, like classification, is an area in which the EC does not provide for uniform administration of its customs law. Each member State's authorities make their own interpretations of the Code and Implementing Regulation, and even where differences between member States are identified, the EC lacks the capacity systematically to reconcile them.

22. ***Customs Procedures.*** With respect to customs procedures, non-uniform administration is evident in various phases of the customs process. It comes up, for example, in the audits that different member State authorities perform after goods have been released for free circulation. It is not uncommon for a member State's authorities to perform an audit to verify the value that an importer declared for goods that were released for free circulation. The December 2000 Court of Auditors Report found that different member State authorities take different approaches to such valuation audits, with important consequences for importers.

23. In the case of at least one member State, the Court found that the customs authorities lack the right to perform post-importation audits at all, except in cases of fraud. Even among States in which authorities are permitted to perform post-importation audits, the Court found differences among working practices, including the balance between reliance on examinations of goods at time of importation and post-release audits. Significantly, the Court found that differences in working procedures mean that "individual customs authorities are reluctant to accept each other's decisions." One audit procedure that the Court highlighted was the issuance of written valuation decisions. While some member States regularly issue written valuation decisions with binding effect going forward, others rarely issue such decisions.

24. Another area in which administration varies from member State to member State concerns penalties for violation of customs law. This area of divergence is one that has been noted by the ECJ on a number of occasions. The Commission itself has recognized (in its explanatory note accompanying a recent proposed revision to the Code) that "[e]conomic operators have complained for a long time about the lack of harmonisation with regard to penalties against infringements of the customs rules. Specific offences may be considered in one Member State as a serious criminal act possibly leading to imprisonment, whilst in another Member State the same act may only lead to a small – or even no – fine."

25. Yet another area in which the administration of EC customs law differs among member States is the decision to permit what is known as "processing under customs control." Where this procedure is permitted, goods may be brought into the EC without being subject to duty and processed into downstream products in the EC, with those products then being released for free

circulation at the applicable duty rate. Permission to engage in processing under customs control is subject to an economic conditions assessment, which different member States administer differently. Guidance issued by the United Kingdom customs authorities states that there are "two aspects to the economic test" and requires an applicant to provide evidence of the impact on its business of processing under customs control as well as evidence of "the impact upon any other community producers of the imported goods." In contrast, French regulations, for example, do not impose the additional test of demonstrating the absence of harm to competitors in the EC.

26. Another area in which non-uniform administration is evident is local clearance procedures ("LCP"). Under LCP, an importer may have goods released for free circulation at its own premises or certain other designated locations (as opposed to customs premises). While the general concept of how LCP is supposed to operate is set forth in the Implementing Regulation, the particular requirements vary from member State to member State. This is evident in the information that member States require LCP importers to transmit to customs authorities before goods are released. Some require only the electronic transmittal of manifest data. Others require that manifest data be translated or supplemented. Variations also are evident in the involvement of customs authorities prior to goods being released. Some member States rely on post-release audits, while others reserve the right to inspect goods prior to release. Member States typically require that supplementary information be transmitted to customs authorities following release under LCP, though here, too, the requirements vary. For example, some member States require transmittal of the EC's DV1 valuation form, whereas others do not. Some require the transmittal of invoices, certificates, and other supporting documentation, whereas others do not. Finally, requirements for retaining documents supporting LCP imports vary widely, ranging from four years in the United Kingdom to ten years in the Netherlands.

27. As the panel correctly observed in *Argentina – Hides*, "Article X:3(a) requires an examination of the real effect that a measure might have on traders operating in the commercial world" (para. 11.77). To that end, "[e]very exporter and importer should be able to expect treatment of the same kind, in the same manner both over time *and in different places. . .* " (para. 11.83; emphasis added). Article X:3(a) thus acts as a check against certain distortions to trade that may come about through administration that varies depending on factors such as point of entry within the territory of a Member.

28. A system that subjects traders to different procedures and different interpretations of classification and valuation law depending on the member State through which goods are imported into the territory of the EC is contrary to this basic principle. At a minimum, it makes it difficult for a trader to have a reasonable expectation of the treatment goods will receive when they are imported into the EC. It may also cause traders to make decisions about how to bring goods into the EC based on known differences among member States.

29. ***The Commission, acting through the Customs Code Committee, does not provide uniformity to the administration of EC customs law***. The mechanism provided in the Code for the Commission to address questions of administration of EC customs law is the Customs Code Committee. The Committee consists of representatives of each of the member States and is chaired by a representative of the Commission. Individual traders have no right to raise matters

with the Committee. That right is reserved to the chairman of the Committee and member State representatives. A trader may petition a member State to bring a question before the Committee (though the Code does not require member States to have a petition process). However, the member State is under no obligation to respond favorably to such a petition.

30. For the most part, the Committee operates under the "regulatory procedure" laid down in the EC's so-called "comitology" decision. In matters relating to binding advance rulings that member States may issue on the classification or origin of goods, and in certain matters relating to preferential tariff treatment, the Committee operates under the comitology decision's "management procedure." Under both the regulatory procedure and the management procedure, a decision by the Committee requires the support of a majority of the member State representatives and at least 231 votes out of a total of 321 (based on weighting by member State as set out in the EC Treaty), and failure to reach a decision can lead to referral of the matter to the Council of the European Union, with different consequences depending on the applicable procedure. However, in practice, with respect to matters of customs administration, the Commission turns to the Council only on extremely rare occasions. Given institutional disincentives to refer matters to the Council, they may linger before the Committee indefinitely, as the Commission attempts to achieve the necessary majorities. This may mean that in controversial cases, no decision at all is taken.

31. The Code provides for adoption by the Committee of its own rules of procedure. Those rules are notable for purposes of the present dispute primarily for what they do *not* say. First, the rules do not contain any process for a trader affected by a member State's application of the Code to petition the Committee. Second, the rules contain no requirement that the Committee publish its agenda in advance of its meetings. Thus, a trader that may be affected by a question put before the Committee has no assurance that it will be made aware of the pendency of the matter. Third, while the rules contain an article entitled "Admission of third parties," that article does not establish a right for potentially affected parties to submit evidence and arguments to the Committee or even to be present at Committee meetings. It merely authorizes the Committee Chairman to invite experts to address the Committee and allows observers of certain third countries or organizations as specified in other EC instruments to be present at Committee meetings. Finally, there is no requirement that records of the Committee's proceedings be made public. In fact, Article 15 of the rules expressly provides that decisions on public access to the Committee's documents are subject to the discretion of the Commission and that, in any event, "[t]he Committee's discussions shall be kept confidential."

32. Traders as well as EC institutions have acknowledged the limits of the Committee procedure's ability to reconcile differences in administration among member State customs authorities. For example, in the Court of Auditors Valuation Report, it was observed that in using the valuation section of the Committee, the Commission "has to rely on discussion, persuasion and encouragement as the means of achieving common treatment of identical problems in Member States." In reply, the Commission itself acknowledged that the Committee "can . . . only deal with a limited number of important cases that are brought before it."

33. In sum, the Committee process through which the Commission operates in matters of customs administration is not designed to systematically achieve uniform administration where

divergences are shown to exist. From the point of view of "traders operating in the commercial world" (the relevant perspective for examining the Article X:3(a) obligation, as noted by the panel in *Argentina - Hides*), a WTO Member does not provide for uniform administration where there is doubt as to whether the mechanism ostensibly available for bringing about uniformity will or will not operate in the case of any given divergence. The mechanism theoretically available for bringing uniformity to the administration of customs law in the EC lacks a process for doing so on a systematic basis, and this absence of a process leads back to the conclusion that the EC simply does not provide for the uniform administration required by Article X:3(a).

The EC does not provide tribunals or procedures for the prompt review and correction of administrative action relating to customs matters.

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

35. The issue of reviewability of customs decisions is linked to the issue of uniform administration of customs law. To the extent that the administration of customs law is fragmented, the provision for review in the courts of each of 25 member States does not alleviate the fragmentation and may well compound it. In contrast, a single system of review could alleviate the different initial results that may occur in different ports from time to time.

36. The GATT 1994 provision pertinent to appellate review of customs decisions is Article X:3(b), which requires *each* WTO Member to "maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters." The EC is a WTO Member in its own right and is subject to Article X:3(b). Accordingly, the *EC* must have such tribunals or procedures.

37. Relevant context for interpreting Article X:3(b) includes the immediately preceding subparagraph in the paragraph in which the obligation at issue appears. That subparagraph calls for the "uniform, impartial, and reasonable" administration of customs laws. Thus, the decisions of the tribunals or procedures must provide for the review and correction of customs matters for the EC as a whole, not just within limited geographical regions within the EC. It is inconsistent with Article X:3(b) to require a trader who had received adverse customs decisions in three different member States, each at odds with the prevailing interpretation of EC customs law in other member States, to pursue separate appeals in each of those States.

38. The Community Customs Code says little on the question of appeals. It merely establishes that there shall be a right to appeal from customs decisions; provides that, in the first instance, appeals may be exercised before a member State's customs authorities and

subsequently before a court or other independent body; and provides that, except in certain specified circumstances, "the lodging of an appeal shall not cause implementation of the disputed decision to be suspended." Beyond that, the Code simply states that "[t]he provisions for the implementation of the appeals procedure shall be determined by the Member States."

39. Thus, the Code leaves wide discretion to the individual member States in establishing procedures for appeals from customs decisions, and that discretion is evidenced in the diversity of procedures in fact available in the different member States. Indeed, even if it could be argued (contrary to what the United States argues here) that the EC might fulfill its obligation under Article X:3(b) merely by requiring member States to have appellate procedures in place, it is notable that nothing in the Code requires that review by member State tribunals be prompt. The Code is silent on the question of timing.

40. In fact, appellate procedures vary from member State to member State with respect to factors such as the availability of first-level review by the customs authorities themselves, time-periods for first-level review by the customs authorities (where such review is mandatory before proceeding to court), requirements to post security in order to avoid immediate enforcement of the decision on appeal, and availability of review by courts of superior jurisdiction. For example, the time periods for first instance reviews conducted by member State customs authorities can vary widely (from 30 days in Ireland, to one year in the Netherlands). Moreover, differences among procedures are even more pronounced after the first stage of review.

41. At the top of the review structure is the ECJ. Unlike the decisions of the courts in individual member States, the decisions of the ECJ do have effect throughout the territory of the EC. It is only at this stage, after a trader has pursued its appeal through a member State's court system, that the trader reaches a forum for review and correction provided by the EC itself. However, given the time it necessarily takes to reach this forum, it can hardly be considered to meet the EC's Article X:3(b) obligation to provide "tribunals or procedures for the purpose . . . of the *prompt* review and correction of administrative action relating to customs matters."

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

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

44. In his opinion in the 1997 *Weiner* case before the ECJ, the EC's Advocate General urged member State courts to exercise self-restraint in referring questions of customs classification law to the ECJ. The Advocate General found it "clear that the Court's contribution to uniform application of the Common Customs Tariff by deciding on the classification of particular products will always be minimal." The Advocate General's reasoning is easily transferrable to valuation and other areas in which member States' administration of EC law may diverge. A key lesson to be drawn from *Weiner* is that the ECJ is not suited to be the EC's tribunal or procedure for prompt review and correction of administrative action relating to customs matters required by Article X:3(b). Its place within the EC system – as the highest level adjudicator of questions of EC law – and the manner in which questions are put to it – typically, through discretionary referral by member State courts – make it incapable of serving that role.

45. As the ECJ is not set up to be an EC customs court – and, in any event, as the time it takes for a question raised in a member State's customs decision ultimately to get to ECJ review hardly qualifies such review as prompt – what is left is a patchwork of member State customs authorities whose work is reviewed by member State courts, with no EC tribunal or procedure providing prompt review and correction of customs decisions in a way that would bring about uniformity in the administration of EC customs law. In sum, the EC provides no tribunal or procedure for the prompt review and correction of administrative action relating to customs matters, as required by Article X:3(b) of the GATT 1994.

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