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COLOMBIA – MEASURES RELATING TO THE IMPORTATION OF TEXTILES, APPAREL AND FOOTWEAR

REPORT OF THE PANEL

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Chile – Price Band System	Appellate Body Report, Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products, WT/DS207/AB/R, adopted 23 October 2002
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EC – Bananas III	Appellate Body Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, adopted 25 September 1997
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EC – Tube or Pipe Fittings	Appellate Body Report, European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, WT/DS219/AB/R, adopted 18 August 2003
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US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
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US – Countervailing and Anti-Dumping Measures (China)	Appellate Body Report, United States – Countervailing and Anti-Dumping Measures on Certain Products from China, WT/DS449/AB/R and Corr.1, adopted 22 July 2014
US – Customs Bond Directive	Panel Report, United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties, WT/DS345/R, adopted 1 August 2008, as modified by Appellate Body Report WT/DS343/AB/R / WT/DS345/AB/R
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US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina, WT/DS268/AB/R, adopted 17 December 2004
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)	Appellate Body Report, United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina, WT/DS268/AB/RW, adopted 11 May 2007
US – Shrimp	Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW, adopted 21 November 2001
US – Shrimp (Thailand) / US – Customs Bond Directive	Appellate Body Report, United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties, WT/DS343/AB/R / WT/DS345/AB/R, adopted 1 August 2008
US – Shrimp (Thailand)	Panel Report, United States – Measures Relating to Shrimp from Thailand, WT/DS343/R, adopted 1 August 2008, as modified by Appellate Body Report WT/DS343/AB/R / WT/DS345/AB/R
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US – Softwood Lumber IV	Appellate Body Report, United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, WT/DS257/AB/R, adopted 17 February 2004
US – Tuna II (Mexico)	Appellate Body Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB/R, adopted 13 June 2012
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005
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US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1
US – Zeroing (EC) (Article 21.5 – EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009

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EEC – Parts and Components	GATT Panel Report, *European Economic Community – Regulation on Imports of Parts and Components*, L/6657, adopted 16 May 1990, BISD 37S/132
US – Superfund	GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances*, L/6175, adopted 17 June 1987, BISD 34S/136

EXHIBITS REFERRED TO IN THIS REPORT

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COL-10	*Ministerio de Hacienda y Crédito Público, Dirección de Impuestos y Aduanas Nacionales, Unidad de Información y Análisis Financiero de Colombia, Tipologías de Lavado de Activos Relacionadas con Contrabando* (Ministry of Finance and Public Credit, National Customs and Excise Directorate, Information and Financial Analysis Unit, *Money Laundering Typologies Related to Smuggling*), January 2006	National Customs and Excise Directorate, Information and Financial Analysis Unit, *Money Laundering Typologies Related to Smuggling*, January 2006
COL-11	Financial Action Task Force, *Trade-Based Money Laundering*, 23 June 2006	Financial Action Task Force, *Trade-Based Money Laundering*, 23 June 2006
COL-12	Financial Action Task Force, *Money Laundering Vulnerabilities of Free Trade Zones*, March 2010	Financial Action Task Force, *Money Laundering Vulnerabilities of Free Trade Zones*, March 2010
COL-15	*Juan Ricardo Ortega, Contrabando y Lavado de Activos, Dirección de Impuestos y Aduanas Nacionales de Colombia* (Juan Ricardo Ortega, *Smuggling and Money Laundering*, National Customs and Excise Directorate of Colombia), July 2013	Ortega, *Smuggling and Money Laundering*, July 2013
COL-16	*Decreto del Presidente de la República de Colombia No. 074 del 23 de enero de 2013, Por el cual se modifica parcialmente el Arancel de Aduanas* (Decree of the President of the Republic of Colombia No. 074 of 23 January 2013, partially amending the Customs Tariff)	Decree No. 074
COL-17	*Decreto del Presidente de la República de Colombia No. 456 del 28 de febrero de 2014, Por el cual se modifica parcialmente el Arancel de Aduanas* (Decree of the President of the Republic of Colombia No. 456 of 28 February 2014, partially amending the Customs Tariff)	Decree No. 456
COL-18	*Claudia Rincón, Contrabando y Lavado de Activos, Dirección de Impuestos y Aduanas Nacionales de Colombia* (Claudia Rincón, *Smuggling and Money Laundering*, National Customs and Excise Directorate of Colombia), April 2014	Rincón, *Smuggling and Money Laundering*, April 2014

Exhibit	Title	Short title
COL-19	*República de Colombia, Consejo Nacional de Política Económica y Social, Política Nacional Anti-Lavado de Activos y Contra la Financiación del Terrorismo, Documento Conpes 3793* (Republic of Colombia, National Council for Economic and Social Policy (CONPES), *National Policy against Money Laundering and the Financing of Terrorism*, CONPES document 3793), 18 December 2013	National Council for Economic and Social Policy, *National Policy against Money Laundering and the Financing of Terrorism*, 18 December 2013
COL-20	*Proyecto de ley, Por medio del cual se adoptan instrumentos para prevenir, controlar y sancionar la competencia desleal derivada de operaciones ilegales de comercio exterior, comercio interno, lavado de activos y evasión fiscal* (Draft Law adopting instruments to prevent, control and punish unfair competition deriving from illegal foreign trade, internal trade, money laundering and tax evasion operations)	Draft Law adopting instruments to prevent, control and punish unfair competition deriving from illegal foreign trade, internal trade, money laundering and tax evasion operations
COL-21	*Informe de Ponencia para primer debate del Proyecto de ley 94 de 2013 – Senado, Por medio del cual se adoptan instrumentos para prevenir, controlar y sancionar el contrabando, el lavado de activos y la evasión fiscal* (Report for the first discussion of Draft Law No. 94 of 2013 - Senate, adopting instruments to prevent, control and punish smuggling, money laundering and tax evasion)	Report for the first discussion of Draft Law No. 94 of 2013
COL-22	*República de Colombia, Comisión de Coordinación Interinstitucional para el Control del Lavado de Activos, Acta Sesión XXI, 22 de julio de 2013* (Republic of Colombia, Inter-Institutional Coordination Commission for the Control of Money Laundering, Minutes of the 21st session, 22 July 2013)	Inter-institutional Coordination Commission for the Control of Money Laundering, Minutes of the 21st session, 22 July 2013
COL-23	*República de Colombia, Consejo Superior de Comercio Exterior, Acta de la sesión 94, 1 de abril de 2013* (Republic of Colombia, Higher Council for Foreign Trade, Minutes of the 94th session, 1 April 2013)	Higher Council for Foreign Trade, Minutes of the 94th session, 1 April 2013
COL-24	*Oficina de las Naciones Unidas contra la Droga y el Delito, Convención de las Naciones Unidas contra la Delincuencia Organizada Transnacional y sus Protocolos* (United Nations Office on Drugs and Crime, *United Nations Convention against Transnational Organized Crime and the Protocols thereto*) (signed in December 2000), 2004	*United Nations Convention against Transnational Organized Crime and the Protocols thereto*, December 2000
COL-25	*Convenio Internacional para la Represión de la Financiación del Terrorismo* (*International Convention for the Suppression of the Financing of Terrorism*), approved in December 1999	*International Convention for the Suppression of the Financing of Terrorism*, December 1999
COL-26	*GAFISUD, Estándares Internacionales sobre la Lucha contra el Lavado de Activos y el Financiamiento del Terrorismo y la Proliferación: Las Recomendaciones del GAFI* (GAFISUD, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations*), February 2012	GAFISUD, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, February 2012
COL-27	*Ministerio de Justicia y del Derecho, Observatorio de Drogas de Colombia, El Problema de las Drogas en Colombia – Acciones y Resultados 2011-2013* (Ministry of Justice and Law, Colombian Drugs Observatory, *The Drug Problem in Colombia - Actions and Results 2011 - 2013*)	Ministry of Justice and Law, Drugs Observatory, *The Drug Problem in Colombia*
COL-28	*Disposiciones sobre intercambio de información aduanera en los TLC vigentes con Colombia* (Provisions on exchange of customs information in existing FTAs with Colombia)	Provisions on exchange of customs information in existing FTAs with Colombia
COL-29	*The Wall Street Journal, Llega la hora de la "nueva China"* (*The Wall Street Journal*, "The New China"), Leslie Norton, 20 November 2014	News item: *The Wall Street Journal,* "The New China", 20 November 2014
COL-30	Charts submitted by Colombia with its opening statement at the first meeting of the Panel	Charts submitted by Colombia with its opening statement at the first meeting of the Panel
COL-31	List of signatory countries to the United Nations Convention against Transnational Organized Crime	List of signatory countries to the United Nations Convention against Transnational Organized Crime

Exhibit	Title	Short title
COL-33	*República de Colombia, Departamento Nacional de Planeación, Plan Nacional de Desarrollo 2010-2014* (Republic of Colombia, National Planning Department, National Development Plan 2010-2014) (extracts)	National Planning Department, National Development Plan 2010-2014) (extracts)
COL-34	*República de Colombia, Comité de Asuntos Aduaneros, Arancelarios y de Comercio Exterior – Comité Triple A, Acta de la Sesión 269 Ordinaria, 23 de enero de 2014* (Republic of Colombia, Committee on Customs, Tariffs and Foreign Trade - "Triple A Committee", Minutes of the 269th regular session, 23 January 2014)	Committee on Customs, Tariffs and Foreign Trade, Minutes of the 269th regular session, 23 January 2014
COL-35	*Portafolio.co, Decreto de arancel mixto en el sector textil se mantendrá* (*Portafolio.co*, "Decree on the mixed tariff in the textiles sector will be maintained"), 21 January 2014	News item: *Portafolio.co*, "Decree on the mixed tariff in the textiles sector will be maintained", 21 January 2014
COL-39	*La Prensa, "Paralizan TLC con Colombia"* (*La Prensa*, "FTA with Colombia paralysed"), Luis Burón-Barahona, 7 January 2015	News item: *La Prensa*, "FTA with Colombia paralysed", 7 January 2015
COL-42	*Comité Preparatorio sobre Facilitación del Comercio, Notificación de los compromisos designados en la Categoría A del Acuerdo sobre Facilitación del Comercio, Comunicación de Colombia* (Preparatory Committee on Trade Facilitation, Notification of commitments designated under Category A of the Agreement on Trade Facilitation, Communication by Colombia), Document WT/PCTF/N/COL/1, 13 June 2014	Preparatory Committee on Trade Facilitation, Communication by Colombia, document WT/PCTF/N/COL/1, 13 June 2014
COL-43	*Análisis de Operaciones, Análisis de Selectividad Capítulos (61 al 64), años 2012 y 2013* (Analysis of Operations, Selectivity Analysis Chapters (61 to 64), years 2012 and 2013)	Analysis of Operations, Selectivity Analysis Chapters (61 to 64), years 2012 and 2013
COL-45	*Ley No. 1609 de 2013, Por la cual se dictan normas generales a las cuales debe sujetarse el gobierno para modificar los aranceles, tarifas y demás disposiciones concernientes al régimen de aduanas* (Law No. 1609 of 2013 establishing general rules to be observed by the Government when modifying duties, tariffs and other provisions concerning the customs regime), 2 January 2013	Law No. 1609 of 2013

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
COMALEP	Multilateral Convention on Cooperation and Mutual Assistance between the National Customs Directorates of Latin America, Spain and Portugal
Customs Valuation Agreement	Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
Decree No. 074	*Decreto del Presidente de la República de Colombia No. 074, de 23 de enero de 2013* (Decree of the President of the Republic of Colombia No. 074 of 23 January 2013)
Decree No. 456	*Decreto del Presidente de la República de Colombia No. 456, de 28 de febrero de 2014* (Decree of the President of the Republic of Colombia No. 456 of 28 February 2014)
DIAN	*Dirección de Impuestos y Aduanas Nacionales de Colombia* (National Customs and Excise Directorate of Colombia)
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
FATF	Financial Action Task Force
f.o.b.	Free on board
GAFILAT	*Grupo de Acción Financiera de América Latina* (Latin American Financial Action Task Force)
GAFISUD	*Grupo de Acción Financiera de Sudamérica* (South American Financial Action Task Force)
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade 1994
kg	Kilograms
US$	United States dollars
Vienna Convention	Vienna Convention on the Law of Treaties
WCO	World Customs Organization
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

1 INTRODUCTION

1.1 Complaint by Panama

1.1. On 18 June 2013, Panama requested consultations with Colombia pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) with respect to the imposition by Colombia of a compound tariff affecting the importation of textiles, apparel and footwear from Panama.[1]

1.2. Consultations were held on 24 July 2013 but failed to resolve the dispute.[2]

1.2 Panel establishment and composition

1.3. On 19 August 2013, Panama requested the Dispute Settlement Body (DSB) to establish a panel pursuant to Articles 4.7 and 6 of the DSU and Article XXIII:2 of the GATT 1994, with the standard terms of reference provided for in Article 7.1 of the DSU.[3] At its meeting on 25 September 2013, the DSB established a panel pursuant to the request of Panama in document WT/DS461/3, in accordance with Article 6 of the DSU.[4]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Panama in document WT/DS461/3 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[5]

1.5. At Panama's request, on 15 January 2014 the Director-General composed the Panel as follows:

Chairman: Mr Elbio Rosselli

Members: Mr Carlos Véjar Borrego
Mr Fabián Villarroel Ríos

1.6. China, Ecuador, El Salvador, the European Union, Guatemala, Honduras, the Philippines and the United States reserved their right to participate in the Panel proceedings as third parties.

1.3 Panel proceedings

1.7. After consultations with the parties, the Panel adopted its working procedures[6] and a partial timetable on 7 February 2014. Under the partial timetable the first written submissions of the parties were to be submitted no later than 29 August 2014 (for the complaining party) and 24 October 2014 (for the responding party). Subsequent dates for the proceedings were to be decided at a later stage. The Panel adopted a timetable for the remaining stages of the proceedings on 23 October 2014 after consulting with the parties.[7]

1.8. In conformity with the timetable, Panama presented its first written submission on 29 August 2014, and Colombia presented its first written submission on 24 October 2014. On 7 November 2014, the Panel received third-party written submissions from the Philippines and the European Union.

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[1] See Panama's request for consultations, document WT/DS461/1 (20 June 2013).
[2] See Panama's request for the establishment of a panel, document WT/DS461/3 (20 August 2013).
[3] Ibid.
[4] See the minutes of the DSB meeting held in the Centre William Rappard on 25 September 2013, document WT/DSB/M/337 (13 January 2014) and the Constitution of the Panel established at the request of Panama, document WT/DS461/4 (16 January 2014).
[5] Constitution of the Panel established at the Request of Panama.
[6] See the Panel's working procedures in Annex A-1.
[7] See also Communication from the Panel, document WT/DS461/5 (6 November 2014).

1.9. The Panel held its first substantive meeting with the parties on 25 and 26 November 2014. A session with the third parties took place on 26 November 2014, during which the European Union, Honduras, the Philippines and the United States made oral statements. Prior to the substantive meeting, on 19 November 2014, the Panel sent the parties a list of topics for discussion. The Panel also addressed written questions to the parties and third parties after the meeting, which were transmitted to them on 2 December 2014. On that same date, Colombia submitted written questions to Panama. On 16 December 2014, the Panel received written replies from the parties, as well as from the European Union, the Philippines and the United States as third parties. On the same date, Panama transmitted its response to the questions of Colombia.

1.10. The parties presented their second written submissions to the Panel on 28 January 2015.

1.11. The Panel held its second substantive meeting with the parties on 24 February 2015. Prior to the second substantive meeting, on 19 February 2015, the Panel sent the parties a list of topics for discussion. The Panel also addressed written questions to the parties after the meeting, which were transmitted to the parties on 4 March 2015. On 25 March 2015, the parties furnished written responses to the Panel's questions, and on 7 April 2015 each party submitted comments on the responses provided by the other party.

1.12. The Panel provided the parties with the descriptive (factual and argument) sections of its Final Report on 30 April 2015. On the same date, the Panel informed the European Union, Honduras, the Philippines and the United States that the descriptive part of the Report would contain a summary of the arguments of each of them. On 18 May 2015, the parties submitted their comments on the descriptive section of the report. The Panel issued its Interim Report to the parties on 18 June 2015. On 2 July 2015, Colombia submitted a written request for the Panel to review specific aspects of the Interim Report. Neither of the parties requested a further meeting with the Panel to discuss the issues identified by Colombia in its written comments. On 16 July 2015, Panama submitted written comments to the Panel on Colombia's request for review.

1.13. The Panel issued its Final Report to the parties on 6 August 2015.

2 THE MEASURE AT ISSUE

2.1. In its request for establishment of a panel, Panama identified the measure at issue in this dispute as "the compound tariff" imposed by Decree of the President of the Republic of Colombia No. 074 of 23 January 2013 on the importation of certain textiles, apparel and footwear (Decree No. 074). Specifically, Panama stated that the challenged compound tariff was composed of an *ad valorem* levy, expressed as a percentage of the customs value of the goods, and a specific levy, expressed in units of currency per unit of measurement. With respect to products classified in Chapters 61, 62 and 63 and under heading 64.06 of Colombia's Customs Tariff, the compound tariff was equal to 10% of the customs value of the goods, plus five US dollars per gross kilo (US$5/kg). With respect to products classified in Chapter 64, with the exception of heading 64.06, the compound tariff was equal to 10% of the customs value, plus five US dollars per pair (US$5/pair). The compound tariff was in force for a period of one year starting on 1 March 2013, and did not apply to imports originating in the countries with which Colombia had free trade agreements in force. The specific levy of US$5/kg or US$5/pair was included in the tax base for the value added tax (VAT).[8]

2.2. In its panel request, Panama identified the following legal instruments in which it understood the measure at issue to be contained:

a. Decree No. 074;

b. Decree No. 4297/2011 (*sic*) of 26 December 2011 as regards the definition of the products covered by the nomenclature of Chapters 61, 62, 63 and 64 of Colombia's Customs Tariff;

c. Memorandum No. 000165 as regards measures of compliance, customs control and administration under Decree 074/2013 and the compound tariff;

[8] See Panama's request for the establishment of a panel.

d. Any other rules, administrative or legal decisions, acts, practices, guidance or guidelines issued by Colombia that may be relevant in examining the dispute, as well as any possible amendments, extensions or additions where applicable.

2.3. In its first written submission, Panama pointed out that Decree No. 074 had been amended by Decree of the President of the Republic of Colombia No. 456 of 28 February 2014 (Decree No. 456), and that thenceforward "Panama [would] focus on the measure currently in force".[9]

2.4. Panama indicated that Colombia's compound tariff is composed of an *ad valorem* levy expressed as a percentage of the customs value of the goods, and a specific levy, expressed in units of currency per unit of measurement.[10] The products that would be affected are textiles, apparel and uppers (parts of footwear), classified respectively in Chapters 61, 62 and 63 and under tariff line 6406.10.00.00 of Colombia's Customs Tariff, as well as most of the footwear products classified in Chapter 64.[11]

2.5. Panama referred to Articles 1 and 2 of Decree No. 456, noting that under those provisions, the *ad valorem* component of the compound tariff is 10%, while the specific component varies according to the product and the declared f.o.b. price as follows: (i) with respect to the products classified in Chapters 61, 62 and 63 and under tariff line 6406.10.00.00, the specific levy is US$5/kg when the declared f.o.b. price is US$10/kg or less, and US$3/kg when the declared f.o.b. price is greater than US$10/kg; (ii) with respect to products classified in Chapter 64, with the exception of heading 64.06, the specific levy is US$5/pair when the declared f.o.b. price is US$7/pair or less, and US$1.75/pair when the declared f.o.b. price is greater than US$7/pair.[12]

2.6. Panama also indicated that when products classified under the same tariff subheading enter as part of the same process of importation, some at prices below and others at prices above the respective thresholds (i.e. US$10/kg for textiles and apparel and US$7/pair for footwear), the specific levy of US$5/kg will be applied to textiles and apparel, or US$5/pair to footwear.

2.7. Panama points out that Decree No. 456 has a two-year period of application, starting on 30 March 2014.[13] Furthermore, the compound tariff is not applicable to imports originating in countries with which Colombia has free trade agreements in force, and the specific component of the tariff "shall be included in the tax base for the value added tax".[14]

3 PARTIES' REQUESTS FOR FINDINGS, RECOMMENDATIONS AND SUGGESTIONS

3.1. Panama requests the Panel to find that the compound tariff imposed by Colombia is inconsistent with:[15]

a. Article II:1(b), first sentence, of the GATT 1994 and Colombia's Schedule of Concessions;

b. Article II:1(a) of the GATT 1994 and Colombia's Schedule of Concessions.

3.2. In response to the defences invoked by Colombia, Panama requests the Panel to reject the argument that the measure at issue is justified under the general exceptions of Articles XX(a) and XX(d) of the GATT 1994.

3.3. Panama further requests the Panel to suggest, in accordance with Article 19.1 of the DSU, that Colombia introduce a cap mechanism that would guarantee compliance with the relevant bound tariffs, or alternatively that it revert to an *ad valorem* tariff system, without exceeding the bound levels of 35% and 40% *ad valorem* depending on the product.

[9] Panama's first written submission, para. 3.2.
[10] Ibid. para. 3.3.
[11] Ibid. para. 3.6.
[12] Ibid. paras. 3.4-3.6.
[13] Ibid. para. 3.9.
[14] Ibid. para. 3.10.
[15] Although Panama included Articles VII:1(a) and X:3(a) of the GATT 1994 in its panel request, it has not referred to those legal provisions, nor has it made any arguments in relation to them.

3.4. Colombia, for its part, requests the Panel to reject Panama's claims in their entirety. Colombia asserts that Decree No. 456 is a measure designed to combat illegal trade operations that are not covered by Article II of the GATT 1994. Colombia further asserts that Panama has not presented any evidence to support a *prima facie* case that the compound tariff results in a breach of the levels bound in Colombia's Schedule of Concessions. Should the Panel conclude that the compound tariff is inconsistent with any of the obligations under Article II:1 of the GATT 1994, Colombia requests the Panel to find that the measure is justified under the general exceptions of Articles XX(a) and XX(d) of the GATT 1994.

3.5. Finally, in the event that the Panel finds that the measure at issue is inconsistent with the obligations contained in Articles II:1(a) or II:1(b), first sentence, and is not justified under Articles XX(a) or XX(d) of the GATT 1994, Colombia requests the Panel to refrain from making suggestions as to the way in which Colombia could comply with the DSB's recommendation to bring the measure at issue into conformity with its obligations.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in the executive summaries provided to the Panel in accordance with paragraph 20 of the Working Procedures (see Annexes B-1, B-2, B-3 and B-4).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of the European Union, Honduras, the Philippines and the United States are reflected in the executive summaries provided to the Panel in accordance with paragraph 21 of the Working Procedures (see Annexes C-1, C-2, C-3 and C-4). China, Ecuador, El Salvador and Guatemala did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. In accordance with Article 15.3 of the DSU, this section of the Report sets out the Panel's response to the parties' arguments made at the interim review stage, providing explanations where necessary. This section forms an integral part of the Panel's findings in the present case. The Panel thoroughly examined Colombia's request for the review of precise aspects of the Interim Report, as well as Panama's comments on Colombia's request, before issuing this Final Report. As explained below, the Panel modified specific aspects of its Interim Report in the light of Colombia's comments when it considered that it was appropriate to do so.[16]

6.2. Colombia requests that the following paragraphs of the Interim Report be amended to reflect its arguments more accurately: 7.85; 7.86; 7.87; 7.89; 7.94; 7.105; 7.107; 7.113; 7.118; 7.123; 7.199; 7.210; 7.335; 7.339; 7.349; 7.350; 7.384; 7.405; 7.445; 7.455; 7.549; and footnote 219 to paragraph 7.102.[17] For the same reason, Colombia requests the inclusion of new paragraphs following paragraph 7.200 and preceding paragraph 7.209 of the Interim Report.[18]

6.3. Colombia also requests amendments to paragraphs 7.200, 7.222, 7.359, 7.370, 7.377 and 7.381 of the Interim Report, which describe the exhibits provided by Colombia.[19] Finally, Colombia requests amendments to paragraphs 7.26, 7.359, 7.373 and 7.408 of the Interim Report in order to clarify some of the Panel's statements.[20]

6.4. Panama takes the view that the amendments requested by Colombia are unnecessary, but nevertheless leaves it up to the Panel to determine whether the amendments are relevant. Panama expresses concern about the way in which Colombia proposes to characterize some of its

[16] The numbering of paragraphs and footnotes in the Final Report has changed in relation to the numbering in the Interim Report. The text of this section refers to the paragraph numbers of the Interim Report.

[17] Colombia's request for review of the Interim Report, paras. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 16, 18, 19, 20, 21, 28, 29, 31, 32 and 33.

[18] Colombia's request for review of the Interim Report, paras. 14 and 15.

[19] Colombia's request for review of the Interim Report, paras. 13, 17, 22, 24, 26 and 27.

[20] Colombia's request for review of the Interim Report, paras. 2, 23, 25 and 30.

arguments, and asks the Panel to reject these amendments if they "seek to put in the Panel's words Colombia's reading of the facts".[21]

6.5. In the light of Colombia's request, the Panel amended the text of the following paragraphs of the Interim Report in order to improve the description of the arguments put forward by Colombia in the course of the proceedings: 7.85; 7.86; 7.87; 7.89; 7.94; 7.107; 7.113; 7.118; 7.123; 7.200; 7.201; 7.210; 7.212; 7.213; 7.335; 7.350; 7.373; 7.445; 7.455 and 7.549. For the same reason, the Panel inserted new paragraphs after paragraph 7.199, before paragraph 7.209 and after paragraph 7.444 of the Interim Report. In some cases, the amendments were less than what Colombia had requested, since certain arguments had already been described in other sections of the report.

6.6. In the light of Colombia's request, the Panel also amended paragraphs 7.200, 7.222, 7.359 and 7.377 describing the exhibits provided by Colombia during the proceedings.

6.7. In addition, the Panel amended paragraph 7.26 of the Interim Report in order to clarify the description of the operation of the measure, as well as paragraphs 7.359, 7.362, 7.384 and 7.408 of the Interim Report, to clarify some of the Panel's statements contained therein.

6.8. The Panel did not deem it necessary to amend the first sentence of paragraph 7.105 of the Report, or paragraphs 7.349 and 7.350, as requested by Colombia. These sections do not refer to arguments of Colombia, but to the Panel's analysis. Nor was it considered necessary to amend paragraphs 7.339 and 7.405 of the Report, since Colombia's arguments identified in its request had already been described in other sections of the Report. The amendments requested by Colombia to paragraphs 7.370 and 7.384 were incorporated, respectively, in paragraphs 7.362 and 7.201, which correspond to the sections containing the description of Colombia's arguments. Finally, the Panel felt that it was unnecessary to change the position of footnote 219 to paragraph 7.102 of the Report.

6.9. Lastly, the Panel also made typographical corrections to the following paragraphs: 1.12; 7.49; 7.370; and 7.560.

7 FINDINGS

7.1 Preliminary considerations

7.1.1 Function of the Panel and standard of review

7.1. According to Article 11 of the DSU, the function of panels is "to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements." The same Article establishes the standard of review, according to which a panel should:

> [M]ake an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

7.2. Regarding the "objective assessment" of the facts, the Appellate Body has stated that it is not for panels to undertake "*de novo* review", but also not to show "total deference" to the findings of the national authorities.[22] On the specific subject of the assessment of evidence, the Appellate Body stated that:

> [I]n accordance with Article 11 of the DSU, a panel is required to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence".[23] It must further provide in

[21] Panama's comments on Colombia's request for review of the Interim Report.

[22] Appellate Body Report, *EC – Hormones*, para. 117.

[23] (Footnote original) Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185 (referring, *inter alia*, to Appellate Body Report, *EC – Hormones*, paras. 132 and 133). See also Appellate Body Reports, *Australia – Salmon*, para. 266; *EC – Asbestos*, para. 161; *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177 and 181;

> its report "reasoned and adequate explanations and coherent reasoning" to support its findings.[24] Within these parameters, "it is generally within the discretion of the [p]anel to decide which evidence it chooses to utilize in making findings".[25] Although a panel must consider evidence before it in its totality, and "evaluate the relevance and probative force" of all of the evidence[26], a panel is not required "to discuss, in its report, each and every piece of evidence" put before it[27], or to "accord to factual evidence of the parties the same meaning and weight as do the parties".[28, 29]

7.3. A panel 's obligation to make an objective assessment of the matter also refers to the legal assessment, that is, the analysis of the consistency or inconsistency of the challenged measures with the applicable provisions.[30] To that end, a panel is free "to use arguments submitted by any of the parties – or to develop its own legal reasoning – to support its own findings and conclusions on the matter under its consideration."[31] In other words, each panel must assess the provisions of the relevant agreements and reach its own conclusions without necessarily limiting itself to the arguments or approaches put forward by any of the parties.[32]

7.4. Article 3.4 of the DSU, for its part, provides that recommendations or rulings made by the DSB "shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements."

7.1.2 Interpretation of the relevant rules of the agreements

7.5. In its objective assessment of the matter before it, the Panel may be called upon to clarify the scope of certain provisions of the covered agreements cited by the parties. In this connection, Article 3.2 of the DSU states that the WTO dispute settlement system serves to "clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law".

7.6. The "customary rules of interpretation of public international law" referred to by the DSU are the rules of interpretation that have attained the status of general customary international law, as codified in the Vienna Convention on the Law of Treaties of 1969 (Vienna Convention).[33] The Appellate Body has explained that:

> [T]he rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* apply to *any* treaty, in *any* field of public international law, and not just to the WTO agreements. These rules of treaty interpretation impose certain common disciplines upon treaty interpreters, irrespective of the content of the treaty provision being examined and irrespective of the field of international law concerned.[34] (emphasis original)

7.7. The purpose of the interpretation of treaty rules is to ascertain the common intentions of the parties.[35] Article 31 of the Vienna Convention contains a general rule of interpretation to the effect

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EC – Sardines, para. 299; *EC – Tube or Pipe Fittings*, para. 125; *Japan – Apples*, para. 221; *Japan - Agricultural Products II*, paras. 141 and 142; *Korea – Alcoholic Beverages*, paras. 161 and 162; *Korea – Dairy*, para. 138; *US – Carbon Steel*, para. 142; *US – Gambling*, paras. 330 and 363; *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; and *EC – Selected Customs Matters*, para. 258.

[24] (Footnote original) Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, fn 618 to para. 293.

[25] (Footnote original) Appellate Body Report, *EC – Hormones,* para. 135.

[26] (Footnote original) Appellate Body Report, *US – Continued Zeroing*, para. 331; and Appellate Body Report, *Korea – Dairy*, para. 137.

[27] (Footnote original) Appellate Body Report, *Australia – Apples*, para. 271; and Appellate Body Report, *Brazil – Retreaded Tyres*, para. 202.

[28] (Footnote original) Appellate Body Report, *Australia – Salmon*, para. 267.

[29] Appellate Body Reports, *US – COOL*, para. 299.

[30] Appellate Body Report, *EC – Hormones*, para. 118.

[31] Ibid. para. 156.

[32] Appellate Body Reports, *Canada – Renewable Energy / Canada - Feed-in Tariff Program*, para. 5.215.

[33] Appellate Body Reports, *US – Gasoline,* p. 17*; Japan - Alcoholic Beverages II,* p. 10. See also Vienna Convention on the Law of Treaties (Vienna Convention), done at Vienna on 23 May 1969, United Nations document A/CONF.39/27.

[34] Appellate Body Report, *US – Hot-Rolled Steel,* para. 60.

[35] Appellate Body Report, *EC – Computer Equipment,* para. 84.

that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[36] Under the terms of Article 31.2 of the Vienna Convention, the context for the purpose of the interpretation of a treaty shall comprise the text of the relevant agreement, including its preamble and annexes.

7.8. Article 32 of the Vienna Convention provides that recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable.[37] The Appellate Body has stressed that Article 32 does not define exhaustively the supplementary means of interpretation, so that an interpreter has a certain flexibility in considering relevant supplementary means in a given case so as to assist in ascertaining the common intentions of the parties.[38]

7.9. Article XVI of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) indicates that the legal texts of the WTO are equally authentic in their English, French and Spanish versions.[39] In view of the foregoing, and in accordance with the provisions of Article 33 of the Vienna Convention, the terms of the covered agreements are presumed to have the same meaning in each authentic text, and in the event that a difference of meaning is disclosed between the different language versions, the meaning that best reconciles the three texts, having regard to the object and purpose of the treaty, shall be adopted.[40]

7.1.3 Burden of proof

7.10. The DSU does not contain any express provision governing the burden of proof. However, by application of the general principles of law the WTO dispute settlement system has traditionally recognized that the burden of proof lies with the party asserting a fact, whether that party be the complainant or the defendant.[41]

7.11. In the light of the foregoing, the burden of proving in a preceeding that the impugned measure is inconsistent with the relevant provisions of the covered agreements initially lies with the complaining party. Once the complaining party has made a *prima facie* case for such inconsistency, the burden shifts to the defending party, which must in turn refute the alleged inconsistency.[42] A *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[43] In the words of the Appellate Body:

> [A]s a general matter, the burden of proof rests upon the complaining Member. That Member must make out a *prima facie* case by presenting sufficient evidence to raise a presumption in favour of its claim. If the complaining Member succeeds, the responding Member may then seek to rebut this presumption. Therefore, under the usual allocation of the burden of proof, a responding Member's measure will be

[36] With respect to good faith, the Appellate Body has indicated that "[t]hat means, *inter alia*, that terms of a treaty are not to be interpreted based on the assumption that one party is seeking to evade its obligations and will exercise its rights so as to cause injury to the other party". Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China),* para. 326.

[37] Appellate Body Report, *EC – Chicken Cuts*, para. 282.

[38] Ibid. para. 283.

[39] See also the explanatory note to paragraph 2(c)(i) of the GATT 1994.

[40] The Appellate Body explained: "Article 33 of the Vienna Convention reflects the principle that the treaty text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail. For the covered agreements, Article XVI of the WTO Agreement provides that the English, French, and Spanish language each are authentic. Consequently, the terms of Article III:8(a) of the GATT 1994 are presumed to have the same meaning in each authentic text." Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program,* fn 512 to para. 5.66. See also, for example, Appellate Body Reports, *Chile – Price Band System,* para. 271; *EC – Bed Linen (Article 21.5 - India)*, fn 153 to para. 123; *US – Softwood Lumber IV*, fn 50 to para. 59; *EC – Tariff Preferences*, para. 147; and *US – Upland Cotton,* fn 510 to para. 424.

[41] Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 12-16.

[42] Appellate Body Report, *EC – Hormones,* para. 98.

[43] Ibid. para. 104.

> treated as WTO-*consistent*, until sufficient evidence is presented to prove the contrary.[44] (emphasis original)

7.12. Precisely how much and precisely what kind of evidence will be required for the complaining party to establish its case will necessarily vary from measure to measure, provision to provision and case to case.[45] In any event, it should be borne in mind that, in the context of the WTO dispute settlement system:

> A *prima facie* case must be based on "evidence *and* legal argument" put forward by the complaining party in relation to *each* of the elements of the claim. A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments.[46] (emphasis original, footnotes omitted)

7.13. Similarly, a party that invokes an exception under Article XX of the GATT 1994 has the burden of demonstrating both that its measure is justified as being an exception under one of the paragraphs of the Article, and that it complies with the *chapeau* of that Article.[47]

7.14. In the matter before us, and by application of the foregoing criteria, it lies with Panama to make a *prima facie* case for its claim that the measure at issue is inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994. If Panama is able to make a *prima facie* case for its claim, it would then be for Colombia to rebut the claim. Since Colombia invoked the general exceptions under Articles XX(a) and XX(d) of the GATT 1994, it lies with Colombia to adduce evidence and legal argument to prove that the measure at issue is justified under those exceptions. If Colombia is able to make a *prima facie* case for the exceptions claimed, it would then be for Panama to rebut them.

7.1.4 Order of analysis

7.15. As a general principle, panels are free to structure the order of their analysis as they see fit. Except insofar as there may be a mandatory sequence of analysis, deviation from which would lead to an error of law and/or affect the substance of the analysis itself, a panel has discretion to structure the order of its analysis.[48] Although in structuring their analysis, panels may take account of the manner in which a complainant presents its claims, they may also follow a different sequential order.[49]

7.16. Panama has made claims of inconsistency with Articles II:1(a) and II:1(b), first sentence, of the GATT 1994. Colombia, for its part, has rejected Panama's claims. Colombia believes that Article II of the GATT 1994 does not cover illegal trade operations, and hence, does not apply to the measure at issue. Colombia adds that in the event that the Panel finds that the measure at issue is inconsistent with any of the obligations under Article II:1, that measure is justified under Article XX of the GATT 1994. In this connection, it is logical and a matter of common practice that in disputes in which the complaining party alleges an inconsistency with any of the obligations under the GATT 1994 and the responding party invokes any of the general exceptions under Article XX to justify its measure, the order of analysis should begin with an examination of the claims of inconsistency with the GATT 1994, to be followed, if such inconsistency is found to exist, with an assessment of whether the measure at issue is justified under Article XX of the GATT 1994.[50]

7.17. The Panel will therefore begin with the analysis of the measure at issue in this dispute (i.e. the compound tariff), and examine whether that measure falls within its terms of reference

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[44] Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II),* para. 66.
[45] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[46] Appellate Body Report, *US – Gambling,* para. 140.
[47] Appellate Body Reports, *US – Wool Shirts and Blouses*, p. 16; *US – Gasoline*, p. 22-23; *EC – Seal Products*, paras. 5.169 and 5.297; and *Korea – Various Measures on Beef*, para. 157.
[48] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, paras. 126-127.
[49] Ibid.; Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 277.
[50] See Appellate Body Report, *Thailand – Cigarettes (Philippines*), para. 173 (in which the Appellate Body states that "[a]n analysis of whether a measure infringes an obligation necessarily precedes, and is distinct from, the 'further and separate' assessment of whether such measure is otherwise justified").

under Article 6.2 of the DSU. The Panel will then address Colombia's argument that Article II of the GATT 1994 does not apply to the measure at issue. Depending on its findings, the Panel will assess Panama's claim that the compound tariff applied by Colombia is inconsistent with the obligations under Articles II:1(a) and II:1(b), first sentence, of the GATT 1994. Should the Panel find that there is such an inconsistency, it will then proceed with the analysis of whether, as Colombia argues, the measure at issue is justified under Articles XX(a) or XX(d) of the GATT 1994.

7.18. Finally, if it is found that the measure at issue is inconsistent with the obligations of the GATT 1994 and is not justified under Article XX, the Panel will address Panama's request that it make suggestions for the implementation of possible DSB recommendations and rulings in the light of Article 19.1 of the DSU.

7.2 The measure at issue

7.2.1 The compound tariff imposed by Colombia

7.19. In its panel request, Panama identified as the measure at issue in this dispute the "compound tariff" imposed by Colombia pursuant to Decree of the President of the Republic No. 074 of 23 January 2013 ("Decree No. 074") on imports of certain textile products, apparel and footwear.[51] Panama also identified what it considered to be the characteristics of the compound tariff.[52] In its first written submission, Panama indicated that Decree No. 074 had been amended by Decree No. 456 of 28 February 2014 ("Decree No. 456"), and that thenceforward "Panama would focus on the measure currently in force".[53]

7.20. The main characteristics of the compound tariff, as regulated by Decree No. 074 and Decree No. 456[54], are described below.

7.21. Decree No. 074 and Decree No. 456 have the same title: "Partially amending the Customs Tariff". Both Decrees indicate that they were issued by the President of the Republic of Colombia "in exercise of his constitutional and legal powers, more particularly those conferred by Article 189, paragraph 25, of Colombia's Political Constitution, subject to the provisions of Laws Nos. 7ª of 1991 and 1609 of 2013". Article 189, paragraph 25, of Colombia's Political Constitution provides that it is the responsibility of the President of the Republic, "as Head of State, Head of Government, and Supreme Administrative Authority":

> To organize public credit; recognize the national debt and arrange for its servicing; modify customs duties, tariffs, and other provisions concerning the customs regime; regulate foreign trade; and intervene in financial, stock market, insurance, and any other activities connected with the management, use and investment of resources originating from the savings of third parties, in accordance with the law.[55]

7.22. Law No. 7 of 1991 contains general rules to be followed by the National Government in regulating the country's foreign trade, creates the Ministry of Foreign Trade, determines the composition and functions of the Higher Council for Foreign Trade, creates the Foreign Trade Bank and the Economic Modernization Fund, grants certain authorizations and enacts other provisions.[56] Law No. 1609 of 2013, on the other hand, contains general rules to be followed by the Government in modifying duties, tariffs and other provisions concerning the customs regime.[57]

7.23. Both Decree No. 074 and Decree No. 456 indicate that they were adopted by the President of the Republic of Colombia pursuant to a recommendation by the Committee on Customs, Tariffs and Foreign Trade. In the case of Decree No. 074, the Committee's recommendation was made at session 251 of 17 December 2012; while for Decree No. 456, the recommendation was made at session 269 in 2014.

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[51] See Panama's request for the establishment of a panel.
[52] Ibid.
[53] Panama's first written submission, para. 3.2.
[54] Decree No. 074 (Exhibits PAN-2 and COL-16); Decree No. 456 (Exhibits PAN-3 and COL-17).
[55] Political Constitution of Colombia, Preamble and Articles 188 and 189 (Exhibit PAN-29).
[56] Law No. 7 of 1991 (Exhibit PAN-30).
[57] Law No. 1609 of 2013 (Exhibits PAN-31 and COL-45).

7.24. Decree No. 074 established a compound tariff on the import of goods classified in Chapters 61, 62, 63 and 64 of the Customs Tariff[58], consisting of[59]:

a. An *ad valorem* component of 10% plus a specific component of US$5/kg for goods classified in Chapters 61, 62 and 63 of the Customs Tariff (textiles and articles of apparel) and under heading 64.06 (parts of footwear); and

b. An *ad valorem* component of 10% plus a specific component of US$5/pair for goods classified in Chapter 64 of the Customs Tariff (footwear), except for those classified under heading 64.06 (parts of footwear).

7.25. Decree No. 456, on the other hand, establishes that the compound tariff on the import of goods classified in Chapters 61, 62, 63 and 64 of the Customs Tariff consists of[60]:

a. An *ad valorem* component of 10% plus a specific component of US$5/kg for goods classified in Chapters 61, 62 and 63 of the Customs Tariff (textiles and articles of apparel) and under tariff line 6406.10.00.00 (uppers of footwear and parts thereof, other than stiffeners), when the f.o.b. price declared on importation is US$10/kg or less;

b. An *ad valorem* component of 10% plus a specific component of US$3/kg for goods classified in Chapters 61, 62 and 63 of the Customs Tariff (textiles and articles of apparel) and under tariff line 6406.10.00.00 (uppers of footwear and parts thereof, other than stiffeners), when the f.o.b. price declared on importation exceeds US$10/kg;

c. An *ad valorem* component of 10% plus a specific component of US$5/pair for goods classified in Chapter 64 of the Customs Tariff (footwear), except for those classified under heading 64.06 (parts of footwear), when the f.o.b price declared on importation is US$7/pair or less; and

d. An *ad valorem* component of 10% plus a specific component of US$1.75/pair for goods classified in Chapter 64 of the Customs Tariff (footwear), except for those classified under heading 64.06 (parts of footwear), when the f.o.b price declared on importation exceeds US$7/pair.

7.26. Decree No. 456 provides that, when in a single transaction some goods of the same subheading are imported at prices below and others at prices above the respective threshold, the compound tariff payable is 10% *ad valorem* plus the highest specific levy applicable, i.e. US$5 per kilo or per pair, as applicable depending on the classification of the goods.[61]

7.27. Both Decree No. 074 and Decree No. 456 provide that the specific component of the compound tariff shall be included in the basis for calculating value added tax (VAT).[62] Both decrees exempt from application of this measure imports from countries with which Colombia has trade agreements in force, for which purpose the corresponding proof of origin is required; Decree No. 456 clarifies that such exemption only applies if the tariff subheading has been the subject of negotiations.[63]

7.28. The compound tariff does not apply to imports entering Colombia under certain special regimes, although this is not explicitly indicated in either Decree No. 074 or Decree No. 456.

[58] Colombia's Customs Tariff was adopted pursuant to Decree No. 4927 of 26 December 2011. Colombia's Customs Tariff (extracts) (Exhibit PAN-1). The chapters to which the compound tariff applies concern the following products: (i) Chapter 61 – "Articles of apparel and clothing accessories, knitted or crocheted"; (ii) Chapter 62 – "Articles of apparel and clothing accessories, not knitted or crocheted"; (iii) Chapter 63 – "Other made up textile articles; sets; worn clothing and worn textile articles; rags" and (iv) Chapter 64 – "Footwear, gaiters and the like; parts of such articles".

[59] Decree No. 074 (Exhibits PAN-2 and COL-16), Articles 1 and 2.

[60] Decree No. 456 (Exhibits PAN-3 and COL-17), Articles 1 and 2.

[61] Ibid. Article 1, para. 4; and Article 2, para. 4.

[62] Decree No. 074 (Exhibits PAN-2 and COL-16), Article 3, para. 2; Decree No. 456 (Exhibits PAN-3 and COL-17), Article 3.

[63] Decree No. 074, Article 3, para. 1; Decree No. 456, Article 5, paragraph, point 1.

7.29. For example, the compound tariff does not apply to goods entering certain regions designated by Colombia as Special Customs Regime Zones. These zones (of which there are currently three, located respectively in the region of Urabá, Tumaco and Guapi; in the region of Maicao, Uribia and Manaure; and in the region of Leticia) have been created by the Government of Colombia for the purpose of supporting and promoting development in areas with very low levels of development or areas that are isolated or integrated with other states, so that "they need to be managed differently from the rest of the national customs territory".[64] Decree No. 456 clarifies that, in the case of imports into a Special Customs Regime Zone, the measure will only be applied when the goods are to be introduced into the rest of the national customs territory.[65]

7.30. Nor does the compound tariff apply to goods entering Colombia under Special Import-Export Systems (SIEX), known in Colombia as the "Plan Vallejo ". Under these systems, the import of certain goods, especially inputs for production which are subsequently processed or used to produce goods for export, is exempt from customs duty.[66] Decree No. 456 further provides that the compound tariff also does not apply to the import into the customs territory of residues or waste of commercial value from the clothing industry and resulting from production processes developed under the SIEX (Plan Vallejo).[67]

7.31. Decree No. 074 came into effect on 1 March 2013 and was to remain in force for one year.[68] Decree No. 456 provides that it will enter into force 30 days after its publication in the Official Journal, that it repeals Decree No. 074, and that it will remain in force for two years.[69] Both Decree No. 074 and Decree No. 456 provide that, when they expire, the Customs Tariff in Decree No. 4927 of 2011 and amendments thereto will once again enter into force.[70]

7.2.2 The Panel's terms of reference

7.32. As explained above, in its panel request Panama challenged the compound tariff provided for in Decree No. 074, which was composed of: (i) an *ad valorem* component of 10% plus a specific component of US$5/kg for goods classified in Chapters 61, 62 and 63 and under heading 64.06 (parts of footwear); and an *ad valorem* component of 10% plus a specific component of US$5/pair for goods classified in Chapter 64 (footwear), except for those classified under heading 64.06.

7.33. Following the constitution of the Panel, Colombia modified the compound tariff by means of Decree No. 456. The following table shows and compares the compound tariff as regulated by Decrees Nos. 074 and 456.

[64] Colombia's response to Panel question No. 16. See also response to Panel questions Nos. 133 and 141.
[65] Decree No. 456 (Exhibits PAN-3 and COL-17), Article 4.
[66] Panama's response to Panel question No. 89; Colombia's response to Panel question No. 89.
[67] Decree No. 456 (Exhibits PAN-3 and COL-17), Article 5, paragraph, point 2. See also Colombia's response to Panel question No. 18.
[68] Decree No. 074 (Exhibits PAN-2 and COL-16), Articles 3 and 5.
[69] Decree No. 456 (Exhibits PAN-3 and COL-17), Articles 5, 6 and 7. Decree No. 456 was published in Official Journal of the Republic of Colombia No. 49.078 of 28 February 2014. See the Official Journal website at http://www.imprenta.gov.co, viewed on 30 April 2015.
[70] Decree No. 074 (Exhibits PAN-2 and COL-16), Article 3; Decree No. 456 (Exhibits PAN-3 and COL-17), Article 5.

	Chapters	Declared f.o.b. prices	Compound tariff
Decree No. 074	61, 62, 63 and heading 64.06	All prices	10% *ad valorem* and US$5/kg
	64, except heading 64.06	All prices	10% *ad valorem* and US$5/pair
Decree No. 456	61, 62, 63 and subheading 6406.10.00.00	US$10/kg or less	10% *ad valorem* and USS5/kg
		Over US$10/kg	10% *ad valorem* and US$3/kg
		Products imported under the same subheading, some at prices above and others at prices below US$10/pair	10% *ad valorem* and US$5/kg
	64, except heading 64.06	US$7/pair or less	10% *ad valorem* and US$5/pair
		Over US$7/pair	10% *ad valorem* and US$1.75/pair
		Products imported under the same subheading, some at prices above and others at prices below US$7/pair	10% *ad valorem* and US$5/pair

7.34. Panama's arguments refer to the compound tariff in its current form (regulated by Decree No. 456). Colombia has not indicated that the amendments to the compound tariff introduced by Decree No. 456 are outside the Panel's terms of reference.

7.35. As the Appellate Body has stated, a panel's terms of reference may include "amendments" to the measures described in the panel request as long as the terms of reference are broad enough and the amendments do not change the essence of the original measures.[71] A panel may also consider whether it is necessary to take account of amendments to the measure in order to secure a positive solution to the dispute.[72]

7.36. In this connection, it is relevant to note that, even though Panama's panel request does not refer to Decree No. 456, it includes "amendments, extensions or additions" to the aforementioned measure, that is, the compound tariff as regulated by Decree No. 074.[73] The preamble ("*Considerandos"*) to Decree No. 456 mentions that the Committee on Customs, Tariffs and Foreign Trade "recommended evaluating and, where relevant, amending Decree No. 074 of 2013".[74] As confirmed by Colombia in the course of these proceedings, Decree No. 456 is an "amendment" to Decree No. 074.[75]

7.37. Even more important, the compound tariff provided for in Decree No. 456 maintains the essence and nature of that established by Decree No. 074 for the following reasons. First, both decrees provide for a compound tariff consisting of a 10% *ad valorem* component plus a specific component. Second, both decrees apply to practically the same range of products, Chapters 61, 62, 63 and 64 of the Customs Tariff, which cover textiles, apparel and footwear. The only difference in product coverage is that, whereas Decree No. 074 included the goods of the whole of tariff heading 64.06 (parts of footwear), Decree No. 456 applies to the tariff line 6406.10.00.00 (uppers of footwear and parts thereof) but not to other tariff lines under heading 64.06. Third, both decrees contain similar regulations, including with regard to the main exemptions from the measure's scope and use of the tariff in the basis for calculating value added tax (VAT) Fourth, both decrees were issued by the President of the Republic of Colombia citing the same legal basis

[71] See Appellate Body Reports, *Chile – Price Band System*, para. 139; *EC – Chicken Cuts*, paras. 156-161. See also Panel Reports, *EC – IT Products*, para. 7.139.

[72] Panel Reports, *EC – IT Products*, para. 7.139.

[73] A general reference to "amendments", "additions" or "implementing measures" in a panel request may meet the "specificity" requirement in Article 6.2 of the DSU if the measure in question "improves", "implements" or is "clearly related" to the principal measure that has in fact been explicitly included in the request. In order to meet this requirement, however, such references must not be so vague as not to allow identification of the specific instruments the measure aims to cover. Appellate Body Report, *EC – Selected Customs Matters*, fn 369 to para. 152. See also Appellate Body Report, *EC – Bananas III*, para. 140; Panel Reports, *Japan – Film*, para. 10.8; *US – Carbon Steel*, para. 8.11; and *China – Raw Materials,* Communication from the Panel, document WT/DS394/9, WT/DS395/9, WT/DS398/8 (18 May 2010), paras. 17 and 18.

[74] Decree No. 456 (Exhibits PAN-3 and COL-17), third preambular paragraph.

[75] See Colombia's closing statement at the first meeting of the Panel, para. 8.

(the constitutional and legal powers of the President of the Republic, especially those conferred by Article 189, paragraph 25, of Colombia's Political Constitution and Laws No. 7 of 1991 and No. 1609 of 2013). Fifth, both decrees have the same title ("Partially amending the Customs Tariff") and were adopted by the President of the Republic of Colombia following a recommendation by the Committee on Customs, Tariffs and Foreign Trade. Sixth, both decrees have a limited period of validity (one year for Decree No. 074 and two years for Decree No. 456), after which they both specify that the Customs Tariff provided for in Decree No. 4927 of 2011 and amendments thereto will be restored. Seventh, during the proceedings, Colombia stated that both decrees have the same objective (constituting "an instrument within [the] State strategy [of the Colombian Government] for combating smuggling and money laundering").[76] Eighth, as already mentioned, Decree No. 456 replaces and repeals Decree No. 074.[77]

7.38. All the foregoing elements, taken together, lead the Panel to conclude that the compound tariff provided for in Decree No. 456 is closely related to that regulated by Decree No. 074 and maintains its essence and nature.

7.39. Consequently, Colombia's compound tariff as currently imposed (i.e. taking into account the amendments incorporated by Decree No. 456) comes within the Panel's terms of reference.

7.40. In any event, in the circumstances of this dispute, findings which take into account the compound tariff with the amendments incorporated by Decree No. 456 are necessary to help resolve this dispute. The usefulness of any finding would be limited if the Panel were to disregard these amendments and base itself solely on the compound tariff as established by the previous Decree No. 074.

7.3 Analysis of Panama's claims under Articles II:1(a) and II:1(b), first sentence, of the GATT 1994

7.41. In this section, the Panel will examine Panama's claim that the compound tariff is inconsistent with Colombia's obligations under Articles II:1(a) and II:1(b), first sentence, of the GATT 1994.

7.3.1 Main arguments of the parties

7.3.1.1 Complaint by Panama

7.42. Panama requests the Panel to find that the compound tariff applied by Colombia is "by its design, structure and architecture … inconsistent with Article II:1 of the GATT 1994".[78] Panama argues that the compound tariff is an "ordinary customs dut[y]" within the meaning of the first sentence of Article II:1(b) of the GATT 1994 and that it exceeds the tariff bound in Colombia's Schedule of Concessions.[79] Panama does not contest the fact that Colombia has adopted the compound tariff modality for products in Chapters 61, 62, 63 and 64 of its Customs Tariff.[80] Rather, Panama claims that the methods of calculating this tariff sometimes cause the rates bound by Colombia for the products concerned (40% *ad valorem* for most of the products and 35% *ad valorem* for "some specific products") to be exceeded.[81] Panama considers that the compound tariff applied by Colombia is a measure which pursues a policy for the protection of domestic production, seeking to increase sales, create jobs, benefit a priority sector and, to a large extent, redistribute wealth in favour of domestic producers "at the expense of international competition".[82]

7.43. Panama points out that the compound tariff applied by Colombia and the tariff that Colombia bound in its Schedule of Concessions are not directly comparable because the former consists of an *ad valorem* component and a specific component, whereas the latter has been

[76] See Colombia's closing statement at the first meeting of the Panel, para. 8.
[77] See Decree No. 456 (Exhibits PAN-3 and COL-17), Article 7. See also Committee on Customs, Tariffs and Foreign Trade, Minutes of Regular Session 269, 23 January 2014 (Exhibit COL-34), pp. 9-12.
[78] Panama's response to Panel question No. 91.
[79] Panama's first written submission, paras. 4.1 and 4.2.
[80] Ibid. para. 1.4.
[81] Ibid. para. 4.6.
[82] Panama's opening statement at the first meeting of the Panel, para. 1.7.

expressed in *ad valorem* terms.[83] In order to determine the consistency of the compound tariff with Colombia's bound tariffs, Panama indicates that an "*ad valorem* equivalent" of the compound tariff has to be obtained.[84] Panama has calculated a "break-even price", that is, an import price level in relation to which the *ad valorem* bound tariff would be the same as the *ad valorem* equivalent of the compound tariff. Panama contends that any import price above the break-even price calculated would never exceed the level bound by Colombia, whereas any price below the break-even price would lead to the application of a tariff above the bound level.[85]

7.44. Panama estimates an break-even price for each of the hypotheses provided for in Decree No. 456 in relation to the products in Chapters 61, 62, 63 and tariff line 6406.10.00.00[86]:

Declared f.o.b. price	Formula for calculating the compound tariff	Bound tariff	Break-even price
Price of US$10/kg or less	10% *ad valorem* and US$5/kg	40%	US$16.67
Price of US$10/kg or less	10% *ad valorem* and US$5/kg	35%	US$20
Price above US$10/kg	10% *ad valorem* and US$3/kg	40%	US$10
Price above US$10/kg	10% *ad valorem* and US$3/kg	35%	US$12

7.45. With regard to Chapter 64, except for heading 64.06, Panama estimates the following break-even prices:

Declared f.o.b. price	Formula for calculating the compound tariff	Bound tariff	Break-even price
Price of US$7/pair or less	10% *ad valorem* and US$5/pair	40%	US$16.67
Price of US$7/pair or less	10% *ad valorem* and US$5/pair	35%	US$20
Price above US$7/pair	10% *ad valorem* and US$1.75/pair	40%	US$5.83
Price above US$7/pair	10% *ad valorem* and US$1.75/pair	35%	US$7

7.46. Panama states that the compound tariff is in excess of the level bound in Colombia's Schedule of Concessions in the following cases:

a. Imports of products in Chapters 61, 62 and 63 and tariff line 6406.10.00.00, when the declared f.o.b. import prices are US$10/kg or less. In such cases, the compound tariff includes a 10% *ad valorem* component plus a specific component of US$5/kg.[87] The US$10/kg threshold is below the break-even price of US$16.67/kg and US$20/kg for goods with bound tariffs of 40% and 35% *ad valorem*, respectively[88];

b. Imports of products under subheading 6305.32 (sacks and bags, of a kind used for the packing of goods, of man-made textile materials; flexible intermediate bulk containers) at prices higher than US$10/kg but lower than US$12/kg. In such cases, the compound tariff includes a 10% *ad valorem* component plus a specific component of US$3/kg.[89] This subheading has a bound tariff of 35% *ad valorem*, so Panama has estimated the break-even price to be US$12/kg. Any import price above US$10/kg but below US$12/kg would be subject to a tariff whose *ad valorem* equivalent would exceed the bound level of 35% *ad valorem*[90];

c. Imports of products in Chapters 61, 62 and 63 and tariff line 6406.10.00.00, when in a single transaction some products of the same subheading are imported at prices above and others at prices below US$10/kg.[91] In such cases, the compound tariff includes a 10% *ad valorem* component plus a specific component of US$5/kg. Goods below the break-even prices of US$16.67/kg and US$20/kg would be subject to a tariff whose *ad*

[83] Panama's first written submission, para. 4.15.
[84] Ibid.
[85] Ibid. para. 4.49.
[86] See ibid. paras. 4.18-4.47.
[87] Ibid. paras. 4.20-4.26. See also response to Panel question No. 19.
[88] Panama's first written submission, para. 4.22.
[89] Ibid. paras. 4.30-4.32. See also response to Panel question No. 19.
[90] Panama's first written submission, para. 4.26.
[91] Ibid. para. 3.8. See also response to Panel question No. 19.

valorem equivalent would exceed the bound levels of 40% and 35% *ad valorem,* respectively[92];

d. Imports of products in Chapter 64 (except for heading 64.06) when the declared f.o.b. import prices are US$7/pair or less. In such cases, the compound tariff includes a 10% *ad valorem* component plus a specific component of US$5/pair.[93] The US$7/pair threshold is below the break-even prices of US$16.67/pair and US$20/pair for goods with bound tariffs of 40% and 35% *ad valorem*, respectively[94]; and

e. Imports of products in Chapter 64 (except for heading 64.06) when in a single transaction some products of the same subheading are imported at prices above and others at prices below US$7/pair. In such cases, the compound tariff includes a 10% *ad valorem* component plus a specific component of US$5/pair.[95]Goods below the break-even prices of US$16.67/pair and US$20/pair would be subject to a tariff whose *ad valorem* equivalent would exceed the bound levels of 40% and 35% *ad valorem,* respectively.[96]

7.47. Regarding Colombia's argument that "illicit trade" lies outside the scope of Article II of the GATT 1994[97], Panama points out that such an interpretation seeks to add to the word "commerce[*]" the qualifying adjective "illicit", which is not to be found in Article II.[98] In Panama's opinion, if Colombia's argument were accepted, a Member could unilaterally introduce distinctions between what would be licit or illicit trade and thus circumvent the multilateral obligations of the WTO.[99] Panama states that, on the contrary, a "good faith" interpretation of Article II:1(a) of the GATT 1994 indicates that "the term 'trade' covers any type of international trade operation".[100]

7.48. In response to Colombia's argument that the GATT 1994 has to be interpreted in its context and especially taking into account the recognition in its preamble that trade and economic relations among Members should be conducted "with a view to raising standards of living", Panama states that the reference to this objective could also be taken to mean that "the creation of trade" through observance of bound tariff levels, without distinction "between purportedly legal or illegal trade sectors" could help to raise the living standards of workers in exporting countries and of consumers in importing countries.[101]

7.49. Panama also asserts that Colombia misinterprets the term "illicit trade", because it covers activities with an illicit purpose such as "the sale of illegal, counterfeit or pirated goods"[102], and not imports of apparel and footwear, legally subject to an import procedure, at prices below certain thresholds unilaterally established by Colombia.[103] Panama considers that the fact that apparel and footwear import operations are sometimes directed by criminals does not make such operations illegal or illicit in themselves.[104] Although activities deriving from illicit operations or customs or intellectual property violations must be sanctioned under domestic legal systems, Panama points out that when such sanctions result in the imposition of measures that may be inconsistent with the GATT 1994, Article XX of the GATT provides for exceptions to the obligations which enable

[92] Panama's response to Panel question No. 19.
[93] See Panama's first written submission, paras. 4.35-4.41. See also response to Panel question No. 19.
[94] Panama's first written submission, paras. 4.37 and 4.41.
[95] Ibid. para. 3.8. See also response to Panel question No. 19.
[96] Panama's response to Panel question No. 19.
[97] See paras. 7.57. to 7.65. below.
[*] [Translator's note] In the English language text of the GATT 1994, the terms "commerce" (as used in the preamble and Articles II and IX) and "trade" (as used in various articles) are both rendered as "*comercio*" in the Spanish language text and as "*commerce*" in the French language text.
[98] Panama's opening statement at the first meeting of the Panel, para. 1.11; second written submission, para. 2.4, p 6; and opening statement at the second meeting of the Panel, para. 2. See also response to Panel question No. 96.
[99] Panama's opening statement at the first meeting of the Panel, para. 1.11. See also second written submission, para. 2.6, p. 7; and closing statement at the second meeting of the Panel, para. 2.
[100] Panama's response to Panel question No. 4.
[101] Panama's response to Panel question No. 22. See also Panama's response to Panel question No. 94.
[102] Panama's opening statement at the first meeting of the Panel, para. 1.12.
[103] Ibid. and second written submission, paras. 2.1 and 2.7.
[104] Panama's opening statement at the first meeting of the Panel, para. 1.13.

measures that are necessary to be justified.[105] In Panama's opinion, the foregoing does not imply questioning the applicability of the GATT 1994.[106]

7.50. Panama also rejects Colombia's reference to certain awards by foreign investment arbitral tribunals.[107] Panama states that there is no "interpretative criterion" based on the rules of interpretation of the Vienna Convention on the Law of Treaties under which it would be relevant to take such decisions into account when interpreting the word "trade".[108] In Panama's view such decisions concern procedural issues relating to the jurisdiction of the tribunal in question and do not provide "any interpretation or guidance for interpreting the word 'trade'".[109] Panama also states that, in the investment cases cited by Colombia, the awards refer to the legality of "specific investments", whereas the present dispute concerns a "trade policy measure .. *independently of specific trade transactions*".[110]

7.51. Even if one accepts the argument that Article II:1(a) and Article II:1(b) of the GATT 1994 do not apply to illicit trade, Panama points out that Colombia has not proved that such illegality exists in the present case. In its opinion, Colombia has only referred to "a high risk, a likelihood, follow-up action taken after importation in order to determine possible illegality", but Colombia "does not know at the time of importation" whether illegal activity is involved in the transactions subject to the compound tariff.[111] Panama indicates that if all imports at prices below the threshold were for money laundering purposes, that would mean "as a minimum, implementing control and follow-up measures to prevent an offence being committed in Colombian territory", but "Colombia has not identified any measure that serves that purpose".[112] Furthermore, after the compound tariff has been paid, "the goods enter Colombian territory" and the alleged money laundering operation "goes ahead without further consequences".[113] In any event, a mere indication cannot lead to the imposition of a tariff raising the tax burden on imports because there is no link between the indication of a possible criminal offence and the levy applicable.[114] Panama concludes that Decree No. 456 does not establish that the import of apparel or footwear below certain prices is illicit but, on the contrary, that such products "are subject to the normal import procedure".[115]

7.52. With regard to Colombia's argument that the examples of import prices presented by Panama are purely hypothetical, Panama states that its complaint is based on the "design, structure and architecture of the compound tariff" and that it does not have "the burden of proving adverse economic effects" or of "presenting actual cases".[116] In any event, Panama considers that the examples it has given "may actually occur in light of the scope and content of Decree No. 456".[117] In this connection, Panama points out that the compound tariff is in force, is mandatory and results in the application of duties above Colombia's bound tariff.[118] In Panama's opinion, the design, structure and architecture of the measure at issue "result in the imposition of tariffs in violation of those bound by Colombia in the WTO".[119] Panama also states that the import documents presented as Exhibits PAN-18 and PAN-19 show "Colombia's application of a tariff above its bound tariff".[120]

[105] Panama's response to Panel questions Nos. 98 and 99.
[106] Panama's opening statement at the first meeting of the Panel, para. 1.14; response to Panel question No. 3; and closing statement at the second meeting of the Panel, para. 2. See also response to Panel question No. 94.
[107] Panama's response to Panel question No. 101.
[108] Ibid.
[109] Panama's response to Panel questions Nos. 101 and 102.
[110] Panama's response to Panel question No. 101 (emphasis original).
[111] Panama's closing statement at the first meeting of the Panel, para. 1.6.
[112] Panama's response to Panel question No. 122.
[113] Ibid.
[114] See Panama's closing statement at the first meeting of the Panel, paras. 1.6 and 1.7.
[115] Panama's second written submission, para. 2.2.
[116] Ibid. para. 2.3.
[117] Panama's response to Panel question No. 23.
[118] Panama's opening statement at the first meeting of the Panel, para. 1.16; and closing statement at the first meeting of the Panel, para. 1.5.
[119] Panama's opening statement at the first meeting of the Panel, para. 1.17.
[120] Panama's response to Panel question No. 23. See also second written submission, para. 2.3; opening statement at the second meeting of the Panel, para. 4; response to Panel questions Nos. 156-158; import declarations (Exhibits PAN-18 and PAN-19).

7.53. From the foregoing Panama concludes that "[t]he structure and design of Colombia's compound tariff are such that, below certain break-even prices" the resulting tariff "clearly exceeds the *ad valorem* rate bound in Colombia's Schedule" in a manner inconsistent with the first sentence of Article II:1(b) of the GATT 1994.[121] Moreover, Panama considers that the compound tariff is inconsistent with Article II:1(a) of the GATT 1994. Panama claims in this regard that panels and the Appellate Body have indicated that a measure contrary to Article II:1(b) "will always be inconsistent" with Article II:1(a).[122]

7.54. Accordingly, Panama requests the Panel to find that the compound tariff imposed by Colombia is inconsistent with Articles II:1(a) and II:1(b), first sentence, of the GATT 1994.

7.3.1.2 Colombia's defence

7.55. Colombia, for its part, claims that Panama has not established a *prima facie* case that the compound tariff is inconsistent with Articles II:1(a) and II:1(b), first sentence, of the GATT 1994. It puts forward three arguments in this regard.

7.56. First, Colombia asserts that Decree No. 456 has incorporated a "legislative ceiling"[123] by setting a tariff comprising an *ad valorem* component of 10% and a specific component of US$3/kg for imports of textiles and apparel at an f.o.b. price exceeding US$10/kg; as well as a tariff comprising an *ad valorem* component of 10% and a specific component of US$1.75/pair for imports of footwear when the f.o.b. price is greater than US$7/pair. For Colombia, the legislative ceiling introduced by Decree No. 456 "prevents the compound tariff from exceeding Colombia's bound levels" of 35% and 40% *ad valorem*, as applicable.[124]

7.57. Secondly, Colombia argues that Article II of the GATT 1994 only covers licit trade and cannot refer to illicit trade transactions.[125] Colombia states that f.o.b. prices below US$10/kg (in the case of apparel) and US$7/pair (for footwear) "are artificially low" and involve "a high risk that [the imports] are being used to launder money".[126] Colombia indicates that, in order to determine the thresholds provided in Decree No. 456 for imports of textiles, apparel and footwear, it used a series of benchmarks such as national and international market prices; the average producer price at the different stages of production; and unit import prices for representative importers in Colombia.[127] Furthermore, for the threshold in respect of footwear, Colombia also took into account the average import price in three other countries (Chile, China and the United States).[128] In all these cases, the prices obtained using these benchmarks were said to be higher than the thresholds established in Decree No. 456.[129]

7.58. In addition, Colombia states that "around 45% of imports of textiles, apparel and footwear entering Colombia from Panama, but originating in other countries, are priced below the prices at which they were exported to Panama".[130] In its opinion, this shows that imports at prices below the prescribed thresholds are not effected at prices which "reflect market conditions", but have "artificially low" prices, and the purpose of the transactions is to launder money.[131] Colombia asserts that, as a response to money laundering through the underinvoicing of imports, the compound tariff seeks "to discourage imports at artificially low prices, reduce the artificial profit

[121] Panama's first written submission, para. 4.49.
[122] See Ibid. paras. 4.56-4.58.
[123] Colombia's first written submission, para. 64.
[124] Ibid. See also closing statement at the second meeting of the Panel, para. 9; response to Panel question No. 93, paras. 36 and 37; and comments on Panama's response to Panel question No. 91, para. 11.
[125] Colombia's first written submission, paras. 51, 54 and 67.
[126] Ibid. para. 66.
[127] Colombia's second written submission, paras. 31-33. See also response to Panel question No. 104, paras. 58 and 59.
[128] Colombia's second written submission, para. 34.
[129] See Ibid, paras. 31-35.
[130] Colombia's opening statement at the second meeting of the Panel, para. 41.
[131] Colombia's second written submission, para. 36. See also opening statement at the second meeting of the Panel, para. 40.

margin which the importer may obtain by selling the goods in Colombia, and prevent criminal groups from continuing with such money laundering operations".[132]

7.59. Colombia argues that Article II of the GATT 1994 only "covers licit trade and cannot cover operations where there are indications that they are being conducted at artificially low prices in order to launder money".[133] In its opinion, the word "importation" in the phrase "on their importation" in Article II:1(b) of the GATT 1994 cannot be extended to "foreign trade operations conducted for the purpose of laundering money or for other illicit purposes".[134] In this connection, the term "commerce" in Article II:1(a) "refers to licit trade" and only covers "the exchange of goods whose purpose and reason are licit".[135] On the contrary, the term "commerce" does not cover "exchanges of goods for reasons which the international community considers illicit".[136] Colombia contends it would make no sense for Article II to be intended to oblige "a Member to accord favourable treatment to the entry of goods which violate the legal formalities and requirements of the country of destination".[137]

7.60. In support of its argument, Colombia maintains that Article VII of the GATT 1994 and the Customs Valuation Agreement, used as context, confirm that, when imports are effected "at artificially low prices and for the purpose of laundering money, they cannot be considered as being imported at their 'actual value'".[138] Thus, "arbitrary or fictitious" prices would bear no relation whatsoever to the "commercial reality" because they are not the result of "market operations".[139]

7.61. Colombia cites the preambles to the GATT 1994[140] and the Marrakesh Agreement Establishing the World Trade Organization[141] in order to affirm that the object and purpose of these Agreements is, *inter alia*, to raise living standards, ensure full employment and increase real income. Money laundering helps criminal groups gain access to financial resources in order to carry out activities such as drug trafficking, murder, kidnapping, terrorist attacks and other criminal activities.[142] Likewise, imports at artificially low prices "lower the living standards of Colombia's population"[143] because there are no increases in income or gains in productivity, and at the same time the government revenue normally used for health, education and other social programmes is reduced. In Colombia's opinion, all of the foregoing is clearly contrary to the objective of raising the population's living standards and also creates "distortions of real income and aggregate demand".[144]

7.62. Colombia also argues that one of the rules of interpretation enshrined in Article 31 of the Vienna Convention is the "principle of good faith", which means that activities covered by an international obligation must be "of a lawful nature", i.e. be consistent with "the values underpinning any society".[145] In its opinion, "to interpret Article II in such a way that its benefits extend to import operations that fail to comply with a country's legislation would be manifestly absurd and unreasonable".[146] Colombia states that broadening the scope of the WTO agreements

[132] Colombia's first written submission, para. 66. See also closing statement at the first meeting of the Panel, para. 11; and response to Panel question No. 39, paras. 95 and 96.
[133] Ibid. para. 67; and second written submission, para. 37.
[134] Ibid. para. 53.
[135] Colombia's opening statement at the second meeting of the Panel, para. 13. See also closing statement at the second meeting of the Panel, para. 5.
[136] Colombia's opening statement at the second meeting of the Panel, para. 16. See also comments on Panama's response to Panel question No. 94, para. 14.
[137] Colombia's first written submission, para. 54; and opening statement at the first meeting of the Panel, para. 48.
[138] See Colombia's first written submission, paras. 56-59.
[139] Ibid. para. 58; and opening statement at the first meeting of the Panel, paras. 49-51.
[140] Ibid. para. 60.
[141] Colombia's second written submission, para. 7.
[142] Colombia's response to Panel question No. 22, para. 57.
[143] Ibid. paras. 56 and 57.
[144] Colombia's first written submission para. 60; and opening statement at the first meeting of the Panel, para. 53. See also opening statement at the second meeting of the Panel, para. 27; and response to Panel question No. 96, paras. 44-49.
[145] Colombia's opening statement at the second meeting of the Panel, para. 18.
[146] Colombia's first written submission, para. 61 (referring to Panel Report, *US – Gambling*, para. 6.49); opening statement at the first meeting of the Panel, para. 54; and response to Panel question No. 4, para. 10. See also comments on Panama's response to Panel questions Nos. 94 and 96, paras. 16 and 19.

to "illicit" trade transactions could result in including, for example, trade in human organs obtained illegally[147]; the import or export of narcotics[148]; or "trafficking in persons".[149]

7.63. Colombia also states that the concern in relation to "illicit trade" is recognized by the international community, as can be seen from various international instruments such as the Framework Convention on Tobacco Control; the Arms Trade Treaty; the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials; and the Convention on International Trade in Endangered Species of Wild Fauna and Flora, among others.[150] Colombia also points out that international organizations such as INTERPOL, GAFI-SUD and the OECD have expressed their concern at money laundering and its effects on countries' economies.[151]

7.64. Colombia submits that international foreign investment tribunals "have repeatedly refused to extend the protection" of the investment agreements concerned "to illegal investment, even when the respective treaty does not include a specific clause requiring that the investment be made in accordance with the laws of the receiving country".[152] Colombia mentions in particular the award of the arbitral tribunal in the *Plama Consortium v. Bulgaria* case, in connection with the European Energy Charter, in which it was stated that protection of investment does not extend to "illegal investment".[153] The arbitral tribunal based its decision on the following considerations: the principle of good faith should govern the interpretation of treaties; the object and purpose of the European Energy Charter includes strengthening the rule of law; there is a legal principle according to which nobody may benefit from his own wrong; and respect for the law is a principle of "international public policy".[154] Colombia also states that, even though the European Energy Charter contains a general exceptions clause, the tribunal did not base its decision on denying protection under this clause but determined that "illegal investments are excluded from the scope of protection of the agreement".[155]

7.65. Colombia considers that the prices of textile, apparel and footwear imports below the thresholds set in Decree No. 456 are "artificially low" and "do not reflect market conditions", and that the purpose of such imports cannot be commercial "but money laundering".[156] Colombia considers that there is a "high likelihood" or "high risk" that imports at artificially low prices are linked to money laundering.[157] Such trade transactions are therefore illicit "from the outset", that is, from the time at which a "consignment of narcotics … is sold abroad" and the illicit earnings repatriated to Colombia.[158] Colombia concludes that the obligations stemming from Articles II:1(a) and II:1(b) of the GATT 1994 cannot be extended to imports entering at artificially low prices and violating the rules of the importing country.[159]

7.66. Thirdly, Colombia contends that Panama has not established a *prima facie* case because in its first written submission it only put forward "some hypothetical examples" and no "actual cases" showing that Colombia was exceeding the bound tariff levels for imports of textiles, apparel and

[147] Colombia's opening statement at the second meeting of the Panel, para. 20.
[148] Ibid. para. 55.
[149] Ibid. para. 19.
[150] Ibid. paras. 22-25; response to Panel question No. 93, paras. 40 and 42; and comments on Panama's response to Panel question No. 94, para. 15.
[151] Colombia's opening statement at the second meeting of the Panel, paras. 23, 27 and 28. See also response to Panel question No. 93, para. 39; and comments on Panama's response to Panel question No. 94, para. 14.
[152] Colombia's opening statement at the second meeting of the Panel, para. 29. See also comments on Panama's response to Panel question No. 101, paras. 24-28.
[153] Colombia's opening statement at the second meeting of the Panel, para. 30.
[154] Ibid. para. 31.
[155] Ibid. paras. 30 and 31 (citing the Award of the Arbitral Tribunal, *Plama Consortium Limited – Republic of Bulgaria*, ICSID No. ARB/03/24, 27 August 2008, para. 138).
[156] Colombia's opening statement at the second meeting of the Panel, paras. 40, 42, 47, 60, 66, 68, 69, 78 and 95.
[157] Colombia's first written submission, paras. 60, 66 and 73; and opening statement at the first meeting of the Panel, paras. 53 and 57.
[158] Colombia's response to Panel question No. 38, para. 92.
[159] Colombia's opening statement at the first meeting of the Panel, para. 56. See also opening statement at the second meeting of the Panel, paras. 42-44; closing statement at the second meeting of the Panel, paras. 7 and 8; and response to Panel questions Nos. 122 and 144, paras. 89 and 129, respectively.

footwear.[160] Moreover, to the extent that Article II:1(b) of the GATT 1994 only applies to "licit trade", Colombia asserts that Panama must prove that the compound tariff in the measure at issue exceeds the bound level for imports "introduced at market prices and not at artificially low prices".[161] Colombia refers to the reports of the panel and the Appellate Body in *Argentina – Textiles and Apparel*, in which the complainant presented "actual examples and a little more than 95 pages of customs documents showing that the bound tariff was systematically breached".[162] On this basis, Colombia concludes that both the panel and the Appellate Body "founded their conclusions and recommendations on this evidence and not, as is attempted in this case, solely on the basis of hypotheses".[163]

7.67. Furthermore, Colombia contends that the hypothetical cases presented by Panama "are not well formulated and therefore have no probative value".[164] The reason is that these examples do not correspond to the reality of international trade in the products mentioned; or they do not specify the tariff heading to which the hypothetical case refers or do not describe the product with sufficient precision, which makes it difficult for Colombia to exercise its right of defence.[165] Colombia thus considers that Panama has not responded to the questions raised by Colombia regarding these hypothetical examples.[166]

7.68. With regard to the customs declarations submitted by Panama as Exhibits PAN-18 and PAN-19, Colombia submits that the first one is illegible, while the second contains information that may give rise to doubts. This information includes: the long period of time between the dates of purchase, shipment and import of the goods (more than one year's difference between purchase and import); the low declared freight charge from China (US$34.39); and the declaration on the number of shoes and loads imported (84 pairs of shoes in 35 loads, which would mean 2.4 pairs per load). Moreover, in both exhibits the form serial number and the information identifying the importer have been blacked out.[167] As they cannot be verified, Colombia concludes that these documents have no probative value.[168]

7.69. In the light of the foregoing, Colombia requests the Panel to reject Panama's claim that the compound tariff is inconsistent with Article II:1(b) of the GATT 1994. Colombia also requests that the claim concerning Article II:1(a) be rejected inasmuch as it is subsidiary to the claim concerning Article II:1(b).[169]

7.3.2 Main arguments of the third parties

7.3.2.1 United States

7.70. The United States affirms that Colombia has not denied that the categories of imports identified by Panama are subject to duties in excess of the levels bound in its Schedule of Concessions.[170] With regard to Colombia's argument that Articles II:1(a) and II:1(b) of the GATT 1994 do not apply to illicit trade, the United States considers that Article II:1 cannot be interpreted in such a way as to leave a measure outside its scope simply because a Member's domestic legislation considers a transaction or form of trade to be "illegal".[171] Such an interpretation would mean that the scope of a Member's obligations varies when it unilaterally determines that trade in a product is "illegal", which would not be consistent with the ordinary

[160] Colombia's second written submission, paras. 17-18; opening statement at the second meeting of the Panel, paras. 37-39; and comments on Panama's response to Panel question No. 91, para. 12.
[161] Colombia's opening statement at the first meeting of the Panel, paras. 61 and 62. See also response to Panel question No. 1, paras. 3 and 4.
[162] Colombia's response to Panel question No. 1, para. 2. See also second written submission, para. 19.
[163] Colombia's response to Panel question No. 1, para. 2.
[164] Colombia's first written submission, para. 70.
[165] Ibid.
[166] Colombia's second written submission, para. 18.
[167] Ibid. paras. 21, 23 and 25. See also closing statement at the second meeting of the Panel, para. 10; and response to Panel question No. 156, paras. 165 and 166.
[168] Colombia's first written submission, para. 74; and second written submission, para. 27. See also comments on Panama's response to Panel question No. 158, para. 77.
[169] Colombia's first written submission, para. 75; opening statement at the first meeting of the Panel, para. 63; and second written submission, para. 28
[170] United States' third-party statement, para. 9.
[171] Ibid. para. 4.

meaning of Article II:1. On the contrary, a proper interpretation of Article II:1, made in good faith and based on the ordinary meaning of the terms, in their context and in light of the treaty's object and purpose, suggests that Article II:1 of the GATT covers any commerce in the products included in a Member's schedule, regardless of the legal status of such commerce under that Member's domestic laws.[172] In the opinion of the United States, the Panel, in its examination of Article II:1, need not determine whether the transactions covered by Decree 456 are illegal.[173]

7.71. The United States argues that, in any event, it is not clear that the measure at issue only applies to illegal trade inasmuch as the compound tariff provided for in Decree No. 456 applies "to all covered products imported at certain prices" and does not describe the import of products as an illegal activity as such.[174] The United States indicates that there may be situations in which imports at prices below the prescribed thresholds are legal and not underinvoiced, for example, dumped imports or products whose actual price is lower than US$10/kg for textiles or apparel and US$7/pair for footwear.[175]

7.72. With regard to Colombia's argument that Panama has only presented "hypothetical examples" instead of actual cases in which the bound tariff has been exceeded, the United States considers that when the meaning of a measure "as such" is unequivocal and is not contested by the parties, an analysis of the text of the measure itself may be sufficient and it is not necessary to prove its application in specific situations.[176] In the present dispute, the United State indicates that, as a factual issue, Panama must provide evidence of the scope and meaning of the challenged measure and, based on this, show that "in certain circumstances" Decree No. 456 "will necessarily impose tariffs in excess of those provided in Colombia's Schedule".[177]

7.3.2.2 Philippines

7.73. The Philippines indicates that a compound tariff which includes an *ad valorem* duty and a specific levy results in an equivalent *ad valorem* rate that is inversely proportional to the change in the price of the goods. In other words, the *ad valorem* equivalent will be higher for lower-priced products than for higher-priced products. It is thus possible that there may be a price below which the compound tariff exceeds the level bound by Colombia.[178] The Philippines points out that, to ensure that the compound tariff does not exceed the bound level, a cap could be imposed on the *ad valorem* equivalents, or there could be a "floor" import price below which the compound tariff would not apply.[179] The Philippines states that, in the situations described by Panama, it would appear that the compound tariff is in excess of the levels bound in Colombia's Schedule of Concessions.[180]

7.74. With regard to Colombia's argument that Articles II:1(a) and II:1(b) do not apply to illicit trade, the Philippines points out that the GATT 1994 coverage cannot be extended to imports entering at artificially low prices and violating the rules of the importing country.[181] The Philippines indicates, however, that the claim that the GATT 1994 does not apply to certain goods, not because of their nature or physical characteristics, but because of the manner in which the trade has been financed and their use as conduits for illegal activity, is not as straightforward as for other goods that are inherently dangerous or produce ill effects, such as illicit drugs or chemical weapons.[182] A WTO Member which uses higher tariffs to sanction or discourage the import of

[172] United States' third-party statement, para. 4; and response to Panel questions Nos. 3 and 4, paras. 14-15 and 16-19.
[173] United States' responses to Panel questions Nos. 2, 4 and 5, paras. 9, 19 and 20, respectively.
[174] United States' third-party statement, paras. 5 and 6; and response to Panel question No. 2, para. 10.
[175] United States' response to Panel question No. 6, para. 21.
[176] See United States' response to Panel question No. 1, paras, 1-8. In cases where the measure at issue supports two or more meanings or is contested by the parties, the United States considers that the complainant would need to prove how the measure at issue is applied or interpreted by the responding Member. In its opinion, this would have to be done in accordance with the responding Member's domestic legal system, including the rules of interpretation in its own legislation. Ibid. paras. 2 and 3.
[177] United States' third-party statement, paras. 10-12. See also United States' response to Panel question No. 1, paras. 1 and 8.
[178] Philippines' third-party written submission, para. 4.14; and third-party statement, para. 3.3.
[179] Philippines' third-party written submission, para. 4.16.; and third-party statement, paras. 3.4 and 3.5.
[180] Philippines' third-party statement, paras. 3.7 and 3.8.
[181] Philippines' third-party written submission, para. 4.26.
[182] Ibid. para. 4.29; and third-party statement, para. 4.4.

products, basing itself on a price threshold below which the goods are assumed to be illegally traded, has the burden of showing that "all items below the threshold" have artificially low prices, and are illegally traded.[183]

7.75. Concerning Colombia's argument that Panama has used hypothetical examples that are unrealistic or insufficiently clear, the Philippines asserts that, although Panama is challenging the design and structure of the measure, it might be useful to establish the reasonableness or existence of particular items used as examples.[184]

7.76. Lastly, the Philippines considers that a finding of a measure's inconsistency with Article II:1(b) of the GATT 1994 necessarily entails inconsistency with Article II:1(a).[185]

7.3.2.3 Honduras

7.77. Honduras considers the distinction proposed by Colombia regarding the legality of trade as a criterion for application of the GATT 1994 throws doubt on the validity and enforceability of the tariff concessions granted by WTO Members during numerous negotiating rounds. In Honduras' opinion, if the Panel were to uphold Colombia's argument, this would create uncertainty during trade negotiations within the WTO.[186]

7.3.2.4 European Union

7.78. The European Union points out that, in order to compare Colombia's bound tariff and the compound tariff provided for in Decree No. 456, the latter has to be converted into an *ad valorem* equivalent.[187] As a result of this exercise, the European Union concludes that the compound tariff exceeds the level bound by Colombia in the case of goods classified: (i) in Chapters 61, 62, 63 and tariff line 64.06.10.00.00, when their f.o.b. import price is US$10/kg or less and their bound *ad valorem* level is either 35% or 40%; (ii) under tariff subheading 6305.32, when their bound *ad valorem* level is 35% and their f.o.b. import price is higher than US$10/kg but lower than US$12/kg; and (iii) under tariff subheading 6405.20, when their f.o.b. import price is US$7/pair or less and their bound *ad valorem* level is either 35% or 40%.[188]

7.79. The European Union also states that the parties do not challenge the description of the compound tariff and that Colombia appears to accept that, in some cases, the tariffs applied are higher than those established in its Schedule of Concessions.[189] Furthermore, the European Union considers that, in "as such" challenges of measures, the complainant does not need to show that the measure at issue has been applied in a manner that results in an inconsistency with a WTO obligation.[190] Moreover, the European Union observes that the complainant has to show that the measure at issue, in view of its design, structure and expected operation, necessarily leads to an inconsistency.[191] Even if, as Colombia contends, Panama has only presented hypothetical cases, the design, structure and expected operation of the measure are capable of including such cases, thus leading to the imposition of ordinary customs duties that are higher than the bound level.[192]

7.80. The European Union rejects Colombia's argument that transactions aimed at money laundering cannot be covered by Articles II:1(a) and II:1(b) of the GATT 1994. In the European Union's opinion, misrepresenting the price of goods or the fact that a transaction is used to launder money does not render the trade operation illegal in itself. In such cases, what is illegal under domestic law is the money laundering activity *per* se, but not the trade transaction. In this connection, the European Union states that the material scope of what is covered under the GATT 1994 cannot be circumscribed to what a WTO Member unilaterally determines is legal or not

[183] Philippines' third-party written submission, paras. 4.28 and 4.30; third-party statement, para. 4.5; and response to Panel question No. 5, para. 1.2.
[184] See Philippines' third-party written submission, paras. 4.34-4.39.
[185] Ibid. paras. 4.21-4.24; and third party statement, para. 3.9.
[186] Honduras' third-party statement.
[187] European Union's third-party written submission, para. 22.
[188] Ibid. para. 14.
[189] Ibid. and third-party statement, para. 3.
[190] European Union's response to Panel question No. 1, para. 1.
[191] Ibid.
[192] European Union's third-party written submission, para. 23.

under its own jurisdiction, since this would entail a high risk of circumvention of the WTO rules.[193] The European Union points out that Article XX of the GATT 1994 contains general exceptions to cater for legitimate policies, including the enforcement of customs measures.[194]

7.81. The European Union also considers that the "natural consequence" of inconsistency with Article II:1(b) of the GATT 1994 would be inconsistency with Article II:1(a).[195]

7.3.3 Order of analysis of the claim concerning Article II:1(a) and Article II:1(b), first sentence, of the GATT 1994

7.82. Article II:1(a) and the first sentence of Article II:1(b) of the GATT 1994 provide as follows:

> ***Article II***
>
> *Schedules of Concessions*
>
> 1. (*a*) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.
>
> (*b*) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein.

7.83. The two provisions are very closely linked: while Article II:1(a) "requires that a Member must accord to the commerce of the other Members 'treatment no less favourable than that provided for'" in its Schedule of Concessions[196], Article II:1(b), first sentence, requires that products "on their importation" be exempt from ordinary customs duties "in excess of those set forth" in the importing Member's Schedule of Concessions.

7.84. In *Argentina – Textiles and Apparel*, the Appellate Body explained the relationship that exists between the two provisions in the sense that "[p]aragraph (b) [of Article II:1] prohibits a specific kind of practice that will always be inconsistent with paragraph (a): that is, the application of ordinary customs duties in excess of those provided for in the Schedule."[197] In that case, taking into account the circumstances of the dispute, as well as the relationship between the two provisions, the Appellate Body began its interpretative analysis with Article II:1(b) and focused on that provision.[198] Moreover, a measure that is inconsistent with Article II:1(b) "will always be inconsistent" with Article II:1(a).[199] In other words, a finding of inconsistency with Article II:1(b) necessarily results in an inconsistency with Article II:1(a) of the GATT 1994.

7.85. The analysis of Panama's claim in relation to Article II:1(a) and (b), first sentence, of the GATT 1994 will commence with the preliminary question raised by Colombia as to whether the scope of this provision extends to "illicit trade" transactions. Secondly, and depending on the finding in relation to the preceding question, the Panel will address Colombia's argument concerning the standard of proof applicable in the circumstances of this dispute. Thirdly, the Panel will examine whether the compound tariff is inconsistent with Article II:1(b), first sentence, of the GATT 1994. Lastly, it will consider Panama's claim of inconsistency with Article II:1(a) of the GATT 1994.

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[193] Ibid.
[194] European Union's third-party written submission, para. 23, and third-party statement, para. 5.
[195] European Union's third-party written submission, para. 31.
[196] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47.
[197] Ibid. para. 45.
[198] Ibid.
[199] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 45. See also Panel Reports, *EC – IT Products*, para. 7.747; *EC – Bananas III (Article 21.5 – Ecuador II)*, para. 7.394; *EC – Chicken Cuts (Brazil)*, para. 7.63; and *EC – Chicken Cuts (Thailand)*, para. 7.63.

7.3.4 The question of the applicability of Article II:1(a) and Article II:1(b), first sentence, of the GATT 1994 to "illicit trade"

7.86. First of all, the Panel will address Colombia's argument that Article II:1 of the GATT 1994 does not apply to illicit trade.

7.3.4.1 Main arguments of the parties

7.87. Colombia argues that imports of textiles, apparel and footwear at prices below the thresholds prescribed in Decree No. 456 are imports at prices which "are artificially low", so that there is a "high likelihood"[200], a "greater likelihood"[201] or a "high risk"[202] that such imports are being used to launder money through the underinvoicing of imports.[203] Colombia states that the thresholds provided for in Decree No. 456 were determined in the light of a comparative analysis using certain benchmarks which "in every case" exceeded the thresholds established in Decree No. 456.[204] According to Colombia, these benchmarks, together with evidence of the use of imports of the products concerned at artificially low prices to launder money, show that imports below the respective thresholds are "operations whose objective is not commercial but to launder money".[205] Colombia also argues that, according to the principle of good faith and the object and purpose of the GATT 1994 reflected in its preamble, as well as in the preamble to the WTO Agreement[206], "Article II:1(b) covers licit trade and cannot cover operations where there are indications that they are being concluded at artificially low prices in order to launder money".[207]

7.88. In response, Panama contends that the term "illicit trade" refers to activities with an illicit objective such as "the sale of illegal, counterfeit or pirated goods" and not to imports of textiles, apparel or footwear, legally subject to import procedures and whose prices are below certain thresholds unilaterally established by Colombia.[208] Panama considers that the fact that criminals may sometimes be behind import transactions involving textiles, apparel or footwear does not make such transactions illegal or illicit in themselves.[209] Moreover, Panama argues that the term "commerce" in Article II:1(a) of the GATT 1994 does not have any qualifying adjective and it cannot therefore be argued that this provision does not apply to situations that Colombia unilaterally determines to be illicit.[210] Panama states that the issue raised by Colombia in relation to the alleged illegality of trade operations should be transposed to the context of Colombia's defence under Article XX of the GATT 1994.[211] In any event, Panama contends that Colombia has not shown that it has knowledge of the illegality of all imports of goods at prices below the thresholds established in Decree No. 456.[212]

7.3.4.2 Analysis by the Panel

7.89. Colombia argues that the obligations under Article II of the GATT 1994 do not extend to "illicit trade" and especially to imports which reflect "conduct which both Colombia and the

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[200] Colombia's first written submission, para. 60.
[201] Ibid. para. 73.
[202] Ibid. para. 66
[203] Ibid. paras. 60, 66 and 73; and opening statement at the first meeting of the Panel, paras. 53 and 57. See also closing statement at the first meeting of the Panel, para. 8. Colombia also clarified that "underinvoicing" refers to "imports at artificially low prices which do not correspond to actual or market prices". Response to Panel question No. 41, para. 98.
[204] Colombia's second written submission, paras. 33-35; opening statement at the second meeting of the Panel, para. 40.
[205] Colombia's second written submission, para. 36; opening statement at the second meeting of the Panel, para. 42.
[206] Colombia's second written submission, para. 7.
[207] Colombia's first written submission, para. 67. See also opening statement at the first meeting of the Panel, para. 56.
[208] Panama's opening statement at the first meeting of the Panel, para. 1.12.
[209] Ibid. para. 1.13.
[210] Panama's second written submission, para. 2.4. See also opening statement at the first meeting of the Panel, para. 1.11.
[211] Panama's opening statement at the first meeting of the Panel, para. 1.11. See also Panama's second written submission, para. 2.5; opening statement at the second meeting of the Panel, para. 2; and closing statement at the second meeting of the Panel, para. 2.
[212] Panama's closing statement at the first meeting of the Panel, para. 1.6; and response to Panel question No. 5.

international community have determined to be illegal".[213] Colombia's contention relates to the applicability of Articles II:1(a) and II:1(b) of the GATT 1994 to the measure at issue. The Panel should therefore address this issue before embarking upon a substantive analysis of the claim regarding the alleged inconsistency with the obligations under the GATT 1994.

7.90. In order to comply with its terms of reference under the DSU, a panel has to rule on the legal issues necessary for the resolution of the matter between the parties. As stated by the Appellate Body with reference to Article 11 of the DSU:

> Nothing in this provision or in previous GATT practice requires a panel to examine all legal claims made by the complaining party. Previous GATT 1947 and WTO panels have frequently addressed only those issues that such panels considered necessary for the resolution of the matter between the parties, and have declined to decide other issues. … In recent WTO practice, panels likewise have refrained from examining each and every claim made by the complaining party and have made findings only on those claims that such panels concluded were necessary to resolve the particular matter.
>
> ...
>
> Furthermore, such a requirement [that a panel examine all legal claims made by the complaining party] is not consistent with the aim of the WTO dispute settlement system. Article 3.7 of the *DSU* explicitly states:
>
> > The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.[214]
> >
> > (emphasis original; footnotes omitted)

7.91. Accordingly, the Panel will begin by considering whether, in order to resolve this dispute, it is necessary or useful to issue a finding as to whether the obligations contained in Articles II:1(a) and II:1(b) of the GATT 1994 do or do not apply to "illicit trade". Colombia's argument would only be pertinent if the Panel were to make two determinations. First, the Panel would have to determine whether, as a factual matter, as affirmed by Colombia, the trade affected by the measure at issue is "illicit trade". Secondly, the Panel would have to find that the obligations contained in Articles II:1(a) and II:1(b) of the GATT 1994 do not apply to "illicit trade".

7.92. Below, the Panel will examine the first of these issues, that is, whether, as Colombia contends, the trade affected by the measure at issue is "illicit trade".

7.93. The Panel points out that the WTO covered agreements contain no definition of "illicit trade", and do not employ this expression. Nor has Colombia proposed a single definition of the term for the purposes of its argument in this dispute.

7.94. However, Colombia has stated that the "concept of illicit trade" "is recognized by the international community, which in various international instruments has jointly decided to suppress this phenomenon in its different forms".[215] Specifically, Colombia has referred to the definition of "trafficking in illicit goods" used by the International Criminal Police Organization – INTERPOL, which refers to "all types of illicit trade"; it includes such practices as counterfeiting (trademark infringements), piracy (copyright infringements), smuggling of legitimate products and tax evasion"[216]; as well as the definition of "illicit trade" used in the Framework Convention on Tobacco

[213] Colombia's opening statement at the second meeting of the Panel, para. 35. See also first written submission, para. 62.

[214] Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 18 and 19.

[215] Colombia's opening statement at the second meeting of the Panel, para. 22; response to Panel question No. 94, para. 38.

[216] Colombia's opening statement at the second meeting of the Panel, para. 23; and response to Panel question No. 94, para. 39 (citing INTERPOL's website,

Control of the World Health Organization (WHO), which refers to "any practice or conduct prohibited by law and which relates to production, shipment, receipt, possession, distribution, sale or purchase, including any practice or conduct intended to facilitate such activity".[217]

7.95. Colombia has also mentioned as examples of "illicit trade" practices combated by other international instruments such as the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 of the United Nations Educational, Scientific and Cultural Organization (UNESCO); the Arms Trade Treaty; the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials; and the Convention on International Trade in Endangered Species of Wild Fauna and Flora.[218]

7.96. Lastly, Colombia referred to the definition of "illicit trade" used by an author, according to which "[i]llicit trade [is] trade that infringes the rules – the laws, regulations, licenses, taxation system, embargoes and all the procedures that countries use to organize trade, protect their citizens, raise the standard of living and enforce codes of ethics."[219]

7.97. In a report by the World Customs Organization (WCO) on illicit trade provided by Colombia as an exhibit, it is stated that:

> Illicit trade involves money, goods or value gained from illegal and otherwise unethical activity. It encompasses a variety of illegal trading activities, including human trafficking, environmental crime, illegal trade in natural resources, intellectual property infringements, trade in certain substances that cause health or safety risks, smuggling of excisable goods, trade in illegal drugs and a variety of illicit financial flows.[220]

7.98. Colombia clarified that its argument concerning illicit trade refers to "conduct considered illegal by the international community" and not to "minor offences or misdemeanours" which "would not constitute illicit trade".[221] It indicates, in particular, that the trade affected by the measure that is the subject of this dispute is "trade used to launder money".[222] Colombia adds that "money laundering is conduct deemed illegal by the international community, as can be seen from the United Nations Convention on Transnational Organized Crime".[223]

7.99. Colombia concludes that foreign trade operations carried out for the purpose of laundering money or for other illicit ends cannot be covered by Article II:1(a) and Article II:1(b), first sentence, of the GATT 1994.[224]

7.100. Despite the fact that, as previously mentioned, the WTO covered agreements do not contain any definition of "illicit trade" and do not employ this expression, several of the situations referred to by Colombia are covered by provisions of the covered agreements. For example, Article 41.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) provides that Members must ensure that their domestic legislation establishes procedures to

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http://www.interpol.int/en/Internet/Crime-areas/Trafficking-in-illicit-goods-and-counterfeiting/Trafficking-in-illicit-goods-and-counterfeiting, viewed on 30 April 2015).

[217] Colombia's opening statement at the second meeting of the Panel, para. 24; and response to Panel question No. 94, para. 40 (citing the website of the WHO Framework Convention on Tobacco Control, http://www.who.int/tobacco/framework/WHO_FCTC_english.pdf, viewed on 30 April 2015).

[218] Colombia's opening statement at the second meeting of the Panel, para. 25.

[219] Moses Naim, *Illicit: How Smugglers, Traffickers, and Copycats Are Hijacking the Global Economy* (Doubleday, 2005), p. 16. Cited by Colombia in English, first written submission, footnote 7.

[220] World Customs Organization, *Illicit Trade Report 2012* (Exhibit COL-8), p. 2.

[221] Colombia's response to Panel question No. 95, para. 43.

[222] Colombia's comments on Panama's response to Panel question No. 94, para. 15. See also first written submission, paras. 25, 28, 35, 37, 38, 50, 66, 80, 87, 88, and 93; opening statement at the first meeting of the Panel, paras. 11, 26, 65; and response to Panel questions Nos. 1, 6, 48, paras. 4, 14, 105, respectively

[223] Colombia's comments on Panama's response to Panel question No. 94, para. 15. See also first written submission, paras. 80 and 81; opening statement at the first meeting of the Panel, para. 65; and response to Panel question No. 3, paras. 6 and 7.

[224] See Colombia's first written submission, paras. 53 and 67; and opening statement at the first meeting of the Panel, para. 47.

permit effective action against infringements of intellectual property rights, including trademarks and copyright[225]:

> Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. …

7.101. Article VII of the GATT 1994, as well as the Customs Valuation Agreement, establish disciplines for determining customs value, including cases in which a Member's authorities have doubts about the truth or accuracy of information, documents or declarations submitted for customs valuation purposes.

7.102. Article XX of the GATT 1994 provides for general exceptions to the obligations under the Agreement, including with respect to the obligations contained in Article II of the GATT 1994. The exceptions provided for in Article XX include, for example: measures necessary to protect public morals; measures necessary to protect human, animal or plant life or health; measures necessary to secure compliance with laws or regulations which are not inconsistent with the GATT 1994, *inter alia* for purposes of customs enforcement, the protection of patents, trademarks and copyrights, as well as the prevention of deceptive practices; measures imposed for the protection of national treasures of artistic, historic or archaeological value; and measures relating to the conservation of exhaustible natural resources.[226] Similarly, Article XXI of the GATT 1994 provides for exceptions in respect of, *inter alia*, measures relating to the traffic in arms, ammunition and implements of war; and measures relating to fissionable materials or the materials from which they are derived.[227]

7.103. In other words, the provisions of the covered agreements cited above refer to several of the situations identified by Colombia as examples of "illicit trade" practices regulated by international instruments.

7.104. In any event, as previously mentioned, Colombia's argument would only be pertinent if the Panel determines as a factual issue that, as asserted by Colombia, the trade affected by the measure at issue is "illicit trade". In order to be able to make an objective assessment of this matter, the Panel must consider the meaning and scope of the measure in question. In this case, the starting point for the Panel's analysis will be the text of the relevant provision itself.[228]

7.105. The factor common to the various definitions of "illicit trade" cited by Colombia is that they all refer to "illegal" activities, that is, activities that have been prohibited by law. In the light of the actual terms of the measure that is the subject of this dispute, however, the compound tariff applies to all imports of products classified in Chapters 61, 62, 63 and 64 of Colombia's Customs Tariff (except for some tariff lines of heading 64.06). For each category of product, the compound tariff has two different levels, one that is lower (10% *ad valorem* and US$3/kg or 10% *ad valorem* and US$1.75/pair, depending on the products concerned) and one that is higher (10% *ad valorem* and US$5/kg or 10% *ad valorem* and US$5/pair, depending on the products concerned). In the specific case of the highest levels of the compound tariff, which correspond to some of the instances identified by Panama as inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994, the compound tariff applies to all imports of the products concerned when they are effected at prices below the thresholds provided for in Decree No. 456. Imposition of the compound tariff on imports is not preceded by any declaration on the part of the judicial or administrative authorities that the operation constitutes an unlawful act, nor is it even associated with the commission of any

[225] Article 41.1 of the TRIPS also provides that the enforcement procedures mentioned "shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse".

[226] Concerning the general exceptions in Article XX of the GATT 1994, Colombia indicated that there is a difference between "illicit conduct" and "licit conduct subject to regulation". In its opinion, illicit conduct "is prohibited" and therefore the Article II:1 obligations do not apply. On the other hand, the general exceptions in Article XX of the GATT 1994 "enable measures affecting licit trade to be justified". Colombia's response to Panel question No. 99, para. 54; and comments on Panama's response to Panel question No. 98, para. 20.

[227] Articles XIV and XIV *bis* of the General Agreement on Trade in Services contain exceptions similar to those provided for in Articles XX and XXI of the GATT 1994, in respect of measures affecting trade in services.

[228] See Appellate Body Report *US – Shrimp II (Viet Nam)*, paras. 4.31 and 4.32.

unlawful act. Moreover, Colombia has not identified any legal rule prohibiting the import of goods at prices lower than the thresholds determined in Decree No. 456.

7.106. Consequently, the terms of the subject measure themselves show that the compound tariff is applied to all imports of the products in question, without distinguishing as to whether the operations are lawful or unlawful. The measure is not structured or designed to apply solely to operations which have been classified as "illicit trade".

7.107. The Panel also notes that the compound tariff is not applicable to imports from countries with which Colombia has signed trade agreements in which the subheadings subject to Decree No. 456 have been negotiated.[229] Nor does the compound tariff apply to goods entering certain zones in Colombia called "Special Customs Regime Zones", unless the goods subsequently enter other parts of Colombia's customs territory.[230] Likewise, the compound tariff is not applicable to goods entering Colombian territory under the Special Import-Export Systems (Plan Vallejo).[231] Accordingly, goods classified in Chapters 61, 62, 63 and 64 (except for heading 64.06 but including tariff line 6406.10.00.00) at prices below the thresholds provided for in Decree No. 456 may freely enter Colombia under all these modalities, subject to tariffs lower than the compound tariff, or even duty free. In the Panel's opinion, this supports the conclusion that in Colombia's legal system there is no rule prohibiting or restricting what Colombia considers "illicit trade", that is, the import of goods whose declared prices are below the thresholds provided for in Decree No. 456 (prices which, according to Colombia, are artificially low for money laundering purposes).

7.108. In the light of the foregoing, in the context of this dispute, a finding as to whether or not the obligations in Articles II:1(a) and II:1(b) of the GATT 1994 are applicable to "illicit trade" would be merely theoretical and would be neither necessary nor of practical use in achieving a satisfactory settlement of the matter placed before this Panel. Consequently, it is not necessary for the Panel to issue a finding on whether or not the obligations of Article II:1 of the GATT 1994 can be extended to "illicit trade".

7.109. That having been said, the Panel notes that Colombia has stated that the compound tariff could be useful in discouraging the underinvoicing of imports and the use of such practices for money laundering purposes. In the Panel's view, this statement is related to Colombia's argument that the compound tariff is in this respect a measure necessary to protect public morals or to secure compliance with rules against money laundering. Such arguments are therefore not the same as asserting that imports at prices lower than the thresholds provided for in Decree No. 456 necessarily constitute "illicit trade".

7.110. The Panel is aware that the GATT 1994 is structured in such a way as to strike an effective balance between obligations under the Agreement, on the one hand, and the right of Members to promote and apply measures seeking to achieve legitimate public policy objectives, on the other. The GATT 1994, and other WTO agreements, thus contain exceptions to the obligations they contain, which may be invoked if there is any legitimate reason justifying the possible inconsistency of a measure with the obligations enshrined in the agreements.[232]

7.111. As was indicated above, in the specific case of the GATT 1994, the exceptions may include, *inter alia*: measures necessary to protect public morals; measures necessary to protect human, animal or plant life or health; measures relating to the conservation of exhaustible natural resources; measures necessary to secure compliance with laws or regulations consistent with the GATT 1994; and measures necessary to protect a Member's essential security interests. In the Panel's opinion, it does not appear that the grounds invoked by Colombia in defence of the measure at issue should be considered in the analysis of compliance with the specific obligations in Article II of the GATT 1994.[233]

[229] Decree No. 074 (Exhibits PAN-2 and COL-16), Article 3, para. 1; Decree No. 456 (Exhibits PAN-3 and COL-17), Article 5, paragraph, point. 1.

[230] Decree No. 456 (Exhibits PAN-3 and COL-17), Article 4.

[231] Panama's response to Panel question No. 89; Colombia's response to Panel question No. 89, paras. 30-32.

[232] See Appellate Body Report, *US – Clove Cigarettes*, paras. 96 and 109.

[233] See Appellate Body Report *EC – Seal Products*, para. 5.125.

7.112. For the foregoing reasons, the Panel could, if necessary, examine the public policy arguments advanced by Colombia in relation to the import of goods at prices below certain thresholds in the light of the defences invoked by Colombia under Article XX of the GATT 1994.

7.3.5 The standard of proof

7.3.5.1 Main arguments of the parties

7.113. Colombia claims that Panama has not established a *prima facie* case because it has only put forward hypothetical examples and has not provided any evidence to show "that apparel and footwear are being imported at prices which violate the levels bound by Colombia".[234] In support of its argument, Colombia points out that in *Argentina – Textiles and Apparel*, the Panel and the Appellate Body both founded their conclusions and recommendations on "actual examples and rather more than 95 pages of customs documents showing that the bound level was systematically breached by Argentina".[235] Colombia states that Panama has not "presented evidence showing that the bound levels were being violated for goods declared at actual and not hypothetical prices".[236]

7.114. Panama, for its part, argues that its complaint in this dispute focuses on "the design, structure and architecture of the compound tariff" and that, consequently, "it does not have the burden of proving adverse economic effects or presenting actual cases".[237] Nevertheless, Panama also refers to the import documents submitted as Exhibits PAN-18 and PAN-19, which, in its opinion, show "Colombia's application of the tariff above its bound level".[238]

7.3.5.2 Analysis by the Panel

7.115. With regard to this aspect, the disagreement between the parties concerns what evidential elements Panama has to submit in order to establish a *prima facie* case that the measure is inconsistent with Article II:1(a) and Article II:1(b), first sentence, of the GATT 1994. It is relevant to note that, as has been explained by the Appellate Body, "it is well established" that measures containing rules or norms can be challenged "as such" "independently of whether or how those rules or norms are applied in particular instances".[239]

7.116. In cases where a measure is challenged "as such" (i.e. independently of any application), the complaining party bears the burden of introducing evidence as to the scope and meaning of the measure in order to substantiate its assertion.[240] As the Appellate Body pointed out, "in some cases the text of the relevant legislation may suffice to clarify the scope and meaning of the relevant legal instruments".[241] In other cases the complaining party will also need to support its understanding of the scope and meaning of the legal instruments challenged with "evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars".[242] In any event, the complaining party has to prove that the measure challenged "not only in a particular instance

[234] Colombia's opening statement at the first meeting of the Panel, para. 60. See also first written submission, para. 68; opening statement at the first meeting of the Panel, paras. 61 and 62; response to Panel question No. 1, para. 2; second written submission, para. 18; and comments on Panama's response to Panel question No. 91, para. 12.

[235] Colombia's response to Panel question No. 1, para. 2. See also second written submission, para. 19.

[236] Colombia's opening statement at the first meeting of the Panel, para. 60.

[237] Panama's second written submission, para. 2.3. See also first written submission, para. 5.3.

[238] Panama's response to Panel question No. 23. See also second written submission, para. 2.3.

[239] Appellate Body Reports, *Argentina – Import Measures*, para. 5.101. See also Appellate Body Report, *US – 1916 Act*, para. 61. The Appellate Body indicated that the possibility of challenging measures "as such" independently of any application is part of the GATT and WTO *acquis*. The panel in *US - Superfund* stated that "the very existence of mandatory legislation providing for an internal tax, without it being applied to a particular imported product, should be regarded as falling within the scope of Article III:2, first sentence". GATT Panel Report, *US – Superfund*, para. 5.2.2.

[240] Appellate Body Report, *US – Carbon Steel*, para. 157.

[241] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.100 (referring to Appellate Body Report *US – Carbon Steel*, para. 157).

[242] Appellate Body Report, *US – Carbon Steel*, para. 157. See also Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.100; *US – Shrimp II (Viet Nam)*, para. 4.32; and *US – Carbon Steel (India)*, para. 4.446.

that has occurred, but in future situations as well … will necessarily be inconsistent with that Member's WTO obligations".[243]

7.117. In *US – FSC (Article 21.5 – EC)*, the Appellate Body noted that the examination of whether a measure involves "less favourable treatment" of imported products within the meaning of Article III:4 of the GATT 1994 must be grounded in close scrutiny of the fundamental thrust and effect of the measure itself. "This examination cannot rest on simple assertion, but must be founded on a careful analysis of the contested measure and of its implications in the marketplace. At the same time, however, the examination need not be based on the *actual effects* of the contested measure in the marketplace."[244] In *EC – IT Products*, the Panel referred to this explanation by the Appellate Body and considered that the same held true for purposes of its analysis with respect to Article II:1(a) of the GATT 1994.[245]

7.118. In the instant case, Panama has explained its understanding of the structure, design and architecture of the compound tariff. It has also presented arithmetical calculations in an attempt to show how the compound tariff affects the duties payable on imports of the goods subject to the measure. As a factual issue, Colombia has not objected to the description of the operation or the meaning and scope of the compound tariff's various formulas submitted by Panama in the course of the Panel's proceedings.[246]

7.119. Colombia states that the panel and the Appellate Body in *Argentina – Textiles and Apparel* founded their conclusions and recommendations on "actual examples and rather more than 95 pages of customs documents showing that the bound tariff was systematically breached".[247] In that dispute, the issue was whether the minimum specific import duties (DIEM) imposed by Argentina were inconsistent with Article II of the GATT 1994.[248] In its defence, Argentina argued that the United States' allegations were "too general, hypothetical and theoretical" and that the panel should not consider "such 'hypothetical' situations without evidence of specific transactions where breaches occurred".[249]

7.120. In *Argentina – Textiles and Apparel*, the Panel observed that GATT/WTO case law made it clear that a mandatory measure could "be brought before a panel, even if such an adopted measure is not yet in effect".[250] On that basis, it analysed "the nature" of the minimum specific duty system and concluded that the United States had "established a presumption that the very nature" of the measure at issue "violate[d] the provisions of Article II of GATT"[251] inasmuch as "in many cases" the specific duties at issue "[would] necessarily result in a duty in excess" of the level bound in Argentina's Schedule of Concessions.[252] The Panel subsequently examined an "average import price" for certain products in relation to the total amount of duties collected, which in the Panel's opinion was evidence of "a sufficient number of transactions which were subject to duties" above the bound rate.[253] Lastly, the Panel examined "approximately 90 invoices and customs documents" in which the bound level of 35% *ad valorem* had been exceeded.[254] In the light of this

[243] Appellate Body Report - *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.

[244] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215. (emphasis original; footnote omitted)

[245] Panel Report, *EC – IT Products*, para. 7.762.

[246] In response to the Panel's question asking Colombia to comment on the relevance and usefulness of the break-even prices put forward by Panama in its first written submission, Colombia stated that "the parameters of Decree No. 456 represent the legislative ceiling of the measure" and that such "legislative caps … prevent licit trade entering the country from being subject to a tariff higher than the tariff bound by Colombia" (Colombia, response to Panel question No. 93, para. 36). Colombia also indicated that "Panama [had] not presented any proof of imports at prices below the thresholds [or that] imports at prices below the thresholds reflect market conditions and are not imports for the purpose of laundering money" (Colombia's response to Panel question No. 93, para. 37).

[247] Colombia's first written submission, para. 69. See also response to Panel question No. 1, para. 2; and second written submission, para. 19.

[248] Panel Report, *Argentina – Textiles and Apparel*, para. 2.6; Appellate Body Report, *Argentina – Textiles and Apparel*, para. 49.

[249] Panel Report, *Argentina – Textiles and Apparel*, para. 6.42.

[250] Ibid. para. 6.45.

[251] Ibid. para. 6.47.

[252] Ibid. para. 6.43.

[253] Ibid. para. 6.51.

[254] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 77. See also Panel Report, *Argentina – Textiles and Apparel*, paras. 6.52-6.63.

analysis, the Panel concluded that the United States had provided sufficient evidence that Argentina had effectively imposed duties on imports above its bound rate and that "in any case … the very nature of the minimum specific duty system imposed … will inevitably lead, in certain instances, to the imposition of duties above" the rate bound in the Schedule of Concessions.[255]

7.121. The Appellate Body, for its part, found in that dispute that, for a certain range of import prices (those below the break-even price), the "structure" and "design" of the measure at issue resulted in specific duties which exceeded the tariff bound in Argentina's Schedule of Concessions.[256] In arriving at this conclusion, the Appellate Body did not have recourse to empirical evidence on the application of the measure in order to confirm its finding that the measure at issue violated Article II of the GATT 1994.

7.122. Accordingly, in *Argentina – Textiles and Apparel,* in reaching a finding of inconsistency with Article II:1 of the GATT 1994, the panel and the Appellate Body based themselves on the "very nature" (in the words of the panel) or the "structure and design" (in the words of the Appellate Body) of the measure at issue. The empirical evidence on the application of the measure examined by the Panel did not constitute indispensable evidence for its analysis but rather served to confirm the previous conclusions regarding the "nature" of the measure.

7.123. In the context of the present dispute, the Panel understands that the meaning and scope of the measure at issue (i.e. the compound tariff) can be determined from the actual text of Decree No. 456, in addition to being confirmed by the additional explanations furnished by the parties. As a factual matter, Colombia has not rejected Panama's description of the operation, meaning and scope of the various examples of the compound tariff. Decree No. 456 is sufficient in itself to conduct an analysis of whether Panama has established a *prima facie* case that the compound tariff is inconsistent with Article II:1(a) and Article II:1(b), first sentence, of the GATT 1994.

7.124. The Panel also notes that, in its responses to questions after the first meeting, Panama submitted Exhibits PAN-18 and PAN-19, which contain two "import documents for the products affected" by Decree No. 456.[257] Colombia, for its part, challenged these items of evidence because one of them was illegible; another contained information which "gives rise to doubts concerning the goods"[258]; and, in any event, information essential to enabling Colombia to verify the truth of the two items of evidence had been expunged.[259] In the light of the Panel's finding that the text of Decree No. 456 is sufficient in itself to proceed with the examination of inconsistency with Article II:1(a) and Article II:1(b), first sentence, of the GATT 1994, the Panel does not consider it necessary to examine the relevance of Exhibits PAN-18 and PAN-19.

7.3.6 The question of whether the compound tariff is inconsistent with Article II:1(b), first sentence, of the GATT 1994

7.125. In the light of the arguments put forward by the parties, this dispute requires examination of whether the compound tariff exceeds the levels bound in Colombia's Schedule of Concessions with respect to the relevant products and, consequently, whether it is inconsistent with the obligations contained in Article II:1(b), first sentence, of the GATT 1994.

7.126. Pursuant to Article II of the GATT 1994, entitled "Schedules of Concessions", Members have undertaken commitments on access to their respective markets by establishing specific obligations in their Schedules annexed to the WTO Agreement. Article II:1(a) requires Members to "accord to the commerce of the other [Members] treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule …". Article II:1(b), first sentence, on the other hand, provides that "the products of territories of other [Members] shall, on their importation … be exempt from ordinary customs duties in excess of those set forth and provided [in the Schedule]". Both provisions refer to the "Schedule", that is, the "appropriate Schedule

[255] Panel Report, *Argentina – Textiles and Apparel*, para. 6.65.
[256] Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 53, 55 and 62.
[257] Panama's response to Panel question No. 23; second written submission para. 2.3; opening statement at the second meeting of the Panel, para. 4; import declarations (Exhibits PAN-18 and PAN-19).
[258] Colombia's second written submission, para. 25.
[259] Ibid. paras. 20-25. See also closing statement at the second meeting of the Panel, para. 10; and comments on Panama's response to Panel question No. 158, para. 77.

annexed" to the GATT 1994, in which WTO Members have determined their specific commitments with regard to trade and the import of goods. These Schedules are "an integral part of Part I" of the GATT 1994, as provided in Article II:7 thereof, and in the WTO Agreement.[260] The commitments provided for therein are thus part of the terms of the treaty, in this case the GATT 1994.[261]

7.127. The preamble to the GATT 1994 affords contextual support regarding the importance to the multilateral trading system of the tariff concessions to which each Member has committed itself in its Schedule of Concessions. In this connection, the Panel agrees with Colombia that the preamble to the GATT 1994 reflects the recognition by the Contracting Parties to the GATT, and currently the Members of the WTO, that their trade and economic relations "should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income".[262] The preamble to the GATT 1994 also expresses the "desire" of WTO Members that the contribution to these objectives should be made effective "by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce".[263] In the Panel's opinion, this means that the commitments agreed under the WTO agreements are the mechanism by which the Members have agreed to promote goals and objectives such as raising standards of living, ensuring full employment and increasing the population's real income.

7.128. In the same vein, Articles II:1(a) and II:1(b), first sentence, of the GATT 1994 reflect the result of the successive negotiations concluded by the GATT Contracting Parties and, more recently, by the WTO Members, which led to specific commitments on market access through the establishment of bound levels for ordinary customs duties. As a result of these negotiations, each Member agrees to set its bound tariffs at a certain level, in the expectation that the other Members will also comply with their respective tariff commitments. As the Appellate Body has indicated, a basic object and purpose of the GATT 1994, as reflected in Article II, is "to preserve the value of tariff concessions negotiated by a Member with its trading partners, and bound in that Member's Schedule".[264] Conversely, failure to comply with the commitments undertaken in a Member's Schedule could upset the balance of concessions negotiated among WTO Members.[265] In this connection, the Appellate Body warned that "the security and predictability of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade' is an object and purpose of the *WTO Agreement*, generally, as well as of the GATT 1994".[266]

7.129. The obligations contained in Article II:1(a) and II:1(b), first sentence, are complementary and must be interpreted in harmony. As stated above, Article II:1(a) refers to each Member's obligation to accord to the "commerce" of other Members treatment no less favourable than that provided for in the importing Member's Schedule of Concessions. Article II:1(b), first sentence, on the other hand, sets out the obligation to exempt products of other Members, "on their importation … from ordinary customs duties" in excess of those set forth in the Schedule of Concessions.[267] This means, therefore, that the commitments established in a Member's Schedule of Concessions must be observed in respect of *commerce* in a product for which concessions have been made,

[260] Appellate Body Reports, *EC – Computer Equipment*, para. 84; and *EC – Chicken Cuts*, para. 145. See also Panel Reports, *EC – IT Products,* para. 7.16.

[261] Appellate Body Report, *EC – Computer Equipment*, para. 84.

[262] Colombia's first written submission, para. 60.

[263] The text of the preamble to the WTO Agreement employs language very similar to that of the GATT 1994, indicating that the parties to the Agreement recognize that "their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services" by "entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations". By virtue of the foregoing, WTO Members resolved "therefore … to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations".

[264] Appellate Body Report, Argentina, *Textiles and Apparel*, para. 47.

[265] Ibid.

[266] Appellate Body Report *EC – Computer Equipment*, para. 82 (referring to Panel Report, *EC - Computer Equipment*, para. 8.25). See also Appellate Body Report, *EC – Chicken Cuts*, para. 243.

[267] Appellate Body Report, *India – Additional Import Duties*, para. 157.

pursuant to Article II:1(a), and in respect of products *imported* from another Member, pursuant to Article II:1(b), first sentence.

7.130. Panama claims that, in some instances it has identified, the compound tariff is inconsistent with Article II:1(b), first sentence, of the GATT 1994. An analysis of whether the compound tariff is inconsistent with Article II:1(b), first sentence, of the GATT 1994 requires that the following be determined:

a. The treatment accorded to imports of the products concerned in Colombia's Schedule of Concessions;

b. The treatment accorded to imports of the products concerned under the compound tariff; and

c. Whether the compound tariff gives rise to the imposition of ordinary customs duties on the products concerned in excess of those provided for in Colombia's Schedule of Concessions.[268]

7.3.6.1 The treatment accorded to the products concerned in Colombia's Schedule of Concessions

7.131. Panama challenges the treatment accorded by Colombia, by means of the compound tariff, to imports of goods classified in Chapters 61, 62, 63 and 64 of Colombia's Customs Tariff (except for heading 64.06 but including tariff line 6406.10.00.00).

7.132. In Exhibit PAN-4, Panama submitted a table showing the tariff rates bound by Colombia, broken down by subheading.[269] Panama states that, with regard to Chapters 61, 62 and 63, all the subheadings except one (i.e. 294 subheadings) have a bound tariff of 40% *ad valorem* in Colombia's Schedule of Concessions. The sole exception is subheading 6305.32 (sacks and bags, of a kind used for the packing of goods, of man-made textile materials, flexible intermediate bulk containers), which has a 35% *ad valorem* bound tariff. With regard to Chapter 64 (except for heading 64.06), Panama points out that 24 subheadings have a bound tariff of 35% *ad valorem*, while subheading 6405.20 (other footwear with uppers of textile materials) has a bound tariff of 40% *ad valorem*. Panama also points out that the bound level for products of tariff line 6406.10.00.00 is 40% *ad valorem*.[270] Colombia, for its part, has not disputed Panama's description of the bound tariffs established in Colombia's Schedule of Concessions.

7.133. The following table summarizes Colombia's bound duties on the goods concerned, according to Colombia's Schedule LXXVI:

Bound level	Product
40% *ad valorem*	All subheadings of Chapters 61, 62 and 63, except for those in subheading 6305.32
	Subheading 6405.20
	Subheading 6406.10
35% *ad valorem*	Headings 64.01, 64.02, 64.03, 64.04 and 64.05, except for subheading 6405.20
	Subheading 6305.32

7.3.6.2 The treatment accorded to the products concerned pursuant to the measure at issue

7.134. Once the bound levels for the products concerned have been identified in Colombia's Schedule of Concessions, the next step is to determine the treatment accorded by Colombia, by means of the compound tariff, to imports of products classified in Chapters 61, 62, 63 and 64 of its Customs Tariff (except for heading 64.06 but including tariff line 6406.10.00.00).

[268] Panel Reports, *EC – IT Products*, para. 7.100; *EC – Chicken Cuts (Brazil)*, para. 7.65; and *EC – Chicken Cuts (Thailand)*, para. 7.65.

[269] Illustrative table of Colombia's bound tariff (Exhibit PAN-4).

[270] Panama's first written submission, para. 4.13.

7.135. In the preceding paragraphs, the Panel described the various circumstances in which the compound tariff is applied. It should be recalled that the compound tariff makes the goods concerned subject to the following tariff treatment:

7.136. With regard to the import of goods classified in Chapters 61, 62, 63 and tariff line 6406.10.00.00:

a. Tariff consisting of an *ad valorem* component of 10% plus a specific component of US$5/kg when the f.o.b. import prices are US$10/kg or less;

b. Tariff consisting of an *ad valorem* component of 10% plus a specific component of US$3/kg when the f.o.b. import prices exceed US$10/kg; and

c. Tariff consisting of an *ad valorem* component of 10% plus a specific component of US$5/kg when some goods under the same subheading are imported at f.o.b. import prices lower than US$10/kg and others at higher prices.

7.137. With regard to the import of goods classified in Chapter 64, except for heading 64.06:

a. Tariff consisting of an *ad valorem* component of 10% plus a specific component of US$5/pair when the f.o.b. import prices are US$7/pair or less;

b. Tariff consisting of an *ad valorem* component of 10% plus a specific component of US$1.75/pair when the f.o.b. import prices exceed US$7/pair; and

c. Tariff consisting of an *ad valorem* component of 10% plus a specific component of US$5/pair when some goods under the same subheading are imported at f.o.b. import prices lower than US$7/pair and others at higher prices.

7.3.6.3 The question of whether the compound tariff gives rise to the imposition of ordinary customs duties in excess of those provided for in Colombia's Schedule of Concessions

7.138. In the preceding paragraphs, the Panel identified the levels bound in Colombia's Schedule of Concessions in respect of the products concerned, as well as the tariff treatment to which imports of these products are made subject by means of the contested compound tariff. The next step is therefore to determine whether the compound tariff gives rise to the imposition of ordinary customs duties higher than those provided for in Colombia's Schedule of Concessions. To that end, the Panel will examine whether: (i) the duties provided for by the measure at issue constitute "ordinary customs duties" pursuant to Article II:1(b), first sentence, and (ii) such "ordinary customs duties" exceed the bound levels to which Colombia committed itself in its Schedule of Concessions.

7.3.6.3.1 Do the different forms of the compound tariff constitute "ordinary customs duties"?

7.139. For the obligation under Article II:1(b), first sentence, to be applicable it must be determined whether the compound tariff, in the various instances described, constitutes an "ordinary customs duty". In this connection, the Appellate Body has held that, for a charge to constitute an ordinary customs duty, "the *obligation* to pay it must accrue at the moment and by virtue of or, in the words of Article II:1(b), 'on', importation" of the products.[271]

7.140. The term "ordinary customs duties" has been compared to the term "all other duties or charges of any kind" used in the second sentence of Article II:1(b). The Appellate Body has indicated that these two types of duty may, or may not, "pertain to the same event of importation" because while both concepts relate to duties or charges applied "on the importation", the "other duties or charges" in Article II:1(b), second sentence, also refer to duties or charges "in connection with the importation".[272] The Appellate Body also explained that because the "other

[271] Appellate Body Reports, *China – Auto Parts*, para. 158. (emphasis original)
[272] See Appellate Body Report, *India – Additional Import Duties*, para. 157.

duties or charges" in the second sentence of Article II:1(b) may be "of any kind", they may be of a similar kind to OCDs [ordinary customs duties]" or "different".[273] Consequently, the distinction between these two types of duties or charges does not necessarily depend on their "kind" or nature. The panel in *Dominican Republic – Safeguard Measures* considered that "a 'derecho de aduana propiamente dicho' [ordinary customs duty] would be a duty that possesses the essential attributes or qualities of customs duties"[274], that is to say, the term "refers [only] to …'customs duties' in the strict sense of the term (*stricto sensu*)" and not to "possible extraordinary or exceptional duties collected in customs".[275]

7.141. In the case before us, the following facts are not disputed. The compound tariff has been established pursuant to Articles 1 and 2 of Decree No. 456 "for the import of products classified" in Chapters 61, 62, 63 and 64, except for heading 64.06 but including the tariff line 6406.10.00.00.[276] Decree No. 456 modifies the tariff regime established in Colombia's Customs Tariff, that is, the regime which normally establishes ordinary customs duties in Colombia.[277] As long as Decree No. 456 remains in force, the customs duty payable on the import of goods covered by Chapters 61, 62, 63 and 64 (except for heading 64.06 but including the tariff line 6406.10.00.00) shall be the compound tariff established in the Decree. The obligation to pay the compound tariff arises at the moment and by virtue of the importation. All of the foregoing suggests that the compound tariff is similar in nature to the tariff provided for in the Customs Tariff for the products concerned. Lastly, there is no evidence whatsoever that the compound tariff forms part of possible extraordinary or exceptional duties collected in customs or that the compound tariff lacks the essential attributes or qualities of duties collected in customs.

7.142. In any event, Panama has stated and Colombia has not denied that the duties resulting from the compound tariff are "ordinary customs duties" for the purposes of Article II:1(b), first sentence, of the GATT 1994.

7.143. The Panel therefore concludes that the compound tariff constitutes an "ordinary customs duty" for the purposes of Article II:1(b), first sentence, of the GATT 1994.

7.3.6.3.2 The question of whether the compound tariff exceeds the levels bound in Colombia's Schedule of Concessions

7.144. Article II:1(b), first sentence, of the GATT 1994 lays down the obligation to exempt the products of other Members, on their importation, from ordinary customs duties in excess of those set forth and provided in the importing Member's Schedule of Concessions.[278] Panama does not challenge the fact that Colombia, despite having established tariff commitments in its Schedule of Concessions in *ad valorem* terms, has adopted the modality of a compound tariff (which consists of an *ad valorem* component and another specific component).[279] Panama contends, however, that in certain cases which it has identified[280], the *ad valorem* equivalent of the compound tariff exceeds the bound levels established in Colombia's Schedule of Concessions.

7.145. The examination of a measure's consistency with Article II:1(b), first sentence, of the GATT 1994 necessarily requires a comparison between the tariff treatment accorded by the

[273] Ibid.

[274] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.82.

[275] Ibid. para. 7.85. Along the same lines, the Panel in *Peru – Agricultural Products* found that "the concept of 'other duties or charges of any kind' corresponds to a residual category". Hence, a measure will be a "duty or charge" pursuant to the second sentence of Article II:1(b) provided that it is not *inter alia* an ordinary customs duty under the terms of Article II:1(b), first sentence, of the GATT 1994. Panel Report, *Peru – Agricultural Products*, para. 7.408.

[276] Decree No. 456 (Exhibits PAN-3 and COL-17), Articles 1 and 2.

[277] Ibid. Article 7.

[278] Article II:1(b) of the GATT 1994 does not attempt to eliminate the imposition of "ordinary customs duties" on imported products; rather, the purpose of Article II:1(b), first sentence, is that Members should not apply to imported products customs duties in excess of the rates bound in their respective Schedules of Concessions. The Appellate Body has stated that WTO Members have the right to impose ordinary customs duties (also called "tariffs" by the Appellate Body) and that these are not "somehow unfair or prejudicial" provided that they do not exceed the bound rates. Moreover, under the GATT 1994, tariffs are "legitimate instruments to accomplish certain trade policy or other objectives such as to generate fiscal revenue". Appellate Body Report, *India – Additional Import Duties*, para. 159.

[279] Panama's first written submission, para. 1.4.

[280] Para. 7.46. above.

challenged measure to imports of the products concerned, on the one hand, and the bound level established in the responding Member's Schedule of Concessions, on the other. Where both the tariff provided for in the measure at issue and the tariff bound in the Schedule are expressed in the same terms (for example, in *ad valorem* terms or in specific terms), the comparison may be straightforward. This dispute, however, has the complex feature that the level bound in Colombia's Schedule of Concessions is expressed in *ad valorem* terms (35% or 40% depending on the goods concerned), whereas the compound tariff challenged by Panama contains an *ad valorem* component (10% in both cases) plus a specific component which varies according to the customs classification of the goods and their import price.

7.146. The Appellate Body has explained in this connection that "for any specific duty, there is an *ad valorem* equivalent deduced from the ratio of the absolute amount collected to the price of the imported product".[281] When the duty in question consists of a specific tariff and the level bound in the Member's Schedule is expressed in *ad valorem* terms, there is a "break-even price" by virtue of which the *ad valorem* equivalent of the specific duty at issue is equal to the bound level expressed in *ad valorem* terms. Any import price below the break-even price will cause the *ad valorem* equivalent of the specific duty to exceed the bound tariff, whereas any import price above the break-even price will result in the *ad valorem* equivalent of the specific duty being lower than the bound rate.[282] It is also possible to estimate a "break-even price" when, as in the present case, the tariff consists of an *ad valorem* and a specific component.

7.147. An example will usefully elucidate the concept of the "break-even price". Let us assume that the bound tariff for a product is 15% *ad valorem* and the specific tariff is US$1.50/unit. If the product is imported at a price of US$10 per unit, the applicable specific tariff (US$1.50) will be precisely 15% of the value of the good; in other words, the *ad valorem* equivalent of the specific duty would be the same as the bound tariff. In this example, therefore, the "break-even price" is US$10.[283] However, if a product is imported at US$9.99 (i.e. below the break-even price), the *ad valorem* equivalent of the specific duty of US$1.50 would be 15.01% of the import price, which would exceed the bound level. Conversely, if the import price were US$10.01 (i.e. higher than the break-even price), the specific duty of US$1.50 would be 14.98% of the product's value in *ad valorem* terms, that is, lower than the bound level.[284]

7.148. In the present dispute, Panama has submitted a series of "break-even prices" calculated in relation to the various compound tariff scenarios in order to show that the compound tariff necessarily leads to ordinary customs duties higher than the corresponding bound level. Colombia, for its part, did not put forward any arguments seeking to rebut Panama's calculations.[285] In this context, it is necessary to analyse the compound tariff and assess whether the levy imposed by the measure at issue on imports of the products concerned exceeds the bound levels established in Colombia's Schedule of Concessions. More specifically, the Panel will review Panama's arithmetical calculations and verify whether they are of value in resolving this dispute.

7.3.6.3.2.1 Products classified in Chapters 61, 62, 63 and tariff line 6406.10.00.00

7.149. With regard to the tariff treatment of imports of products classified in Chapters 61, 62, 63 and tariff line 6406.10.00.00, the tariff bound in Colombia's Schedule of Concessions is 40% *ad valorem*, except for subheading 6305.32, for which the bound rate is set at 35% *ad valorem*. For these products, Decree No. 456 establishes three scenarios, which are examined below.

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[281] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 50.

[282] Ibid. para. 53. In that dispute, the customs authority calculated a representative international price for each tariff category, which was multiplied by the bound rate of 35% *ad valorem*. The result, known as the "minimum specific import duty" (or "DIEM"), worked as a specific tariff. The customs authorities thus had to collect either the result of this operation or the *ad valorem* rate on the value of the product, whichever was higher. Panel Report, *Argentina – Textiles and Apparel*, para. 2.6.

[283] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 50 (where the Appellate Body gave a similar example to explain "the meaning and implications" of the measure at issue in that dispute).

[284] The lower the import price, the greater the increase in the *ad valorem* equivalent of the specific tariff; conversely, the higher the import price, the greater the decrease in the *ad valorem* equivalent of the compound tariff.

[285] In fact, Colombia has argued that the import price thresholds for textiles and apparel (US$10/kg) and for footwear (US$7/pair) constitute "legislative caps which prevent tariffs higher than Colombia's bound rate from being applied to lawful trade entering the country". Colombia's response to Panel question No. 93, para. 36.

7.150. First, goods with an import price of US$10/kg or less are subject to a compound tariff consisting of an *ad valorem* component of 10% plus a specific component of US$5/kg.

7.151. With regard to products for which the bound rate is 40% *ad valorem*, Panama has put forward a "break-even price" of US$16.67/kg.[286] The compound tariff applicable to imports at a price of US$16.67/kg would be US$6.67 (US$1.67 plus US$5), i.e. the equivalent of 40% of the price.

7.152. With regard to subheading 6305.32, for which the bound rate is 35% *ad valorem*, the break-even price indicated by Panama is US$20/kg.[287] The compound tariff applicable to imports at a price of US$20/kg would be US$7/kg (US$2 plus US$5), which corresponds to 35% of the price of US$20/kg.

7.153. The Panel considers that the calculation of the break-even prices of US$16.67/kg and US$20/kg is correct for products for which the bound tariff is 40% and 35% *ad valorem*, respectively. However, the compound tariff of 10% *ad valorem* plus US$5/kg only applies to imports entering at a price of US$10/kg or less. Products subject to this form of the compound tariff will, therefore, necessarily have prices lower than the break-even prices of US$16.67/kg and US$20/kg for goods with bindings of 40% and 35% *ad valorem*, respectively. This means that this variant of the compound tariff will always result in the application of an *ad valorem* equivalent higher than the bound levels of 35% and 40% *ad valorem* for the products concerned. For example, if the import price were US$10/kg, the compound tariff payable would be US$6/kg (US$1 plus US$5), which is equivalent to 60% *ad valorem* of the import price. If the import price were US$8/kg the compound tariff payable would be US$5.80/kg (US$0.80 plus US$5), corresponding to 72.5% *ad valorem* of the import price. If the import price were US$5/kg, the compound tariff payable would be US$5.50/kg (US$0.50 plus US$5), which is equivalent to 110% of the import price.

7.154. To conclude, the compound tariff of 10% *ad valorem*, plus US$5/kg for goods classified in Chapters 61, 62, 63 and tariff line 6406.10.00.00 whose import price is US$10/kg or less *necessarily* exceeds the levels of 40% and 35% *ad valorem* bound in Colombia's Schedule of Concessions.

7.155. Secondly, goods whose import price exceeds US$10/kg are subject to a compound tariff consisting of an *ad valorem* component of 10% plus a specific component of US$3/kg.

7.156. With regard to the subheadings for which the bound level is 40% *ad valorem*, Panama has submitted a break-even price of US$10/kg.[288] The calculation of this break-even price is correct, as the compound tariff applicable to an import with a price of US$10/kg would be US$4/kg (US$1 plus US$3), i.e. the *ad valorem* equivalent of 40% of the price. As the compound tariff of 10% *ad valorem* plus US$3/kg only applies to imports at prices exceeding US$10/kg, that is, prices higher than the break-even price, this example of the compound tariff would *never* exceed the 40% *ad valorem* tariff bound in Colombia's Schedule of Concessions.

7.157. As regards goods classified under subheading 6305.32, the bound level is 35% *ad valorem*. Panama has presented a break-even price of US$12/kg.[289] The calculation of this break-even price is correct, since with an import price of US$12/kg the compound tariff payable would be US$4.20/kg (US$1.20 plus US$3), i.e. the equivalent of 35% *ad valorem* of the price of US$12/kg.

7.158. The break-even price of US$12/kg indicates that the compound tariff of 10% *ad valorem* plus US$3/kg is higher than the rate bound in Colombia's Schedule of Concessions for goods included in subheading 6305.32 when they enter at import prices above US$10/kg but below US$12/kg. By way of illustration, if the import price is US$11.95/kg, the compound tariff would be US$4.195/kg (US$1.195 plus US$3), which is equivalent to 35.10% of the import price; if the import price is US$11/kg, the compound tariff would be US$4.10/kg (US$1.10 plus US$3), which is equivalent to 37.27% of the import price; likewise, if the import price is US$10.05/kg, the

[286] Panama's first written submission, para. 4.21.
[287] Ibid. para.4.25.
[288] Panama's first written submission, para. 4.28.
[289] Ibid. para. 4.31.

compound tariff would be US$4.005/kg (US$1.005 plus US$3), which is equivalent to 39.85% of the import price.

7.159. In conclusion, the compound tariff of 10% *ad valorem* plus US$3/kg for goods classified in subheading 6305.32 at import prices above US$10/kg *but below* US$12/kg *necessarily* exceeds the rate of 35% *ad valorem* bound in Colombia's Schedule of Concessions. However, if these goods are imported at a price of US$12/kg or more, the bound rate of 35% *ad valorem* would not be exceeded.

7.160. Thirdly, in the case of products imported under the same subheading, some at prices below and others at prices above the threshold of US$10/kg, the compound tariff applicable to all the goods is 10% *ad valorem* plus US$5/kg.

7.161. In paragraph 7.153 of this Report, the Panel indicated that the break-even price is US$16.67/kg for imports of goods under Chapters 61, 62, 63 and tariff line 6406.10.00.00 (for which the compound tariff is 10% *ad valorem* plus US$5/kg and the bound rate is 40% *ad valorem*) and US$20/kg for goods imported under subheading 6305.32 (for which the compound tariff is 10% *ad valorem* plus US$5/kg and the bound rate is 35% *ad valorem*). Imports of goods at prices below the corresponding break-even prices are therefore necessarily subject to the imposition of a tariff higher than the bound rate.

7.162. It should be noted that under this compound tariff scenario there will always be at least some goods with import prices below the break-even price, since this scenario requires that at least some of the goods be imported at prices below US$10/kg, i.e. below the break-even price of US$16.67/kg or US$20/kg.

7.163. This being the case, when some imports under the same subheading are declared at prices below and others at prices above the threshold of US$10/kg, the compound tariff of 10% *ad valorem* plus US$5/kg for goods in Chapters 61, 62 and 63 or tariff line 6406.10.00.00 *necessarily* exceeds the bound levels of 40% and 35% *ad valorem* for those goods whose import prices are lower than US$16.67/kg and US$20/kg, respectively.

7.164. In the light of the foregoing, the following instances of the compound tariff applicable to imports of goods classified in Chapters 61, 62, 63 and tariff line 6406.10.00.00 exceed the level bound in Colombia's Schedule of Concessions:

a. The tariff consisting of an *ad valorem* component of 10% plus a specific component of US$5/kg, when the f.o.b. import price is US$10/kg or less;

b. The tariff consisting of an *ad valorem* component of 10% plus a specific component of US$5/kg, in the case of products imported under the same subheading, some at f.o.b. prices above and others at f.o.b. prices below the threshold of US$10/kg.

c. With regard to subheading 6305.32, the tariff consisting of an *ad valorem* component of 10% plus a specific component of US$3/kg, when the f.o.b. import price is higher than US$10/kg but lower than US$12/kg.

7.165. On the other hand, the compound tariff consisting of an *ad valorem* component of 10% plus a specific component of US$3/kg, applicable to goods with f.o.b. import prices above US$10/kg, does not exceed the level bound in Colombia's Schedule of Concessions (except, as discussed earlier, in the case of imports under subheading 6305.32 at prices higher than US$10/kg but lower than US$12/kg).

7.3.6.3.2.2 Products classified in Chapter 64, except for heading 64.06

7.166. With regard to the tariff treatment of imports of products classified under the various tariff headings of Chapter 64 subject to the measure at issue (except for heading 64.06), the compound tariff also provides for three variants, which are discussed below. The bound tariff for these products in Colombia's Schedule of Concessions is 35% *ad valorem*, except in the case of subheading 6405.20, for which the bound rate is 40% *ad valorem*.

7.167. First, goods with an import price of US$7/pair or less are subject to a compound tariff consisting of an *ad valorem* component of 10% plus a specific component of US$5/pair.

7.168. With regard to the subheadings in Chapter 64 for which the bound level is 35% *ad valorem*, Panama has presented a break-even price of US$20/pair.[290] In fact, an import price of US$20/pair results in the imposition of a compound tariff of US$7/pair (US$2 plus US$5), which is equivalent to 35% of that price. Consequently, a compound tariff of 10% *ad valorem* plus US$5/pair applied to any price below US$20/pair is higher than the bound level of 35% *ad valorem*. Because this example of the compound tariff applies to prices of US$7/pair or less, the Panel concludes that the compound tariff of 10% *ad valorem* plus US$5/pair *necessarily* exceeds the bound level of 35% *ad valorem*.

7.169. In the case of subheading 6405.20, for which the binding has been set at 40% *ad valorem*, the break-even price presented by Panama is US$16.67/pair. In this connection, an import price of US$16.67/pair would result in the imposition of a compound tariff of US$6.67/pair (US$1.67 plus US$5), equivalent to 35% of the import price. Consequently, as the compound tariff of 10% *ad valorem* plus US$5/pair applies only to goods with prices below the break-even price of US$16.67/pair, this compound tariff *necessarily* exceeds the level bound in Colombia's Schedule of Concessions in relation to subheading 6405.20.

7.170. As a way of illustrating that the compound tariff exceeds the bound rates of 35% and 40% *ad valorem* in Colombia's Schedule of Concessions for products classified in the various tariff headings of Chapter 64 subject to the measure at issue, if the import price were US$7/pair, the applicable compound tariff would be US$5.70/pair (US$0.70 plus US$5), equivalent to 81.42% of the price; if the import price were US$5/pair, the compound tariff would be US$5.50/pair (US$0.50 plus US$5), equivalent to 110%; and if the import price were US$3/pair, the applicable compound tariff would be US$5.30/pair (US$0.30 plus US$5), equivalent to 176.67%.

7.171. Thus, the compound tariff applicable to goods classified under the various tariff headings of Chapter 64 subject to the measure at issue, at prices of US$7/pair or less, *necessarily* exceeds the bound levels of 35% and 40% *ad valorem.*

7.172. Secondly, goods with an import price above US$7/pair are subject to a compound tariff consisting of an *ad valorem* component of 10% plus a specific component of US$1.75/pair.

7.173. Panama has presented a break-even price of US$7/pair with respect to the subheadings for which the bound rate is 35% *ad valorem*. In the Panel's opinion, this break-even price is correct, inasmuch as the compound tariff applicable to imports priced at US$7/pair would be US$2.45/pair (US$0.70 plus US$1.75), i.e. the equivalent of 35% of that price.[291] As the compound tariff of 10% *ad valorem* plus US$1.75/pair applies only to imports at prices higher than US$7/pair, i.e. prices above the break-even price, this variant of the compound tariff *never* exceeds the 35% *ad valorem* tariff bound in Colombia's Schedule of Concessions.

7.174. As regards subheading 6405.20, for which the bound tariff is 40% *ad valorem*, Panama has submitted a break-even price of US$5.83/pair, which the Panel considers to be correct. This means that the compound tariff applicable to imports priced at US$5.83/pair would be US$2.33/pair (US$0.58 plus US$1.75), equivalent to 40% of the price. Since the compound tariff of 10% *ad valorem* plus US$1.75/pair only applies to imports with prices higher than US$7/pair, that is, prices above the break-even price of US$5.83/pair, this variant of the compound tariff *never* exceeds the 35% *ad valorem* tariff bound in Colombia's Schedule of Concessions.

7.175. In conclusion, the compound tariff of 10% *ad valorem* plus US$1.75/pair *never* exceeds the levels of 35% and 40% *ad valorem* bound in Colombia's Schedule of Concessions with respect to goods classified in Chapter 64 of Colombia's Customs Tariff.

7.176. Thirdly, in the case of products classified in the various tariff headings of Chapter 64 subject to the measure at issue, which are declared under the same subheading, some at import

[290] Panama's first written submission, para. 4.40.
[291] Ibid. para. 4.46.

prices below and others at prices above the threshold of US$7/pair, the applicable compound tariff is 10% *ad valorem* plus US$5/pair.

7.177. As indicated above, the break-even price is US$20/pair for imports of goods classified in the various tariff headings of Chapter 64 subject to the measure at issue, where the compound tariff is 10% *ad valorem* plus US$5/pair, except in the case of subheading 6405.20, for which the break-even price is US$16.67/pair. In this instance (importation of products under the same subheading, some at prices below and others at prices above US$7/pair), the importation of products below the corresponding break-even prices will result in the imposition of a tariff in excess of the bound level.

7.178. It should be noted that, under this compound tariff scenario, there will always be some goods with import prices below the break-even price, inasmuch as this scenario requires that at least some of the goods be imported at prices below US$7/pair, that is, below the break-even prices of US$16.67/pair or US$20/pair.

7.179. Consequently, where some imports under the same subheading are declared at prices below and others at prices above the threshold of US$7/pair, the compound tariff of 10% *ad valorem* plus US$5/pair for the goods classified in the various tariff headings of Chapter 64 subject to the measure at issue *necessarily* exceeds the bound level of 35% and 40% *ad valorem* for those goods with import prices below US$20/pair and US$16.67/pair, respectively.

7.180. Thus, the level bound in Colombia's Schedule of Concessions is exceeded by the following variants of the compound tariff applicable to imports of products classified in the various tariff headings of Chapter 64 subject to the measure at issue:

a. The tariff consisting of an *ad valorem* component of 10% plus a specific component of US$5/pair, when the f.o.b. import price is US$7/pair or less; and

b. The tariff consisting of an *ad valorem* component of 10% plus a specific component of US$5/pair, when some products of the same subheading are imported at f.o.b. prices above and others at prices below the threshold of US$7/pair.

7.181. On the other hand, the compound tariff consisting of an *ad valorem* component of 10% plus a specific component of US$1.75/pair, applicable to goods in Chapter 64 imported at f.o.b. prices above US$7/pair, does not exceed the level bound by Colombia in its Schedule of Concessions.

7.3.6.4 The question of the existence of a "legislative ceiling"

7.182. Before concluding the analysis of the complaint in relation to Article II:1(a) and Article II:1(b), first sentence, of the GATT 1994, the Panel deems it relevant to address Colombia's statement that specific tariffs can be prevented from exceeding the bound levels expressed in *ad valorem"* terms through the adoption of a "legislative ceiling".[292] On this basis, Colombia indicates that "Decree No. 456 incorporates a legislative ceiling that prevents the levels bound [in its Schedule of Concessions] from being exceeded".[293] According to Colombia, the maximum *ad valorem* equivalent of the compound tariff of 10% *ad valorem* plus US$3/kg for imports of goods under Chapters 61, 62 and 63 and tariff line 6406.10.00.00 at prices exceeding US$10/kg is 40%, i.e. the same as the level bound in its Schedule of Concessions. Colombia also points out that the maximum *ad valorem* equivalent of the compound tariff of 10% *ad valorem* plus US$1.75/pair applicable to imports of goods under Chapter 64 at prices exceeding US$7/pair is 35%, i.e. the same as the bound level.[294]

[292] Colombia's first written submission, para. 63 (referring to Appellate Body Report, *Argentina – Textiles and Apparel*, para. 46).
[293] Ibid. para. 64
[294] Ibid. See also response to Panel question No. 93, para. 36.

7.183. In response to Colombia's argument, Panama points out that Colombia has not expressed an opinion regarding the "alleged cap mechanism" in respect of imports of the products concerned at prices below the thresholds provided for in Decree No. 456.[295]

7.184. In its report in *Argentina – Textiles and Apparel*, the Appellate Body indicated that it is possible, under certain circumstances, for a Member to designate a legislative "ceiling" or "cap" on the level of duty applied "which would ensure that, even if the type of duty applied differs from the type provided for in that Member's Schedule, the *ad valorem* equivalents of the duties actually applied would not exceed the *ad valorem* duties provided for in the Member's Schedule".[296]

7.185. Despite the foregoing, Colombia's argument that Decree No. 456 incorporates a "legislative ceiling" for goods with import prices above the respective thresholds does not affect the findings that the compound tariff, as regards the examples set out in paragraphs 7.164. and 7.180. , exceeds the levels bound in Colombia's Schedule of Concessions. First of all, the "legislative ceiling" mentioned by Colombia refers to the level of the compound tariff that applies only to imports at prices above the prescribed thresholds. Such a "legislative ceiling" would not apply to other imports and, more specifically, to imports priced below the thresholds or imports under the same subheading, some priced above and others priced below the thresholds. Secondly, even in respect of imports entering at prices above the respective thresholds, the Panel has found that at least in the case of imports classified in heading 6305.02, when these enter at prices higher than US$10/kg *but* lower than US$12/kg, the compound tariff of 10% *ad valorem* plus US$3/kg breaches the rate bound in Colombia's Schedule of Concessions.

7.186. For the foregoing reasons, the Panel is not convinced by Colombia's argument that Decree No. 456 incorporates a "legislative ceiling" which prevents the compound tariff resulting in duties that exceed the levels bound in Colombia's Schedule of Concessions.

7.3.6.5 Conclusion

7.187. The table below summarizes the various examples of the compound tariff whose *ad valorem* equivalents necessarily exceed the levels bound in Colombia's Schedule of Concessions. As can be seen, the range of import prices to which each of the examples applies is lower than the respective break-even price.

Products covered	Declared f.o.b. price	Formula for calculating the compound tariff	Break-even price
Chapters 61, 62, 63 and tariff line 6406.10.00.00	Prices of US$10/kg or less	10% *ad valorem* and US$5/kg	US$16.67 (40% bound)
			US$20 (35% bound)
Subheading 6305.32	Prices above US$10 and below US$12/kg	10% *ad valorem* and US$3/kg	US$12 (35% bound)
Chapters 61, 62 and 63 and tariff line 6406.10.00.00	Some prices above and others below US$10/kg when imported under the same subheading	10% *ad valorem* and US$5/kg	US$16.67 (40% bound)
			US$20 (35% bound)
Chapter 64, except for heading 64.06	Prices of US$7/pair or less	10% *ad valorem* and US$5/pair	US$16.67 (40% bound)
			US$20 (35% bound)
Chapter 64, except for heading 64.06	Some prices above and others below US$7/pair when imported under the same subheading	10% *ad valorem* and US$5/pair	US$16.67 (40% bound)
			US$20 (35% bound)

7.188. On the other hand, the compound tariff applicable to products classified in Chapters 61, 62 and 63 (except subheading 6305.32) and in tariff line 6406.10.00.00, when goods are imported *exclusively* at prices above the threshold of US$10.kg, does not exceed the bound level of 40% *ad valorem*, inasmuch as these prices are necessarily the same as or higher than the respective

[295] Panama's opening statement at the first meeting of the Panel, para. 1.17. See also second written submission, para. 2.1; and response to Panel question No. 91.

[296] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 54.

break-even price. Likewise, the compound tariff applicable to products classified under the various tariff headings of Chapter 64 subject to the measure at issue, when goods are imported *exclusively* at prices above the threshold of US$7/pair, does not exceed the bound levels of 35% and 40% *ad valorem*, inasmuch as the import prices are necessarily the same as or higher than the respective break-even price.

7.189. In conclusion, the Panel has reviewed the arithmetical calculations furnished by Panama in respect of each example of the compound tariff and confirmed that they are correct. The Panel therefore finds that the compound tariff, as regards the examples set out in paragraphs 7.164. and 7.180. , *necessarily* exceeds the levels bound in Colombia's Schedule of Concessions of 35% and 40% *ad valorem* (depending on the subheading) and are thus inconsistent with Article II:1(b), first sentence, of the GATT 1994.

7.3.7 The question of whether the compound tariff is inconsistent with Article II:1(a) of the GATT 1994

7.190. Panama also claims that, inasmuch as the compound tariff is inconsistent with Article II(b), first sentence, of the GATT 1994, it is "necessarily inconsistent with Article II:1(a) of the GATT and Colombia's Schedule of Concessions".[297] Colombia, for its part, requests the Panel to reject Panama's claim regarding Article II:1(a) inasmuch as it is subsidiary to the claim relating to Article II:1(b), first sentence, and the latter is inadmissible.

7.191. The Appellate Body considered it "evident … that the application of customs duties *in excess of* those provided for in a Member's Schedule, inconsistent with the first sentence of Article II:1(b), constitutes 'less favourable' treatment under the provisions of Article II:1(a)".[298] Several panels considered that inconsistency with Article II:1(b), first sentence, of the GATT 1994 "necessarily results in less favourable treatment which is inconsistent with the obligations in Article II:1(a)".[299]

7.192. Thus, a finding that the measure at issue is inconsistent with Article II:1(b), first sentence, of the GATT 1994 may lead this Panel to conclude, without the need for further analysis, that the compound tariff accords less favourable treatment than that provided for in Colombia's Schedule of Concessions, in a manner inconsistent with Article II:1(a). Consequently, the Panel finds that, in respect of the examples set out in paragraphs 7.164. and 7.180. , the compound tariff is also inconsistent with Article II:1(a) of the GATT 1994.

7.3.8 General conclusion with regard to the claims concerning Article II:1(a) and Article II:1(b), first sentence, of the GATT 1994

7.193. As a result of the foregoing analysis, the Panel finds that the compound tariff, as regards the examples set out in paragraphs 7.164. and 7.180. , exceeds the levels bound in Colombia's Schedule of Concessions and is therefore inconsistent with the obligation in Article II:1(b), first sentence, of the GATT 1994 not to impose on the import of products of other Members "ordinary customs duties in excess of those set forth and provided" in Colombia's Schedule of Concessions.

7.194. Likewise, the Panel finds that, in the cases referred to in paragraphs 7.164. and 7.180. , the compound tariff is also inconsistent with Colombia's obligation under Article II:1(a) of the GATT 1994, inasmuch as it exceeds the applicable tariff bindings, and therefore accords less favourable treatment than that to which Colombia committed itself in its Schedule of Concessions.

7.4 Colombia's defence under Article XX of the GATT 1994

7.195. Colombia has requested the Panel, should it conclude that the compound tariff is inconsistent with the obligations contained in Article II:1(b), first sentence, or in Article II:1(a) of the GATT 1994, to determine that the measure is justified under Articles XX(a) and XX(d) of the GATT 1994 as a measure necessary to protect public morals or as a measure necessary to secure

[297] Panama's first written submission, para. 4.59.
[298] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47 (emphasis original).
[299] Panel Reports, *EC – IT Products*, para. 7.1504.

compliance with laws or regulations which are not inconsistent with the provisions of the GATT 1994.[300]

7.196. As the Panel has found that the compound tariff is inconsistent with obligations contained in Article II:1(b), first sentence, and in Article II:1(a) of the GATT 1994, it will proceed to analyse Colombia's defence under Article XX of the GATT 1994.

7.197. To this end, the Panel will assess Colombia's defence under Article XX of the GATT 1994, by analysing, first, whether the compound tariff is justified under either of the two paragraphs invoked by Colombia, beginning with paragraph (a) and continuing with paragraph (d); and secondly, if so, whether the compound tariff meets the requirements of the *chapeau* (introductory clause) of Article XX.[301]

7.4.1 Summary of the arguments of the parties and third parties

7.4.1.1 Summary of Colombia's main arguments

7.4.1.1.1 Decree No. 456 is a measure necessary to protect public morals

7.198. Colombia claims that Decree No. 456 is a measure necessary to protect public morals within the meaning of Article XX(a) of the GATT 1994.[302]

7.4.1.1.1.1 Concerning "to protect public morals"

7.199. Colombia maintains that Decree No. 456 is a measure designed to combat money laundering.[303] Colombia asserts that money laundering is linked with drug trafficking and the financing of groups operating outside the law, so that Decree No. 456 also seeks to reduce the operational capacity of drug traffickers and criminal groups. Colombia adds that Decree No. 456 is likewise intended to combat tax evasion and unfair competition. Colombia points out that the money laundering operation is a chain of illicit acts that includes the importation of goods.[304]

7.200. Colombia asserts that it has presented arguments and evidence to show that Decree No. 456 is an anti-money laundering measure.[305] Colombia points out that criminal groups use imports of apparel and footwear at artificially low prices to launder money.[306] It states that the use of imports of apparel and footwear at artificially low prices to launder money has been confirmed by Colombia's competent authorities (such as the DIAN and the UIAF), as well as by international organizations that monitor the issue (such as the FATF and the OECD).[307] Colombia adds that, due to Colombia's foreign exchange controls, the money laundering operation depends on the use of declared import prices that are artificially low, which enables the importer to open up a foreign exchange channel to legalize the assets.[308] Colombia asserts that Decree No. 456 "discourages imports at artificially low prices … as a vehicle for money laundering".[309]

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[300] Colombia's first written submission, paras. 2, 83, 89, 105; second written submission, paras. 12, 38, 61, 62, 97, 98, 107, 108; opening statement at the first meeting of the Panel, paras. 14, 64, 73, 74, 77; closing statement at the first meeting of the Panel, para. 21; opening statement at the second meeting of the Panel, paras. 10, 45, 63, 82, 107, 117.

[301] Appellate Body Report, *US – Gasoline*, p. 22. See also Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 139; *Dominican Republic – Importation and Sale of Cigarettes*, para. 64.

[302] Colombia's first written submission, para. 89; second written submission, para. 97; opening statement at the first meeting of the Panel, para. 73; and opening statement at the second meeting of the Panel, para. 82.

[303] Colombia's first written submission, paras. 80-81; second written submission, paras. 1, 38, 53, 56-59, 104; opening statement at the first meeting of the Panel, paras. 11 and 65; and opening statement at the second meeting of the Panel, para. 47.

[304] Colombia's second written submission, para. 2; and response to Panel questions Nos. 37 and 43.

[305] Colombia's second written submission, para. 53.

[306] Colombia's second written submission, para. 53. See also first written submission, paras. 22-24; opening statement at the first meeting of the Panel, paras. 15-25.

[307] Colombia's second written submission, para. 53; response to Panel question No. 36.

[308] Colombia's second written submission, para. 54; closing statement at the first meeting of the Panel, paras. 13-19.

[309] Colombia's opening statement at the first meeting of the Panel, paras. 26-28.

7.201. Colombia maintains that the lack of explicit identification of the objective of the challenged measure does not, in itself alone, have any probative value for purposes of the analysis required under Article XX of the GATT 1994. Colombia notes that every WTO Member has its own legal system and not all of these systems require that legal instruments include a statement of reasons. In Colombia's opinion, it cannot be a requirement that every measure which a Member seeks to justify under Article XX of the GATT 1994 must explicitly identify the objective pursued by that measure. Colombia affirms that its administrative law does not require legal instruments to specify the reasons for their adoption or contain an explanatory statement and asserts that the absence of express identification of the objective in the text of its measure has no probative value. Colombia points out that in previous WTO cases it has not been required that the objective of a measure be expressly mentioned in its text.[310]

7.202. Colombia maintains that the objective of its measure is obvious from its design and structure, since Decree No. 456 discourages apparel and footwear imports at artificially low prices, and by reducing such imports, in turn reduces money laundering.[311] Colombia has presented statements by the President of Colombia and minutes of the discussions of the Committee on Customs, Tariffs and Foreign Trade (Triple A Committee) during its review of Decree No. 456 prior to its adoption, which, in Colombia's opinion, confirm that the purpose of Decree No. 456 is to combat money laundering through imports of apparel and footwear at artificially low prices.[312]

7.203. Colombia refers to Panama's questions with regard to the limitations and exclusions of the measure.[313] With respect to the exclusion of imports corresponding to tariff heading 64.06 (parts of footwear), Colombia points out that these products are raw materials for manufacturing footwear and not products to be sold directly to the consumer, which makes it difficult to use them for money laundering.[314] With respect to the exclusion for Special Customs Regime Zones, Colombia asserts that these are border areas with very low levels of development or in situations of isolation or economic integration with other states, which need to be managed differently from the rest of Colombian territory.[315] With regard to the exemption from the application of the measure for waste and scrap from apparel production under special import/export systems (Plan Vallejo), Colombia points out that this exemption is for environmental reasons and is an incentive for the use of waste in other products.[316] With respect to the two-year duration of the measure, Colombia maintains that there is nothing inherently protectionist about a time-limited measure and that Panama has not shown that there is a necessary link between the limited duration of the measure and protectionism. Colombia also asserts that the limited duration enables it, if necessary, to make adjustments to the tariff, as it did upon the expiration of the previous Decree No. 074.[317]

7.204. Colombia points out that, in addition to imports of textiles, apparel and footwear, criminal groups use imports of petrol, cigarettes, spirits and rice and exports of gold, scrap and raw hides for money laundering purposes. Colombia notes, however, that in these cases overt smuggling is used, so that the controls with respect to these products are basically of a law enforcement or military nature.[318] Colombia adds that it has never been required that a measure to protect public morals should have universal coverage.[319]

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[310] Colombia's second written submission, para. 60; opening statement at the second meeting of the Panel, paras. 50-51; response to Panel question No. 17.

[311] Colombia's second written submission, para. 55; opening statement at the first meeting of the Panel, paras. 26-28.

[312] Colombia's second written submission, paras. 56-60; opening statement at the second meeting of the Panel, paras. 50-55; and response to Panel question No. 17; Committee on Customs, Tariff and Foreign Trade Affairs, Minutes of the 269th regular session, 23 January 2014 (Exhibit COL-34); and News item: *Portafolio.co*, "Decree on the mixed tariff in the textiles sector will be maintained", 21 January 2014 (Exhibit COL-35).

[313] See para. 7.233 below.

[314] Colombia's opening statement at the second meeting of the Panel, para. 61; and response to Panel question No. 14.

[315] Colombia's response to Panel question No. 16.

[316] Colombia's response to Panel question No. 18.

[317] Colombia's opening statement at the second meeting of the Panel, para. 62; and response to Panel questions Nos. 76 and 78.

[318] Colombia's first written submission, para. 43; opening statement at the second meeting of the Panel, para. 56; and response to Panel questions Nos. 34 and 35.

[319] Colombia's opening statement at the second meeting of the Panel, paras. 57-60.

7.205. Colombia asserts that money laundering is criminal conduct in Colombia, defined as an offence in Article 323 of the Colombian Criminal Code. Thus, Colombia points out that Decree No. 456 is related to the "standards of right and wrong conduct" as defined by Colombian society. Colombia adds that both money laundering and the financing of terrorism are activities censured at international level, so that the Decree also reflects the "standards of right and wrong conduct" of the international community. Colombia asserts that, accordingly, Decree No. 456 protects public morals.[320]

7.206. Colombia maintains that, as public morals involve highly sensitive issues integral to Members' sovereignty, panels have acted with a high degree of deference and have refrained from second-guessing a Member which declares that its measure was adopted or is being enforced to protect public morals.[321] Colombia adds that the panel in *US — Gambling* recognized that measures which address concerns relating to money laundering and organized crime are measures designed to protect public morals and that, as Decree No. 456 pursues similar aims, it must also be regarded as a measure to protect public morals.[322]

7.4.1.1.1.2 Concerning the "necessity" of the measure

7.207. Colombia maintains that the measure is "necessary" to protect public morals within the meaning of Article XX(a) of the GATT 1994.[323]

7.208. Colombia maintains that the interests and values at stake in this dispute are vital and of maximum importance. Colombia asserts that illicit drug trafficking is a criminal phenomenon which has particularly afflicted Colombia, and affects the lives of thousands of Colombians and the stability of Colombian democracy. Colombia contends that money laundering is a vital link in the drug trafficking chain, which enables criminal groups to finance their operations and carry out their criminal activities.[324]

7.209. Colombia asserts that it was recognized in other disputes that measures which addressed concerns relating to money laundering and organized crime protected values and interests that could be considered vital and important in the highest degree. Colombia maintains that Decree No. 456 pursues similar aims and that, due to the importance for Colombia of the fight against drug trafficking and money laundering, the interests and values protected by Decree No. 456 could not be regarded as less vital and important.[325] Colombia asserts that the importance of the fight against money laundering as an objective of Colombian public policy is reflected in statements made by high-ranking officials, in its National Development Plan, in the commemoration of National Money Laundering Prevention Day, in the recognition of money laundering as a crime, and in the adoption of a National Policy against Money Laundering and the Financing of Terrorism.[326]

7.210. Colombia refers to a DIAN study which estimates that in 2012, in Colombia, smuggling of textile products and apparel generated business worth between US$2.5 billion and US$4 billion, which would mean that in that year between 30% and 60% of the textiles and apparel sold in Colombia were smuggled into the country. In the case of footwear, the same study estimates that, of the 116 million pairs of shoes consumed in Colombia, approximately 70 million were imported and that, of these, 30 million pairs entered the country at prices between US$0.50 and US$5. The

[320] Colombia's first written submission, paras. 80-83, second written submission, paras. 41-47; and opening statement at the first meeting of the Panel, para. 65.

[321] Colombia's second written submission, paras. 49-51; and opening statement at the second meeting of the Panel, para. 51 (referring to Panel Reports, *China – Publications and Audiovisual Products*, para. 7.766 and *Brazil – Retreaded Tyres*, para. 7.101).

[322] Colombia's first written submission, para. 82; second written submission, para. 52; and opening statement at the first meeting of the Panel, para. 66 (referring to Panel Report, *US – Gambling*, paras. 6.486-6.487).

[323] Colombia's first written submission, para. 89; second written submission, para. 62.

[324] Colombia's first written submission, para. 85; second written submission, paras. 63-64 and 97; opening statement at the first meeting of the Panel, para. 67; opening statement at the second meeting of the Panel, para. 82; and response to Panel question No. 7.

[325] Colombia's first written submission, para. 86; and response to Panel question No. 7 (referring to Panel Report, *US – Gambling*, paras. 6.486-6.487).

[326] Colombia's second written submission, paras. 65-69; and response to Panel question No. 7.

study also estimates that, of the 30 million pairs of shoes that entered Colombia at these prices, 20 million pairs could have been technically smuggled.[327]

7.211. Colombia asserts that it has presented arguments and evidence to show that Decree No. 456 is an appropriate measure for making an important contribution to the fight against money laundering, by preventing the utilization of one of the mechanisms used for this purpose by criminal groups (namely, the use of imports of apparel and footwear at artificially low prices to launder assets). Colombia states that, by discouraging imports of apparel and footwear at artificially low prices, Decree No. 456 prevents criminal groups from using these imports for money laundering and therefore makes an important contribution to the anti-money laundering campaign.[328]

7.212. Colombia suggests that the analysis of the contribution of Decree No. 456 to the fight against money laundering should be broadly similar to the analysis carried out by the panel and the Appellate Body in *Brazil – Retreaded Tyres.*[329]

7.213. Colombia has also provided a table of seizures relating to imports of textiles, apparel and footwear as evidence of the use of such imports for money laundering[330]:

	Seizures 2013		Seizures 2014 (to 6 July)	
Chapter / Tariff description	**Number**	**Value**	**Number**	**Value**
50-60 / Textiles	254	9,797,049,958	141	6,006,390,574
61-63 / Made up articles of apparel	9,750	69,210,464,697	5,573	38,762,634,794
64 / Footwear and the like	2,625	17,506,422,438	2,120	13,125,875,989

7.214. Colombia also asserts that it has provided quantitative evidence showing that Decrees Nos. 074 and 456 have significantly reduced the opportunities for criminal groups to use apparel and footwear imports at artificially low prices for money laundering purposes or to generate financial resources for other criminal activities, as shown by the trend in imports. Colombia states that it has also submitted charts that show a reduction in the underinvoicing of imports since Decrees Nos. 074 and 456 were issued.[331]

7.215. Colombia asserts that the measure has a moderate effect on trade because it opens up opportunities for parties importing at market prices, does not impose quantitative limits on imports, and is carefully calibrated to affect imports likely to be used for money laundering.[332] Colombia adds that the factors which are affecting Panama's sales are a slowdown in demand and the depreciation of the Colombian currency.[333]

7.216. With respect to the proposed alternative of using the disciplines of the Customs Valuation Agreement [334], Colombia asserts that the Colombian authorities are already applying the disciplines of that Agreement; thus, the application of that Agreement and Decree No. 456 are complementary, not substitute measures. Colombia states that pre-existing measures applied in parallel with the measure challenged do not constitute alternative measures for purposes of the necessity test under Article XX of the GATT 1994, as was determined by the panel and the Appellate Body in *Brazil – Retreaded Tyres*. Colombia points out that the Panel should therefore

[327] Ortega, *Smuggling and Money Laundering*, July 2013 (Exhibit COL-15), pp. 29-30; Rincón, *Smuggling and Money Laundering*, April 2014 (Exhibit COL-18), p. 6. See also Colombia's first written submission, para. 22.

[328] Colombia's first written submission, para. 87; second written submission, paras. 70-79 and 97; opening statement at the first meeting of the Panel, paras. 26-28 and 68; and opening statement at the second meeting of the Panel, paras. 82, 88-93.

[329] Colombia's second written submission, paras. 75-79; response to Panel question No. 120 (referring to Appellate Body Report, Brazil – *Retreaded Tyres*, para. 153).

[330] Colombia's response to Panel question No. 36.

[331] Colombia's first written submission, para. 37; second written submission, paras. 70-74; opening statement at the first meeting of the Panel, paras. 26-36; Exhibit COL-30.

[332] Colombia's first written submission, para. 88; second written submission, paras. 80-81 and 97; opening statement at the first meeting of the Panel, para. 69; and opening statement at the second meeting of the Panel, paras. 82 and 95.

[333] Colombia's opening statement at the second meeting of the Panel, paras. 96-97; closing statement at the second meeting of the Panel, para. 15; and response to Panel question No. 121.

[334] See paras. 7.249 and 7.281 below.

conclude that the application of the Customs Valuation Agreement is not an alternative to Decree No. 456.[335]

7.217. Colombia also claims that this suggestion disregards the magnitude of the problem. Colombia points out that the instruments envisaged in the Customs Valuation Agreement make it possible to question individual imports and were defined in the light of isolated situations of customs fraud; they would therefore not provide effective tools for tackling a problem as generalized, massive and serious as that facing Colombia, which is caused by transnational criminal groups with huge financial resources operating on a large scale. Colombia adds that this alternative would not provide the same level of protection as Decree No. 456, and would not be less trade-restrictive; moreover, it would not be appropriate to consider that Colombia could, within a short space of time, create a customs service with sufficient capacity to deal with the problem effectively.[336]

7.218. With respect to the proposed alternative of using customs cooperation and information exchange instruments[337], Colombia maintains that, being an existing measure, the Protocol of Procedure for Cooperation and Exchange of Customs Information between the Customs Authorities of the Republic of Panama and the Republic of Colombia does not constitute an alternative measure for the purposes of the necessity analysis under Article XX of the GATT 1994.[338] Moreover, Colombia states that it has had difficulties in the area of customs cooperation with Panama under the Protocol. Colombia maintains that, out of 329 requests submitted to Panama in 2007, only 79 elicited a reply; that the pattern of response was similar in the years 2008 to 2010; that in the years 2011 and 2012 the proportion of replies rose to 74%; but that in 2013 and 2014 the proportion fell to 15.6%. Colombia adds that, despite the fact that the above-mentioned Protocol establishes a time-limit of 20 days for replies, Panama had, on average, taken 50 days to respond to its requests. Colombia stresses that the Protocol does not have a dispute settlement mechanism to ensure enforcement and there is no certainty as to whether the Panamanian authorities will collaborate.[339] Colombia adds that it has signed a free trade agreement with Panama which incorporates customs cooperation and information exchange instruments and has a dispute settlement mechanism, but Panama has not submitted the agreement to its legislature for approval.[340]

7.219. With respect to the proposed alternative of using the mechanisms of the Agreement on Preshipment Inspection[341], Colombia maintains that this would be a more restrictive and less effective alternative. Colombia points out that it applied this mechanism up to the year 2000, but eliminated it because of corruption in the inspection agencies. Colombia adds that the World Customs Organization (WCO), the WTO and other bodies have expressed concerns about the restrictive nature and ineffectiveness of this mechanism and that WTO Members agreed to abandon it under Article 10.5 of the Agreement on Trade Facilitation.[342]

7.4.1.1.2 Decree No. 456 is a measure necessary to secure compliance with Colombia's anti-money laundering legislation

7.220. Colombia maintains that Decree No. 456 is a measure necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATT 1994 (i.e. the

[335] Colombia's opening statement at the second meeting of the Panel, para. 101 (referring to Panel Report, *Brazil – Retreaded Tyres*, paras. 7.169, 7.171-7.172 and 7.178; and Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 159 and 181).

[336] Colombia's second written submission, paras. 84-86; opening statement at the first meeting of the Panel, paras. 71 and 72; opening statement at the second meeting of the Panel, para. 101; and response to Panel questions Nos. 30 and 31.

[337] See para. 7.250. below.

[338] Colombia's opening statement at the second meeting of the Panel, para. 104.

[339] Colombia's second written submission, paras. 87-89; opening statement at the second meeting of the Panel, paras. 104-106; and response to Panel questions Nos. 61, 63 and 65.

[340] Colombia's second written submission, paras. 6, 116-118; News item: *La Prensa*, FTA with Colombia paralysed, 7 January 2015 (Exhibit COL-39).

[341] See para. 7.252 below.

[342] Colombia's second written submission, paras. 90-93; and opening statement at the second meeting of the Panel, paras. 102-103.

Colombian anti-money laundering legislation), within the meaning of Article XX(d) of the GATT 1994.[343]

7.4.1.1.2.1 Concerning "to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATT 1994"

7.221. Colombia asserts that Decree No. 456 is designed to secure compliance with the Colombian legislation against money laundering and the financing of other criminal activities, because it reduces the incentives for criminal groups to use imports of apparel and footwear for money laundering by means of artificially low prices. Colombia maintains that the compound tariff reduces the profit margin between the declared price of the goods and their selling price on the domestic market, which leads to a reduction in the amount of money that can be laundered in any given import operation.[344]

7.222. Colombia identifies Articles 323 and 345 of its Criminal Code (which, as Colombia indicates, create the crimes of money laundering and financing terrorism, respectively) as the laws and regulations with which it seeks to secure compliance through its compound tariff.[345]

7.223. Colombia points out that these are not the only provisions whose enforcement Decree No. 456 is intended to secure. It notes that, *inter alia*, the following provisions are also relevant[346]: (i) Article 321 of the *Criminal Code* (customs revenue fraud); (ii) Articles 25, 128, 238, 239, 240, 241, 249, 254, 255, and 501-2 of the *Customs Statute – Decree No. 2685 of 1999* (rules of conduct for administrators, legal representatives, customs brokers and auxiliaries; authorization of the release of imported goods and doubts regarding the declared value of imports; import declaration and Andean Declaration of Value, customs value, commercial invoices and supporting documents; currency conversion; and customs offences on the part of international trading companies); (iii) Articles 102, 103, 104 and 107 of the *Organic Statute of the Financial System – Decree 663 of 1993* (administrative control regulations for combating money laundering), and Article 43 of *Law 190 of 1995* (extending the requirements of Articles 102 to 107 of the Organic Statute of the Financial System to persons engaged in foreign trade, casino or gambling activities); (iv) *Decree 1071 of 1999* (relating to the functions of the Colombian National Customs and Excise Directorate (DIAN) with regard to the fiscal security of the Colombian State and the protection of national public order, through the administration and control of due compliance with tax, customs and foreign exchange requirements and facilitation of foreign trade operations); (v) Articles 14, 15, 17, 18 and 25 of *Andean Community Decision 571* (on customs value) and Articles 48, 49, 51 and 61 of the Regulations contained in *Andean Community Resolution 846* (on customs valuation controls); (vi) *Law 808 of 27 May 2003*, approving the *International Convention for the Suppression of the Financing of Terrorism*; and (vii) *Law 800 of 13 March 2003*, approving the United Nations Convention against Transnational Organized Crime.[347]

7.224. Colombia maintains that its legislation against money laundering and the financing of terrorism is not in itself inconsistent with the GATT 1994 and ensures compliance with its international commitments. Colombia adds that a Member's law is considered to be WTO-consistent until proven otherwise.[348]

7.4.1.1.2.2 Concerning the "necessity" of the measure

7.225. Colombia maintains that its measure is "necessary" to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATT 1994, within the meaning of Article XX(d), and refers to the arguments put forward in the context of its defence under

[343] Colombia's first written submission, para. 105; second written submission, para. 107 and opening statement at the first meeting of the Panel, para. 74.

[344] Colombia's first written submission, paras. 93, 97-100; second written submission, para. 99; opening statement at the first meeting of the Panel, paras. 74-75; and opening statement at the second meeting of the Panel, paras. 65-66.

[345] Colombia's first written submission, paras. 93 and 94; and second written submission, paras. 41-42, 99.

[346] Colombia's response to Panel questions Nos. 51 and 52.

[347] Colombia's response to Panel question No. 52.

[348] Colombia's first written submission, para. 95; second written submission, para. 100; and opening statement at the second meeting of the Panel, para. 75 (referring to Appellate Body Report, *US – Carbon Steel*, para. 157).

Article XX(a). In short, Colombia points out that: (i) the interests and values at stake are vital and of the utmost importance; (ii) the measure is capable of making a material contribution to combating money laundering, because it reduces the incentives for using imports of apparel and footwear for money laundering purposes; and (iii) the measure has a moderate restrictive effect on importers operating under market conditions.[349]

7.4.1.1.3 Decree No. 456 complies with the introductory clause (*chapeau*) of Article XX of the GATT 1994

7.226. Colombia maintains that Decree No. 456 complies with the introductory clause of Article XX of the GATT 1994 because it is not applied in a manner which constitutes a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade. Colombia affirms that Decree No. 456 is applicable to all imports of textiles, apparel and footwear, except for those arriving from countries with which Colombia has signed a free trade agreement.[350]

7.227. With respect to this exclusion, Colombia affirms that in combating money laundering, and in particular the use of imports for money laundering purposes, it has sought to extend cooperation with the customs authorities of its trading partners and has adopted customs cooperation and information exchange mechanisms with several of them, mainly in the context of free trade agreements signed since 2004.[351] Colombia has submitted a table showing "[p]rovisions on exchange of customs information in existing FTAs with Colombia".[352] Colombia also maintains that, because imports from its trading partners are exempt from payment of the tariff, there is less incentive to price those imports at artificially low levels for money laundering purposes. Colombia adds that this exemption is justified under Article XXIV of the GATT 1994.[353] Colombia also maintains that Decree No. 456 is a measure to protect public morals and/or secure compliance with Colombian anti-money laundering laws and regulations and is therefore not a disguised restriction on trade.[354]

7.228. Colombia also points out that at the end of 2013 it signed a free trade agreement with Panama, which contains provisions on customs cooperation and information exchange and adds that, when this agreement enters into force, Colombia will exempt imports originating in that country from the provisions of Decree No. 456. Colombia notes, however, that Panama has not completed the legislative procedures necessary for the agreement to enter into force. Colombia adds that, meanwhile, it has attempted to negotiate, without success, a separate agreement on customs cooperation and information exchange with Panama.[355]

7.4.1.2 Summary of the main arguments of Panama

7.4.1.2.1 Concerning the objective of the measure

7.229. Panama contends that the compound tariff is not a measure designed or necessary to protect public morals or to secure compliance with Colombian anti-money laundering legislation.[356] Panama asserts that the measure seeks to protect a sector of Colombia's domestic industry which

[349] Colombia's first written submission, paras. 102-105; second written submission, para. 108; and opening statement at the first meeting of the Panel, paras. 76-77.
[350] Colombia's first written submission, para. 110; second written submission, para. 112; and opening statement at the first meeting of the Panel, para. 78.
[351] Colombia's first written submission, paras. 111-113.
[352] Provisions on exchange of customs information in existing FTAs with Colombia (Exhibit COL-28). This table relates to provisions in the free trade agreements signed by Colombia with: the European Union; the United States; the European Free Trade Association (EFTA); Canada; Chile; Mexico; the Northern Triangle of Central America (El Salvador, Guatemala and Honduras); and the Andean Community.
[353] Colombia's second written submission, paras. 112-115; opening statement at the first meeting of the Panel, paras. 78-80; opening statement at the second meeting of the Panel, paras. 108-110.
[354] Colombia's opening statement at the second meeting of the Panel, para. 116.
[355] Colombia's first written submission, para. 114; second written submission, paras. 6 and 116; opening statement at the first meeting of the Panel, para. 81; and response to Panel questions Nos. 13, 60 and 62.
[356] Panama's opening statement at the first meeting of the Panel, para. 1.26.

is experiencing problems of competitiveness with imports, and serves a purpose similar to that of a structural adjustment mechanism.[357]

7.230. Panama asserts that, following an objective examination of the design, structure and architecture of Decree No. 456, it is questionable whether the measure can, as such, be linked to morals, be a measure for securing compliance with a criminal code, or be designed to combat money laundering.[358] Panama maintains that the objective of combating money laundering has been introduced into this dispute by Colombia *ex post facto*.[359]

7.231. Panama maintains that Decree No. 456 lacks a statement of reasons and that nowhere in the Decree, or in the internal debate in Colombia relating to its adoption, was any reference made to money laundering as one of the reasons for the Decree.[360] Panama points out that the exhibits it has submitted illustrate how the imposition of the tariff was a consequence of an internal debate between the Government, clothing manufacturers, importers and traders, which sought to protect the domestic industry without making products not manufactured in Colombia more expensive.[361] Panama points out that the only documents submitted by Colombia, i.e. the minutes of the Triple A Committee and a statement by Colombia's President, are subsequent to the initiation of the dispute[362], in addition to which the minutes indicate that the proposal to amend Decree No. 074 came from the vice-ministry responsible for formulating development and industrial promotion policy in Colombia.[363]

7.232. Panama adds that the scope of the measure is limited to a specific import sector and does not extend to other products that could be used for money laundering.[364] Furthermore, it has only a two-year duration, despite the importance of the stated objective.[365]

7.233. Panama also asserts that the measure exempts parts of footwear, an input required by the domestic industry[366]; excludes imports that enter special customs regime zones[367]; does not apply

[357] Ibid. para. 1.20; and opening statement at the second meeting of the Panel, para. 6.
[358] Panama's opening statement at the first meeting of the Panel, paras. 1.20-1.21; and closing statement at the first meeting of the Panel, para. 1.8.
[359] Panama's second written submission, para. 3.19; and response to Panel questions Nos. 17 and 39.
[360] Panama's second written submission, para. 3.20; opening statement at the first meeting of the Panel, para. 1.21; and closing statement at the first meeting of the Panel, para. 1.8.
[361] Panama's opening statement at the first meeting of the Panel, para. 1.6; response to Panel question No. 118. See also Information note: Office of the President of the Republic, President announces measures to boost the textiles sector, 22 January 2003 (Exhibit PAN-6); Information note: Office of the President of the Republic, Government signs Decree to strengthen clothing and footwear sectors, 23 January 2013 (Exhibit PAN-7); Information note: International Press Centre, President highlights benefits of measures taken to protect textiles industry, 22 July 2013 (Exhibit PAN-8); Information note: Office of the President of the Republic, Statement by the President at the national "Weaving Colombia" event, 28 November 2012 (Exhibit PAN-9); Information note: Office of the President of the Republic, Statement by the President at the close of the Management Dialogues in the Ministry of Trade, Industry and Tourism, 20 January 2014 (Exhibit PAN-10); National Federation of Merchants, The specific tariff on footwear: a controversial decision entailing considerable collateral damage, 5 February 2013 (Exhibit PAN-11); News item: *El Nuevo Siglo*, "Fenalco asks for a lower tariff on textiles and footwear", 1 March 2013 (Exhibit PAN-12); News item: *El Economista*, "Controversy over decree on footwear imports", 6 September 2013 (Exhibit PAN-13); News item: *La República*, "Fenalco and the Chamber of Clothing reach agreement to modify tariffs", 7 December 2013 (Exhibit PAN-14); News item: *La República*, "Importers not convinced by agreement between clothing manufacturers and Fenalco", 9 December 2013 (Exhibit PAN-15); National Federation of Merchants, FENALCO rejects decree on clothing and footwear tariffs (Exhibit PAN-16).
[362] Panama's opening statement at the second meeting of the Panel, para. 5.
[363] Panama's response to Panel question No. 118.
[364] Panama's second written submission, paras. 3.22-3.23; closing statement at the first meeting of the Panel, para. 1.8; opening statement at the second meeting of the Panel, para. 6; and response to Panel questions Nos. 8 and 39.
[365] Panama's second written submission, para. 3.26; opening statement at the first meeting of the Panel, para. 1.23; closing statement at the first meeting of the Panel, para. 1.8; and opening statement at the second meeting of the Panel, para. 6.
[366] Panama's second written submission, para. 3.24; closing statement at the first meeting of the Panel, para. 1.8; opening statement at the second meeting of the Panel, para. 6; and response to Panel question No. 14.
[367] Panama's second written submission, para. 3.25; opening statement at the first meeting of the Panel, para. 1.22; closing statement at the first meeting of the Panel, para. 1.8; opening statement at the second meeting of the Panel, para. 6; and response to Panel question No. 16.

to imports from trading partners, which could also present a risk of money laundering; and does not establish mechanisms for prosecuting persons suspected of committing criminal offences.[368]

7.234. Panama maintains that the fact that the production cost of the products in question in Colombia was the basis for determining the thresholds shows that the real parameter for the thresholds was the extent to which the import prices reflect the production costs for the domestic products and their ability to compete.[369] Panama asserts that the thresholds were established not for technical reasons but to maintain a balance of interests between the different sectors involved.[370] Panama adds that the compound tariff provides for a single threshold for apparel and footwear, without taking into account the differences between the products classified in each subheading, although the database of Colombia's National Customs and Excise Directorate (DIAN) itself contains numerous reference prices and many below 10 US$/kilo (for apparel) and US$7/pair (for footwear).[371]

7.235. Panama also maintains that Colombia's defence is based on a chain of presumptions which cannot withstand objective scrutiny. Panama asserts that, out of the whole range of generic and quick-selling goods, Colombia considers that it is imports of textiles, apparel and footwear that are used for money laundering. Panama adds that the Colombian authorities unilaterally fixed certain thresholds below which Colombia considers that imports would be entering at artificially low prices and presumes that they would be used for money laundering purposes. For Panama, this presumption is unacceptable.[372]

7.4.1.2.2 Concerning "to protect public morals"

7.236. For Panama, there is no question that problems relating to money laundering fall within the scope of the notion of public morals. Panama adds that, in any event, it would be for Colombia to show that combating money laundering is one of the policies designed to protect public morals in Colombia.[373]

7.4.1.2.3 Concerning "to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATT 1994"

7.237. Panama asserts that Colombia has been imprecise in identifying the laws and regulations with which it seeks to secure compliance by means of Decree No. 456. Due to this imprecision and the lack of supporting evidence, in Panama's opinion, neither it nor the Panel would be able properly to identify the provisions cited by Colombia.[374]

7.238. Panama maintains that Colombia has made a general reference to Articles 323 and 345 of its Criminal Code, but has not submitted the text of the provisions, or exhibits that would make it possible to verify the existence, scope and meaning of their terms.[375] Panama also asserts that, after having submitted a defence relating to compliance with its anti-money laundering legislation, Colombia broadened its scope to include laws against the financing of other criminal activities and provisions against the financing of terrorism.[376]

7.239. With respect to the provisions cited by Colombia in its responses to the Panel's questions, Panama asserts that the references are belated, apart from which Colombia has not submitted evidence that would make it possible to evaluate these provisions. Panama points out that the provisions cited by Colombia contain numerous obligations and Colombia has not identified those

[368] Panama's closing statement at the first meeting of the Panel, para. 1.8.
[369] Panama's response to Panel question No. 29.
[370] Panama's closing statement at the second meeting of the Panel, para. 5. Ministry of Trade, Industry and Tourism of Colombia, Proposed amendments to Decree No. 074 of 2013 (Exhibit PAN-28).
[371] Panama's response to Panel question No. 118. National Customs and Excise Directorate of Colombia, Reference price database (Exhibit PAN-34).
[372] Panama's response to Panel questions Nos. 5, 6 and 39.
[373] Panama's second written submission, para. 3.18; response to Panel question No. 7.
[374] Panama's second written submission, paras. 3.45-3.54.
[375] Ibid. paras. 3.48 and 3.52.
[376] Ibid. para. 3.47.

obligations whose fulfilment requires the existence of the measure at issue[377] or explained how the compound tariff would ensure that those obligations are fulfilled.[378]

7.240. Panama maintains that the International Convention for the Suppression of the Financing of Terrorism and the United Nations Convention against Transnational Organized Crime, cited by Colombia, are international instruments which do not qualify as "laws or regulations" within the meaning of Article XX(d) of the GATT 1994.[379]

7.241. Panama also states that no relationship between Decree No. 456 and the Colombian money laundering legislation, in particular Articles 323 and 345 of the Criminal Code, can be discerned from the text of the Decree or Colombia's arguments.[380] Panama asserts that what is important is the relationship between the compound tariff and Articles 323 and 345 of the Criminal Code, and not the relationship between the Decree as a whole and the money laundering legislation in general.[381] Panama maintains that Colombia must demonstrate that, in the absence of the compound tariff, there would be a concern about violations of Articles 323 and 345 of the Criminal Code.[382] Panama adds that it is not clear that a border measure in the nature of an indirect tax could be converted into a tool for enforcement of a criminal code.[383]

7.242. Accordingly, Panama argues that there is no genuine relationship of ends and means between the compound tariff provided for in Decree No. 456 and Articles 323 and 345 of the Criminal Code. In its opinion, the compound tariff is not a measure designed to secure compliance with Colombian anti-money laundering legislation.[384]

7.243. Moreover, Panama asserts that Colombia has made no attempt to show that the domestic laws it has invoked are consistent with the GATT 1994.[385]

7.4.1.2.4 Concerning the "necessity" of the measure

7.244. Panama maintains that the compound tariff is not a measure "necessary" to protect public morals or to secure compliance with the laws and regulations cited by Colombia.[386]

7.4.1.2.4.1 Evaluation of factors

7.245. With respect to the importance of the interests or values protected, Panama does not deny that the fight against money laundering and the financing of terrorism may be deemed to be social interests of great importance. However, Panama does not consider that the compound tariff has been introduced to secure compliance with the legislation aimed at upholding these values.[387]

7.246. With respect to the contribution of the measure to Colombia's declared objective, Panama maintains that the only thing which Colombia has succeeded in demonstrating is that it has created a disincentive for importing goods at prices which Colombia itself considers to be low, by making imports more expensive.[388] Panama maintains that the measure does not prevent money laundering, but, at most, reduces the amount of money that can be laundered in a given operation. In Panama's opinion, the reduction of the margin that can be legalized through the domestic sale of the imported goods would not *per se* entail a reduction in imports for money laundering purposes. Panama adds that the measure penalizes legitimate imports, while allowing money laundering to continue.[389]

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[377] Ibid. paras. 3.49-3.51 and 3.53.
[378] Ibid. para. 3.56.
[379] Ibid. para. 3.54.
[380] Ibid. para. 3.56; and response to Panel question No. 8.
[381] Panama's response to Panel question No. 8.
[382] Panama's second written submission, para. 3.41; and response to Panel question No. 54.
[383] Panama's response to Panel question No. 8.
[384] Panama's second written submission, para. 3.57; and response to Panel question No. 8.
[385] Panama's second written submission, para. 3.55.
[386] Ibid. 3.28 and 3.59.
[387] Ibid. paras. 3.32 and 3.64.
[388] Ibid. para. 3.61.
[389] Panama's response to Panel questions Nos. 39 and 45; and opening statement at the second meeting of the Panel, para. 7.

7.247. Panama also maintains that, where there is an intention to launder money, the payment of the compound tariff does not prevent the sale of the goods being used to legalize money of illicit origin and, indeed, would create an incentive to try and compensate for the loss of profit margin by increasing the volume of imports.[390] Panama adds that the limited coverage of the compound tariff, its limited duration and its exclusions confirm that the measure cannot contribute and is not contributing to the objective of combating money laundering.[391]

7.248. With respect to the trade-restrictiveness of the measure, Panama asserts that the measure is having a highly restrictive impact on international trade and that Colombia itself has acknowledged that imports of apparel and footwear have been reduced. Panama maintains that, taking into account the volume of re-exports to Colombia under the four chapters covering apparel and footwear, at the end of 2013, these re-exports reflected a fall of up to 18%. Panama asserts that in just one year after the entry into force of the measure, Panama's re-exports of apparel and footwear to Colombia fell from 41 million to 33.67 million kilograms.[392]

7.4.1.2.4.2 The possible alternative measures

7.249. Panama argues that a more targeted and effective alternative solution to the problem of imports at artificially low prices (allegedly being used for money laundering) would be to use the disciplines of the Customs Valuation Agreement. Panama points out that the Customs Valuation Agreement is intended to achieve the correct determination of customs value. In Panama's opinion, any instance of undervaluation or underinvoicing could be made subject to the methodologies for which that Agreement provides, without cross-penalizing legitimate imports entering at more competitive prices.[393]

7.250. Panama also maintains that, as Colombia has acknowledged, the mechanisms of customs cooperation and information exchange are a clear and less restrictive alternative which would make it possible to combat the use of imports for money laundering. Panama asserts that this option is already available, because since 2006 Panama and Colombia have had the Protocol of Procedure for Cooperation and Exchange of Customs Information between the Customs Authorities of the Republic of Panama and the Republic of Colombia, within the framework of the Multilateral Convention on Cooperation and Mutual Assistance between the National Customs Directorates of Latin America, Spain and Portugal (COMALEP), under which the parties may request cooperation or mutual assistance for the purpose of exchanging information conducive to the prevention, investigation, suppression and control of customs offences.[394]

7.251. According to Panama, COMALEP and the Protocol give the parties broad powers to request customs information, and the high volume of use is an indication of their effectiveness.[395] Panama maintains that, between 2012 and 2013, its customs authority received 721 requests for information from DIAN and between January and November 2014, 696 requests. Panama asserts that its customs authorities' response rate to requests from DIAN is 85%, although it acknowledges that the prescribed 20-day time-limit has not been sufficient. Panama also indicates that the existence of requests still awaiting a response is due to factors such as the inaccuracy of the request or companies having ceased operations.[396]

7.252. Panama maintains that another alternative would be to apply the disciplines of the Agreement on Preshipment Inspection, which provides for inspection procedures on the territory of the exporting Member, thereby making it possible to verify the price of the imported goods. Panama maintains that Colombia could contract out preshipment inspection activities or require

[390] Panama's second written submission, paras. 3.29 and 3.61; and opening statement at the second meeting of the Panel, para. 7.

[391] Panama's second written submission, paras. 3.30 and 3.62.

[392] Panama's first written submission, paras. 5.3-5.4; second written submission, paras. 3.31 and 3.63; and opening statement at the second meeting of the Panel, para. 7; Colón Free Zone Administration, communication, 25 August 2014 (Exhibit PAN-5).

[393] Panama's second written submission, para. 3.34; opening statement at the first meeting of the Panel, para. 1.24; and response to Panel question No. 66.

[394] Panama's second written submission, para. 3.35; opening statement at the first meeting of the Panel, para. 1.25; and response to Panel question No. 63.

[395] Panama's response to Panel question No. 63.

[396] Panama's second written submission, para. 3.35; and response to Panel questions Nos. 65, 145 and 146.

their use. For Panama, the price verification tools of the aforementioned agreement would be more effective and less restrictive than the compound tariff.[397]

7.4.1.2.5 Concerning the *chapeau* of Article XX of the GATT 1994

7.253. Panama maintains that the compound tariff is applied in a manner which constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, because it excludes imports from countries with which Colombia has trade agreements in force. Panama asserts that a trade agreement does not lessen the concern about money laundering and, indeed, the non-existence of a tariff would increase the incentive to enter more imports at lower prices.[398]

7.254. Panama asserts that, if the intention is to launder money through low-priced imports, it matters little whether or not the imports enter through trade partners. Panama points out that, since under the trade agreements there is no requirement to pay a tariff or value the goods for customs purposes, anyone trying to introduce goods linked to illicit activities would be perfectly free to declare those goods at a zero price and obtain an even greater profit margin.[399]

7.255. Panama also considers that the compound tariff is a disguised restriction on trade, as it has no *raison d'être* in regard to the fight against money laundering and the financing of terrorism, as is evidenced by the fact that goods entering free zones are exempted from the application of the tariff.[400]

7.4.1.3 Summary of the main arguments of the third parties

7.4.1.3.1 United States

7.256. The United States points out that the Appellate Body has affirmed that a Member asserting a defence under Article XX(a) of the GATT 1994 must show that it has adopted the measure to protect public morals and that the measure is necessary to protect such public morals.[401]

7.257. The United States agrees with Colombia that the objective of combating illicit drug trafficking and transnational organized crime, including by combating money laundering, could be among the policy objectives covered by Article XX(a) of the GATT 1994, but points out that this is a question that must be considered on a case-by-case basis.[402]

7.258. The United States is of the opinion that Colombia must show, based on the text and legislative history, or other evidence pertaining to the design, structure and operation of the measure, that the primary objective of Decree No. 456 is to prevent money laundering.[403] The United States considers that Colombia has not referred to the text of the measure, its legislative history, any official statements, reports, or other evidence supporting its assertion that the measure is intended to prevent money laundering. The United States questions whether the alleged effect of the measure, a rise in the price of these goods, alone is sufficient to show that the objective of the measure is the reduction or prevention of money laundering.[404]

7.259. The United States considers that the Panel must analyse whether and to what extent Colombia has shown that this rise in prices contributes to the objective of preventing money laundering, and if it does, whether that contribution warrants the restrictive effect of the measure.

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[397] Panama's second written submission, para. 3.36; and response to Panel questions Nos. 67 and 152.
[398] Panama's second written submission, paras. 3.77-3.78; and opening statement at the first meeting of the Panel, para. 1.27.
[399] Panama's second written submission, para. 3.79; and response to Panel question No. 9.
[400] Panama's second written submission, para. 3.82.
[401] United States' third-party statement, para. 14 (referring to Appellate Body Reports, *EC - Seal Products*, para. 5.169).
[402] United States' response to Panel question No. 7.
[403] United States' third-party statement, paras. 16-17 (referring to Appellate Body Report, *EC - Seal Products*, fn 913).
[404] United States' third-party statement, para. 18.

The United States notes that several examples of alternative measures have been suggested that the Panel might evaluate.[405]

7.260. The United States points out that, to be justified under Article XX(d), a measure must be designed to secure compliance with laws or regulations not inconsistent with the GATT 1994 and must be necessary to secure such compliance.[406]

7.261. For the United States, it is unclear whether the relationship that Colombia has described between Decree No. 456 and its anti-money laundering law falls within the scope of to "secure compliance". In the United States' view, the text of Article XX(d) would not support an interpretation that enforcement measures having any relationship, even if only coincidental, with a WTO-consistent measure can be considered necessary to secure compliance with such measure. The United States considers that it is not clear that the arguments and evidence in relation to Decree No. 456 establish that it is apt to secure compliance with the anti-money laundering law through its price effects.[407]

7.4.1.3.2 Philippines

7.262. In the opinion of the Philippines, Decree No. 456, being a measure to combat money laundering, a criminal activity in Colombia, is clearly related to standards of right and wrong conduct as defined by Colombian society, and also reflects the rules of right and wrong conduct of the international community.[408] To the Philippines it appears that the interests or values that the measure seeks to address are at least as important or vital as those addressed in *US – Gambling* (money laundering and organized crime) and *Dominican Republic – Import and Sale of Cigarettes* (tax evasion and smuggling), and more important than the commercial interests involved in *Canada – Wheat Exports and Grain Imports*.[409]

7.263. The Philippines also considers that Decree No. 456 is designed to secure compliance with Colombian regulations against money laundering because, by reducing the profit margins, it reduces the amount of money laundered, and thus the incentives for criminal groups to use imports of the products in question to launder money.[410]

7.264. With respect to the measure's contribution to the achievement of Colombia's objective, it is unclear to the Philippines whether the increase in the prices of imports can be considered a proxy for the reduction of laundered imports. In the opinion of the Philippines, it should be established that this increase can be directly attributed to the reduction in the quantity of money-laundered imports, and not just by mere correlation, since an increase in prices is a natural consequence of raising tariffs.[411] The Philippines adds that money laundering might still exist even with higher tariff rates, perhaps even above the threshold values.[412]

7.265. The Philippines therefore considers that showing an increase in import prices, without any evidence that money laundering has been curtailed, would not be sufficient to prove contribution.[413] For the Philippines, if it were not shown that the measure contributes to the achievement of the objective, there is a possibility that as money laundering persists, legitimate imports are being penalized, and consumers are being made to bear the brunt of an erroneously targeted measure.[414]

7.266. Moreover, for the Philippines, the empirical basis for Colombia's determination of the thresholds for distinguishing imports at artificially low prices is unclear. The Philippines considers

[405] Ibid. para. 20.
[406] United States' third-party statement, para. 21; and response to Panel question No. 8.
[407] United States' third-party statement, para. 23.
[408] Philippines' third-party written submission, para. 4.46.
[409] Philippines' third-party written submission, para. 4.54; and third-party statement, para. 4.7.
[410] Philippines' third-party written submission, para. 4.88.
[411] Ibid. para. 4.58; and third-party statement, para. 4.8.
[412] Philippines' third-party written submission, para. 4.59; and third-party statement, para. 4.9.
[413] Philippines' third-party written submission, paras. 4.60 and 4.94.
[414] Ibid. para. 4.61.

that, to conclude that artificially low-priced imports have been reduced, the quantity of such imports would have to be determined prior to the entry into force of the measure.[415]

7.267. With regard to the restrictiveness of the measure, in the opinion of the Philippines, the increase in import prices may be due to the increase in duties on legitimate low-priced goods.[416] The Philippines considers that Colombia itself, in referring to imports "likely to be used for money laundering", has acknowledged that legitimate imports at competitive prices may have been affected.[417]

7.268. The Philippines asserts that the goods at issue are legal and that it is not their nature that makes them illicit but the manner in which they are used, so that care must be taken in dealing with them to ensure that legitimately traded products are not restricted. For the Philippines, the design of the measure should reflect a greater degree of care.[418]

7.269. The Philippines is also of the opinion that the systemic impact of the measure must be considered, since, although the objective is important, the use of tariffs that might go beyond the bound rates to achieve public policy objectives could have wide-ranging consequences.[419]

7.270. Where possible alternative measures are concerned, the Philippines takes the view that a more effective solution for dealing with underinvoicing could be through customs valuation, on a case-by-case basis, by applying the methodologies of the Customs Valuation Agreement, which would ensure that imports with proper valuation would not be penalized with higher duties.[420] The Philippines also considers that an effective import licensing regime that weeded out the perpetrators of illegal activities from the legitimate importers would achieve the desired outcome.[421] The Philippines also notes that the Agreement on Trade Facilitation contains provisions which, once adopted, would address Colombia's concerns.[422]

7.271. As another alternative the Philippines identifies the confiscation or banning of the goods in question. The Philippines notes that, following Colombia's reasoning, these products are used for money laundering but continue to enter the market. The Philippines adds that raising tariffs on illicitly traded goods would not make these importations any more legitimate.[423] For the Philippines, "reducing the risk" of the imports being used for money laundering should be distinguished from reducing or eliminating the illicit activity itself, so that alternatives that directly address the criminal activity itself and not just the aforementioned risk should be considered.[424]

7.272. The Philippines considers that the fact that Colombia uses customs cooperation and information exchange mechanisms with its trading partners challenges the rational relationship between the measure and its objective. If Colombia considers that these mechanisms are effective, it could have used them with other countries.[425] If Colombia considers that all imports below the threshold are being used for money laundering, it could have included its trading partners in the measure, using the exceptions in each agreement[426], since, even though these mechanisms exist, there could be imports with declared values below the threshold prices.[427]

7.273. The Philippines considers that, if there is less incentive to use imports from trading partners for money laundering, it would seem that money laundering is conducted by importing high-value products and declaring them at artificially low prices to save on duties paid. Therefore, there could be a greater incentive to import higher-value products.[428] For the Philippines, the key would be to determine which particular products command the highest profit margins, and focus

[415] Ibid. para. 4.60.
[416] Ibid. para. 4.64.
[417] Ibid. paras. 4.66 and 4.72; and third-party statement, paras. 4.12-4.13.
[418] Philippines' third-party written submission, paras. 4.67-4.71.
[419] Ibid. para. 4.73.
[420] Ibid. para. 4.81; and third-party statement, para. 4.15.
[421] Philippines' third-party written submission, para. 4.82; and third-party statement, para. 4.15.
[422] Philippines' third-party written submission, para. 4.83.
[423] Ibid. para. 4.84; and third-party statement, para. 4.15.
[424] Philippines' third-party written submission, para. 4.92.
[425] Ibid. para. 4.104; and third-party statement, para. 4.18.
[426] Philippines' third-party written submission, para. 4.107.
[427] Philippines' third-party statement, para. 4.19.
[428] Philippines' third-party written submission, para. 4.108.

efforts on those products.[429] The Philippines adds that there is a possibility that perpetrators would prefer to source their goods from trading partners, in order not to pay duties, rather than to undervalue them, in order to pay lower duties.[430]

7.274. The Philippines considers that upholding the measure under Article XX of the GATT 1994 would run counter to the spirit of Article XXIV, as the effect of the measure is to maintain duty-free treatment of imports from Colombia's trading partners while increasing the duties on imports from non-trading partners, an outcome that Article XXIV seeks to avoid.[431]

7.275. The Philippines concludes that the measure is aimed at protecting public morals and is intended to ensure compliance with laws and regulations against money laundering, but does not appear to pass the necessity test or comply with the *chapeau* of Article XX of the GATT 1994.[432]

7.4.1.3.3 European Union

7.276. With respect to the defence under Article XX(a) of the GATT 1994, the European Union submits that the measure should genuinely address the value protected, so that Colombia has to prove how money laundering associated with drug trafficking affects public morals and whether Decree No. 456 has sufficient nexus with those protected interests.[433] In this connection, the European Union takes the view that, while fighting against money laundering could possibly and in principle fall under Article XX(a) of the GATT 1994, it leaves open the question as to whether Colombia has demonstrated that the measure at issue is in fact necessary to protect public moral concerns related to money laundering.[434] The European Union considers that it needs to be examined whether there is a sufficient nexus between the measure and the interest protected and notes that Decree No. 456 makes no reference to fighting against money laundering.[435]

7.277. With regard to the defence under Article XX(b) of the GATT 1994, the European Union considers that Colombia has to prove that Decree No. 456 reduces the incentive for using imports of the products in question to launder money, thus securing compliance with Colombian laws and regulations against money laundering.[436]

7.278. With regard to the necessity test, the European Union considers that, to prove that the measure makes a material contribution to the objective, Colombia would have to show more than an increase in import prices, which may have affected legitimate imports as well, and establish a direct link between the compound tariff and a decrease in money laundering. This contribution could be assessed as part of a wider set of measures which Colombia might be taking to address the same concerns. The European Union adds that the Panel might look into whether Colombia imposes the same requirements on products other than textiles, apparel and footwear, where money laundering risks may also exist.[437]

7.279. With regard to the increase in the unit price of the imports mentioned by Colombia, the European Union wonders how those prices were calculated and whether they relate to declared or actual values. The European Union adds that, in any event, Colombia would need to show that there is some correlation between the adoption of the measure and the decrease in money laundering.[438]

7.280. The European Union considers it necessary to analyse how the established thresholds relate to the objective pursued by the measure, as it is important for Colombia to clarify how it

[429] Ibid. para. 4.109.
[430] Ibid. para. 4.110; third-party statement, para. 4.20; and response to Panel question No. 9.
[431] Philippines' third-party written submission, paras. 4.111-4.112.
[432] Philippines' third-party statement, paras. 5.2-5.3.
[433] European Union's third-party statement, para. 9.
[434] European Union's third-party written submission, para. 40.
[435] Ibid. para. 44.
[436] European Union's third-party statement, para. 10.
[437] European Union's third-party written submission, para. 44; and third-party statement, para. 12.
[438] European Union's third-party written submission, para. 52.

reached the conclusion that the products with below-threshold prices were artificially low-priced, and that the undervaluation of those products was in fact linked to money laundering.[439]

7.281. The European Union is of the opinion that a possible alternative measure would be to tackle undervaluation by using the provisions of the Customs Valuation Agreement. For the European Union, these procedures might be an appropriate tool for customs officials to ascertain the correct transaction value and play a preventive role in curbing money laundering.[440]

7.282. The European Union considers that another alternative might be the conclusion of customs cooperation agreements, including: (i) an anti-money laundering agreement between Colombia and Panama, or between Colombia, Panama and other affected countries; or (ii) a customs cooperation and information exchange agreement between Colombia and Panama, or between Colombia, Panama and other affected countries, with provisions similar to those contained in Colombia's trade agreements, in which case Article 12 of the Trade Facilitation Agreement might serve as a model.[441]

7.283. The European Union has doubts about the appropriateness of applying customs duties in excess of Colombia's bindings on the basis of low declared customs values. The European Union could imagine situations where there are genuine low import prices unrelated to money laundering.[442] The European Union also refers to the different treatment for countries having preferential agreements with Colombia, and indicates that it might be appropriate to examine whether the difference in treatment is based on objective factors that contribute to the objective pursued by the measure.[443]

7.284. The European Union concludes that the key points in this case are the contribution of Decree No. 456 to its alleged objectives, the availability of alternative measures and the application of the measure in a manner consistent with the *chapeau* of Article XX of the GATT 1994.[444]

7.4.2 Colombia's defence under Article XX(a) of the GATT 1994

7.4.2.1 General aspects concerning the analysis of Article XX of the GATT 1994

7.4.2.1.1 Nature and purpose of Article XX of the GATT 1994

7.285. The Appellate Body has indicated that paragraphs (a) to (j) of Article XX of the GATT 1994 comprise measures that have been recognized as exceptions to substantive obligations established in the Agreement "because the domestic policies embodied in such measures have been recognized as important and legitimate in character."[445]

7.286. The Appellate Body has also explained that the *chapeau* of Article XX of the GATT 1994 embodies the recognition on the part of Members of the need to maintain a balance between the right of a Member to invoke one or another of the exceptions contained in that article and the substantive rights of the other Members under the Agreement.[446] This seeks to ensure that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations that the Members themselves have agreed. The location of the line of equilibrium between these rights is not fixed and unchanging but moves as the measures and the facts in specific cases vary.[447]

[439] European Union's third-party statement, para. 13.
[440] European Union's third-party written submission, paras. 45 and 53; third-party statement, para. 16.
[441] European Union's third-party written submission, paras. 46 and 53; third-party statement, para. 16.
[442] European Union's third-party written submission, para. 58.
[443] Ibid. para. 59.
[444] European Union's third-party statement, para. 17.
[445] Appellate Body Report, *US – Shrimp*, para. 121.
[446] Ibid. para. 156.
[447] Ibid. para. 159.

7.4.2.1.2 Applicability

7.287. The Appellate Body has indicated that the exceptions listed in Article XX of the GATT 1994 relate to *all* of the obligations under the Agreement, so that these exceptions are applicable, *inter alia*, to the obligations contained in Article II.[448]

7.4.2.1.3 Structure of the analysis

7.288. As the Appellate Body has pointed out, in order that the protection of Article XX of the GATT 1994 may be extended to a measure, that measure must not only come under one or another of the particular exceptions listed in the paragraphs of the Article, but must also satisfy the requirements imposed by its opening clause.[449] In other words, a panel called upon to determine the merits of a defence under this Article must carry out a two-tiered analysis. Firstly, it must determine whether the measure is provisionally justified by reason of being comprehended in any of the situations provided for in the various paragraphs and, secondly, it must appraise the measure in the light of the introductory clause.[450]

7.289. The Appellate Body has observed that this order of analysis reflects not random choice, but rather the fundamental structure and logic of Article XX of the GATT 1994[451], since "the task of interpreting the *chapeau* so as to prevent the abuse or misuse of the specific exemptions provided for in Article XX is rendered very difficult, if indeed it remains possible at all, where the interpreter ... has not first identified and examined the specific exception threatened with abuse."[452]

7.4.2.1.4 Burden of proof

7.290. As the Appellate Body has confirmed, the burden of proving any of the defences contained in paragraphs (a) to (j) of Article XX of the GATT 1994 rests on the party invoking that defence.[453] The party invoking the defence is also responsible for showing that a measure which it has provisionally justified as falling within one of the paragraphs of Article XX does not, in its application, constitute abuse of such exception under the *chapeau*.[454]

7.4.2.2 The text of Article XX(a) of the GATT 1994

7.291. The *chapeau* and paragraph (a) of Article XX of the GATT 1994 read as follows:

> **Article XX**
>
> General Exceptions
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) necessary to protect public morals;

7.4.2.3 Measures necessary to protect public morals

7.292. Article XX(a) of the GATT 1994 justifies measures adopted or enforced by a Member which are necessary to protect public morals.

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[448] Appellate Body Report, *US – Gasoline*, p. 24.
[449] Ibid. p. 22; see also Appellate Body Report, *Korea – Various Measures on Beef*, para. 156.
[450] Appellate Body Report, *US – Gasoline*, p. 22. See also Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 139; *Dominican Republic – Import and Sale of Cigarettes*, para. 64.
[451] Appellate Body Report, *US – Shrimp*, para. 119.
[452] Ibid. para. 120.
[453] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.
[454] Appellate Body Report, *US – Gasoline*, pp. 22-23.

7.4.2.4 Structure of the analysis

7.293. Provisional justification under one of the paragraphs of Article XX of the GATT 1994 requires that a challenged measure address the particular interest specified in that paragraph and that there be a sufficient nexus between the measure and the interest protected.[455] In the context of Article XX(a), this means that a Member wishing to justify its measure must demonstrate: (i) that it has adopted or enforced the measure "to protect public morals", and (ii) that the measure is "necessary" to protect such public morals.[456]

7.4.2.4.1 Adopted or enforced "to protect public morals"

7.294. For the purpose of determining whether a measure had been adopted or enforced to protect public morals, the panel in *US – Gambling* examined whether the party that had invoked the defence had demonstrated that the measure was designed to "protect public morals".[457] The Appellate Body did not question this approach.[458]

7.295. In order to assess whether a measure has been adopted or enforced "to protect public morals" or, in other words, whether it is designed to "protect public morals", it is first necessary to know the measure's objective.

7.296. As the Appellate Body has pointed out, in seeking to identify the objective of a measure, a panel may be faced with conflicting arguments by the parties as to the nature of the objective pursued. Although a panel should take into account the respondent's articulation of the objective it pursues through its measure, it is not bound by that characterization but must make an objective and independent assessment. To this end, the panel should take into account all the evidence available to it, including the texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure.[459] The Appellate Body has also suggested that the objective of a measure could be discerned from its design, architecture and revealing structure, with consideration given to all the relevant facts and all the relevant circumstances of the case.[460]

7.297. In addition, in assessing a measure in the light of Article XX(a) of the GATT 1994, it is not enough to identify the objective of the measure, since not every policy objective is related to the protection of public morals. Thus, it is also necessary to assess whether the policy objective pursued by the measure is included among the series of policies designed to protect public morals.[461] For this it is necessary to explore the meaning of "public morals".

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[455] Appellate Body Reports, *EC – Seal Products*, para. 5.169 (referring to Appellate Body Report, *US - Gambling*, para. 292).

[456] Appellate Body Reports, *EC – Seal Products*, para. 5.169 (referring to Panel Report, *US – Gambling*, para. 6.455).

[457] Panel Report, *US – Gambling*, para. 6.455. The finding of the panel in *US – Gambling* was made in the context of a defence under Article XIV(a) of the General Agreement on Trade in Services, a provision equivalent to Article XX(a) of the GATT 1994. The expression "designed to 'protect public morals'" in the original English language text of the panel report was translated into Spanish as "*destinada a 'proteger la moral*'" and into French as "*conçue pour 'la protection de la moralité publique*'". In the course of the proceedings, which were conducted in Spanish, parties used the expressions "*diseñada para*" and "*destinada a*" interchangeably. The original Spanish language text of the present Panel report uses the expression "*destinada a*".

[458] See Appellate Body Report, *US – Gambling*, paras. 294-295. See also Appellate Body Report, *EC - Seal Products*, para. 5.169.

[459] Appellate Body Report, *EC – Seal Products*, para. 5.144. See also Appellate Body Report, *US - COOL*, para. 371; *US - Tuna II (Mexico)*, para. 314.

[460] In *Japan — Alcoholic Beverages II*, the Appellate Body stated that: "Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure ... Most often, there will be other factors to be considered as well. In conducting this inquiry, panels should give full consideration to all the relevant facts and all the relevant circumstances in any given case." Appellate Body Report, *Japan - Alcoholic Beverages II*, p. 29.

[461] Panel Reports, *EC – Seal Products*, para. 7.631. See also Appellate Body Report, *EC – Seal Products*, para. 5.179. The expression "designed to protect public morals" in the original English language text of the panel reports was translated into Spanish as "*destinadas a proteger la moral pública*" and into French as "*conçues pour protéger la moralité publique*". In the course of the proceedings, which were conducted in Spanish, parties used the expressions "*diseñadas para*" and "*destinadas a*" interchangeably. The original Spanish language text of the present Panel report uses the expression "*destinadas a*".

7.298. The panel in *US – Gambling* assessed whether the measures imposed by the United States to restrict gambling and betting services were necessary to protect public morals within the meaning of Article XIV(a) of the General Agreement on Trade in Services (GATS), a provision that contains language similar to that of Article XX(a) of the GATT 1994.[462] In the context of its analysis, the panel examined whether the measures were designed to "protect public morals" or to "maintain public order".[463]

7.299. In interpreting the concept of "public morals" for the first time, that panel pointed out that the expression "denotes standards of right and wrong conduct maintained by or on behalf of a community or nation"[464], and that its content for Members "can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values".[465] The panel also noted that Members, in applying similar societal concepts, have the right to determine the level of protection that they consider appropriate[466] and added that Members should be given some scope to define and apply for themselves the concept of "public morals" in their respective territories, according to their own systems and scales of values.[467]

7.300. The panel in *China – Publications and Audiovisual Products*, in interpreting Article XX(a) of the GATT 1994 for the first time, adopted the interpretation of "public morals" proposed by the panel in *US – Gambling*. The panel considered that Article XX(a) of the GATT 1994 and Article XIV(a) of the GATS use the same concept and saw no reason to depart from the interpretation proposed in *US – Gambling*.[468]

7.301. The panel in *EC – Seal Products* also interpreted the term "public morals" within the meaning of Article XX (a) of the GATT 1994. The panel pointed out that the assessment of the scope of the expression suggests that "WTO Members are afforded a certain degree of discretion in defining the scope of 'public morals' with respect to various values prevailing in their societies at a given time."[469] The panel added that:

> [T]he question of whether a measure aims to address public morals relating to a particular concern in the society of a regulating Member requires ... an assessment of two issues: first, whether the concern in question indeed exists in that society; and, second, whether such concern falls within the scope of "public morals" as "defined and applied" by a regulating Member "in its territory, according to its own systems and scales of values".[470]

7.302. However, the Appellate Body in *EC – Seal Products* made it clear that it did not consider that the term "to protect", when used in relation to "public morals" under Article XX(a), required the panel to identify the existence of a risk to public moral concerns, and that it had difficulty in accepting that a panel is required to identify the exact content of the public morals standard at issue.[471]

7.303. The *US – Gambling* case, for example, concerned measures prohibiting gambling and betting services which addressed problems related to money laundering, organized crime, fraud, under-age gambling, and pathological gambling. The panel in that case concluded that measures prohibiting gambling and betting services could fall within the scope of Article XIV(a) of the GATS

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[462] Article XX(a) of the GATT 1994 speaks of measures "necessary to protect public morals"; Article XIV(a) of the GATS speaks of measures "necessary to protect public morals or to maintain public order". In Spanish Article XX(a) of the GATT 1994 speaks of measures " *necesarias para proteger la moral pública*"; Article XIV(a) of the GATS speaks of measures "*necesarias para proteger la moral o mantener el orden público*". In French, Article XX(a) of the GATT 1994 speaks of measures "*nécessaires à la protection de la moralité publique*"; Article XIV(a) of the GATS speaks of measures "*nécessaires à la protection de la moralité publique ou au maintien de l'ordre public*".

[463] Panel Report, *US – Gambling*, paras. 6.455 and 6.457-6.474.

[464] Ibid. para. 6.465.

[465] Ibid. para. 6.461.

[466] Panel Report, *US – Gambling*, para. 6.461 (referring to Appellate Body Report, *Korea - Various Measures on Beef*, para. 176, and *EC - Asbestos*, para. 168).

[467] Panel Report, *US – Gambling*, para. 6.461.

[468] Panel Report, *China – Publications and Audiovisual Products*, para. 7.759.

[469] Panel Reports, *EC – Seal Products*, paras. 7.380–7.381.

[470] Ibid. para. 7.383.

[471] Appellate Body Reports, *EC – Seal Products*, paras. 5.198 and 5.199.

if they were enforced in pursuance of policies, the object and purpose of which was to "protect public morals" or "to maintain public order".[472]

7.4.2.4.2 Measures *necessary* – The necessity analysis

7.304. The term "necessary" (referring to "measures necessary") is mentioned in paragraphs (a), (b) and (d) of Article XX of the GATT 1994 and in paragraphs (a), (b) and (c) of Article XIV of the GATS.[473] The interpretation of this term in the context of any one of these paragraphs has been used for purposes of analysis under other paragraphs[474], including those relevant to the present case.

7.305. The first time the Appellate Body interpreted the term "*necessary*" was in *Korea – Various Measures on Beef*, in the context of Article XX(d) of the GATT 1994. The Appellate Body noted that, in principle, the word "necessary" could refer to a range of degrees of necessity, being understood at one end as "measures *indispensable*" and at the other end as "measures *making a contribution to*". The Appellate Body considered that, in the context of Article XX(d) of the GATT 1994, a *necessary* measure is located significantly closer to the pole of *indispensable* than to the pole of *making a contribution to* and pointed out that a measure which is indispensable or of absolute necessity certainly fulfils that requirement.[475]

7.306. The Appellate Body added that the determination of whether a measure which is not "indispensable" may nevertheless be "necessary" involves in every case a process of weighing and balancing a series of factors which prominently include: (i) the importance of the objective or the common interests or values protected; (ii) the contribution of the measure to the realization of the ends pursued; and (iii) the extent to which the measure restricts imports or exports.[476]

7.307. The Appellate Body also considered that the weighing and balancing process for determining whether a measure is necessary encompassed the determination of whether a WTO-consistent alternative measure, which the Member concerned could "reasonably be expected to employ", was available, or whether a less WTO-inconsistent measure, which would make an equivalent contribution to the achievement of the objective pursued, was "reasonably available".[477] The comparison between the challenged measure and possible alternatives should take into account the importance of the interests at issue.[478]

7.308. On the basis of this process of "weighing and balancing" factors and comparing the challenged measure with possible alternatives, taking into account the interests or values at stake, a panel may determine whether the measure is "necessary" or, if not, whether other measures which are WTO-consistent, or less inconsistent than the challenged measure, are "reasonably available" to the responding Member.[479]

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[472] Panel Report, *US – Gambling*, para. 6.474.

[473] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 141.

[474] For example, the Appellate Body in *China – Publications and Audiovisual Products* stated that: "In articulating the proper approach in *Brazil – Retreaded Tyres*, the Appellate Body referred to its report in *US - Gambling* without distinguishing that case or suggesting any intention to depart from the approach articulated in *US – Gambling* (or, for that matter, *Korea – Various Measures on Beef*)". Appellate Body Report, *China – Publications and Audiovisual Products*, fn 455.

[475] Appellate Body Report, *Korea – Various Measures on Beef*, para. 161. See also Appellate Body Report, *US – Gambling*, para. 310; Appellate Body Report, *Brazil – Retreaded Tyres*, para. 141; Appellate Body Reports, *EC – Seal Products*, fn 1300; and Panel Report, *China – Publications and Audiovisual Products*, para. 7.782.

[476] Appellate Body Report, *Korea – Various Measures on Beef*, para. 164. See also Appellate Body Report, *US – Gambling*, paras. 305-306; Appellate Body Report, *Brazil – Retreaded Tyres*, para. 143; Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 241-242; Appellate Body Reports, *EC - Seal Products*, para. 5.214; Panel Report, *China – Publications and Audiovisual Products*, para. 7.783.

[477] Appellate Body Report, *Korea – Various Measures on Beef*, para. 166. See also Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 156; *China – Publications and Audiovisual Products*, paras. 241-242; *EC – Seal Products*, para. 5.214.

[478] Appellate Body Report, *US – Gambling*, para. 307. See also Appellate Body Report, *Brazil - Retreaded Tyres*, para. 156; Panel Report, *China – Publications and Audiovisual Products*, para. 7.784.

[479] Appellate Body Reports, *EC – Seal Products*, para. 5.214 (referring to Appellate Body Reports, *US - Gambling*, para. 307; *Korea – Various Measures on Beef*, para. 166).

7.309. The Appellate Body has added that "[t]he weighing and balancing [of these factors] is a holistic operation that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement."[480]

7.310. In short, examining whether a measure is "necessary" is a process in which the following factors should be weighed and balanced holistically:

a. The importance of the objective;

b. The contribution of the measure to the achievement of the objective pursued; and

c. The trade-restrictiveness of the measure.

d. If the preliminary conclusion is that the measure is necessary, the result should be confirmed by comparing the challenged measure with possible, reasonably available, WTO-consistent or less inconsistent alternatives that could have less trade-restrictive effects while making an equivalent contribution to the achievement of the objective pursued.

7.4.2.4.2.1 The importance of the objective

7.311. The first factor to be considered in examining the necessity of a measure is the importance of the objective in question, which should be investigated by taking into account the facts specific to each case. In *Korea – Various Measures on Beef*, the Appellate Body suggested that the more vital or important the interests or values it is wished to protect, the easier it is to accept a measure as "necessary".[481]

7.312. For example, the panel in *US – Gambling* considered that the interests and values protected by the measure at issue, which addressed problems related to money laundering, organized crime, fraud, under-age gambling, and pathological gambling, served very important societal interests which could be characterized as vital and important in the highest degree.[482]

7.4.2.4.2.2 The contribution of the measure to the achievement of the objective pursued

7.313. As a second factor in the examination of necessity, a panel must analyse the contribution of the measure to the achievement of the objective pursued. This should also involve taking into account the facts specific to each case and the importance of the interests or values at stake.

7.314. In *Korea – Various Measures on Beef*, the Appellate Body suggested that the greater the contribution of a measure to the realization of the ends pursued, the more easily the measure might be considered to be "necessary".[483]

7.315. In *Brazil – Retreaded Tyres*, the Appellate Body explained that a measure contributes to the achievement of the objective when there is a genuine relationship of ends and means between the objective pursued and the measure at issue.[484] In analysing the import ban in question, the Appellate Body explained that, to justify a ban, or a measure that produces trade-restrictive effects as serious as those that follow from a ban, a panel must be satisfied that it brings about a *material* contribution to the achievement of its objective. A panel might conclude that a ban is necessary, "on the basis of a demonstration that the import ban at issue is apt to produce a

[480] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 182. The expression "is a holistic operation" in the original English language text of the Appellate Body Report was translated into Spanish as "*debe efectuarse en forma íntegra*". See also Appellate Body Report, *EC – Seal Products*, para. 5.214.

[481] Appellate Body Report, *Korea – Various Measures on Beef,* para. 162. See also Appellate Body Report, *EC – Asbestos*, para. 172; Panel Report, *US — Gambling*, para. 6.477.

[482] Panel Report, *US — Gambling*, para. 6.492. See also Appellate Body Report, *US — Gambling*, para. 301.

[483] Appellate Body Report, *Korea – Various Measures on Beef,* para. 163. See also Panel Report, *US - Gambling*, para. 6.477.

[484] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145.

material contribution to the achievement of its objective."[485] In its report in *EC – Seal Products*, the Appellate Body indicated that its approach in *Brazil – Retreaded Tyres* did not set out a generally applicable standard requiring the use of a pre-determined threshold of contribution in analysing the necessity of a measure.[486]

7.316. The Appellate Body in *Brazil – Retreaded Tyres* also made it clear that the selection of a methodology to assess a measure's contribution was a function of the nature of the risk, the objective pursued, and the level of protection sought, and depended on the nature, quantity, and quality of evidence existing at the time.[487] As there is no requirement to quantify the contribution, the analysis can be done in either quantitative or qualitative terms.[488] In other words, the contribution can be demonstrated by means of quantitative data pertaining to the past or the present, or by means of quantitative projections into the future, but also by means of qualitative reasoning based on a set of hypotheses tested and supported by sufficient evidence.[489]

7.317. The Appellate Body also expressed the view that panels, as triers of the facts, should enjoy a certain latitude in designing the appropriate methodology and deciding how to structure the analysis of the contribution, a latitude limited by the text of Article XX of the GATT 1994 and Article 11 of the DSU.[490]

7.318. The panel in *US – Gambling* concluded, for example, that the measures at issue, given that they prohibited the remote supply of gambling and betting services, must contribute, "at least to some extent", to addressing the problems identified.[491]

7.319. The panel in *EC – Seal Products* analysed the contribution of the ban on the import and placing on the market of seal products to the objective of reducing the global demand for these products and protecting the European Union public from being exposed to them. The panel, having also considered the diminution in the degree of the contribution caused by the exceptions to the ban, concluded that the seal regime, as a whole, contributed "to a certain extent" to its objective of addressing the European Union's public moral concerns on seal welfare.[492]

7.4.2.4.2.3 The trade-restrictiveness of the measure

7.320. As the third factor in examining necessity, a panel must assess the degree to which the measure restricts international trade. This should involve taking into account the facts specific to each case and the importance of the interests or values at stake.

7.321. In *Korea – Various Measures on Beef,* the Appellate Body suggested that a measure with a relatively slight impact on the trade in imported products might more easily be considered as "necessary" than a measure with broader restrictive effects.[493]

7.322. In *China – Publications and Audiovisual Products*, the Appellate Body added that "if a Member chooses to adopt a very restrictive measure, it will have to ensure that the measure is carefully designed so that the other elements to be taken into account in weighing and balancing the factors relevant to an assessment of the 'necessity' of the measure will 'outweigh' such restrictive effect".[494]

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[485] Ibid. para. 151. The expression "apt to produce a material contribution" in the original English language text of the Appellate Body report was translated into Spanish as "*adecuada para hacer una contribución importante*".
[486] Appellate Body Reports, *EC – Seal Products*, para. 5.213.
[487] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145.
[488] Ibid. para. 146.
[489] Ibid. para. 151.
[490] Ibid. para. 145.
[491] Panel Report, *US – Gambling*, para. 6.494.
[492] Panel Reports, *EC – Seal Products*, para. 7.638.
[493] Appellate Body Report, *Korea – Various Measures on Beef,* para. 163. See also Appellate Body Report, *Brazil – Retreaded Tyres*, para. 150; Appellate Body Report, *China – Publications and Audiovisual Products*, para. 310; Panel Report, *US – Gambling*, para. 6.477.
[494] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 310.

7.323. The Appellate Body indicated that, while in principle a panel must assess the restrictive effect of a measure on international commerce, this test must be applied in the light of the specific obligations that the measure infringes and the defence being invoked.[495]

7.324. The panel in *US – Gambling*, for example, considered that the United States' laws restricting online gambling and betting services had "a significant restrictive trade impact".[496]

7.4.2.4.2.4 Comparison of the measure with possible alternatives

7.325. If a panel arrives at a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives.[497]

7.326. It rests upon the complaining Member to identify possible alternatives that the responding Member could have taken.[498] If the complainant succeeds in identifying an alternative measure which, in its view, the respondent could have taken and which provides an equivalent contribution to the achievement of the objective pursued, the respondent will be required to demonstrate why its challenged measure nevertheless remains *necessary* or, in other words, why the proposed alternative is not, in fact, "reasonably available". If the complainant fails to identify an appropriate alternative measure or if the respondent demonstrates that the alternative is not "reasonably available", in the light of the interests or values being pursued and the desired level of protection, the panel will be able to confirm its preliminary conclusion that the measure is *necessary*.[499]

7.327. The Appellate Body has accepted as a fundamental principle that Members of the WTO have the right to determine the level of protection that they consider appropriate in each particular situation[500], so that an alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued.[501]

7.328. The Appellate Body has also stated that "[a]n alternative measure may be found not to be 'reasonably available' [to the responding Member], however, where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties."[502]

7.329. In *EC – Asbestos,* the Appellate Body, in analysing the ban on asbestos and asbestos-containing products in France, considered that, in determining whether a suggested alternative measure is "reasonably available", several factors must be taken into account, besides the difficulty of implementation. The Appellate Body referred to the following factors: (i) that the measure proposed should be WTO-consistent or less inconsistent than the measure challenged; (ii) the extent to which the alternative measure contributes to the realization of the end pursued; and (iii) that the measure proposed should be less trade-restrictive than the measure challenged.[503]

7.4.2.5 The question of whether the compound tariff is a measure necessary to protect public morals

7.4.2.5.1 Introduction to the analysis under Article XX(a) of the GATT 1994

7.330. The Panel will analyse whether Colombia has succeeded in demonstrating that the compound tariff is a measure necessary to protect public morals within the meaning of Article XX(a) of the GATT 1994. The Panel will structure its analysis by assessing whether Colombia has shown, first, that the compound tariff has been adopted or enforced, or is designed,

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[495] Ibid. para. 306.
[496] Panel Report, *US – Gambling*, para. 6.495.
[497] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.
[498] Appellate Body Report, *US – Gambling*, para. 309; *Brazil – Retreaded Tyres*, para. 156.
[499] Appellate Body Report, *US – Gambling*, para. 311.
[500] Appellate Body Reports, *Korea – Various Measures on Beef,* para. 176; *Brazil – Retreaded Tyres*, para. 210; *EC – Asbestos*, para. 168.
[501] Appellate Body Report, *US – Gambling*, para. 308.
[502] Ibid.
[503] Appellate Body Report, *EC – Asbestos*, paras. 170-172.

to protect public morals; and, secondly, whether the compound tariff is necessary to protect public morals.[504]

7.4.2.5.2 As to whether the compound tariff is a measure "designed to protect public morals"

7.331. To assess whether the compound tariff has been adopted or enforced, or is designed, to protect public morals, the Panel will consider whether Colombia has shown, first, that its declared policy objective, i.e. to combat money laundering[505], is one of the policies designed to protect public morals in Colombia; and, secondly, whether the compound tariff is itself designed to combat money laundering.

7.4.2.5.2.1 Has Colombia shown that the fight against money laundering is one of the policies designed to protect public morals in Colombia?

7.332. Colombia asserts that money laundering is criminal conduct in Colombia. Therefore, according to Colombia, the compound tariff is related to the "standards of right and wrong conduct" as defined by Colombian society. Colombia adds that money laundering is conduct censured at the international level, so that the Decree also reflects the "standards of right and wrong conduct" of the international community. Colombia asserts that, accordingly, the compound tariff protects public morals.[506]

7.333. Panama, for its part, does not question that problems related to money laundering fall within the scope of public morals. Panama adds that, in any event, it would be for Colombia to show that the fight against money laundering is one of the policies designed to protect public morals in Colombia.[507]

7.334. As recognized in previous cases, the term "public morals" denotes standards of right and wrong conduct maintained by or on behalf of a community or nation, and its content may vary in time and space, depending on the prevailing factors.[508] Members have the right to determine the level of protection that they consider appropriate and some scope to define and apply for themselves the concept of "public morals" in their respective territories, according to their own systems and scales of values.[509]

7.335. Colombia has shown that money laundering is criminal conduct in Colombia, defined as an offence under Article 323 of its Criminal Code.[510] Colombia has submitted documents which show that combating money laundering is an important policy objective for the Colombian State. These documents include: (i) the National Development Plan 2010-2014 which, in a section on the fight against illicit drug trafficking and illegality, refers to the control of money laundering[511]; (ii) the National Anti-Drug Policy, which includes a reference to an anti-money laundering policy[512]; (iii) the National Policy against Money Laundering and the Financing of Terrorism[513]; and (iv) Draft Law No. 94 of 2013, currently at the discussion stage, which would lead to the adoption of instruments to prevent, control and punish smuggling, money laundering and tax evasion.[514]

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[504] Appellate Body Reports, *EC – Seal Products*, para. 5.169.

[505] Colombia's first written submission, paras. 38, 66, 80-81, 88, 93, 97, 100 and 113; second written submission, paras. 1, 6, 38, 53, 56-59, 104; and opening statement at the first meeting of the Panel, paras. 11 and 65.

[506] Colombia's first written submission, paras. 80-83; second written submission, paras. 41-47; and opening statement at the first meeting of the Panel, para. 65.

[507] Panama's second written submission, para. 3.18; and response to Panel question No. 7.

[508] Panel Report, *US – Gambling*, paras. 6.461 and 6.465.

[509] Ibid. para. 6.461.

[510] Colombia's second written submission, para. 41; National Customs and Excise Directorate, Information and Financial Analysis Unit, *Money Laundering Typologies Related to Smuggling*, January 2006 (Exhibit COL-10), p. 8.

[511] National Planning Department, National Development Plan (2010-2014) (extracts) (Exhibit COL-33).

[512] Ministry of the Interior and Justice, National Anti-Drug Policy (Exhibit COL-6).

[513] National Council for Economic and Social Policy, *National Policy against Money Laundering and the Financing of Terrorism*, 18 December 2013 (Exhibit COL-19).

[514] Draft Law, adopting instruments to prevent, control and punish unfair competition deriving from illegal foreign trade, internal trade, money laundering and tax evasion operations (Exhibit COL-20); Report for the first discussion of Draft Law No. 94 of 2013 (Exhibit COL-21).

Colombia has also referred to other actions, such as the decision to establish a National Anti-Money Laundering Day.[515]

7.336. Colombia has presented information on the consequences of illicit drug trafficking and armed conflict for Colombian society.[516] Several of the documents submitted by Colombia refer to the relationship between money laundering and drug trafficking in Colombia[517], as well as to the relationship between those two activities and the financing of Colombia's internal armed conflict.[518]

7.337. In addition, Colombia has identified international instruments, to which Colombia is party, relating to the fight against money laundering and the financing of terrorism, including the United Nations Convention against Transnational Organized Crime[519] and the International Convention for the Suppression of the Financing of Terrorism.[520] Colombia has also referred to the International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, drawn up by the Financial Action Task Force[521], as well as to Colombia's participation in the Latin American Financial Action Task Force (GAFILAT), previously known as the South American Financial Action Task Force (GAFISUD), an intergovernmental organization set up to combat money laundering and the financing of terrorism.[522]

7.338. In the opinion of this Panel, in the circumstances of this case, Colombia has presented sufficient evidence to demonstrate the existence of a real and present concern in Colombian society and the Colombian State with regard to money laundering, as well as with regard to the way in which money laundering is linked with drug trafficking and other criminal activities and with Colombia's internal armed conflict. Consequently, the Panel concludes, as a matter of fact, that combating money laundering is one of the policies designed to protect public morals in Colombia. This conclusion recognizes the freedom of WTO Members to define their own concept of public morals, in the light of factors such as the social, cultural, ethical and religious values prevailing in a society at a given moment in time. In addition, this conclusion is consistent with the analysis made by other panels which have recognized that measures that address concerns related to money laundering can be characterized as measures designed to protect public morals.[523]

7.339. The Panel therefore concludes that Colombia has demonstrated that combating money laundering is one of the policies designed to protect public morals in Colombia.

7.4.2.5.2.2 Has Colombia shown that the compound tariff is designed to combat money laundering?

7.340. Throughout this dispute, Colombia has maintained that the compound tariff is a measure designed to combat money laundering.[524] Colombia asserts that this objective is obvious from the

[515] Colombia's response to Panel question No. 7.

[516] National Historical Memory Centre, *Enough Already!*, General Report, Historical Memory Group, 2013 (Exhibit COL-1), p. 20; News item: *Semana*, "Colombian conflict claims six million victims", 2 February 2008 (Exhibit COL-2); News item: *El Tiempo*, "The war against drug trafficking", 24 November 2013 (Exhibit COL-3).

[517] Rocha García, *New dimensions of drug trafficking in Colombia*, 2011 (Exhibit COL-4), pp. 89-105 and 199-206; Ministry of Justice and Law, Drugs Observatory, *The Drug Problem in Colombia* (Exhibit COL-27), pp. 142-155.

[518] National Historical Memory Centre, *Enough Already!*, General Report, Historical Memory Group, 2013 (Exhibit COL-1), p. 20; National Planning Department, National Development Plan 2010-2014) (extracts) (Exhibit COL-33).

[519] *United Nations Convention against Transnational Organized Crime and the Protocols thereto*, December 2000 (Exhibit COL-24); List of signatory countries to the United Nations Convention against Transnational Organized Crime (Exhibit COL-31). See also Colombia's first written submission, para. 45; response to Panel questions Nos. 94 and 129.

[520] *International Convention for the Suppression of the Financing of Terrorism*, December 1999 (Exhibit COL-25). Colombia's first written submission, para. 47; response to Panel question No. 129.

[521] GAFISUD, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, February 2012 (Exhibit COL-26).

[522] Colombia's first written submission, para. 48.

[523] Panel Report, *US – Gambling*, para. 6.492. See also Appellate Body Report, *US – Gambling*, para. 301.

[524] Colombia's first written submission, paras. 38, 66, 80-81, 88, 93, 97, 100 and 113; second written submission, paras. 1, 2, 6, 38, 53, 56-59, 104; opening statement at the first meeting of the Panel, paras. 11 and 65; opening statement at the second meeting of the Panel, para. 47.

design and structure of its measure, since the compound tariff discourages imports at artificially low prices that are used for money laundering.[525]

7.341. For its part, Panama maintains that the compound tariff is not designed to protect public morals against money laundering. According to Panama, nothing in the design, structure or architecture of Decree No. 456 suggests that the measure is designed to combat money laundering operations.[526] In Panama's opinion, the objective of combating money laundering has been introduced into this dispute by Colombia *ex post facto*.[527]

7.342. In response to a question from the Panel, Colombia added that the compound tariff also seeks to reduce the operational capacity of the drug traffickers and criminal groups[528], and is intended to combat tax evasion and unfair competition, on the understanding that money laundering is part of a single chain of illicit acts that includes the importation of goods.[529] Be that as it may, Colombia has based its arguments on the compound tariff's purported objective of combating money laundering, so that the Panel lacks the elements necessary to analyse the measure in relation to additional objectives, such as combating tax evasion and unfair competition. The Panel will therefore focus on the objective that Colombia has identified, namely, combating money laundering.

7.343. The parties disagree with respect to the objective of the compound tariff. Nevertheless, this Panel will make an objective assessment as to whether the compound tariff is, in fact, designed to combat money laundering. To this end, the Panel will consider the design, architecture and revealing structure of the compound tariff, taking into account all the relevant facts and relevant circumstances of the case, beginning with the analysis of the text of the measure itself, and assessing all the evidence available.[530]

7.4.2.5.2.3 Analysis of the text of Decree No. 456

7.344. This Panel begins its assessment by analysing the text of Decree No. 456, the legal instrument that regulates the measure at issue. Without intending to repeat its description of the measure, this Panel observes that Decree No. 456 establishes an *ad valorem* tariff of 10% plus a specific tariff of US$5/kg on imports of textiles and apparel, when the declared f.o.b. price is US$10/kg or less, and an *ad valorem* tariff of 10% plus a specific tariff of US$3/kg on imports of textiles and apparel, when the declared f.o.b. price is greater than US$10/kg.[531] Decree No. 456 establishes an *ad valorem* tariff of 10% plus a specific tariff of US$5/pair on imports of footwear whose declared f.o.b. price is US$7/pair or less, and an *ad valorem* tariff of 10% plus a specific tariff of US$1.75/pair on imports of footwear whose declared f.o.b. price is greater than US$7/pair.[532] If an import declaration includes products of the same subheading, some priced above and others below these thresholds, the tariff applicable to all the products in that declaration will be that which is highest.[533]

7.345. Decree No. 456 excludes from the application of the compound tariff: products of heading 64.06 (parts of footwear)[534]; imports originating in countries with which Colombia has trade agreements in force, if the relevant subheadings have been negotiated[535]; and imports of clothing industry waste and/or scrap resulting from production processes carried out under Special Import-Export Systems (SIEX), known as the "Plan Vallejo".[536] Nor is the compound tariff applied to goods entering certain regions which Colombia has designated as Special Customs Regime Zones or to goods entering Colombia under the "Plan Vallejo".

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[525] Colombia's second written submission, para. 55.
[526] Panama's opening statement at the first meeting of the Panel, paras. 1.20-1.21; closing statement at the first meeting of the Panel, para. 1.8.
[527] Panama's second written submission, para. 3.19; response to Panel questions Nos. 17 and 39.
[528] Colombia's response to Panel question No. 37.
[529] Colombia's second written submission, para. 2; and response to Panel questions Nos. 37 and 43.
[530] See Appellate Body Reports, *EC – Seal Products*, para. 5.144, *US - COOL*, para. 371; *US - Tuna II (Mexico)*, para. 314, *Japan — Alcoholic Beverages II*, p. 29.
[531] Decree No. 456 (Exhibits PAN-3 and COL-17), Article 1.
[532] Ibid. Article 2.
[533] Ibid. paragraph of Article 1 and paragraph 1 of Article 2.
[534] Ibid. second paragraph of Article 1.
[535] Ibid. paragraph of Article 5.
[536] Ibid. paragraph of Article 5.

7.346. Decree No. 456 stipulates that the measure will remain in force for a period of two years, after which the customs tariff envisaged in Decree No. 4927 of 2011 and its amendments will be re-established.[537]

7.347. Neither Decree No. 456 nor the previous Decree No. 074[538] contains any statement of reasons or recitals indicating that the objective of the compound tariff is to combat money laundering. Neither of these decrees refers elsewhere in its text to the objective of combating money laundering or to its being applicable to imports used for money laundering.

7.348. Nor do the legal underpinnings cited in Decrees Nos. 074 and 456 (Article 189, paragraph 25 of the Political Constitution and Laws Nos. 7 of 1991 and 1609 of 2013) make it possible to confirm whether the compound tariff is designed to combat money laundering. As already mentioned, Article 189 of Colombia's Political Constitution lists the functions of the President of the Republic and paragraph 25 specifically refers, among other things, to the authority of the President to "modify duties, tariffs and other provisions concerning the customs regime; to regulate foreign trade; and to intervene in financial, stock market, and insurance activities and any other activity related to the management, utilization and investment of resources derived from the savings of third parties in accordance with the law". For its part, Law No. 7 of 1991 is Colombia's framework law for foreign trade, establishing, *inter alia*, general standards to be observed by the Government in regulating the country's foreign trade, creating the Ministry of Foreign Trade and the Foreign Trade Bank, and determining the composition and functions of the Higher Council for Foreign Trade. Finally, Law No. 1609 of 2013 is Colombia's framework customs law, establishing general standards to be observed by the Government in modifying duties, tariffs and other provisions concerning the customs regime.

7.349. Neither Article 189, paragraph 25, of the Political Constitution nor Law No. 7 of 1991 contains any reference to the functions of the President of the Republic in the area of combating money laundering or, more generally, combating criminal activities or maintaining public order.[539] Both Article 189, paragraph 25, of the Political Constitution and Laws Nos. 7 of 1991 and 1609 of 2013 refer rather to the powers of the President of the Republic to regulate foreign trade and modify tariffs, fees and other provisions concerning the customs regime.

7.350. In the case of Law No. 1609 of 2013, paragraph 2 of Article 4 and Article 6 refer to money laundering in relation to risk management in the customs service. Article 6 also states that "[p]ublic officials and customs users shall seek to guard against, prevent and frontally and decisively attack corruption, smuggling and money laundering, as well as any conduct that runs counter to the faithful and correct performance of customs functions".[540] However, from the reference to money laundering in these provisions it is not possible to establish a link between Decree No. 456 and the compound tariff's purported aim of combating money laundering.

7.4.2.5.2.4 Other aspects relating to the design, architecture and structure of the compound tariff

7.351. In addition to the fact that the texts of Decrees Nos. 074 and 456 make no express reference to the objective of combating money laundering, the design, architecture and revealing structure of the compound tariff do not support Colombia's claim that the measure is designed for that purpose. What follows from the text of Decree No. 456 is that, by virtue of its design, architecture and structure, the measure imposes a heavier tax on imports at prices below certain specified thresholds. In other words, the measure is designed to impose a higher levy on imports of relevant products entering at low prices, without distinguishing and determining whether those low prices include actual cases of undervaluation, or whether such undervaluation is in any way connected with money laundering.

[537] Ibid. Articles 3, 5, 6 and 7. See also Colombia's response to Panel questions Nos. 76 and 78.
[538] Decree No. 074 (Exhibits PAN-2 and COL-16).
[539] By contrast, the functions described in other paragraphs of Article 189 of the Political Constitution, not mentioned as being part of the legal basis of Decrees Nos. 074 and 456, relate to aspects such as: preserving and restoring public order (para. 4); ensuring that laws are strictly enforced (para. 10); and issuing decrees necessary for laws to be fully implemented (para. 11). Political Constitution of Colombia, Preamble and Articles 188 and 189 (Exhibit PAN-29).
[540] Colombia's response to Panel question No. 81. Law No. 1609 of 2013 (Exhibits PAN-31 and COL-45).

7.352. The Panel understands that Colombia's argument is that import prices that are below the thresholds established in Decree No. 456 are "artificially low" and do not reflect market conditions, so that any importation taking place at declared prices below the thresholds would be being undervalued for money laundering purposes.[541] In Colombia's own words, "imports at prices lower than those established in the thresholds of Decree No. 456 are imports effected at artificially low prices which are used for money laundering".[542] In some parts of its statements, however, Colombia has used different language and has referred to the "high risk" of imports at below-threshold prices being used for money laundering.[543] The Panel put several questions to Colombia with a view to confirming that its argument was that any importation taking place at declared prices below the thresholds would be being undervalued for money laundering purposes.[544] In its responses to these questions, Colombia did not indicate that its argument was any different.

7.353. Colombia's argument makes a series of interconnected assumptions that require verification, namely: (i) that the thresholds established in Decree No. 456 reflect "market conditions" and any price below them is "artificially low"; (ii) that products imported at prices below the thresholds established in Decree No. 456 are being undervalued; and (iii) that imports of goods subject to the compound tariff at prices below the thresholds established in Decree No. 456 are being used for money laundering purposes.

7.4.2.5.2.5 Is there evidence that the thresholds established in Decree No. 456 reflect "market conditions" and that any price below them is "artificially low"?

7.354. With respect to the first point (that is, whether there is evidence that the thresholds established in Decree No. 456 reflect "market conditions" and that any price below them is "artificially low"), Colombia has indicated that the studies and calculations it used as a basis for determining the thresholds "consist of [calculation] sheets and internal working documents. Being internal working documents, they are confidential."[545] However, Colombia has offered a general explanation of the methodology used for determining these price thresholds. According to Colombia, the thresholds are based on domestic and international market prices. In order to establish these prices, Colombia determined critical points (*puntos de quiebre*) or benchmarks (*puntos de referencia*), including: (i) the average import prices of the relevant products; (ii) the average production prices of the raw materials used in making the products, as compared with production costs in Colombia; (iii) the unit import prices for representative importers in Colombia; and (iv) in the case of footwear, the average third-country import prices and the average import price for representative importers in Colombia.[546] Colombia asserts that, in all cases, the thresholds are lower than the critical points or benchmarks obtained from the calculations[547], as well as that, in the case of apparel, the threshold is "significantly less … than the average cost of production … and is very close to the average import price", which would prevent the domestic industry from being protected.[548]

7.355. It is therefore impossible for this Panel, on the basis of the information available, to verify that, as Colombia asserts, the thresholds established in Decree No. 456 reflect the prices of transactions under normal market conditions for the products in question. In any event, neither has Colombia explained how the calculation of single price thresholds established on a fixed basis for each of the two broad categories of products covered by this dispute can be useful, without an examination of the specific characteristics of the particular transaction concerned, for determining market prices and the levels below which import prices must be considered "artificially low". At the

[541] Colombia's first written submission, paras. 29-36; second written submission, para. 36.
[542] Colombia's response to Panel questions Nos. 1 and 6, paras. 4 and 14. See also first written submission, para. 96; second written submission, paras. 29 and 36; response to Panel questions Nos. 28 and 104.
[543] See, for example, Colombia's first written submission, paras. 35, 60, 66, 73 and 93.
[544] See, for example, Panel questions Nos. 5, 6, 27, 32, 33, 40, 46, 88, 100, 104, 108, 109, 110, 111.
[545] Colombia's response to Panel question No. 25.
[546] See Colombia's second written submission, paras. 31-35; opening statement at the first meeting of the Panel, paras. 37-44; opening statement at the second meeting of the Panel, para. 40; response to Panel question No. 29.
[547] Colombia's second written submission, para. 31; opening statement at the second meeting of the Panel, para. 40.
[548] See Colombia's opening statement at the first meeting of the Panel, para. 44; response to Panel question No. 29, paras. 69-70.

same time, the Panel takes note of Colombia's argument that Decree No. 456 covers around 300 tariff lines (at ten-digit level), so that the use of different thresholds would make them much harder to administer and would create incentives for criminal groups to declare the subheadings corresponding to the goods incorrectly.[549]

7.356. In fact, the Panel notes that the compound tariff operates on the basis of two price thresholds, a first threshold for textile products and apparel (more precisely, for the products of Chapters 61, 62 and 63 and the tariff line 6406.10.00.00) and a second threshold for footwear (more precisely, for the products of Chapter 64, with the exception of tariff heading 64.06).

7.357. In particular, it is not clear how the methodology used by Colombia takes into account the possible differences that could exist between the import prices of the different products imported, within each of the broad categories covered by these thresholds, in terms of factors such as: production costs; component materials; quality levels; trademarks; seasonality, consumer tastes and preferences; and the actual nature of the products in question.[550] Nor has Colombia explained how these individual thresholds would take into account the possible differences in import prices that might arise, including with respect to imports of identical products, depending on the circumstances of the import operations, including the conditions of sale and quantities.

7.358. Furthermore, it is evident from the information provided by Colombia it follows that, at least as far as footwear is concerned, the price threshold established in Decree No. 456 (US$7/pair) is higher than the cost of producing the footwear in Colombia (US$6.2/pair) and the import price of one of Colombia's two main footwear importers (US$6.9/pair).[551] In this connection, Colombia has stated that the costs of production in Colombia do not include additional costs (such as transport, marketing and profit) and that the importer in question imported at prices higher than US$7/pair, while other importers had even higher import prices.[552] Nevertheless, the prices used by Colombia for calculating its benchmarks are average prices. For this reason, it may be assumed that, in practice, the average cost of production of US$6.2/pair for footwear in Colombia means that for some footwear products and for some producers in Colombia the price may be lower or higher. Moreover, Colombia's argument relates to the costs of producing footwear in Colombia and does not rule out the possibility of the production costs in other countries being significantly lower. Similarly, the import price of US$6.9/pair corresponds to one of the two main footwear importers which, according to Colombia, were considered representative for the determination of the price threshold in Decree No. 456. Where average import prices are concerned, Colombia's argument that the importer in question imported at prices higher than US$7/pair necessarily means that it also imported at prices lower than the price threshold in Decree No. 456. In any event, the foregoing contradicts Colombia's statement to the effect that, in all cases, the thresholds established in Decree No. 456 are lower than the critical points or benchmarks obtained from the calculations.[553]

7.359. In short, it cannot be ruled out that the importation of goods at prices below the thresholds established in Decree No. 456 could, in practice, reflect "artificially low" prices that do not reflect market conditions. However, nothing in Colombia's arguments or the available evidence serves to show that the thresholds laid down in Decree No. 456 could be decisive in establishing that the importation of goods at prices below those thresholds is *necessarily* taking place at "artificially low" prices that do not reflect real prices or market conditions.

7.360. In addition, Colombia has stated that, in the case of imports of apparel and footwear made in China, import prices have been found to be lower when the products pass through Panama than when the same products are exported directly from China to Colombia. In Colombia's opinion, this shows that these imports from Panama are being undervalued and are entering Colombia at "artificially low" prices.[554] Colombia initially explained that its calculations were made by

[549] Colombia's response to Panel question No. 112.
[550] See Colombia's response to Panel question No. 27.
[551] Colombia's opening statement at the first meeting of the Panel, para. 43; response to Panel question No. 29, para. 71.
[552] Colombia's response to Panel questions Nos. 114 and 115.
[553] Colombia's second written submission, para. 31; opening statement at the second meeting of the Panel, para. 40.
[554] Colombia's second written submission, para. 74; opening statement at the first meeting of the Panel, paras. 21-25; opening statement at the first meeting of the Panel, para. 67; response to Panel questions

determining "the percentage of tariff subheadings which, while originating in China, are cheaper to purchase in Panama than to purchase directly from China".[555] These calculations were said to be based on the prices of imports of goods of Chapters 61, 62, 63 and 64 subject to the compound tariff "per ten-digit tariff subheading".[556] Later, Colombia stated that its determination was also based on: (i) comparing the prices of exports from China to Colombia with the prices of exports from China to three other countries (Chile, the United States and Panama) and then comparing the result with the prices of exports from China to Colombia via Panama; and (ii) comparing export prices from China to Panama with re-export prices from Panama to Colombia.[557] Panama maintains that Colombia's remarks are a mere assertion and that, apart from the charts contained in Exhibit COL-30, Colombia has failed to produce the data on which its calculations were based.[558]

7.361. In fact, Colombia has not submitted the individual data on which it based its observations, but only charts that summarize the prices detected. In any event, judging from the information supplied by Colombia, the price comparisons do not reflect the tracking of a single consignment or relate to the same goods. Moreover, in the Panel's opinion, comparing import or export prices for categories of products classified at ten-digit level does not ensure that the goods imported are comparable. Nor is it clear how such a comparison, even if the products concerned were the same or identical, would take into account any possible price differences resulting from the specific characteristics of the transaction in question, including factors such as differences in the conditions and terms of sale or in quantities.

7.4.2.5.2.6 Is there evidence that the products imported at prices below the thresholds established in Decree No. 456 are being undervalued?

7.362. With respect to the second point (that is, whether there is any evidence that the products imported at prices below the thresholds established in Decree No. 456 are being undervalued), Colombia has stated that "it uses the term 'underinvoicing' to refer in shorthand form to imports at artificially low prices that do not correspond to real or market prices. Imports at artificially low prices commonly use fictitious invoices that do not reflect the price paid for the goods".[559]

7.363. The notion of underinvoicing or undervaluation pertains to a situation in which the price declared on the invoice for a particular transaction is lower than the price actually paid or payable. As indicated above, there is no evidence that the importation of goods at prices below the thresholds contained in Decree No. 456 is *necessarily* taking place at "artificially low" prices that do not reflect real or market prices or the price actually paid or payable in the transaction in question. Furthermore, considering the wide range of products subject to the compound tariff, neither does the importation of goods at prices *above* the thresholds contained in Decree No. 456 *necessarily* mean that the prices reflect real or market prices or that the goods are not being undervalued.

7.364. The studies contributed by the parties are not conclusive with respect to whether the undervaluation occurs exclusively or even preponderantly in connection with imports of products with "low" prices. A study carried out jointly by DIAN and Colombia's Information and Financial Analysis Unit concerning smuggling-related money laundering operations states that "the incidence of smuggling [associated with money laundering operations] is greater in the case of articles in high demand and without minimum descriptions that enable them to be distinguished, since these characteristics facilitate rapid marketing".[560] However, a study by the Financial Action Task Force (FATF) suggests that the more complex and the more highly priced the goods being traded, the more difficult it could be for the customs authorities to identify overvaluation or undervaluation

Nos. 104 and 105, paras. 58 and 60-64. See also the charts submitted by Colombia with its opening statement at the first meeting of the Panel (Exhibit COL-30).

[555] Colombia's second written submission, para. 74; response to Panel question No. 77, para. 3. See also response to Panel question No. 106; comments on Panama's response to Panel question No. 162.

[556] Colombia's response to Panel question No. 105, para. 61.

[557] Ibid. paras. 60-64.

[558] Panama's comments on Colombia's response to Panel question No. 105.

[559] Colombia's response to Panel question No. 41.

[560] National Customs and Excise Directorate, Information and Financial Analysis Unit, *Money Laundering Typologies Related to Smuggling*, January 2006 (Exhibit COL-10), pp. 9-10.

and correctly assess the duties or taxes payable.[561] In the opinion of the Panel, undervaluation in relation to imports of products of greater complexity and value could not only be more difficult to identify but would also have the additional incentive of making it possible to launder a larger amount of money per unit of merchandise.

7.365. In any event, insofar as the thresholds established in Decree No. 456 were determined on a fixed basis for broad categories of products and without examining the specific characteristics of the transaction concerned, there is no indication that products imported at prices below the thresholds established in Decree No. 456 are necessarily being undervalued.

7.4.2.5.2.7 Is there evidence that goods imported at prices below the thresholds established in Decree No. 456 are being used for money laundering purposes?

7.366. With respect to the third point (that is, whether there is any evidence that the undervaluation of goods subject to the compound tariff on importation into Colombia is being used for money laundering purposes), the information available suggests that the undervaluation of imports is, in fact, one of the methods used for money laundering detected by the Colombian authorities.

7.367. As defined by the World Customs Organization, trade-based money laundering is the process of legitimizing the proceeds of crime by disguising them in the form of a payment for an international trade transaction.[562] An FATF study defines trade-based money laundering as the process of disguising the proceeds of crime and moving value through the use of trade transactions in an attempt to legitimize their illicit origin.[563] The same study warns that trade-based money laundering is an important channel of criminal activity and, given the growth in world trade, represents an increasingly important money laundering and terrorist financing vulnerability.[564]

7.368. A joint study by DIAN and the Colombian Information and Financial Analysis Unit identifies some of the most commonly used methods, among those detected by the Colombian authorities, for laundering money and financing terrorism through "smuggling" (the document refers to these various methods as "typologies").[565]

7.369. The typologies identified in the study include "payment in kind for illicit activities with goods smuggled into the national territory". According to Colombia, this typology corresponds to the sort of practices that the compound tariff seeks to combat.[566] The study describes this typology as follows:

> The purpose of this type of operation is to bring goods into Colombia from abroad as an indirect means of entering the proceeds of criminal activities carried out wholly or partially in Colombia or in other countries.
>
> The operation to which this typology relates begins with the delivery abroad to a member of the criminal organization established in country (A) of easily marketable goods, in payment for illicit activities. These goods are then brought into the national territory by means of overt or technical smuggling operations and subsequently distributed and sold inside the national territory. To carry out these activities the criminal organizations concerned require the know-how and infrastructure of

[561] Financial Action Task Force, *Trade-Based Money Laundering*, 23 June 2006 (Exhibit COL-11), p. 5. See also Financial Action Task Force, *Money-Laundering Vulnerabilities of Free Trade Zones*, March 2010 (Exhibit COL-12), pp. 17-18.

[562] World Customs Organization, *Illicit Trade Report 2012* (Exhibit COL-8), p. 34. See also Financial Action Task Force, *Trade-Based Money Laundering*, 23 June 2006 (Exhibit COL-11), p.3.

[563] Financial Action Task Force, *Trade-Based Money Laundering*, 23 June 2006 (Exhibit COL-11), p. 3.

[564] Financial Action Task Force, *Trade-Based Money Laundering*, 23 June 2006 (Exhibit COL-11), p. 25.

[565] National Customs and Excise Directorate, Information and Financial Analysis Unit, *Money Laundering Typologies Related to Smuggling*, January 2006 (Exhibit COL-10), pp. 13-14 and 33; Colombia's response to Panel question No. 44, para. 101.

[566] Colombia's response to Panel question No. 44, para. 101.

> transnational smuggling organizations, which receive part of the proceeds for illegally transporting, introducing and distributing the goods.[567]

7.370. The other typology which, according to Colombia, corresponds to the kind of practices that the compound tariff seeks to combat is called in the study the "transport of money of illicit origin to another country to purchase goods which are introduced into the local country by means of technical smuggling based on underinvoicing".[568] The study describes this typology as follows:

> In this typology the main aim is to interleave several successive operations which help to obscure the trail of the illicit money. The process begins with the transport of foreign currency from Colombia (country (A)) to another country (B) through unauthorized channels, that is, without using a security services company or a money transfer through a foreign exchange market intermediary, as the legislation requires. This money is exported for the purpose of purchasing goods which are subsequently introduced into the country using some means of smuggling. Finally, the goods are marketed in Colombia, and the capital initially sent abroad is recovered and legitimized within the national economic system. The goods may be purchased in country (B) to which the money was first sent or in a third country (C).
>
> As a result of this process, the organization obtains cash in the local currency, which can be represented to the authorities and third parties as the proceeds of a commercial activity. This money could, in turn, be used to make lawful investments in the stepwise process of giving it the semblance of legality and disguising its true origin. A possible alternative is to repeat the aforementioned operation once or twice more.[569]

7.371. The joint study by DIAN and the Colombian Information and Financial Analysis Unit also includes descriptions of other technical typologies used for laundering money by means of smuggling operations, such as: (a) smuggling inputs for "piracy" networks[570]; (b) exporting overinvoiced merchandise and then smuggling it back into Colombian territory[571]; (c) change of destination of raw materials entering the country under the Special Import–Export Systems Plan Vallejo[572]; (d) imports effected by a customs intermediary impersonating a recognized importer and using a programme approved under the Special Import–Export Systems Plan Vallejo[573]; (e) smuggling and trademark fraud[574]; (f) technical smuggling by overvaluing goods[575]; and (g) smuggling by means of triangulated goods traffic.[576]

7.372. Likewise, a Financial Action Task Force (FATF) study identifies overvaluation and undervaluation of imports or exports as trade-based money laundering techniques, in addition to others such as: (a) multiple invoicing of transactions involving the same goods or services; (b) the declaration of quantities less than or greater than the goods or services actually traded; and (c) the fraudulent description of the quality or type of goods or services traded.[577]

7.373. A study by the World Customs Organization (WCO) identifies the overvaluation and undervaluation of imports or exports as the most basic and oldest of the schemes involving the use of international trade transactions for money laundering purposes. The core component of these techniques is the fraudulent declaration of the value of the goods or services in question, for the purpose of transferring resources between the importer and the exporter. By invoicing a

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[567] National Customs and Excise Directorate, Information and Financial Analysis Unit, *Money Laundering Typologies Related to Smuggling*, January 2006 (Exhibit COL-10), p. 15.
[568] Colombia's response to Panel question No. 44, para. 101.
[569] National Customs and Excise Directorate, Information and Financial Analysis Unit, *Money Laundering Typologies Related to Smuggling*, January 2006 (Exhibit COL-10), p. 19.
[570] National Customs and Excise Directorate, Information and Financial Analysis Unit, *Money Laundering Typologies Related to Smuggling*, January 2006 (Exhibit COL-10), pp. 17-18.
[571] Ibid. pp. 21-22.
[572] Ibid. pp. 23-24.
[573] Ibid. pp. 25-26.
[574] Ibid. pp. 27-28.
[575] Ibid. pp. 29-30.
[576] Ibid. pp. 31-32.
[577] Financial Action Task Force, *Trade-Based Money Laundering*, 23 June 2006 (Exhibit COL-11), pp. 5-7.

product or service at a price lower than its market value, the exporter can transfer resources to the importer, since the payment for the good or service is less than the price that the importer will receive when it is sold on the open market. On the other hand, by overinvoicing goods or services at prices above their market value, the exporter can receive resources from the importer, since the payment for the good or service will be greater than the price the importer will receive when it is sold on the open market.[578] The same study points out that, in addition to the overvaluation and undervaluation of imports or exports, there are more complicated schemes that integrate fraudulent trade practices into a web of complex transactions which may also involve the movement of value through the financial system or the physical cross-border movement of bank notes, all with a view to "further obscur[ing] the money trail and complicat[ing] detection".[579]

7.374. In any event, the information available suggests that not every overvaluation or undervaluation operation in an international trade transaction is for money laundering purposes. In many cases, the purpose may be to evade taxes or controls on trade or the movement of capital.[580]

7.375. At the same time, as already mentioned, the undervaluation of imports is just one of the many methods used for money laundering. In fact, as indicated in a document of the Colombian Ministry of Justice: "[p]rominent among the *modi operandi* most often used, according to investigations carried out by the Office of the Attorney-General of the Nation, are unjustified financial transactions, the transport of cash, the use of legal persons and the creation of shell companies to do the laundering."[581] Citing figures from the Office of the Attorney-General of the Nation for November 2013, this document estimates that out of 2,267 money laundering investigations, classified by *modus operandi*, 910 (40.1%) involved unjustified financial transactions; 472 (20.8%) were "unestablished"; 192 involved persons transporting money in suitcases or clothing (8.5%); 170 involved money laundering through legal persons (7.5%); 161 used shell companies (7.1%); 139 used goods in the charge of third parties (frontmen) (6.1%); 85 used split money transfers (3.7%); 41 involved the financing of groups operating outside the law (1.8%), and 39 consisted in smuggling (imports and exports) (1.7%).[582] In this connection, Colombia states that "[t]he number of investigations conducted by the Office of the Attorney-General of the Nation is not a valid indicator of the relative prevalence of a *modus operandi*. If the number of investigations of smuggling as a *modus operandi* is small as compared with the number of investigations relating to other *modi operandi*, it may be because, as pointed out by the FATF[583], smuggling is difficult to detect." In any event, the Ministry of Justice document provided by Colombia indicates not only that the number of investigations of smuggling involving imports or exports as a *modus operandi* for money laundering is low but also that, according to the Office of the Attorney-General of the Nation, this *modus operandi* does not constitute one of those most commonly employed for money laundering purposes.

7.376. In conclusion, even assuming, for the sake of argument, that products imported at prices below the thresholds established in Decree No. 456 are being undervalued, there is no evidence that this necessarily means that the undervaluation in question is for money laundering purposes.

7.4.2.5.2.8 Exemptions from the compound tariff

7.377. As previously noted, Decree No. 456 exempts from the compound tariff, *inter alia*: (i) goods entering certain regions which Colombia has designated as Special Customs Regime

[578] World Customs Organization, *Illicit Trade Report 2012* (Exhibit COL-8), p. 35; Financial Action Task Force, *Trade-Based Money Laundering*, 23 June 2006 (Exhibit COL-11), p. 4.

[579] World Customs Organization, *Illicit Trade Report 2012* (Exhibit COL-8), p. 35. See also Financial Action Task Force, *Trade-Based Money Laundering*, 23 June 2006 (Exhibit COL-11), pp. 4-5; Financial Action Task Force, *Money Laundering Vulnerabilities of Free Trade Zones*, March 2010 (Exhibit COL-12), p. 19.

[580] Rocha García, *New dimensions of drug trafficking in Colombia*, 2011 (Exhibit COL-4), pp. 94 and 199; World Customs Organization, *Illicit Trade Report 2012* (Exhibit COL-8), p.34; Financial Action Task Force, *Trade-Based Money Laundering*, 23 June 2006 (Exhibit COL-11), pp. 2-3. Likewise, not every undeclared cross-border transportation operation involving currency or bearer-negotiable instruments should necessarily be considered to be money laundering. World Customs Organization, *Illicit Trade Report 2012* (Exhibit COL-8), p. 34.

[581] Ministry of Justice and Law, Drugs Observatory, *The Drug Problem in Colombia* (Exhibit COL-27), p. 145.

[582] Ibid.

[583] See Colombia's response to Panel question No. 73.

Zones; (ii) goods entering Colombia under the "Plan Vallejo"; and (iii) imports originating in countries with which Colombia has trade agreements in force, if the subheadings covered were negotiated in the respective agreement. In this connection, Colombia has not explained how these exemptions might be consistent with the purported objective of the compound tariff of combating money laundering.

7.378. With respect to the Special Customs Regime Zones, Colombia has stated that imports into these zones are exclusively for local use in border areas where there are conditions of extreme poverty.[584] This, however, does not rule out the possibility of imports into Special Customs Regime Zones being used for money laundering in accordance with the methodologies described by Colombia. On the other hand, apart from pointing out that imports into Special Customs Regime Zones are exclusively for local consumption, Colombia has not indicated what measures it is taking to deal with the risk of money laundering in connection with these imports.[585]

7.379. With respect to the Special Import–Export Systems (Plan Vallejo), Colombia has stated that the companies participating in this programme "are formal companies with a business track record, which pay taxes, are listed in the commercial register, and can be followed up if there are disputes over their business transactions".[586] This, however, does not rule out the possibility that one of the companies participating in this programme might use imports for money laundering in accordance with the methodologies described by Colombia. In fact, as stated in an FATF document submitted by Colombia, given that, in most cases, the customs authorities pay special attention to preventing smuggling and ensuring that taxes are properly collected, they commonly subject duty-free products to fewer controls, which makes these products especially vulnerable to undervaluation, including for money laundering purposes.[587] Furthermore, a joint study by DIAN and the Colombian Information and Financial Analysis Unit identifies the use of imports under Special Import–Export Systems (Plan Vallejo) as one of the "typologies" detected by the Colombian authorities in relation to money laundering and the financing of terrorism through smuggling operations.[588]

7.380. With respect to imports originating in countries with which it has trade agreements in force, Colombia has stated that the reason for this exemption is that these agreements contain customs cooperation and information exchange mechanisms which would make the goods and the importers more easily traceable and optimize the work of verifying foreign trade transactions. All of the foregoing, in Colombia's opinion, means that "the risks of duty-free imports being used for money laundering [are] significantly reduced".[589] However, it is not clear from the text of Decree No. 456 that the exemption from the compound tariff is linked with the existence of mechanisms for customs cooperation and information exchange with the country of exportation.

7.381. First, the text of Decree No. 456 refers explicitly to goods originating in countries with which Colombia has international trade agreements in force, provided that the tariff subheadings have been negotiated.[590] In other words, the Decree does not refer in its text to countries with which Colombia has mechanisms for customs cooperation and information exchange.

7.382. Second, despite the various questions posed by the Panel in this respect, and apart from having presented a table with "[p]rovisions concerning the exchange of customs information in Colombia's existing FTAs", Colombia has not shown that all the countries with which it has international trade agreements in force, which cover the relevant tariff subheadings, and under

[584] See Colombia's response to Panel questions Nos. 16, 133 and 141.
[585] See Colombia's response to Panel questions Nos. 16, 133 and 141.
[586] Colombia's response to Panel question No. 90, para. 33. See also response to Panel questions Nos. 18, 89, 90 and 133.
[587] Financial Action Task Force, *Trade-Based Money Laundering*, 23 June 2006 (Exhibit COL-11), p. 5.
[588] National Customs and Excise Directorate, Information and Financial Analysis Unit, *Money Laundering Typologies Related to Smuggling*, January 2006 (Exhibit COL-10), pp. 23-26. See also Panama's comments on Colombia's response to Panel questions Nos. 90 and 133.
[589] Colombia's first written submission, para. 36. See also second written submission, para. 115; opening statement at the first meeting of the Panel, para. 79; opening statement at the second meeting of the Panel, paras. 111-115; response to Panel questions Nos. 9, 59, 133, 134, 137 and 138.
[590] Decree No. 456 (Exhibits PAN-3 and COL-17), Article 5, paragraph, point 1. See also, Decree No. 074 (Exhibits PAN-2 and COL-16), Article 3, paragraph 1.

which Colombia grants exemptions from the compound tariff, make provision for customs cooperation and information exchange mechanisms.[591]

7.383. Third, Panama has identified certain trade agreements signed by Colombia which contain customs cooperation and information exchange mechanisms, but in which the relevant tariff subheadings are not duty-free, and asserts that in these cases Colombia applies the compound tariff.[592] This would confirm what is indicated in the text of Decree No. 456, i.e. that Colombia exempts from the compound tariff imports from countries with which it has negotiated the relevant subheadings, irrespective of the existence of a customs cooperation and information exchange mechanism.

7.384. Fourth, only products *originating in* countries with which Colombia has signed trade agreements are exempted from the compound tariff, as opposed to products *coming from* those countries. In this connection, Colombia has stated that the customs cooperation mechanisms "are focused on those goods with respect to which a party has undertaken to ensure compliance with the provisions of the agreement".[593] However, Colombia has not identified any evidence that would confirm this assertion and, more specifically, that the customs cooperation mechanisms agreed by Colombia cannot be used to deal with requests relating to imports of products that *come from*, but do not *originate in*, the other party. For its part, Panama has questioned whether all the free trade agreements signed by Colombia limit customs cooperation to goods originating in the other party and asserts that this does not follow, for example, from the free trade agreement signed between Colombia and Chile.[594] Therefore, in actual fact, it has not been proven that the customs cooperation mechanisms signed by Colombia cannot be used to deal with requests relating to imports of products that *come from*, but do not *originate in*, the other party.

7.385. Fifth, as a matter of fact, Colombia and Panama signed a customs cooperation and information exchange mechanism in 2006.[595] Colombia and Panama have also signed a free trade agreement containing provisions on customs cooperation and information exchange. Colombia has pointed out that, once this free trade agreement enters into force, the compound tariff will not be applied to imports of the products in question *originating* in Panama.[596] Colombia and Panama have also negotiated a separate agreement on customs cooperation and information exchange, which has not, to date, been signed.[597]

7.386. Colombia has also asserted that "the risks of duty-free imports being used for money laundering are significantly less".[598] As has been indicated, however, there is no evidence of this. On the contrary, a FATF document submitted by Colombia suggests that duty-free imports are especially vulnerable to undervaluation, including for money laundering, due to the fact that, in most cases, they are subjected to fewer controls by the customs authorities, which pay special attention to preventing smuggling and ensuring that taxes are properly collected.[599]

7.387. In short, the available evidence, beginning with the text of Decree No. 456 itself, indicates that the exemption from the compound tariff for imports from countries with which Colombia has trade agreements in force is related to the negotiation of the relevant tariff subheadings in the respective agreement, and not to the existence or non-existence of customs cooperation and information exchange mechanisms.

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[591] See Colombia's response to Panel questions Nos. 59, 133, 138 and 139. Provisions on exchange of customs information in existing FTAs with Colombia (Exhibit COL-28).

[592] Panama's response to Panel question No. 139.

[593] Colombia's response to Panel question No. 137.

[594] Panama's comments on Colombia's response to Panel question No. 137.

[595] Protocol of Procedure for Cooperation and Exchange of Customs Information between the Customs Authorities of Panama and Colombia, 31 October 2006 (Exhibit PAN-17). See also Panama's second written submission, para. 3.35; opening statement at the first meeting of the Panel, para. 1.25.

[596] Colombia's first written submission, para. 114. See also second written submission, paras. 6 and 116; opening statement at the first meeting of the Panel, para. 81.

[597] Colombia's first written submission, para. 114. See also opening statement at the first meeting of the Panel, para. 81; and paras. 7.562. -7.564. below.

[598] Colombia's first written submission, para. 35. See also first written submission, para. 112.

[599] Financial Action Task Force, *Trade-Based Money Laundering*, 23 June 2006 (Exhibit COL-11), p. 5 and fn 6.

7.388. In conclusion, all these factors, including the text of Decree No. 456 and the other evidence and arguments presented by the parties, taken together, allow the Panel to conclude that the exemptions from the compound tariff for which Decree No. 456 provides are unrelated to and inconsistent with the measure's alleged objective of combating money laundering.

7.4.2.5.2.9 Period of validity of the compound tariff

7.389. With regard to the measure's temporal validity, Decree No. 456 stipulates that it will remain in force for a period of two years, after which the customs tariff envisaged in Decree No. 4927 of 2011 and its amendments will be re-established.[600] This limited validity of the compound tariff is not in keeping with the measure's alleged objective of combating money laundering, especially in view of the seriousness of the conduct which the measure is said to seek to address.

7.4.2.5.2.10 Legal consequences of importing goods at prices below the thresholds of Decree No. 456

7.390. Despite the fact that the compound tariff subjects imports of products at prices below the thresholds established in Decree No. 456 to higher duties, such imports are not prohibited under Colombian legislation. Colombia has stated that, under its legislation, customs must report any suspicious transaction that might be linked with money laundering to the Information and Financial Analysis Unit.[601] However, there is no indication that the importation of products at prices below the thresholds established in Decree No. 456 automatically results in the imposition of some other type of measure (distinct from the compound tariff) or any particular follow-up of the products or importers involved. At the same time, Colombia's statement to the effect that customs must report any suspicious transaction that might be linked with money laundering does not appear to be related to the importation of products at prices below the thresholds established in Decree No. 456. In other words, this obligation would seem to be the same for customs regardless of the price at which the suspicious transaction is being carried out.

7.391. All of the foregoing would appear to be inconsistent with the compound tariff's stated purpose of combating money laundering. Considering the high priority that Colombia assigns to combating money laundering, it seems incongruous that imports presumed to be used for money laundering are freely admitted to Colombian territory, subject only to the payment of the compound tariff, and that neither the corresponding transaction nor the parties involved are automatically subject to investigation.

7.4.2.5.2.11 Additional evidence furnished by the parties

7.392. In addition to the above, the parties have submitted certain documentary evidence relating to the alleged objective of the compound tariff. Thus, Panama has submitted five official press releases from the Office of the President of the Republic of Colombia (dated November 2012, January 2013, July 2013 and January 2014), which reflect statements made by high-ranking Colombian officials, including the President of the Republic and the Minister of Foreign Trade, suggesting that the compound tariff was imposed to protect the textiles sector from unfair competition, revitalize industry and protect domestic production.[602] Panama has also submitted two online press releases and four press releases from Colombian private business groups (dated

[600] Decree No. 456 (Exhibits PAN-3 and COL-17), articles 3, 5, 6 and 7. See also Colombia's response to Panel questions Nos. 76 and 78.

[601] Colombia's response to Panel questions Nos. 84 and 86.

[602] Panama's opening statement at the first meeting of the Panel, para. 1.6; Information note: Office of the President of the Republic, President announces measures to boost the textiles sector, 22 January 2003 (Exhibit PAN-6); Information note: Office of the President of the Republic, Government signs Decree to strengthen clothing and footwear sectors, 23 January 2013 (Exhibit PAN-7); Information note: International Press Centre, President highlights benefits of measures taken to protect textiles industry, 22 July 2013 (Exhibit PAN-8); Information note: Office of the President of the Republic, Statement by the President at the national "Weaving Colombia" event, 28 November 2012 (Exhibit PAN-9); Information note: Office of the President of the Republic, Statement by the President at the close of the Management Dialogues in the Ministry of Trade, Industry and Tourism, 20 January 2014 (Exhibit PAN-10).

February 2013, March 2013, September 2013 and December 2013), describing the compound tariff.[603]

7.393. Although this documentary evidence should be treated with caution, we note that none of it suggests that the compound tariff is intended to combat money laundering. The releases speak mainly of the objective of dealing with unfair competition and protecting the domestic industry. Although some of these press releases refer to additional measures to strengthen the campaign against money laundering and smuggling, the statements do not demonstrate any link between the compound tariff and the objective of combating money laundering. Panama has also submitted a document from the Colombian Ministry of Trade, Industry and Tourism which is said to contain proposals for amending Decree No. 074, introduced before the adoption of Decree No. 456.[604] This document also fails to establish any link between the compound tariff, or the price thresholds, and the anti-money laundering objective.

7.394. For its part, Colombia has submitted as an exhibit a press article (dated January 2014) with statements made by the President of Colombia before the adoption of Decree No. 456[605], as well as the minutes of a session of the Colombian Government's Committee on Customs, Tariffs and Foreign Trade, held on 23 January 2014, at which the draft amendment of Decree No. 074 was discussed.[606] Both the press article and the Committee's minutes suggest that Decree No. 456 seeks to punish imports introduced at artificially low prices or by smuggling for money laundering purposes. However, the Panel notes that both these items of evidence date from the end of January 2014, after the Panel in this dispute had been composed. Accordingly, the Panel will be extremely cautious about assigning probative value to this documentary evidence for the purpose of confirming whether the compound tariff is intended to combat money laundering.

7.395. Another Colombian exhibit, Draft Law No. 94 of 2013 adopting instruments to prevent, control and punish smuggling, money laundering and tax evasion[607], submitted by the Vice-Ministry of Business Development of the Ministry of Trade, Industry and Tourism and currently at the discussion stage, states that smuggling and money laundering are closely interconnected and contains a reference to Decree No. 074. However, the reference to Decree No. 074 indicates that "[t]he purpose of the measure was to tackle the abnormally low prices which this sector's imports had been recording during recent years"[608], without specifically mentioning the fight against money laundering in relation to that Decree.

7.396. According to Colombia, Decree No. 456 is part of a broader strategy which the Government is developing against the various links in the drug trafficking supply chain[609] and, where money laundering is concerned, the actions are part of the so-called National Policy against Money Laundering and the Financing of Terrorism.[610] However, in none of the following documents submitted by Colombia, in relation to its strategy to counter drug trafficking and money laundering, is there any reference to the compound tariff, or similar measures, as part of the

[603] Panama's opening statement at the first meeting of the Panel, para. 1.21; National Federation of Merchants, The specific tariff on footwear: a controversial decision entailing considerable collateral damage, 5 February 2013 (Exhibit PAN-11); News item: *El Nuevo Siglo*, "Fenalco asks for lower tariff on textiles and footwear", 1 March 2013 (Exhibit PAN-12); News item: *El Economista*, "Controversy over decree on footwear imports", 6 September 2013 (Exhibit PAN-13); News item: *La República*, "Fenalco and the Chamber of Clothing reach agreement to modify tariffs", 7 December 2013 (Exhibit PAN-14); News item: *La República*, "Importers not convinced by agreement between clothing manufacturers and Fenalco", 9 December 2013 (Exhibit PAN-15); National Federation of Merchants, FENALCO rejects decree on clothing and footwear tariffs (Exhibit PAN-16).

[604] Ministry of Trade, Industry and Tourism of Colombia, proposed amendments to Decree No. 074 of 2013 (Exhibit PAN-28).

[605] News item: *Portafolio.co*, "Decree on the mixed tariff in the textiles sector will be maintained", 21 January 2014 (Exhibit COL-35).

[606] Committee on Customs, Tariff and Foreign Trade Affairs, Minutes of the 269th Regular Session, 23 January 2014 (Exhibit COL-34).

[607] Draft Law adopting instruments to prevent, control and punish unfair competition deriving from illegal foreign trade, internal trade, money laundering and tax evasion operations (Exhibit COL-20), p. 32; Report for the first discussion of Draft Law No. 94 of 2013 (Exhibit COL-21).

[608] Draft Law adopting instruments to prevent, control and punish unfair competition deriving from illegal foreign trade, internal trade, money laundering and tax evasion operations (Exhibit COL-20), p. 32.

[609] Colombia's first written submission, paras. 38-39.

[610] Ibid. para. 41.

anti-money laundering strategy: the National Anti-Drug Policy[611]; the National Policy against Money Laundering and the Financing of Terrorism[612]; the minutes of the Inter-institutional Coordination Commission for the Control of Money Laundering[613]; the Minutes of the 94th session of the Higher Council for Foreign Trade[614]; and the Report on Actions and Results of the Drugs Policy of the Directorate of Anti-Drug Policy and Related Activities.[615]

7.4.2.5.2.12 Conclusion as to whether the compound tariff is intended to combat money laundering

7.397. As indicated in the preceding paragraphs, the Panel has considered the text of Decree No. 456 and the other available evidence concerning the structure and application of the compound tariff. The Panel has comprehensively examined all the available pieces of evidence, including those mentioned in the preceding paragraphs, taking into account their individual worth. In examining the evidence, the Panel has considered whether it has the appropriate relevance, credibility, weight and probative value. The Panel has proceeded cautiously in evaluating the facts.

7.398. Decree No. 456 provides for certain single price thresholds on a fixed basis for each of the two broad categories of products covered by the present dispute, without any examination of the specific characteristics of the particular transaction concerned.

7.399. In the opinion of this Panel, and on the basis of the totality of the evidence, including the text of Decree No. 456 and the other evidence provided by the parties, a connection between the compound tariff and the alleged objective of combating money laundering has not been demonstrated. When the relevant facts and relevant circumstances of the case are taken into account, the design, architecture and revealing structure of the compound tariff, including the way in which the price thresholds were determined, the way in which the compound tariff is applied, the tariff exemptions, the period of validity of the measure, and the lack of automatic measures for following up the imports affected, do not make it possible to conclude that there is a relationship between the compound tariff and the declared objective of combating money laundering.

7.400. Accordingly, this Panel concludes that Colombia has failed to demonstrate that the compound tariff is designed to combat money laundering.

7.4.2.5.3 Conclusion as to whether the compound tariff is a measure "to protect public morals"

7.401. For the reasons given, this Panel concludes that, although Colombia has demonstrated that combating money laundering is one of the policies designed to protect public morals in Colombia, it has not shown that the compound tariff is designed to combat money laundering. Consequently, neither has Colombia shown that the compound tariff is, in this respect, a measure designed to protect public morals.

7.4.2.6 As to whether the compound tariff is a measure "necessary" to protect public morals

7.402. Since the Panel has concluded that Colombia has failed to demonstrate that the compound tariff is designed to combat money laundering, in the light of the specific circumstances of the present case, there should be no need to examine whether the compound tariff is *necessary* to protect public morals. However, in order to be exhaustive in its analysis, the Panel will continue with its evaluation by assuming, for the sake of argument, that the compound tariff is designed to combat money laundering.

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[611] Ministry of the Interior and Justice, National Anti-Drug Policy (Exhibit COL-6).
[612] National Council for Economic and Social Policy, *National Policy against Money Laundering and the Financing of Terrorism*, 18 December 2013 (Exhibit COL-19).
[613] Inter-Institutional Coordination Commission for the Control of Money Laundering, Minutes of the 21st Session, 22 July 2013 (Exhibit COL-22).
[614] Senior Foreign Trade Council, Minutes of the 94th Session, 1 April 2013 (Exhibit COL-23).
[615] Ministry of Justice and Law, Drug Monitoring Centre, *The Drug Problem in Colombia* (Exhibit COL-27).

7.403. To determine whether the compound tariff is *necessary* to combat money laundering, this Panel will weigh and balance the following factors[616]: (i) the importance of the fight against money laundering in Colombia; (ii) the contribution of the compound tariff to the achievement of the objective of combating money laundering; (iii) the trade-restrictiveness of the compound tariff; and (iv) if the Panel reaches a preliminary conclusion that the measure is necessary, it will confirm the result by comparing the compound tariff with the alternatives identified by Panama.[617]

7.4.2.6.1 The importance of the anti-money laundering campaign in Colombia

7.404. Colombia maintains that the interests and values at stake in the present dispute are vital and important in the highest degree. According to Colombia, drug trafficking is a criminal phenomenon which has had a negative impact on the country and is adversely affecting the lives of thousands of its inhabitants and the stability of Colombian democracy. Colombia maintains that money laundering is an essential link in the drug trafficking chain which enables criminal groups to finance their operations and carry out their unlawful activities.[618]

7.405. Panama does not deny that for Colombia the fight against money laundering is a social interest that could be described as vital and important in the highest degree. Panama adds that, in any event, it is for Colombia to show that the fight against money laundering is one of the policies designed to protect public morals in Colombia.[619]

7.406. As mentioned above, Colombia has submitted evidence concerning the existence of a relationship between money laundering and drug trafficking in Colombia, activities which, in turn, are related to the financing of the internal armed conflict in the country. Colombia has also provided information concerning the grave consequences of the illicit drug trade and the armed conflict for Colombian society.[620]

7.407. Colombia has also shown that money laundering is criminal conduct in Colombia; has identified international instruments relating to the combating of money laundering and the financing of terrorism to which Colombia is party; and has submitted documents which show that combating money laundering is an important policy objective for the Colombian Government.[621]

7.408. After considering the available evidence, in the circumstances of the present case, the Panel concludes that in Colombia the objective of combating money laundering reflects social interests that can be described as vital and important in the highest degree.

7.4.2.6.2 The contribution of the compound tariff to the objective of combating money laundering

7.409. The Panel will now assess the compound tariff's contribution to the objective of combating money laundering, taking into account the fact that combating money laundering reflects social interests that can be described as vital and important in the highest degree for Colombia.

7.410. Colombia maintains that the compound tariff reduces the incentives for using textile, apparel and footwear imports to launder money. According to Colombia, the compound tariff is an appropriate instrument and is apt to produce a material contribution to the achievement of Colombia's objective, because it has led to an increase in the unit price of apparel and footwear imports, thereby reducing the artificially high profit margin which is the incentive for using these imports to launder money.[622] Colombia also points out that the compound tariff has resulted in a change in the composition of imports of the products in question, which would indicate that the

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[616] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 182.

[617] See, for example, Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156; *China –Publications and Audiovisual Products*, paras. 241-242.

[618] Colombia's first written submission, paras. 85 and 102; second written submission, para. 63; opening statement at the first meeting of the Panel, paras. 67 and 76; opening statement at the second meeting of the Panel, para. 82; response to Panel question No. 7.

[619] Panama's second written submission, paras. 3.18 and 3.32; response to Panel question No. 7.

[620] See para. 7.336. above.

[621] See paras. 7.335. and 7.337. above.

[622] Colombia's first written submission, paras. 37, 87 and 99; opening statement at the first meeting of the Panel, paras. 31 and 33.

measure has discouraged the undervaluation of such imports.[623] Colombia maintains that, viewed from the broader perspective of the overall anti-money laundering strategy, the compound tariff can be characterized as indispensable.[624]

7.411. Panama, for its part, contends that Colombia has only managed to show that the compound tariff has raised the price of imports.[625] Panama maintains that the measure does not prevent money laundering, but, at most, may have reduced the amount of money that can be laundered in each transaction. In Panama's opinion, the reduction of the margin that can be legalized through the domestic sale of the imported goods does not *per se* mean a reduction in imports for money laundering purposes.[626]

7.412. As this Panel understands it, Colombia's argument is that the way in which the compound tariff helps to combat money laundering is by reducing the incentives which lead criminal groups to use textile, apparel and footwear imports to launder money by means of "artificially low" or undervalued prices. This, Colombia argues, is due to the fact that the compound tariff increases the price of the imports, which reduces the artificially high profit margin obtainable in each import operation and hence the amount of money that can be laundered.

7.413. To demonstrate the contribution of the compound tariff to the objective of combating money laundering, Colombia has presented arguments and evidence by means of which it seeks to demonstrate the existence of undervaluation in textiles, apparel and footwear, as well as the effects that the compound tariff has had in reducing undervaluation in connection with imports of the relevant products.

7.4.2.6.2.1 Undervaluation in textiles, apparel and footwear

7.414. Colombia provides figures on imports effected prior to the entry into force of Decrees Nos. 074 and 456 and arriving from countries with which Colombia did not have a trade agreement in force. Colombia points out that between 2009 and February 2013 there were more than 480,000 import operations, of which 390,000 involved apparel and 90,000 footwear. According to Colombia, the average price of apparel imports during this period was US$56.6/kg, while the average price for footwear was US$24.2/pair. Colombia maintains that the range of prices per kilogram represents a significant dispersion, with the variation being between US$0.01/kg and US$224,000/kg for apparel and between US$0.01/pair and US$1,844/pair for footwear. Colombia maintains that such a high dispersion is unjustified and that the prices at the bottom of the range (US$0.01/kg for apparel and US$0.01/pair for footwear) cannot be real prices, because they would not cover the transaction costs or the costs of transport or wages. By introducing this information, Colombia seeks to show that imports of apparel and footwear are entering Colombia at "artificially low" or undervalued prices.[627]

7.415. Colombia has not submitted the individual data on which it based its observations. In any event, in the Panel's opinion, a comparison of import or export prices within such broad categories of products, and without taking into account the possible price differences resulting from the specific characteristics of the transaction concerned, cannot ensure that the imported goods are comparable or allow definitive conclusions to be drawn with regard to the range of dispersion of the prices observed. Although it cannot be ruled out that some imports with low declared prices are being undervalued, on the basis of the information available and in view of the great diversity of the products considered, it is not possible to arrive at a general conclusion as to the degree of undervaluation of the imports prior to the entry into force of the compound tariff.

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[623] Colombia's opening statement at the first meeting of the Panel, paras. 30 and 32; response to Panel question No. 57; charts submitted by Colombia with its opening statement at the first meeting of the Panel (Exhibit COL-30).

[624] Colombia's second written submission, paras. 79 and 97; and opening statement at the second meeting of the Panel, para. 82.

[625] Panama's second written submission, para. 3.61.

[626] Panama's response to Panel questions Nos. 39 and 45; and opening statement at the second meeting of the Panel, para. 7.

[627] Colombia's opening statement at the first meeting of the Panel, paras. 17-20. See also News item: *The Wall Street Journal*, "The New China", 20 November 2014 (Exhibit COL-29).

7.416. As previously noted[628], Colombia also asserts that it has found evidence that, in many cases, the declared prices of imports of the products in question originating in China (which, in the case of apparel, would account for 65% of the total imports subject to the compound tariff) are lower when they arrive via Panama than when imported directly from China.[629] According to Colombia, this assertion is based on three different statistical exercises that it has carried out.

7.417. First, using information supplied by DIAN, Colombia compared the unit prices of imports originating in China but coming from Panama with the prices of products of Chinese origin imported directly from China.[630] Colombia used the results of this first exercise to construct "an underinvoicing index at ten-digit national tariff level, consisting of the percentage of tariff subheadings which, while being of Chinese origin, are purchased more cheaply in Panama than when bought directly from China".[631] Colombia referred to this first statistical exercise in its oral statement at the first meeting of the Panel, and subsequently in its responses to Panel questions, in its second written submission and in its oral statement at the second meeting of the Panel.

7.418. Secondly, using information from the *World Integrated Trade Solution* (WITS) database, Colombia compared the implicit prices (value over quantity) of exports from China to Colombia with the prices of exports from China to three other countries (Chile, United States and Panama) and contrasted the result with the prices of exports from China to Colombia via Panama. From this exercise Colombia concluded that the prices relating to goods of Chinese origin exported directly to Chile, the United States and Panama were all similar. By contrast, the implicit prices of the goods when exported to Colombia via Panama were lower.[632]

7.419. Thirdly, using information for individual ten-digit tariff subheadings from the COMTRADE database, Colombia compared the unit prices for exports from China to Panama with the unit prices for exports from Panama to Colombia. From this exercise Colombia concluded that the imports from Panama entered Colombia at prices lower than the prices recorded at entry into Panama.[633] Colombia first referred to the second and third statistical exercises in its oral statement at the second meeting of the Panel and then, more specifically, in its responses to the Panel's questions after that second meeting.

7.420. From these three exercises Colombia concludes that "imports of Chinese origin entering Colombia from Panama are systematically priced lower than imports, also of Chinese origin, entering other countries, as well as with respect to imports entering Colombia directly from China".[634] In Colmbia's opinion, this shows that the imports coming from Panama are entering Colombia at "artificially low" or undervalued prices.[635]

7.421. In short, it cannot be ruled out that the existence of lower prices for some of the imports considered by Colombia indicates the existence of undervaluation practices.

7.422. However, as the Panel has already noted, Colombia has not submitted the individual data on which it based its observations, but only charts which summarize the prices detected. According to the information provided by Colombia, the price comparisons do not reflect the tracking of a particular consignment or relate to the same goods. Moreover, in the Panel's opinion, a comparison of import or export prices for categories of products classified at ten-digit level cannot ensure that the goods imported are comparable. Nor is it clear how such a comparison, even if the products concerned were the same or identical, would take into account possible price differences

[628] See para. 7.360. above.
[629] Colombia's opening statement at the first meeting of the Panel, para. 34.
[630] Colombia's second written submission, para. 74; opening statement at the first meeting of the Panel, paras. 21-25; opening statement at the second meeting of the Panel, para. 67; response to Panel questions Nos. 74, 77, 104 and 105; charts submitted by Colombia with its opening statement at the first meeting of the Panel (Exhibit COL-30).
[631] Colombia's opening statement at the first meeting of the Panel, para. 34. See also second written submission, para. 74; response to Panel questions Nos. 77 and 104; charts submitted by Colombia with its opening statement at the first meeting of the Panel (Exhibit COL-30).
[632] Colombia's response to Panel question No. 105.
[633] Ibid. See also opening statement at the second meeting of the Panel, para. 67.
[634] Colombia's response to Panel question No. 105.
[635] Colombia's second written submission, para. 74; opening statement at the first meeting of the Panel, paras. 21-25; opening statement at the second meeting of the Panel, para. 67; and response to Panel question No. 105.

resulting from the specific characteristics of the transaction concerned, including factors such as differences in the terms and conditions of sale and in quantities.

7.423. For the reasons indicated, the available information does not make it possible to arrive at a general conclusion concerning the degree to which, as Colombia asserts, the entry into force of the compound tariff has resulted in a decrease in the undervaluation index of imports of the relevant products.

7.4.2.6.2.2 Effect of the compound tariff on import prices

7.424. Colombia asserts that the compound tariff has resulted in a significant increase in the tariffs payable with a consequent increase in transaction costs, which is discouraging the use of foreign trade operations for money laundering.[636] According to Colombia, this has had two results: (i) an increase in the unit price of imports of the products in question; and (ii) a change in the composition of imports of these products.

7.425. First, Colombia points out that, as a consequence of the entry into force of the compound tariff, the unit price of apparel imports rose from an average of US$12.6/kg for the period between January 2011 and March 2013 (before the decrees took effect) to US$23.5/kg for the period between April 2013 and June 2014 (once the decrees had entered into force), which represents an increase of 86.7%. Colombia notes that the average price of footwear imports rose from US$7.2/pair between January 2011 and March 2013 to US$11.9/pair for the period between April 2013 and June 2014, which is equivalent to an increase of 65.3%.[637]

7.426. Second, Colombia states that the compound tariff has resulted in a decrease in imports of the products in question. Colombia offers information in this respect, contrasting the variation in imports of textiles and footwear, in terms of value and volume, over the same periods as those used in the previous paragraph. Colombia points out that, in the case of apparel, the monthly average volume of imports was reduced by 52.2%, while the reduction in value was 8.5%. In the case of footwear, the reduction in the monthly average was 57.1% in volume and 30.1% in value. Colombia asserts that, accordingly, the compound tariff has resulted in a change in the composition of the imports, since despite imports having fallen in terms of both volume and value, the most significant decrease has been in import volume. In Colombia's opinion, this shows that the compound tariff has resulted in the diminished use of "artificially low" or undervalued import prices, which constitutes additional evidence that the compound tariff reduces the incentives to use imports of these products for money laundering.[638]

7.427. Through this information, Colombia seeks to demonstrate that the compound tariff has led to an increase in the unit price of imports, which has reduced the artificially high profit margins obtainable in each import operation and hence the amount of money that can be laundered. This, in turn, would discourage the use of foreign trade operations for money laundering.[639]

7.428. The information provided by Colombia can be accepted as evidence that, since the compound tariff entered into force, Colombian imports of the products in question have declined and average import prices have increased. It can also be taken as evidence that, as Colombia asserts, the compound tariff has resulted in a change in the composition of the imports. In fact, although imports have fallen both in volume and in value, the most significant decrease has been in the value of the imports.

7.429. The foregoing suggests that the compound tariff has affected imports of lower-priced products to a greater extent than imports of higher-priced products. This is to be expected, since by definition any tariff that contains a specific component will be higher, in terms of its *ad valorem*

[636] Colombia's response to Panel question No. 39.
[637] Colombia's first written submission, paras. 37, 87 and 99; opening statement at the first meeting of the Panel, paras. 31 and 33.
[638] Colombia's opening statement at the first meeting of the Panel, paras. 30 and 32; response to Panel question No. 57; charts submitted by Colombia with its opening statement at the first meeting of the Panel (Exhibit COL-30).
[639] Colombia's first written submission, paras. 37, 87 and 99; opening statement at the first meeting of the Panel, paras. 31 and 33; response to Panel question No. 128; charts submitted by Colombia with its opening statement at the first meeting of the Panel (Exhibit COL-30).

equivalent, for lower-priced than for higher-priced products. Furthermore, in the present case the compound tariff comprises two different levels and the higher level applies only to lower-priced products, with the result that the impact on the lower-priced products is even more pronounced.

7.430. However, the fact that the compound tariff has had a greater effect on lower-priced, as compared with higher-priced, products does not in itself prove that the compound tariff has helped to discourage the use of "artificially low" prices or undervaluation for money laundering purposes. In fact, as has been indicated, there is no evidence that all imports of the products in question at low prices correspond to "artificially low" prices or are being undervalued. Furthermore, even assuming, for the sake of argument, that all imports of the products in question at low prices correspond to "artificially low" prices or are being undervalued, there is still no evidence that these imports are necessarily being used to launder money.

7.4.2.6.2.3 Conclusion concerning the contribution of the compound tariff to the objective of combating money laundering

7.431. It is reasonable to assume that the compound tariff may have the effect of reducing the incentives for importers to declare prices below the thresholds laid down in Decree No. 456. In fact, in those cases where an importer declares a price lower than the threshold, the goods immediately become subject to the higher tariff level. Moreover, even though, as already mentioned, there is no indication that the importation of products at prices below the thresholds established in Decree No. 456 automatically results in the imposition of any other type of measure (different from the compound tariff) or any particular form of follow-up of the products or the importers involved[640], some importers might presumably be motivated not to declare prices below the thresholds which might be regarded by the Colombian authorities as an indication that the operation in question is being used for money laundering.

7.432. However, judging from its design, architecture and revealing structure, the compound tariff does not directly target undervalued imports, still less imports used for money laundering, but all imports declared at below-threshold prices, regardless of whether or not there is undervaluation and whatever the purpose of the transaction. That is to say, the compound tariff affects imports which enter at prices below the thresholds even if there is no undervaluation. At the same time, the compound tariff would not be applied to an undervalued import if the declared price is above the threshold in question.

7.433. In fact, as previously pointed out[641], the notion of undervaluation pertains to a situation in which the value declared on the invoice for a particular transaction is lower than the price actually paid or payable. In other words, there may be undervaluation in respect of imports at prices above a given threshold, or even at very high prices, if the price actually paid or payable is higher than the price declared to customs. At the same time, there is nothing to exclude the possibility of imports having prices below a given threshold that do not reflect undervaluation practices, if those low prices correspond to the prices actually paid or payable.

7.434. On the other hand, as has also already been pointed out[642], it has been shown that the undervaluation or overvaluation of imports or exports can be used for money laundering purposes. However, money laundering can be based on other practices or methodologies, including non-undervalued imports and overt smuggling. Moreover, the practice of undervaluation may have purposes other than money laundering, including tax evasion in particular.[643]

7.435. In the light of the available evidence, the Panel can only conclude that the compound tariff could reduce the incentives for importing textile products, apparel and footwear at prices below the thresholds laid down in Decree No. 456.

7.436. In any event, even assuming that imports declared at prices below the thresholds established in Decree No. 456 were considered to be necessarily undervalued and used for money laundering purposes, the compound tariff does not prevent the importation of such goods, nor does it subject the importer of the goods, or the goods themselves, to any other type of measure

[640] See para. 7.390. above.
[641] See para. 7.363. above.
[642] See para. 7.366. above.
[643] See para. 7.374. above.

or any particular follow-up process. On the contrary, once the compound tariff had been paid, the products would be freely admitted into Colombia's domestic market. Thus, at best, the effect of the compound tariff would be limited to reducing the profit margin of the persons intending to use imports for money laundering purposes.

7.437. For all these reasons, and on the basis of the totality of the evidence, including the text of Decree No. 456 and the other evidence provided by the parties, this Panel does not consider that Colombia has demonstrated the existence of an authentic relationship of means and ends between the compound tariff and the alleged objective of combating money laundering. Taking into account the relevant facts and the relevant circumstances of the case, including the design, architecture and revealing structure of the compound tariff, the Panel concludes that Colombia has failed to demonstrate the contribution of the compound tariff to the objective of combating money laundering.

7.4.2.6.3 The trade-restrictiveness of the compound tariff

7.438. According to Colombia, the compound tariff has a moderate effect on trade because it opens up opportunities for those who import at market prices, does not impose quantitative limits on imports, and is carefully calibrated to affect only imports likely to be used for money laundering.[644] Colombia adds that the factors that are affecting Panama's exports to Colombia are a slowdown in demand and the depreciation of the Colombian currency.[645]

7.439. For its part, Panama asserts that the compound tariff is having a highly restrictive impact on international trade and that Colombia itself has acknowledged that the entry into force of the measure was followed by a decline in imports of apparel and footwear. Panama maintains that, having regard to the volume of re-exports to Colombia in the four chapters covered by Decree No. 456, at the end of 2013, such re-exports reflected a fall of up to 18%. Panama asserts that one year after the entry into force of the compound tariff, Panama's re-exports of apparel and footwear to Colombia fell from around 41 million kg to 33.67 million kg.[646] Panama maintains that the contraction in value during this period was 5%. Panama presents as evidence of this impact a letter from the general manager of the administration of the Colón Free Zone describing the effect of the compound tariff on operations in the zone.[647]

7.440. In assessing the trade-restrictiveness of the compound tariff, the Panel starts from the consideration that the most restrictive measure that can exist in trade is a ban, or a measure that has the same effects as a ban.[648] The measure at issue in the present case does not ban imports or have the effects of a ban, but is in the nature of a tariff.

7.441. By its very nature, a tariff can reduce the capacity of imports to compete in the domestic market of the country of importation, by increasing the price of the products. If the tariffs are too high, they can have a very restrictive, even prohibitive effect. However, ordinary customs duties are a form of protection accepted by the rules of the WTO, provided that they are applied in a manner consistent with the requirements set out in the WTO agreements and, *inter alia*, do not accord treatment less favourable than that envisaged in the schedule of concessions of the importing Member or exceed the tariffs set out in that schedule. Ordinary customs duties that exceed those set out in a Member's schedule of concessions affect the negotiated balance of concessions.

7.442. In the case that concerns us, as has already been found[649], in some circumstances the compound tariff exceeds the levels bound in Colombia's Schedule of Concessions. The compound tariff has definite effects on international trade, by reducing the capacity of the products concerned

[644] Colombia's first written submission, para. 88; second written submission, paras. 80-81; opening statement at the first meeting of the Panel, para. 69; and opening statement at the second meeting of the Panel, paras. 82 and 95.

[645] Colombia's opening statement at the second meeting of the Panel, paras. 96-97; closing statement at the second meeting of the Panel, para. 15; and response to Panel question No. 121.

[646] Panama's first written submission, paras. 5.3-5.4; second written submission, paras. 3.31 and 3.63; and opening statement at the second meeting of the Panel, para. 7.

[647] Colón Free Zone Administration, communication, 25 August 2014 (Exhibit PAN-5).

[648] Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 150-151.

[649] See paras. 7.189 and 7.193 above.

to compete on the Colombian market, particularly when the imports are subject to the highest levels of the tariff.

7.443. This is confirmed by the figures submitted by the parties, which indicate increases in import prices, as well as reductions in imports, mainly in terms of volume, but also in terms of value.[650]

7.444. For these reasons, bearing in mind the specific facts of the present case, the Panel concludes that the trade-restrictiveness of the compound tariff is undeniable and is recognized by both parties. At the same time, as has already been indicated, the compound tariff is less restrictive on international trade than an import ban or a measure having the effects of a ban.

7.4.2.6.4 Preliminary conclusion concerning the assessment of the factors

7.445. Assuming, for the sake of argument, that the compound tariff was intended to combat money laundering, this Panel concludes that, even though Colombia has demonstrated that the objective of combating money laundering in Colombia serves social interests that could be described as vital and important at the highest degree, Colombia has not demonstrated the contribution of the compound tariff to the alleged objective of combating money laundering. For this reason, and taking into account the restriction on international trade caused by the compound tariff, Colombia has failed to show that the compound tariff is a measure necessary to combat money laundering.

7.4.2.6.5 Has Panama identified possible alternatives reasonably available to Colombia?

7.446. The Appellate Body has explained that, if in the course of weighing and balancing factors a panel arrives at the preliminary conclusion that a measure is necessary, it must confirm that result by comparing the measure with its possible alternatives, which may be less trade-restrictive while providing an equivalent contribution to the achievement of the objective pursued.[651]

7.447. As a result of its weighing and balancing of factors, this Panel has arrived at the preliminary conclusion that Colombia has failed to demonstrate that the compound tariff is a measure necessary to combat money laundering. Hence, it is neither necessary nor appropriate to compare the compound tariff with the alternatives identified by Panama.[652] However, for the sake of an exhaustive analysis, the Panel will recall the arguments of the parties while confining itself to making the factual findings that it considers relevant.

7.448. Panama has identified three alternative measures which it considers to be reasonably available to Colombia and which could contribute to the achievement of the objective pursued: (i) the use of the disciplines of the Customs Valuation Agreement; (ii) the use of customs cooperation and information exchange mechanisms; and (iii) the use of the disciplines of the Agreement on Preshipment Inspection. We will now deal with each of these in turn.

7.4.2.6.5.1 The use of the disciplines of the Customs Valuation Agreement

7.449. Panama argues that a targeted and effective alternative solution, for dealing with imports at artificially low prices (that are considered to be used for money laundering purposes), is the use of the disciplines of the Customs Valuation Agreement. Panama points out that the Customs Valuation Agreement is designed to permit the correct determination of the customs value in those cases where imports are undervalued or entered at artificially low prices. In Panama's opinion, every instance of undervaluation or underinvoicing could be subjected to the

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[650] See para. 7.426 above.

[651] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156; *China – Publications and Audiovisual Products*, para. 241.

[652] It is not always necessary to analyse the possible alternative measures. For example, in *US – Tuna II (Mexico)*, in the context of Article 2.2 of the TBT Agreement, the Appellate Body gave the following explanation: "[w]e can identify at least two instances where a comparison of the challenged measure and possible alternative measures may not be required. For example, it would seem to us that if a measure is not trade restrictive, then it may not be inconsistent with Article 2.2. Conversely, if a measure is trade restrictive and makes no contribution to the achievement of the legitimate objective, then it may be inconsistent with Article 2.2." Appellate Body Report, *US – Tuna II (Mexico)*, fn 647 to para. 322. (emphasis original)

methodologies envisaged in that Agreement, without penalizing legitimate imports entering at more competitive prices.[653]

7.450. Colombia asserts that the Colombian authorities are already applying the disciplines of the Customs Valuation Agreement, so that the application of that agreement and Decree No. 456 are complementary and not substitute measures. Colombia points out that pre-existing measures applied in parallel with the measure challenged do not constitute alternatives for the purpose of testing necessity under Article XX of the GATT 1994, as was determined by the panel and the Appellate Body in *Brazil – Retreaded Tyres*. According to Colombia, the Panel should therefore conclude that the application of the Customs Valuation Agreement is not an alternative to Decree No. 456.[654]

7.451. Colombia also asserts that this suggestion disregards the magnitude of the problem. Colombia notes that the instruments provided for in the Customs Valuation Agreement make it possible to question individual imports and were defined in the light of isolated situations of customs fraud; hence they would not provide effective tools to address the widespread, massive and serious problem faced by Colombia, which is caused by transnational criminal groups operating on a large scale. Colombia adds that this alternative would not achieve the same level of protection as the compound tariff and would not be less restrictive, apart from which it would be unrealistic to suppose that Colombia could in the short term have a customs service with sufficient capacity to deal with the problem effectively.[655]

7.452. Colombia maintains that, as footwear and apparel are high-risk goods, customs controls cover 30% rather than 10% of imports of the products in question, and it would not be possible to increase customs controls on these products further because, in addition to overwhelming DIAN's capacity, this would delay all foreign trade operations, generating high costs for the whole of the national economy, and would run counter to trade facilitation.[656]

7.453. Colombia also maintains that, even while applying the compound tariff, it continues to apply the Customs Valuation Agreement and the Decision Regarding Cases where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value, but explains that in conformity with Colombian law value checks are carried out declaration by declaration, as required by the Customs Valuation Agreement and confirmed by paragraph 1 of the Decision in question. Colombia affirms that the mechanisms envisaged in the Customs Valuation Agreement and the above-mentioned Decision are not appropriate to Colombia's problems.[657]

7.454. The Panel asked Colombia whether it had considered improving the selectivity of the systems applied by its customs authority in relation to those imports of apparel and footwear that posed a certain degree of risk of undervaluation or any other risk associated with money laundering, so as to make it possible to detect the entry of goods for illicit purposes with greater precision and accuracy.[658]

7.455. Colombia responded to this question as follows:

> Colombia's selectivity systems are improving every day and the Government is making huge efforts to acquire the best possible risk management system. The level of effectiveness of the controls, i.e. the number of finds (inconsistencies in the documentation or inconsistencies between the load and the documentation) as compared with the total number of import declarations inspected is 16%. This percentage reflects an improvement in effectiveness during the period of application

[653] Panama's second written submission, para. 3.34; opening statement at the first meeting of the Panel, para. 1.24; and response to Panel question No. 66.

[654] Colombia's opening statement at the second meeting of the Panel, para. 101 (referring to Panel Report, *Brazil – Retreaded Tyres*, paras. 7.169, 7.171-7.172 and 7.178; Appellate Body Report, *Brazil - Retreaded Tyres,* paras. 159 and 181).

[655] Colombia's second written submission, paras. 84-86; opening statement at the first meeting of the Panel, paras. 71 and 72; opening statement at the second meeting of the Panel, para. 101; and response to Panel questions Nos. 30 and 31.

[656] Colombia's second written submission, para. 86; and opening statement at the second meeting of the Panel, para. 72.

[657] Colombia's response to Panel question No. 31.

[658] See Panel question No. 80.

> of the measure, with respect to the period before it was applied, when the percentage did not exceed 10%. However, we recall that the challenge facing Colombia is an enormous one due to the presence of drug trafficking and organized criminal groups.[659]

7.456. In support of its response, Colombia submitted Exhibit COL-43, which indicates as its source "Analysis of Operations" and which sets out effectiveness percentages by chapter of the Customs Tariff for 2012 and 2013. According to this exhibit, whereas in 2012 the effectiveness percentages were 7% for Chapter 61, 10% for Chapter 62, 12% for Chapter 63 and 13% for Chapter 64, in 2013 the percentages were 17% for Chapter 61, 16% for Chapter 62, 13% for Chapter 63 and 14% for Chapter 64.[660]

7.457. Panama did not make any comment on this response.

7.458. The Panel has no additional information with respect to this alternative measure suggested by Panama.

7.4.2.6.5.2 Customs cooperation and information exchange mechanisms

7.459. Panama maintains that, as it says Colombia has acknowledged, customs cooperation and information exchange mechanisms are a clear and less restrictive alternative means of combating the use of imports for money laundering purposes. Panama asserts that this option is already available, because of the signature in 2006 of the Protocol of Procedure for Cooperation and Exchange of Customs Information between the Customs Authorities of the Republic of Panama and the Republic of Colombia, within the framework of the Multilateral Convention on Cooperation and Mutual Assistance between the National Customs Directorates of Latin America, Spain and Portugal (COMALEP), under which the parties may request cooperation or mutual assistance for the purpose of exchanging information conducive to the prevention, investigation, suppression and control of customs offences.[661]

7.460. According to Panama, COMALEP and the Protocol give the parties broad powers to request customs information, and the high volume of utilization of the mechanisms of the Protocol is an indication of its efficacy.[662] Panama states that, between 2012 and 2013, its customs authority received 721 requests for information from DIAN and, from January to November 2014, 696 requests. Panama asserts that its customs authorities respond to 85% of the requests they receive from DIAN, although it admits that the 20-day time-limit has been insufficient due to the nature of the requests themselves and the numerous formalities that have to be completed to obtain the information requested. According to Panama, Colombia acknowledges that the 20-day time-limit is extremely short, which is why the period envisaged in the free trade agreement signed by Panama and Colombia, which has not yet entered into force, is between 90 and 120 days. Panama also points out that if there are requests still awaiting a response, it is because of factors such as the inaccuracy of the request or companies having ceased operations.[663] Panama has submitted a note from its national customs authority providing information regarding the utilization of the protocol mechanisms[664], together with some examples of its national customs authority's replies to requests from DIAN.[665]

7.461. Colombia maintains that, being a measure that is in force, the Protocol of Procedure for Cooperation and Exchange of Customs Information between the Customs Authorities of the Republic of Panama and the Republic of Colombia does not constitute an alternative for the

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[659] Colombia's response to Panel question No. 80.
[660] Analysis of Operations, Selectivity Analysis Chapters (61 to 64), years 2012 and 2013 (Exhibit COL-43).
[661] Panama's second written submission, para. 3.35; opening statement at the first meeting of the Panel, para. 1.25; and response to Panel question No. 63.
[662] Panama's response to Panel question No. 63.
[663] Panama's second written submission, para. 3.35; and response to Panel questions Nos. 65, 145 and 146.
[664] Ministry of Trade and Industry and National Customs Authority of Panama, communications, 25 November 2014 (Exhibit PAN-20).
[665] National Customs Authority of Panama and National Customs and Excise Directorate of Colombia, communications (Exhibit PAN-21).

purposes of the necessity analysis under Article XX of the GATT 1994.[666] Colombia also asserts that it has had difficulties in the area of customs cooperation with Panama under the Protocol. On the basis of information provided by DIAN, Colombia claims that only 79 of 329 requests submitted to Panama in 2007 received replies; that the pattern of response was similar in the years from 2008 to 2010; and that, although in 2011 and 2012 the proportion of replies rose to 74%, in 2013 and 2014 it fell to 15.6%. Colombia adds that, despite the fact that the Protocol establishes a time limit of 20 days for replies, on average Panama had taken 50 days to respond to its requests and had exceeded the four-month limit that the customs legislation gave the Colombian customs authorities to gather evidence abroad. Colombia points out that the Protocol does not have a dispute settlement mechanism for enforcing compliance, and that there is no certainty as to whether the Panamanian authorities will collaborate in response to a particular request. Colombia also questions the quality of the information provided by Panama in response to its requests.[667] Colombia adds that it has signed a free trade agreement with Panama, which incorporates customs cooperation and information exchange mechanisms and has a dispute settlement mechanism, but Panama has not submitted the agreement for legislative approval.[668]

7.462. This Panel notes the existence of agreement between the parties that a customs cooperation and information exchange mechanism could, in principle, serve as an alternative to the application of the compound tariff.

7.463. Colombia has indicated that the aspects it considers necessary for a customs cooperation and information exchange mechanism to be an alternative to the application of the compound tariff would be: (i) that it has a dispute settlement mechanism which makes it possible to suspend concessions if the other party fails to cooperate; (ii) that it is effectively implemented; (iii) that the cooperation covers both goods that qualify on the basis of origin and goods that qualify on the basis of provenance; and (iv) that the cooperation is as comprehensive and as thorough as possible.[669]

7.464. However, the parties disagree about the effectiveness of the customs cooperation and information exchange mechanism currently in force between Colombia and Panama.[670] This Panel notes that, according to the information provided by Panama in its Exhibit PAN-20, in 2012 the Panamanian authorities received around 373 requests from Colombia, and replied to 238 of them (between 2012 and November 2014), which signifies an average response rate of about 64%. In 2013, the Panamanian authorities received around 428 requests, and replied to 290 (between 2013 and November 2014), which signifies an average response rate of about 68%. In 2014, up to the date of the communication (25 November 2014), around 673 requests were received and elicited 173 replies, which signifies an average response rate of about 26%. The aggregate numbers from 2012 to 2014 amount to 1,474 requests and 701 replies, which corresponds to an average response rate of about 47%.[671] The Panel also notes that, as Panama acknowledges, it took more than the 20 days envisaged in the Protocol for the replies to be received.

7.4.2.6.5.3 The use of the disciplines of the Agreement on Preshipment Inspection

7.465. Panama maintains that another alternative measure would be to apply the disciplines of the Agreement on Preshipment Inspection, which provides for inspection procedures on the territory of exporter Members that make it possible to verify the price of the imported goods. Panama maintains that Colombia could contract for preshipment inspection services or require their use. As far as Panama is concerned, the price verification tools of the above-mentioned Agreement would be more effective and less restrictive than the compound tariff.[672]

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[666] Colombia's opening statement at the second meeting of the Panel, para. 104.

[667] Colombia's second written submission, paras. 87-89; opening statement at the second meeting of the Panel, paras. 104-106; and response to Panel questions Nos. 61, 63, 65, 145, 146 and 147.

[668] Colombia's second written submission, paras. 6, 116-118. News item: *La Prensa*, "FTA with Colombia paralysed", 7 January 2015 (Exhibit COL-39).

[669] Colombia's response to Panel question No. 147.

[670] Protocol of Procedure for Cooperation and Exchange of Customs Information between the Customs Authorities of Panama and Colombia, 31 October 2006 (Exhibit PAN-17).

[671] Ministry of Trade and Industry and National Customs Authority of Panama, communications, 25 November 2014 (Exhibit PAN-20).

[672] Panama's second written submission, para. 3.36; and response to Panel questions Nos. 67 and 152.

7.466. Colombia maintains that this would be an alternative more restrictive and less effective than the compound tariff. Colombia points out that it applied preshipment inspection up until 2000, but abandoned it because of corruption problems with inspection agencies. Colombia adds that the World Customs Organization, the WTO and other entities have expressed concerns about the restrictive nature and lack of effectiveness of this mechanism and that the Members of the WTO agreed to eliminate it under Article 10.5 of the Agreement on Trade Facilitation.[673]

7.467. Panama acknowledges that Article 10.5 of the Agreement on Trade Facilitation stipulates that Members shall not require the use of preshipment inspections in relation to customs valuation. However, Panama points out that the agreement in question is not yet in force and therefore, at this time, preshipment inspection is a measure available under the WTO Agreements. Panama adds that rather than preshipment inspection the Agreement on Trade Facilitation envisages the use of a customs cooperation mechanism that takes some of these concerns into account (Article 12).[674]

7.468. This Panel notes that Article 10.5 (Preshipment Inspection) of the WTO Agreement on Trade Facilitation, which has not yet entered into force, reads as follows:

> 5.1 Members shall not require the use of preshipment inspections in relation to tariff classification and customs valuation.
>
> 5.2 Without prejudice to the rights of Members to use other types of preshipment inspection not covered by paragraph 5.1, Members are encouraged not to introduce or apply new requirements regarding their use.

7.469. This Panel also notes that on 5 June 2014 Colombia notified the Preparatory Committee on Trade Facilitation of the designation of all the provisions in Section I of the Agreement on Trade Facilitation, including the provisions of Article 10.5, as Category A commitments for implementation upon its entry into force.[675]

7.4.2.6.6 Conclusion as to whether the compound tariff is "necessary" to combat money laundering

7.470. Assuming, for the sake of argument, that the compound tariff was designed to combat money laundering, this Panel concludes that Colombia has not demonstrated that its compound tariff is necessary to combat money laundering.

7.4.2.7 Conclusion as to whether the compound tariff is a measure necessary to protect public morals within the meaning of Article XX(a) of the GATT 1994

7.471. As indicated in the preceding paragraphs, the Panel has considered the text of Decree No. 456 and the other available evidence concerning the structure and application of the compound tariff. In the light of all the evidence available, this Panel concludes that Colombia has not demonstrated that the compound tariff is a measure necessary to protect public morals within the meaning of Article XX(a) of the GATT 1994.

7.4.3 Colombia's defence under Article XX(d) of the GATT 1994

7.4.3.1 The legal standard of Article XX(d) of the GATT 1994

7.4.3.1.1 The text of Article XX(d) of the GATT 1994

7.472. The *chapeau* (introductory clause) and paragraph (d) of Article XX of the GATT 1994 read as follows:

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[673] Colombia's second written submission, paras. 90-93; and opening statement at the second meeting of the Panel, paras. 102-103.

[674] Panama's response to Panel question No. 152.

[675] Preparatory Committee on Trade Facilitation, Communication by Colombia, Document WT/PCTF/N/COL/1, 13 June 2014 (Exhibit COL-42).

Article XX

General Exceptions

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

7.4.3.1.2 Measures necessary to secure compliance with laws or regulations which are not inconsistent with the GATT 1994

7.473. Article XX(d) of the GATT 1994 justifies measures adopted or enforced by a Member that are necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATT 1994. The same paragraph includes, as examples of such laws or regulations, laws or regulations relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices.

7.4.3.1.3 Structure of the analysis

7.474. In *Korea – Various Measures on Beef*, the Appellate Body analysed, for the first time within the framework of the WTO, a defence under Article XX(d) of the GATT 1994. The Appellate Body explained that, for a measure inconsistent with the GATT 1994 to be justified provisionally under paragraph (d) of Article XX, it must be shown that: (i) the measure is one designed to "secure compliance" with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994; and (ii) the measure is "necessary" to secure such compliance.[676] The Member invoking Article XX(d) as a justification has the burden of demonstrating that these two requirements are met.[677]

7.4.3.1.4 To secure compliance with laws or regulations which are not inconsistent with the GATT 1994

7.475. With respect to the assessment of whether the measure is designed to secure compliance with laws or regulations which are not inconsistent with the GATT 1994, the panel in *US - Shrimp (Thailand)* considered that the WTO Member which invokes the defence must: (i) identify the laws or regulations with which it is desired to secure compliance; (ii) establish that these laws or regulations are not themselves WTO-inconsistent; and (iii) demonstrate that the measure at issue is itself designed to secure compliance with the relevant laws or regulations.[678]

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[676] Appellate Body Report, *Korea – Various Measures on Beef,* para. 157. See also Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 67. The expression "*designed to 'secure compliance'*" in the original English language text of the Appellate Body report was translated into Spanish as "*destinada a 'lograr la observancia*'" and into French as "*avoir pour objet d''assurer le respect*'". In the course of the proceedings, which were conducted in Spanish, parties used the expressions "*diseñada para*" and "*destinada a*" interchangeably. The original Spanish language text of the present Panel report uses the expression "*destinada a*".

[677] Appellate Body Report, *Korea – Various Measures on Beef, para*. 157.

[678] Panel Report, *US – Shrimp (Thailand)*, para. 7.174. See also Panel Report, *US – Customs Bond Directive*, para. 7.295; *Colombia – Ports of Entry*, para. 7.514.

7.4.3.1.4.1 "Laws or regulations which are not inconsistent with the GATT 1994"

7.476. The Appellate Body has pointed out that Article XX(d) is applicable to a broad range of "laws or regulations" with which compliance has to be secured.[679]

7.477. In *Mexico – Taxes on Soft Drinks*, the Appellate Body made it clear that the expression "laws or regulations" encompasses rules adopted by a WTO Member's legislative or executive branches of government that form part of that Member's domestic legal system.[680]

7.478. Moreover, such laws or regulations must not themselves be inconsistent with the GATT 1994.[681]

7.4.3.1.4.2 "To secure compliance"

7.479. As in the analysis relating to Article XX(a) of the GATT 1994, where the party invoking the defence must demonstrate that its measure has been adopted or enforced to protect public morals, or, in other words, whether it is designed to protect public morals, in the analysis relating to Article XX(d) the party invoking the defence must demonstrate that its measure is designed to secure compliance with laws or regulations which are not inconsistent with the GATT 1994.

7.480. To assess whether a measure is designed to secure compliance with laws or regulations not inconsistent with the GATT 1994, a panel must confirm that that is, in fact, the objective of the measure. In performing this task, a panel may be faced with conflicting arguments of the parties. In any event, the panel must make an objective and independent assessment of the objective of the measure. To that end, the panel must take account of all the evidence available to it, including the texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure.[682]

7.481. The Appellate Body has explained that the requirement to demonstrate that a measure is designed to secure compliance with laws or regulations which are not inconsistent with the GATT 1994 must focus on "the design" (in Spanish "*el destino*") of the measure it is sought to justify.[683] The Appellate Body added that a measure can be said to be "designed to" secure such compliance even if the measure cannot be guaranteed to achieve its result with absolute certainty, because what this step in the analysis requires is that the measure be designed to secure compliance.[684] In any event, the assessment of the contribution of the measure comes under the analysis concerning the necessity of the measure.

7.482. In a GATT 1947 case, *EEC – Regulation on Imports of Parts and Components*, the panel observed that Article XX(d) does not refer to the objectives of laws or regulations, but only to laws or regulations, which indicates that this provision covers measures designed to secure compliance with laws or regulations as such and not with their objectives. In other words, "secure compliance" means enforcing the obligations stipulated in the laws or regulations and not securing the attainment of the objectives of those laws or regulations.[685]

7.483. Various WTO panels have referred to the above interpretation in their reports.[686] For example, the panel in *Colombia – Ports of Entry* pointed out that "to secure compliance" means "to enforce obligations" rather than "to ensure the attainment of the objectives of laws and regulations".[687] The panel in *Mexico – Taxes on Soft Drinks*, for its part, explained that "to secure

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[679] Appellate Body Report, *Korea – Various Measures on Beef, para*. 162.
[680] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras. 69–70.
[681] Panel Report, *Brazil – Retreaded Tyres*, para. 7.388.
[682] Appellate Body Report, *EC – Seal Products*, para. 5.144. See also Appellate Body Report, *US – COOL*, para. 371; *US – Tuna II (Mexico)*, para. 314.
[683] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 72. See also Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.
[684] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras. 74 and 79.
[685] GATT Panel Report, *EEC – Regulation on Imports of Parts and Components*, paras. 5.14-5.18.
[686] See, for example, Panel Reports, *Korea – Various Measures on Beef*, para. 658, *Canada – Periodicals*, para. 5.9; *Canada – Wheat Exports and Grain Imports*, para. 6.248; *EC – Trademarks and Geographical Indications (US)*, para. 7.445.
[687] Panel Report, *Colombia – Ports of Entry*, para. 7.538.

compliance" means to enforce compliance and addresses compliance with laws or regulations, which characteristically concern obligations rather than requests.[688]

7.484. In *Korea – Various Measures on Beef*, the panel found, for example, that Korea's dual retail system, which prohibited the sale of domestic and imported beef in the same shop, or on the same shelf in large shops, despite some troublesome aspects, had been put in place, *at least in part*, in order to secure compliance with the Korean legislation against deceptive practices, to the extent that it served to prevent acts inconsistent with the Unfair Competition Act.[689]

7.485. In *Colombia – Ports of Entry*, Colombia presented a defence under Article XX(d) with respect to its measures relating to ports of entry.[690] The panel, in a report that was not appealed, concluded that Colombia had demonstrated that the measure concerning ports of entry was designed to secure compliance with the laws related to ensuring customs control and enforcement, on the basis of the existing evidence and the circumstances surrounding the implementation of the measure, and in the light of the fact that the measure had been imposed with a view to addressing the need to strengthen and improve customs controls related to the importation of textiles and footwear coming from Panama.[691]

7.4.3.1.5 "Necessary" – The necessity analysis

7.486. As mentioned previously[692], the standard for examining necessity has been developed by the Appellate Body in the course of analysing the various paragraphs of Article XX of the GATT 1994 and Article XIV of the GATS which contain the term "necessary" (in the context of "measures necessary"). Since the necessity analysis has already been described in connection with Article XX(a), in this section the Panel will confine itself to mentioning the distinctive aspects of the necessity analysis in the context of Article XX(d) of the GATT 1994, and briefly recalling the relevant principles.

7.487. The Appellate Body has explained that the determination of whether a measure is "necessary" within the meaning of Article XX(d) of the GATT 1994 involves a process of weighing and balancing a series of factors which prominently include the contribution of the measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.[693] In addition, the process includes the determination of whether a WTO-consistent alternative measure is reasonably available to the Member concerned, or whether a less WTO-inconsistent measure is reasonably available.[694]

7.488. In the light of the above, this Panel notes that in examining necessity in the context of Article XX(d) of the GATT 1994 the following factors should be comprehensively weighed and balanced:

a. The importance of securing compliance with the law or regulation at issue;

b. The contribution of the measure to securing compliance with the law or regulation at issue; and

c. The trade-restrictiveness of the measure.

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[688] Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.175.

[689] Panel Report, *Korea – Various Measures on Beef*, *para*. 658.

[690] The measures consisted of (i) the requirement to enter and clear goods coming from Panama exclusively through Bogota (in the case of air shipments) or Barranquilla (in the case of sea shipments); (ii) the exception allowing transhipped goods to enter through any of the 11 designated ports when proceeding in international transit; and (iii) the requirement to present an advance import declaration, pay taxes on the basis of that advance declaration and satisfy special legalization requirements (only in the case of textiles).

[691] Panel Report, *Colombia – Ports of Entry*, para. 7.543.

[692] See para. 7.304. above.

[693] Appellate Body Report, *Korea – Various Measures on Beef*, para. 164. See also Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 316.

[694] Appellate Body Report, *Korea – Various Measures on Beef*, para. 166.

d. If the preliminary conclusion is that the measure is necessary, the result should be confirmed by comparing the measure with possible, reasonably available alternatives that could have less trade-restrictive effects and make an equivalent contribution to securing compliance with the law or regulation at issue.

7.4.3.1.5.1 The importance of the interests or values protected by the law or regulation at issue

7.489. The first factor to be considered in examining the necessity of a measure is the importance of the interests or values promoted by the law or regulation at issue, which should take account of the specific facts of each case. The more vital or important the interests or values it is sought to protect, the more easily a measure can be accepted as "necessary".[695]

7.490. In *Colombia – Ports of Entry*, for example, the panel was of the view that the fight against underinvoicing and smuggling should be assessed in the proper context, in consideration of the particular realities faced by Colombia. The panel added that the evidence submitted by Colombia demonstrated that problems existed with contraband, smuggling and underinvoicing, particularly in connection with the Colón Free Zone, besides which Colombia had presented additional evidence to demonstrate the effects produced by goods arriving from Panama in relation to the associated problem of drug trafficking. The panel concluded that combating underinvoicing and money laundering associated with drug trafficking was a relatively more important reality for Colombia than for many other countries.[696]

7.4.3.1.5.2 The contribution of the measure to securing compliance with the law or regulation at issue

7.491. As a second factor in the necessity analysis, a panel should analyse the contribution of the measure to securing compliance with the law or regulation at issue. This should also be done in the light of the facts specific to each case and taking into account the importance of the interests or values at stake.

7.492. A measure contributes to the objective when there is genuine relationship of ends and means between the objective pursued and the measure at issue.[697] Furthermore, the greater the contribution of the measure to securing compliance with the law or regulation in question, the more easily the measure might be considered to be necessary.[698]

7.4.3.1.5.3 The trade-restrictiveness of the measure

7.493. As a third factor in the necessity analysis, a panel should assess the trade-restrictiveness of the measure. This should be done in the light of the facts specific to each case and taking into account the importance of the interests or values at stake.

7.494. A measure with a relatively slight impact on imported products can more easily be considered as necessary than a more restrictive measure.[699] Likewise, when a measure produces restrictive effects as severe as those resulting from an import ban, it would be difficult for a panel to find that measure necessary unless it is satisfied that the measure is apt to make a material

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[695] Appellate Body Report, *Korea – Various Measures on Beef*, para. 162. See also Appellate Body Report, *EC – Asbestos*, para. 172; Panel Report, *US – Gambling,* para. 6.477.

[696] In that case, Colombia requested the Panel to examine the measures in light of the important interests involved in securing compliance with its customs laws, both in terms of revenue lost, and in terms of illegal and criminal activities linked to contraband and smuggling in general. Colombia argued that the problem of contraband was significant, as contraband trade played a role in certain types of money laundering, linked to other illegal activities. Colombia also asserted that it was unlike any other country as it was faced with an important domestic problem of drug trafficking and public order. Panel Report, *Colombia – Ports of Entry*, paras. 7.551-7.566.

[697] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145.

[698] Appellate Body Report, *Korea – Various Measures on Beef*, para. 163. See also Panel Report, *US - Gambling*, para. 6.477.

[699] Appellate Body Report, *Korea – Various Measures on Beef*, para. 163. See also Appellate Body Report, *Brazil – Retreaded Tyres*, para. 150; Appellate Body Report, *China – Publications and Audiovisual Products*, para. 310; Panel Report, *US – Gambling*, para. 6.477.

contribution to the achievement of its objective, without this being a requirement for a specific contribution threshold.[700]

7.495. In *Dominican Republic – Import and Sale of Cigarettes*, for example, the panel observed that the tax stamp requirement, which made it compulsory to affix tax stamps to cigarette packets in the Dominican Republic, had not prevented Honduras from exporting cigarettes to the Dominican Republic, and that its exports had increased quite significantly in recent years, so that the measure had not had any intense restrictive effects on trade.[701]

7.4.3.1.5.4 Comparison of the measure with possible alternatives

7.496. If a panel reaches a preliminary conclusion that the measure is *necessary*, as the next step it should confirm the result by comparing the measure with the alternatives identified by the complainant.

7.497. An alternative measure must be one that preserves for the responding Member its right to achieve its desired level of protection with respect to the objective pursued and is reasonably available to it.[702] Moreover, in addition to the difficulty of implementing a measure, consideration should be given to the following: (i) whether it is a WTO-consistent measure or entails a lesser degree of inconsistency; (ii) the extent to which it contributes to the realization of the end pursued; and (iii) whether it has effects less trade-restrictive than the measure at issue.[703]

7.4.3.2 The question of whether the compound tariff is a measure necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATT 1994

7.4.3.2.1 Introduction on the analysis under Article XX(d) of the GATT 1994

7.498. The Panel will analyse whether Colombia has succeeded in demonstrating that the compound tariff is, within the meaning of Article XX(d) of the GATT 1994, a measure necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATT 1994. The Panel will structure its analysis by assessing whether Colombia has demonstrated, first, that the compound tariff is designed to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATT 1994; and, second, that the compound tariff is necessary to secure such compliance.[704]

7.4.3.2.2 As to whether the compound tariff is a measure designed to "secure compliance with laws or regulations which are not inconsistent with the GATT 1994"

7.499. To assess whether the compound tariff is designed to secure compliance with laws or regulations which are not inconsistent with the GATT 1994, the Panel will first enquire whether Colombia has succeeded in identifying the laws or regulations with which it wishes to secure compliance; second, determine whether these laws or regulations are not themselves inconsistent with the GATT 1994; and, third, analyse whether the compound tariff is itself designed to secure compliance with those laws or regulations. This is in line with the structure of analysis used by previous panels.[705]

7.4.3.2.2.1 Has Colombia identified the money laundering legislation with which it wishes to secure compliance?

7.500. In its first written submission, Colombia stated that Decree No. 456 "is designed to secure compliance with the Colombian laws and regulations against money laundering and the financing

[700] Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 150 and 151.
[701] Panel Report, *Dominican Republic – Importation and Sale of Cigarettes*, para. 7.215.
[702] Appellate Body Report, *US – Gambling*, para. 308.
[703] Appellate Body Report, *EC – Asbestos*, paras. 170-172.
[704] Appellate Body Report, *Korea – Various Measures on Beef,* para. 157. See also Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 67.
[705] Panel Report, *US – Shrimp (Thailand)*, para. 7.174. See also Panel Report, *US – Customs Bond Directive*, para. 7.295; *Colombia – Ports of Entry*, para. 7.514.

of other criminal activities".[706] In the same submission, Colombia referred to Article 323 of the Criminal Code on money laundering and Article 345 of the Criminal Code on the financing of terrorism.[707]

7.501. In response to the Panel's questions, Colombia pointed out that these were not the only provisions with which Decree No. 456 seeks to secure compliance. Colombia indicated that, *inter alia*, the following provisions were also relevant: (i) Article 321 of the Criminal Code (customs tax fraud); (ii) Articles 25, 128, 238, 239, 240, 241, 249, 254, 255, 501-2 of the Customs Statute - Decree No. 2685 of 1999 (rules of conduct for administrators, legal representatives, customs brokers and auxiliaries; authorization of the release of imported goods and suspicions regarding the declared value of imports; import declaration and Andean Declaration of Value, customs value, commercial invoices and supporting documents; currency conversion; and customs offences on the part of international trading companies); (iii) Articles 102, 103, 104 and 107 of the Organic Statute of the Financial System – Decree No. 663 of 1993 (administrative control regulations for combating money laundering), and Article 43 of Law No. 190 of 1995 (extending the requirements of Articles 102 to 107 of the Organic Statute of the Financial System to persons engaged in foreign trade, casino or gambling activities); (iv) Decree No. 1071 of 1999 (which relates to the functions of the National Customs and Excise Directorate of Colombia (DIAN) with regard to the fiscal security of the Colombian State and the protection of national public order, through the administration and control of due compliance with tax, customs and foreign exchange requirements and facilitation of foreign trade operations); (v) Articles 14, 15, 17, 18 and 25 of Andean Community Decision 571 (customs value) and Articles 48, 49, 51 and 61 of the Regulation contained in Andean Community Resolution 846 (customs valuation controls); (vi) Law No. 808 of 27 May 2003, approving the International Convention for the Suppression of the Financing of Terrorism; and (vii) Law No. 800 of 13 March 2003, approving the United Nations Convention against Transnational Organized Crime.[708]

7.502. Colombia has referred to all these legal provisions in general terms as the Colombian legislation against money laundering and the financing of terrorism.[709]

7.503. Subsequently, in its second written submission and at the second substantive meeting with the Panel, Colombia referred to Articles 323 and 345 of the Criminal Code as the provisions against money laundering and the financing of terrorism with which it wished to secure compliance by means of the compound tariff.

7.504. Panama asserts that Colombia has been imprecise in identifying the laws and regulations with which compliance would be secured by means of the compound tariff. In Panama's opinion, because of this imprecision and the lack of supporting evidence, neither Panama nor the Panel would be able to verify the proper identification of the provisions cited by Colombia.[710]

7.505. This Panel notes that, throughout its written submissions and oral statements, Colombia has referred principally to Articles 323 and 345 of its Criminal Code as the laws or regulations with which it seeks to secure compliance by means of its compound tariff, and that it has organized its arguments around these two provisions.[711] As regards the other legislation cited by Colombia in response to Panel questions, Colombia itself has explained that these provisions were cited by Colombia in response to a question from the Panel.[712] Therefore, in assessing the identification of the laws and regulations with which Colombia is seeking to secure compliance, the Panel will focus on Articles 323 and 345 of the Colombian Criminal Code.

[706] Colombia's first written submission, para. 93.
[707] Ibid. paras. 93 and 94; and second written submission, paras. 41-42 and 99.
[708] Colombia's response to Panel questions Nos. 51 and 52.
[709] Colombia's first written submission, paras. 93 and 94.
[710] Panama's second written submission, paras. 3.45-3.54.
[711] Colombia's first written submission, paras. 93-95; second written submission, para. 99; and opening statement at the second meeting of the Panel, para. 65.
[712] Colombia's opening statement at the second meeting of the Panel, para. 73.

7.506. The first of these provisions, Article 323 of the Colombian Criminal Code, was reproduced by Colombia in its second written submission.[713] The text of the provision is also contained in Exhibit COL-10, presented by Colombia together with its first written submission.[714]

> Money laundering. Anyone who acquires, holds, invests, transports, converts, keeps custody of or administers assets that originate, directly or indirectly, in activities of extortion, unlawful increase in wealth, kidnapping for ransom, rebellion, arms trafficking, or offences against the financial system or public administration or linked with the proceeds of offences partaking of a criminal conspiracy, in relation to the traffic in toxic drugs, narcotics or psychotropic substances, or which seek to legalize or give a cloak of legality to assets derived from the said activities, or to conceal or disguise the true nature, origin, location, destination or movement of such assets or rights therein, or takes any other action to conceal or disguise their illicit origin, shall be liable, for this conduct alone, to a term of imprisonment of six (6) to fifteen (15) years and a fine of five hundred (500) to fifty thousand (50,000) times the legal minimum monthly wage in force.
>
> The same penalty shall apply if the behaviour described in the preceding paragraph involves assets that have been declared forfeit.
>
> Money laundering shall be punishable even if the activities from which the assets are derived, or the acts punished under the previous paragraphs, were wholly or partly carried out abroad.
>
> The custodial sentences provided for in this article shall be increased by one third to one half if the conduct concerned involved foreign exchange or foreign trade operations, or the introduction of goods into the national territory.
>
> The increase in the penalty envisaged in the preceding paragraph shall also apply if contraband goods were introduced into the national territory.

7.507. As far as Article 345 of the Colombian Criminal Code is concerned, Colombia has not reproduced its text in any of its submissions or statements, nor has it presented any exhibit containing the text. In other words, the content of Article 345 of the Colombian Criminal Code is not on the record. Moreover, Colombia has stated that this provision relates not specifically to money laundering but to the offence of financing terrorism. In its various written submissions, Colombia has developed arguments to show that the compound tariff seeks to secure compliance with its anti-money laundering legislation. On the other hand, Colombia has not argued that the compound tariff seeks to secure compliance with its legislation against the financing of terrorism.

7.508. This Panel therefore finds that Colombia has identified Article 323 of its Criminal Code, which creates the crime of money laundering, as the anti-money laundering legislation with which it seeks to secure compliance by means of the compound tariff.

7.4.3.2.2.2 Has Colombia demonstrated that its anti-money laundering legislation is not inconsistent with the provisions of the GATT 1994?

7.509. Colombia maintains that the anti-money laundering provisions of Article 323 of the Colombian Criminal Code are not, in themselves, inconsistent with the GATT 1994 and, moreover, fulfil international commitments undertaken by Colombia and other member countries of the international community.[715]

7.510. Panama maintains that, apart from the above assertion, Colombia has made no attempt to show that its domestic laws are consistent with the GATT 1994.[716] However, Panama has not introduced any arguments or evidence to suggest that Article 323 of the Colombian Criminal Code,

[713] Colombia's second written submission, para. 41.
[714] National Customs and Excise Directorate, Information and Financial Analysis Unit, *Money Laundering Typologies Related to Smuggling*, January 2006 (Exhibit COL-10), p. 8.
[715] Colombia's first written submission, para. 95.
[716] Panama's second written submission, para. 3.55.

which defines the offence of money laundering, is inconsistent with any of the provisions of the GATT 1994.

7.511. This Panel finds no reason why it could or should consider Article 323 of the Colombian Criminal Code, in itself, to be inconsistent with the provisions of the GATT 1994. The Panel recalls that the Appellate Body has made it clear that a responding Member's law should be treated as WTO-consistent until proven otherwise.[717]

7.512. This Panel therefore concludes that there is no reason to consider that Article 323 of the Colombian Criminal Code is itself inconsistent with the provisions of the GATT 1994.

7.4.3.2.2.3 Has Colombia demonstrated that the compound tariff is itself designed to secure compliance with the Colombian anti-money laundering legislation?

7.513. Colombia asserts that Decree No. 456 is designed to secure compliance with the Colombian anti-money laundering legislation, because it reduces the incentives for criminal groups to use imports of apparel and footwear for money laundering purposes by setting artificially low prices.[718]

7.514. Panama asserts that neither the text of Decree No. 456 nor Colombia's arguments show any relationship between the Decree and Colombia's money laundering legislation, particularly Articles 323 and 345 of the Criminal Code.[719] Panama argues that there is no genuine relationship of ends and means between the compound tariff provided for in Decree No. 456 and Articles 323 and 345 of the Criminal Code. In its opinion, the compound tariff is not a measure that has been designed to secure compliance with the Colombian legislation on money laundering.[720]

7.515. This Panel notes that, in the course of the present dispute, Colombia has used the same arguments to try to show that its compound tariff seeks to combat money laundering as to try to show that its compound tariff seeks to secure compliance with Article 323 of the Colombian Criminal Code, that is to say, that the compound tariff, by its design, reduces the incentives for criminal groups to use imports of apparel and footwear for money laundering purposes, by means of artificially low prices. Colombia refers to the same evidence in support of its arguments in both cases.

7.516. In analysing Colombia's defence under Article XX(a) of the GATT 1994, this Panel carried out an objective and independent assessment with regard to whether the compound tariff was designed to combat money laundering. The Panel considered that Colombia had not demonstrated a connection between the compound tariff and the alleged objective of combating money laundering. The Panel indicated that, taking into account the relevant facts and relevant circumstances of the case, the design, architecture and revealing structure of the compound tariff, including the way in which the price thresholds were determined, the way in which the compound tariff is applied, the tariff exemptions, the period of validity of the measure, and the lack of automatic measures for following up the imports affected, it was unable to conclude that there was a link between the compound tariff and the declared objective of combating money laundering. For these reasons, the Panel concluded that Colombia had failed to demonstrate that the compound tariff was designed to combat money laundering.[721]

7.517. The same considerations also enable the Panel to conclude that Colombia has failed to demonstrate that the compound tariff is designed to secure compliance with Article 323 of its Criminal Code. The same elements that led the Panel to conclude that Colombia has failed to demonstrate that the compound tariff is designed to combat money laundering, lead it to conclude that Colombia has also failed to demonstrate that the measure is designed to secure compliance with the Colombian anti-money laundering legislation and, more specifically, with Article 323 of the Criminal Code.

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[717] Appellate Body Report, *US – Carbon Steel*, para. 157.

[718] Colombia's first written submission, paras. 97-100; second written submission, para. 99; opening statement at the first meeting of the Panel, paras. 74-75; and opening statement at the second meeting of the Panel, paras. 65-66.

[719] Panama's second written submission, para. 3.56; and response to Panel question No. 8.

[720] Panama's second written submission, para. 3.57; and response to Panel question No. 8.

[721] See paras. 7.399. -7.400. above.

7.518. In fact, on the basis of the totality of the evidence, including the text of Decree No. 456, and the other evidence submitted by the parties, no connection has been shown to exist between the compound tariff and the alleged objective of securing compliance with the Colombian anti-money laundering provisions, and more specifically Article 323 of the Criminal Code. Taking into account the relevant facts and relevant circumstances of the case, the design, architecture and revealing structure of the compound tariff, including the way in which the price thresholds were determined, the way in which the compound tariff is applied, the tariff exemptions, the period of validity of the measure, and the lack of automatic measures for following up the imports affected, do not make it possible to conclude that there is a link between the compound tariff and the declared objective of securing compliance with the Colombian anti-money laundering legislation.

7.4.3.2.2.4 Conclusion as to whether the compound tariff is a measure "to secure compliance with laws or regulations which are not inconsistent with the GATT 1994"

7.519. This Panel concludes that, even though Colombia has identified Article 323 of its Criminal Code, which is not in itself inconsistent with the provisions of the GATT 1994, as the anti-money laundering provision with which it seeks to secure compliance by means of the compound tariff, Colombia has failed to demonstrate that its compound tariff is designed to secure compliance with Article 323 of its Criminal Code.

7.4.3.2.3 As to whether the compound tariff is a measure "necessary" to secure compliance with the Colombian anti-money laundering legislation

7.520. As the Panel has concluded that Colombia has failed to demonstrate that the compound tariff is designed to secure compliance with the Colombian anti-money laundering legislation that it has identified, there is no need, in the light of the specific circumstances of this case, to assess whether the compound tariff is *necessary* to secure compliance with the Colombian anti-money laundering legislation. However, in order to be exhaustive in its analysis, the Panel will continue with its assessment, assuming, for the sake of argument, that the compound tariff is designed to secure compliance with the Colombian anti-money laundering legislation.

7.521. In order to determine whether the compound tariff is *necessary* to secure compliance with the Colombian anti-money laundering legislation, this Panel will weigh and balance the following factors[722]: (i) the importance of securing compliance with the Colombian anti-money laundering legislation; (ii) the contribution of the compound tariff to securing compliance with the Colombian anti-money laundering legislation; (iii) the trade-restrictiveness of the compound tariff; and (iv) if the Panel reaches a preliminary conclusion that the measure is necessary, it will confirm the result by comparing the compound tariff with the alternatives identified by Panama.[723]

7.4.3.2.3.1 The importance of securing compliance with the Colombian anti-money laundering legislation

7.522. With respect to the importance of the objective of securing compliance with the Colombian anti-money laundering legislation, Colombia, referring to the same arguments that it used in the context of its defence under Article XX(a), maintains that the interests or values at stake in this dispute are vital and important in the highest degree.[724] For its part, Panama does not question that the fight against money laundering is a social interest that could be characterized as vital and important in the highest degree.[725]

[722] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 182; *US – Gambling*, paras. 306-307.
[723] Appellate Body Report, *Korea – Various Measures on Beef,* para. 166; *Brazil – Retreaded Tyres*, para. 156; *China – Publications and Audiovisual Products*, paras. 241-242, *EC – Seal Products*, paras. 5.214 and 5.169.
[724] Colombia's first written submission, para. 102; second written submission, para. 108; and opening statement at the first meeting of the Panel, para. 76.
[725] Panama's second written submission, para. 3.32; response to Panel question No. 7.

7.523. The Panel has previously concluded that, considering the evidence available, the objective of combating money laundering in Colombia reflects social interests that could be characterized as vital and important in the highest degree.[726]

7.524. Applying the same considerations that led to the conclusion that the objective of combating money laundering in Colombia reflects social interests that can be characterized as vital and important in the highest degree, this Panel concludes that the objective of securing compliance with the Colombian anti-money laundering legislation reflects social interests that can be characterized as vital and important in the highest degree.

7.4.3.2.3.2 The contribution of the compound tariff to securing compliance with the Colombian anti-money laundering legislation

7.525. With respect to the contribution of the measure to securing compliance with the Colombian anti-money laundering legislation, Colombia, referring to the same arguments that it put forward in the context of its defence under Article XX(a) (to the effect that the compound tariff would help to combat money laundering), maintains that its compound tariff contributes to securing compliance with the Colombian anti-money laundering legislation because it reduces the incentives for using imports of textiles, apparel and footwear for money laundering purposes.[727]

7.526. This Panel concluded previously that it did not consider that the existence of a genuine relationship of means and ends between the compound tariff and the alleged objective of combating money laundering had been demonstrated, and that, taking into account the relevant facts and relevant circumstances of the case, including the design, architecture and revealing structure of the compound tariff, Colombia had not demonstrated that the compound tariff contributed to the objective of combating money laundering.[728]

7.527. For the same reasons that led this Panel to conclude that Colombia has failed to demonstrate the contribution of the compound tariff to the objective of combating money laundering, this Panel concludes that Colombia has failed to demonstrate the contribution of the compound tariff to the objective of securing compliance with the Colombian anti-money laundering legislation and, more specifically, with Article 323 of the Criminal Code.

7.528. In fact, on the basis of the totality of the evidence, including the text of Decree No. 456, and the other evidence submitted by the parties, this Panel does not consider that Colombia has demonstrated the existence of a genuine relationship of ends and means between the compound tariff and the alleged objective of securing compliance with the Colombian anti-money laundering legislation. Taking into account the relevant facts and relevant circumstances of the case, including the design, architecture and revealing structure of the compound tariff, the Panel concludes that Colombia has failed to demonstrate the contribution of the compound tariff to the objective of securing compliance with the Colombian anti-money laundering legislation.

7.4.3.2.3.3 The trade-restrictiveness of the compound tariff

7.529. With respect to the trade-restrictiveness of the measure, Colombia, referring to the same arguments as it used in relation to Article XX(a), asserts that the measure has a moderate effect on trade because it opens up opportunities for those who import at market prices, does not impose quantitative limits on imports, and is carefully calibrated to affect imports likely to be used for money laundering.[729] Panama, for its part, asserts that the compound tariff has a highly restrictive impact on international trade.[730]

7.530. This Panel has previously concluded, in the necessity analysis under Article XX(a) of the GATT 1994, that, considering the facts of the present case, the restrictive effect of the compound

[726] See para. 7.408. above.
[727] Colombia's first written submission, para. 103; second written submission, para. 108; and opening statement at the first meeting of the Panel, para. 76.
[728] See para. 7.437. above.
[729] Colombia's first written submission, para. 104; second written submission, para. 108; and opening statement at the first meeting of the Panel, para. 76.
[730] Panama's first written submission, paras. 5.3-5.4; second written submission, paras. 3.31 and 3.63; and opening statement at the second meeting of the Panel, para. 7.

tariff on international trade is certain and recognized by both parties, and that the compound tariff is less trade-restrictive than a ban on imports, or a measure having the effects of a ban.[731]

7.531. This conclusion is also applicable to the necessity analysis under Article XX(d) of the GATT 1994.

7.4.3.2.3.4 Preliminary conclusion concerning the assessment of the factors

7.532. Assuming, for the sake of argument, that the compound tariff was designed to secure compliance with the Colombian anti-money laundering legislation, this Panel concludes that, even though the objective of securing compliance with the Colombian anti-money laundering legislation reflects social interests that could be characterized as vital and important in the highest degree, Colombia has failed to demonstrate the contribution of the compound tariff to the alleged objective of securing compliance with the Colombian anti-money laundering legislation. For this reason, and taking into account the restriction on international trade caused by the compound tariff, Colombia has failed to demonstrate that the compound tariff is a measure necessary to secure compliance with the Colombian anti-money laundering legislation and, more specifically, Article 323 of the Criminal Code.

7.4.3.2.4 Has Panama identified possible alternatives reasonably available to Colombia?

7.533. As a result of its weighing and balancing of factors, this Panel has arrived at the preliminary conclusion that Colombia has failed to demonstrate that the compound tariff is a measure necessary to secure compliance with the Colombian anti-money laundering legislation. Accordingly, it is neither necessary nor appropriate to compare the compound tariff with the alternatives identified by Panama.

7.534. In order to be exhaustive in its analysis in relation to Article XX(a) of the GATT 1994, the Panel confined itself to recalling the arguments of the parties with respect to the alternatives identified by Panama and making the factual findings it considered relevant.

7.535. Panama has identified the same alternatives both for combating money laundering within the scope of Article XX(a) of the GATT 1994 and for securing compliance with the Colombian anti-money laundering legislation within the scope of Article XX(d). Accordingly, the factual findings made by this Panel under Article XX(a) of the GATT 1994[732] are equally applicable under Article XX(d).

7.4.3.2.5 Conclusion as to whether the compound tariff is "necessary" to secure compliance with the Colombian anti-money laundering legislation

7.536. Assuming, for the sake of argument, that the compound tariff is designed to secure compliance with the Colombian anti-money laundering legislation, this Panel concludes that Colombia has failed to demonstrate that its compound tariff is necessary to secure compliance with the Colombian anti-money laundering legislation and, more specifically, with Article 323 of the Criminal Code.

7.4.3.3 Conclusion as to whether the compound tariff is a measure necessary to secure compliance with laws or regulations which are not inconsistent with the GATT 1994, within the meaning of Article XX(d) of the GATT 1994

7.537. The Panel has considered the text of Decree No. 456 and the other available evidence concerning the structure and application of the compound tariff. In the light of all the evidence available, this Panel concludes that Colombia has failed to demonstrate that the compound tariff is a measure necessary to secure compliance with laws or regulations which are not inconsistent with the GATT 1994, within the meaning of Article XX(d) of the GATT 1994.

[731] See para. 7.444. above.
[732] See paras. 7.448. -7.469. above.

7.4.4 The *chapeau* (introductory clause) of Article XX of the GATT 1994

7.4.4.1 The legal standard of the *chapeau*

7.4.4.1.1 The text of the *chapeau*

7.538. The *chapeau* of Article XX of the GATT 1994 reads as follows:

> **Article XX**
>
> General Exceptions
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures …

7.4.4.1.2 Object and purpose of the *chapeau*

7.539. The object and purpose of the *chapeau* of Article XX of the GATT 1994 is to prevent abuse of the exceptions for which the article provides. Thus, the *chapeau* incorporates the principle that, although the exceptions for which Article XX provides can be invoked as legal rights, they must not be applied in such a way as to frustrate or nullify the legal obligations contained in the Agreement. In other words, "the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned."[733]

7.540. The Appellate Body has explained that the *chapeau* is an expression of the principle of good faith, a general principle of international law that prohibits the abusive exercise of a State's rights. This principle enjoins that whenever the assertion of a right impinges on the field covered by a treaty obligation, that right must be exercised *bona fide*, that is to say, reasonably.[734]

7.4.4.1.3 The requirements of the *chapeau*

7.541. In accordance with the *chapeau* of Article XX of the GATT 1994, the parties may adopt or enforce measures justified by any of the paragraphs of that article, provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.[735] The burden of demonstrating that a measure also complies with the provisions of the *chapeau* rests on the party invoking an exception under Article XX of the GATT 1994.[736]

7.542. The Appellate Body has also made it clear that the *chapeau* addresses not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied.[737] For example, the panel in *Brazil – Retreaded Tyres* explained that it would not, in its necessity analysis under Article XX(b) of the GATT 1994, examine the manner in which the measure was implemented in practice, including any elements extraneous to the measure itself that could affect its ability to perform its function, or consider situations in which the ban did not apply. The panel explained, however, that those elements would be especially relevant to its assessment under the *chapeau* of Article XX, where the focus would be, by contrast, primarily on the manner in which the measure was applied.[738]

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[733] Appellate Body Report, *US – Gasoline*, p. 22.
[734] Appellate Body Report, *US – Shrimp*, para. 158.
[735] See, for example, Appellate Body Report, *Brazil – Retreaded Tyres*, para. 215.
[736] Appellate Body Report, *US – Gasoline*, pp. 22-23.
[737] Ibid. p. 22.
[738] Panel Report, *Brazil – Retreaded Tyres*, para. 7.107.

7.4.4.1.4 Arbitrary or unjustifiable discrimination between countries where the same conditions prevail

7.543. The Appellate Body has explained that, in order for a measure to be applied in a manner which would constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", three elements must exist: (i) the application of the measure must result in "discrimination"; (ii) the discrimination must be "arbitrary or unjustifiable in character"; and (iii) this discrimination must occur "between countries where the same conditions prevail".[739]

7.544. With regard to the element of "arbitrary or unjustifiable discrimination", the analysis relates primarily to the cause or the rationale of the discrimination, that is, whether the discrimination that results from the application of some measure has a legitimate cause or basis in the light of the guidelines laid down in the paragraphs of Article XX. In other words, there is arbitrary or unjustifiable discrimination "when a Member seeks to justify the discrimination resulting from the application of its measure by a rationale that bears no relationship to the accomplishment of the objective that falls within the purview of one of the paragraphs of Article XX, or goes against this objective."[740] That is, the assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure.[741]

7.545. With regard to the words "between countries where the same conditions prevail", the Appellate Body has stated that the discrimination may occur not only between different exporting Members, but also between exporting Members and the importing Member concerned.[742] The Appellate Body has also explained that Article XX does not require a Member to anticipate and provide explicitly for the specific conditions prevailing and evolving in every individual Member.[743]

7.4.4.1.5 Disguised restriction on international trade

7.546. With respect to the phrase "disguised restriction on international trade", the Appellate Body has explained that:

> "[A]rbitrary discrimination", "unjustifiable discrimination" and "disguised restriction" on international trade may, accordingly, be read side-by-side; they impart meaning to one another. It is clear to us that "disguised restriction" includes disguised *discrimination* in international trade. It is equally clear that *concealed* or *unannounced* restriction or discrimination in international trade does *not* exhaust the meaning of "disguised restriction." We consider that "disguised restriction", whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to "arbitrary or unjustifiable discrimination" may also be taken into account in determining the presence of a "disguised restriction" on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.[744] (emphasis original)

7.547. In that same case, the Appellate Body found a disguised restriction on international trade for the same reasons as it found unjustifiable discrimination.[745]

7.548. On the basis of the foregoing, the panel in *China – Rare Earths* considered that unjustifiable discrimination can constitute a disguised restriction on trade, but that a disguised restriction on trade may exist even if there is no discrimination.[746]

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[739] Appellate Body Report, *US – Shrimp*, para. 150.
[740] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 246.
[741] Ibid. paras. 225-227 and 246.
[742] Appellate Body Report, *US – Shrimp*, para. 150.
[743] Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 149.
[744] Appellate Body Report, *US – Gasoline*, p. 25.
[745] Ibid. pp. 28-29.
[746] Panel Reports, *China – Rare Earths*, paras. 7.826 and 7.952.

7.549. For its part, the panel in *EC – Asbestos* interpreted the phrase "disguised restriction on international trade" as follows:

> [T]he key to understanding what is covered by "disguised restriction on international trade" is not so much the word "restriction", inasmuch as, in essence, any measure falling within Article XX is a restriction on international trade, but the word "disguised". In accordance with the approach defined in Article 31 of the Vienna Convention, we note that, as ordinarily understood, the verb "to disguise" implies an intention. Thus, "to disguise" (*déguiser*) means, in particular, "conceal beneath deceptive appearances, counterfeit", "alter so as to deceive", "misrepresent", "dissimulate".[747] Accordingly, a restriction which formally meets the requirements of Article XX(b) will constitute an abuse if such compliance is in fact only a disguise to conceal the pursuit of trade-restrictive objectives.[748]

7.4.4.2 The question of whether the compound tariff meets the requirements of the *chapeau* of Article XX of the GATT 1994

7.550. The Panel has previously concluded that Colombia has failed to demonstrate that its compound tariff is justified under Article XX(a) or Article XX(d) of the GATT 1994, so that it would not be necessary for the Panel to analyse whether the compound tariff meets the requirements of the *chapeau*.

7.551. However, in order to be exhaustive in its analysis, the Panel will conduct its assessment of the *chapeau* by assuming, for the sake of argument, that Colombia has succeeded in showing that its measure is provisionally justified under Article XX(a) or Article XX(d) of the GATT 1994.

7.4.4.2.1 Introduction on the examination of the *chapeau*

7.552. As already mentioned, under the *chapeau* of Article XX, the parties may adopt measures justified by any of the paragraphs of the article, provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

7.553. Panama gives two reasons why the application of the compound tariff would be arbitrary or unjustifiable discrimination or a disguised restriction on international trade: (i) the exclusion of imports originating in countries with which Colombia has existing trade agreements would constitute arbitrary or unjustifiable discrimination[749]; and (ii) the exclusion of free zones would constitute a disguised restriction on international trade.[750] The Panel will assess these two situations separately.

7.4.4.2.2 The exclusion of trading partners

7.554. Colombia maintains that Decree No. 456 complies with the *chapeau* of Article XX of the GATT 1994. Colombia asserts that Decree No. 456 is applicable to all imports of textiles, apparel and footwear, "except those arriving from countries with which Colombia has signed a free trade agreement".[751]

7.555. With respect to this exclusion, Colombia asserts that, in combating money laundering, and in particular the use of imports for money laundering purposes, it has sought to extend cooperation with the customs authorities of its trading partners and has adopted customs cooperation and information exchange mechanisms with several of them, mainly within the

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[747] (Footnote original) Petit Larousse illustré (1986), p. 292; Le Nouveau Petit Robert (1994), p. 572.
[748] Panel Report, *EC – Asbestos*, para. 8.236.
[749] Panama's second written submission, paras. 3.77-3.78; and opening statement at the first meeting of the Panel, para. 1.27.
[750] Panama's second written submission, para. 3.82.
[751] Colombia's first written submission, para. 110. See also first written submission, paras. 110-113; second written submission, para. 112; and opening statement at the first meeting of the Panel, para. 78.

framework of free trade agreements signed since 2004.[752] Colombia also contends that, due to the fact that imports coming from its trading partners are exempt from payment of the tariff, there is less incentive for them to be entered at artificially low prices for money laundering purposes.[753] Colombia claims that, for this reason, the exemption from the compound tariff in favour of imports from countries with which it has signed free trade agreements is "rationally related" to the policy objective pursued by Decree No. 456, that is, to the fight against money laundering.[754] Colombia adds that this exclusion is justified under Article XXIV:5 of the GATT 1994. Colombia asserts that Panama has characterized the challenged measure as "ordinary customs duties". In Colombia's opinion, Panama should consequently acknowledge that the elimination of these customs duties with respect to countries with which Colombia has agreements establishing free trade areas or customs unions is explicitly permitted by Article XXIV:5 of the GATT 1994. Colombia expresses the view that something which is explicitly permitted by Article XXIV of the GATT 1994 cannot in turn be prohibited by Article XX.[755]

7.556. Colombia also states that at the end of 2013 it signed a free trade agreement with Panama, which contains provisions on customs cooperation and information exchange, and adds that, when this agreement enters into force, the compound tariff will not be applied to imports originating in Panama.[756]

7.557. Panama maintains that the compound tariff is being applied in a manner which constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, because it excludes imports coming from countries with which Colombia has free trade agreements in force.[757] Panama asserts that, if the intention is to launder money through low-priced imports, it matters little whether or not the imports enter through trading partners. Panama points out that, since the trade agreements contain no requirement to pay a tariff or value the goods for customs purposes, anyone seeking to introduce goods linked with illicit activities would be perfectly free to declare those goods at a zero price and obtain an even greater profit margin.[758] In Panama's opinion, a trade agreement does not reduce concerns about money laundering and, indeed, the absence of a tariff would increase the incentive to enter more imports at lower prices.[759]

7.558. Point 1 of the paragraph to Article 5 of Decree No. 456 excludes the following imports from the application of the compound tariff:

> Those originating in countries with which Colombia has International Trade Agreements in force, provided that the tariff subheadings have been negotiated, for which purpose the evidence of origin specified by the respective Agreement must be presented.

7.559. The above-mentioned exclusion establishes different treatment between products originating in countries with which Colombia has trade agreements in force, in which the tariff subheadings subject to the compound tariff have been negotiated, and products originating in those countries with which Colombia does not have a trade agreement in force. Thus, in accordance with the very terms of the measure, there is discrimination in the application of the compound tariff.

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[752] Colombia's first written submission, para. 111; second written submission, para. 115; opening statement at the first meeting of the Panel, para. 79; opening statement at the second meeting of the Panel, para. 108; and response to Panel questions Nos. 9 and 136.

[753] Colombia's first written submission para. 112; opening statement at the first meeting of the Panel, para. 79.

[754] Colombia's first written submission, para. 113; second written submission, para. 115; opening statement at the first meeting of the Panel, para. 79; and response to Panel question No. 136.

[755] Colombia's second written submission, paras. 112-115; opening statement at the first meeting of the Panel, para. 78; opening statement at the second meeting of the Panel, paras. 108-110; and response to Panel questions Nos. 9 and 136.

[756] Colombia's first written submission, para. 114; second written submission, paras. 6 and 116; opening statement at the first meeting of the Panel, para. 81; and response to Panel questions Nos. 13, 60 and 62.

[757] Panama's second written submission, paras. 3.77-3.78; and opening statement at the first meeting of the Panel, para. 1.27.

[758] Panama's second written submission, para. 3.79; and response to Panel question No. 9.

[759] Panama's second written submission, paras. 3.77-3.78; and opening statement at the first meeting of the Panel, para. 1.27.

7.560. Colombia tries to justify this discrimination by indicating that the free trade agreements are the means through which it has sought to extend cooperation with the customs authorities of its trading partners and that it has adopted customs cooperation and information exchange mechanisms with several of them. However, as previously noted, the exclusion mentioned in Decree No. 456 relates not to countries with which Colombia has signed customs cooperation and information exchange mechanisms, either within or outside a trade agreement, but to countries with which Colombia has trade agreements in force, in which the respective tariff subheadings have been negotiated.[760]

7.561. Therefore, judging by the terms of Decree No. 456, the discrimination resulting from the compound tariff's exclusion in favour of the countries with which Colombia has trade agreements in force is not directly related to the existence of customs cooperation and information exchange mechanisms or, in consequence, to Colombia's declared objective of combating money laundering.

7.562. The Panel has sought to clarify with the parties the manner in which this exclusion operates. To that end, after the first substantive meeting with the parties, the Panel asked Colombia to identify in a list: (i) the countries whose exports are exempt from the application of the compound tariff, because they have a trade agreement in force with Colombia; and (ii) the countries with which Colombia has signed cooperation and information exchange mechanisms for the prevention, investigation and suppression of customs offences, that were in force at the time.[761] In response to this request, Colombia provided a table of provisions concerning the exchange of customs information included in the trade agreements in force between Colombia and the European Union, the United States, the European Free Trade Association, Canada, Chile, Mexico, the Northern Triangle and the Andean Community.[762] According to Colombia, this table constitutes a list of "the trade agreements that Colombia has in force and which include cooperation and information exchange mechanisms".[763] The table supplied by Colombia does not make it clear whether there are countries whose exports are exempt from the application of the compound tariff because they have a trade agreement in force with Colombia, but which do not have a cooperation and information exchange mechanism, nor whether there are countries with which Colombia has agreed existing customs cooperation and information exchange mechanisms, but with which it does not maintain a current international trade agreement in which the relevant tariff subheadings have been negotiated.

7.563. Following the second substantive meeting with the parties, the Panel asked Colombia to clarify: (i) whether it was maintaining any trade agreement in force that did not contain a customs cooperation and information exchange mechanism; and (ii) whether there were countries with which Colombia had agreed existing customs cooperation and information exchange mechanisms, but with which it did not maintain a current international trade agreement in which the relevant tariff subheadings had been negotiated and, in that event, to clarify whether imports originating in those countries were excluded from the application of the compound tariff.[764] In response to these further questions, Colombia referred to the previously submitted Exhibit COL-28, which contains a list of Colombia's existing trade agreements that include cooperation and information exchange mechanisms.[765] As already mentioned, the list contained in this exhibit does not make it clear whether Colombia maintains any trade agreement in force that does not contain a customs cooperation and information exchange mechanism nor whether there are countries with which Colombia has agreed a customs cooperation and information exchange mechanism currently in force, but with which it does not maintain a valid international trade agreement in which the relevant tariff subheadings have been negotiated.

7.564. For its part, Panama has claimed that Colombia maintains customs cooperation and information exchange mechanisms in force with countries with which it has not negotiated the tariff subheadings relevant to this dispute. Specifically, Panama has claimed that the trade agreements signed by Colombia with countries such as Chile, El Salvador, Honduras and Nicaragua exclude a large proportion of the products of Chapters 61 to 64 of the tariff. However, Colombia maintains customs cooperation mechanisms with these countries under the Multilateral Convention

[760] See para. 7.381. above.
[761] See Panel question No. 59.
[762] Provisions on the exchange of customs information in existing FTAs with Colombia (Exhibit COL-28).
[763] Colombia's response to Panel question No. 59.
[764] See Panel questions Nos. 138 and 139.
[765] Colombia's response to Panel questions Nos. 138 and 139.

on Cooperation and Mutual Assistance between the National Customs Directorates of Latin America, Spain and Portugal (COMALEP). Panama also asserts that Colombia's existing trade agreements with the European Free Trade Association, the United States and the European Union contain provisions concerning customs assistance but exclude a significant number of subheadings subject to the compound tariff. Panama points out that, despite the existence of customs information exchange mechanisms, apparel and footwear products that were not negotiated in these agreements are subject to the compound tariff. Panama concludes from this that there is no support for Colombia's argument to the effect that exclusion from the compound tariff is related to the existence of a customs information exchange mechanism.[766] Colombia considers that the examples cited by Panama are inappropriate for the purpose of answering the Panel's question, but has not submitted arguments or evidence that might invalidate the claims made by Panama.[767]

7.565. In addition, as mentioned before, Colombia has not explained why, if exclusion from the application of the compound tariff is linked with the existence of a customs cooperation mechanism, that exclusion covers only imports of products *originating in*, but not *coming from*, the other party.[768]

7.566. As previously mentioned, Colombia also maintains that imports coming from its trading partners are exempt from payment of the tariff, so that there is less incentive for them to be priced at artificially low levels for money laundering purposes. In response to a question from the Panel, Colombia did not explain its argument. However, Colombia stated that the reason for excluding its trading partners is the existence of customs cooperation and information exchange mechanisms and that the exclusion is justified by Article XXIV of the GATT.[769] The existence or non-existence of tariffs does not appear to be one of the considerations in the typologies of undervaluation for money laundering purposes described by Colombia.[770] Moreover, as stated in an FATF document submitted by Colombia, given that, in most cases, the customs authorities pay special attention to preventing smuggling and ensuring that duties and taxes are properly collected, it is common for products exempt from tariffs to be subjected to fewer controls, which makes these products especially vulnerable to undervaluation, including for money laundering purposes.[771]

7.567. Colombia also maintains that the exclusion is justified under Article XXIV of the GATT 1994. However, Colombia has not developed a defence under Article XXIV of the GATT 1994, nor has it claimed that the exclusion of its trading partners from the application of the compound tariff is necessary insofar as, if it were not authorized, the functioning of the agreed free trade area would be impeded. To assess whether the exclusion of trading partners from the compound tariff is justified under Article XXIV of the GATT 1994 would be to go beyond the terms of reference of this Panel. The question facing this Panel is different and relates to whether Colombia has shown that the reason for discriminating in favour of its trading partners in the application of the compound tariff is related to the purported objective of the measure, namely to combat money laundering.

7.568. Taking into account the arguments and the evidence available, the Panel does not consider that Colombia has shown that the reason for discriminating in favour of its trading partners in the application of the compound tariff is related to the purported objective of the measure, namely to combat money laundering. As a matter of fact, Colombia has not shown that exclusion from the compound tariff is related to the existence of a customs cooperation and information exchange mechanism. The arguments and the evidence put forward by Colombia do not alter the fact that, as indicated by the terms of Decree No. 456, the exclusion from the compound tariff is related to the existence of a trade agreement in force, in which the relevant tariff subheadings have been negotiated. Consequently, Colombia has not shown that the discrimination in the application of the compound tariff is justified.

[766] Panama's response to Panel question No. 139.
[767] Colombia's comments on Panama's response to Panel question No. 139.
[768] See para. 7.384. above.
[769] See response to Panel question No. 9.
[770] See National Customs and Excise Directorate, Information and Financial Analysis Unit, *Money Laundering Typologies Related to Smuggling*, January 2006 (Exhibit COL-10), p. 13; Financial Action Task Force, *Trade-Based Money Laundering* (23 June 2006) (Exhibit COL-11), p. 4.
[771] Financial Action Task Force, *Trade-Based Money Laundering*, 23 June 2006 (Exhibit COL-11), p. 5.

7.569. For all the above reasons, this Panel concludes that, due to the exclusion of imports originating in countries with which Colombia has trade agreements in force, the compound tariff is applied in a manner which constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

7.4.4.2.3 The exclusion of free zones

7.570. Panama considers that the compound tariff is a disguised restriction on trade, since it has no *raison d'être* in regard to the fight against money laundering and the financing of terrorism. Panama considers that this is evidenced by the fact that Colombia excludes goods entering free zones from the application of the tariff.[772]

7.571. Colombia, for its part, maintains that Decree No. 456 is a measure to protect public morals and secure compliance with the Colombian anti-money laundering legislation, so that there is no disguised restriction on trade.[773]

7.572. It is this Panel's understanding that Panama's argument relates both to the exclusion from the compound tariff of imports entering regions which Colombia has designated as Special Customs Regime Zones and to the exclusion from the compound tariff of goods entering Colombia under the Special Import–Export Systems (SIEX) procedure, known as the "Plan Vallejo".

7.573. This Panel will analyse each of these exclusions in turn.

7.4.4.2.3.1 Special customs regime zones

7.574. Article 4 of Decree No. 456 reads as follows:

> The provisions of this Decree shall apply to goods of Chapters 61 to 64 of the Customs Tariff coming from a Special Customs Regime Zone only at the moment at which they are going to be introduced into the rest of the national customs territory.[774]

7.575. As the Panel has previously found, the compound tariff is not applied to goods entering certain regions which Colombia has designated as Special Customs Regime Zones unless those goods are going to be introduced into the rest of the national customs territory.[775]

7.576. According to Colombia, there are three special customs regime zones on its territory: (i) the Special Customs Regime Zone of Urabá, Tumaco and Guapi; (ii) the Special Customs Regime Zone of Maicao, Uribia and Manaure; and (iii) the Special Customs Regime Zone of Leticia. Colombia maintains that the three zones correspond to border zones with very low levels of development, or in a situation of isolation or economic integration with another state, which need to be managed differently from the rest of the national customs territory.[776]

7.577. The above-mentioned exclusion establishes a difference in treatment between products entering the Special Customs Regime Zones and products entering the rest of the Colombian customs territory. Therefore, there is discrimination in the application of the measure.

7.578. Colombia tries to justify this discrimination by pointing out that imports into these zones are for local consumption, because they are border zones with a population living in conditions of extreme poverty, and that the goods would not be marketed in the rest of the national territory. However, Colombia has not shown that imports of textiles, apparel and footwear that enter these zones, and are consumed inside the zone, cannot be used for money laundering, nor that they pose a lower risk of being used for money laundering. Even if there is a different risk, Colombia

[772] Panama's second written submission, para. 3.82.
[773] Panama's oral statement at the second meeting of the Panel, para. 116.
[774] Decree No. 456 (Exhibits PAN-3 and COL-17), Article 4.
[775] Ibid. Article 4.
[776] Colombia's response to Panel questions Nos. 16, 133 and 141.

has not explained what other measures it is taking in these zones to reduce the incentives for imports to be used for money laundering.[777]

7.579. Taking into account the arguments and the evidence available, the Panel does not consider that Colombia has shown that the discrimination resulting from the application of the compound tariff, with respect to the exemption of goods entering Special Customs Regime Zones, bears any relation to the pursuit of the declared objective of combating money laundering. As a matter of fact, Colombia has not shown that imports into Special Customs Regime Zones cannot be used for money laundering in accordance with the methodologies that Colombia has described.[778] Consequently, in view of the stated objective of the measure, Colombia has not demonstrated that the discrimination in the application of the compound tariff, with respect to the exemption of goods entering Special Customs Regime Zones, is justified.

7.580. This Panel therefore concludes that, due to the exclusion of Special Customs Regime Zones from the application of the compound tariff, the measure is applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination and, in the light of the circumstances of the present case, a disguised restriction on international trade.

7.4.4.2.3.2 Plan Vallejo

7.581. Article 5.2 of Decree No. 456 excludes from the application of the compound tariff imports of clothing industry residues and/or waste of commercial value resulting from production processes carried out under the Plan Vallejo.

7.582. With respect to this exclusion, Colombia maintains that:

> [T]he process of producing made-up clothing generates waste that can be recycled in the manufacturing of various goods such as, for example, toys. The tariff exemption is an incentive to use this waste in other products instead of treating it as refuse or rubbish. This is an environmental measure. At the same time, the exclusion of waste from the measure does not affect its purpose, which is to discourage the importation of made-up clothing at artificially low prices, as a means of money laundering.[779]

7.583. Moreover, as this Panel has already explained, even though Decree No. 456 does not explicitly mention this point, Colombia has made it clear that the compound tariff also does not apply to goods entering Colombia under the Special Import–Export Systems (SIEX) procedure, known in Colombia as "Plan Vallejo". Under these systems, imports of certain goods, especially production inputs, which are subsequently processed or used to manufacture goods for export, are exempt from the payment of tariffs.[780]

7.584. The general tariff exemption under the "Plan Vallejo" establishes differential treatment for products entering under the Plan Vallejo and products that enter the rest of the Colombian customs territory. Therefore, there is discrimination in the application of the measure.

7.585. With respect to this exemption, Colombia maintains that:

> The users of Plan Vallejo are formal-sector enterprises with an economic track record, which pay taxes, are listed in the companies register, and can be followed up in the event of disputes over their business transactions, as distinct from importers of apparel and footwear at artificially low prices which disappear once the goods have entered the national customs territory. These characteristics of the SIEX make it difficult for them to be used for money laundering operations.[781]

7.586. However, as previously indicated, this does not rule out the possibility of a company that participates in this programme being able to use imports for money laundering in accordance with the methodologies that Colombia has described. In fact, as stated in an FATF document submitted

[777] Colombia's response to Panel question No. 141.
[778] See Panama's comments on Colombia's response to Panel question No. 133.
[779] Colombia's response to Panel question No. 18.
[780] Panama's response to Panel question No. 89; Colombia's response to Panel question No. 89.
[781] Colombia's response to Panel question No. 90.

by Colombia, given that, in most cases, the customs authorities pay special attention to preventing smuggling and ensuring that duties and taxes are properly collected, it is common for products exempt from the payment of tariffs to be subjected to fewer controls, which makes these products especially vulnerable to undervaluation, including for money laundering purposes.[782]

7.587. Moreover, a joint study by DIAN and the Colombian Information and Financial Analysis Unit identifies the use of imports under Special Import-Export Systems (Plan Vallejo) as one of the "typologies" detected by the Colombian authorities for laundering money and financing terrorism by means of smuggling operations.[783] As one of the typologies, this document mentions "[c]hanging the destination of raw materials entering the country under the Special Import-Export Systems Plan Vallejo" procedure. This typology is described as follows:

> A company in Colombia obtains authorization from the competent body to implement a non-reimbursable Plan Vallejo raw materials programme. It subsequently brings the goods into the national territory but fails to fulfil its commitments to export finished products acquired under the procedure and uses the imported goods for a purpose different from that for which they were entered into the country.[784]

7.588. Another typology mentioned relates to "[i]mports effected by a customs intermediary fraudulently replacing a recognized importer and using a programme approved under the Plan Vallejo Special Import-Export Systems". This typology is described as follows:

> A recognized importer with a programme approved under the Plan Vallejo Special Import-Export Systems is fraudulently replaced by a declarant who passes himself off as the importer's legal representative, for the purpose of bringing goods with false import registrations into the country and clearing them for domestic consumption.[785]

7.589. Taking into account the arguments and the evidence available, the Panel does not consider that Colombia has shown that the discrimination resulting from the application of the compound tariff, with respect to the exemption for goods entering Colombia under the "Plan Vallejo", bears any relation to the pursuit of the declared objective of combating money laundering. As a matter of fact, Colombia has not shown that imports entering under the Plan Vallejo cannot be used for money laundering in accordance with the methodologies that Colombia has described.[786] Consequently, in view of the stated objective of the measure, Colombia has failed to demonstrate that the discrimination in the application of the compound tariff, with regard to the exemption of goods entering Colombia under the "Plan Vallejo", is justified.

7.590. For the foregoing reasons, this Panel concludes that, due to the exclusion of imports entering Colombia under the "Plan Vallejo" from the application of the compound tariff, the measure is applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination and, in the light of the circumstances of the present case, a disguised restriction on international trade.

7.4.4.3 Conclusion as to whether the compound tariff meets the requirements of the *chapeau* of Article XX of the GATT 1994

7.591. This Panel concludes that, because of the various exclusions from the application of the measure for imports originating in countries with which Colombia has trade agreements in force, for imports into Colombia's Special Customs Regime Zones and for imports under the "Plan Vallejo", even assuming that Colombia had succeeded in showing that its measure was provisionally justified under Article XX(a) or Article XX(d) of the GATT 1994, the compound tariff is not applied in a manner such that it meets the requirements of the *chapeau* of Article XX of the GATT 1994.

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[782] Financial Action Task Force, *Trade-Based Money Laundering*, 23 June 2006 (Exhibit COL-11), p. 5.

[783] National Customs and Excise Directorate, Information and Financial Analysis Unit, *Money Laundering Typologies Related to Smuggling*, January 2006 (Exhibit COL-10), pp. 14 and 23-26. See also Panama's comments on Colombia's response to Panel questions Nos. 90 and 133.

[784] National Customs and Excise Directorate, Information and Financial Analysis Unit, *Money Laundering Typologies Related to Smuggling*, January 2006 (Exhibit COL-10), p. 14.

[785] Ibid.

[786] See Panama's comments on Colombia's response to Panel question No. 133.

7.4.5 Conclusion as to whether Colombia's compound tariff is justified under Article XX of the GATT 1994

7.592. For all the reasons indicated, this Panel concludes that Colombia has failed to demonstrate that its measure is justified under Article XX of the GATT 1994.

7.5 Suggestion for the implementation of recommendations and rulings

7.593. Panama has requested the Panel, in the event that it finds that the measure at issue is inconsistent with Article II:1(a) and Article II:1(b), first sentence, of the GATT 1994, to formulate a suggestion for the implementation of the recommendations and rulings of the DSB. In particular, Panama requests the Panel to suggest the introduction of a "capping mechanism that ensures the observance of the relevant bound tariffs, or a return to the *ad valorem* tariff system, without exceeding the limits of 35% and 40% *ad valorem* depending on the product, as required in Colombia's Schedule of [C]oncessions".[787]

7.594. Colombia, for its part, has asked the Panel to reject Panama's request on the ground that such a suggestion would not be binding[788], in addition to which a Member is free to choose the method of implementation it deems most appropriate.[789] Therefore, Colombia argues that "it would be pointless" for the Panel to formulate a suggestion under the terms of Article 19.1 of the DSU.[790]

7.595. Article 19.1 of the DSU stipulates that:

> Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned[791] bring the measure into conformity with that agreement.[792] In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

7.596. The Appellate Body has recognized that the second sentence of Article 19.1 "does not oblige panels to make such a suggestion"[793], since this power is "discretionary".[794] Furthermore, the Member concerned may "choose whether or not to follow a suggestion"[795], and is ultimately free to choose the measure that implements (complies with) the recommendations and rulings of the DSB in a manner consistent with WTO obligations.[796]

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[787] Panama's first written submission, para. 5.2; and second written submission, para. 4.2. See also opening statement at the first meeting of the Panel, para. 1.28. In Panama's opinion, it would help the parties "to dispel doubts with respect to the legality of different ways of implementation", and enable the Colombian Government "to relieve internal pressures from the industrial sectors that benefit from the measure in question" with regard to possible implementation measures. Panama's response to Panel question No. 153.

[788] Colombia's first written submission, para. 117; and second written submission, para. 122 (citing Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 321. See also response to Panel question No. 155, para. 164; and comments on Panama's response to Panel question No. 153, paras. 69 and 70.

[789] Colombia's first written submission, para. 117; and second written submission, para. 122 (citing Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 184). See also response to Panel question No. 155, para. 164; and comments on Panama's response to Panel question No. 154, para. 71.

[790] Colombia's response to Panel question No. 154, para. 163.

[791] (Footnote original) The "Member concerned" is the party to the dispute to which the panel or Appellate Body recommendations are directed.

[792] With respect to recommendations in cases not involving a violation of GATT 1994 or any other covered agreement, see Article 26.

[793] Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 189.

[794] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 183.

[795] Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 321.

[796] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 184. Furthermore, the fact that the party concerned or complained against has carefully followed the panel's suggestion does not create a presumption that the new measure is in compliance with WTO rules. Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 325.

7.597. In this dispute, the Panel has found that the measure at issue is in the nature of an "ordinary customs duty". Colombia has various options that would allow it to bring the compound tariff into conformity with its obligations under the GATT 1994. In this respect, a "capping mechanism" is an option that the Appellate Body has considered possible "under certain circumstances" to ensure that the *ad valorem* equivalents of specific duties would not exceed the tariff bindings provided for in the Member's Schedule.[797] Since the Appellate Body has already indicated that the option of a "ceiling" or "cap" could, under certain circumstances, be a viable measure for bringing a tariff into conformity with the obligations set out in Article II of the GATT 1994, the Panel does not see what further purpose would be served by making a suggestion in this respect in the present report.[798]

7.598. Alternatively, the other measure suggested by Panama is that Colombia should re-establish the previous *ad valorem* tariff system without exceeding the levels bound in its Schedule. An implementation measure in *ad valorem* terms whose tariff impact does not exceed the levels bound in Colombia's Schedule of Concessions (also expressed in *ad valorem* terms) would be an appropriate application measure in the circumstances of this dispute. However, as explained throughout this report, even if it were to opt for a specific tariff or a compound tariff, Colombia could adopt certain mechanisms to ensure that the *ad valorem* equivalent of those tariffs do not exceed the levels bound in its Schedule of Concessions. Therefore, since Colombia is maintaining its prerogative of determining the most appropriate means of implementing the DSB's recommendations and rulings, the Panel refrains from suggesting that Colombia should re-establish the previous *ad valorem* tariff system for the relevant products.

7.599. Finally, the Panel is not convinced that the options which Panama has proposed are the only two ways in which Colombia could comply with the DSB's recommendations and rulings.

7.600. For the above reasons, the Panel refrains from making a suggestion concerning the way in which Colombia could implement the DSB's recommendations and rulings in the present dispute.

7.6 Final comments

7.601. In accordance with Article 12.11 of the DSU:

> Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

7.602. Article 12.10 of the DSU states that: "in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation."

7.603. In the course of the present procedure, the parties have not invoked any of the provisions that envisage differential and more favourable treatment for developing countries. In the Panel's opinion, neither does it seem that any of these provisions are relevant for resolving the specific issues that form the subject of the present dispute.

7.604. In any event, in adopting the timetable for the proceedings, the Panel took into account the need to give all the parties sufficient time to prepare and present their respective arguments.

7.605. Finally, the Panel notes that in the course of the procedure Colombia has made reference to the priority it assigns to the fight against money laundering and offences related to that activity, including the traffic in illicit drugs. Colombia has developed arguments and provided evidence

[797] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 54.

[798] The Panel notes that Colombia has acknowledged that a "legislative ceiling" could prevent specific tariffs from exceeding the bound *ad valorem* levels. Colombia's first written submission, para. 63. The Panel has found that Decree No. 456 does not provide for a "legislative ceiling" that would prevent the compound tariff from resulting in duties that exceed the levels bound in Colombia's Schedule of Concessions. See para. 7.186. above.

concerning the serious effects that money laundering is having on its society and concerning the costs which combating that activity has imposed on Colombian society and the Colombian State.

7.606. As indicated in the preceding sections, the Panel's findings in this report do not question the right of WTO Members to implement measures necessary to combat money laundering and related offences, in a manner consistent with international anti-crime commitments, as well as those which derive from the WTO Agreements.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. With respect to the issue of the applicability of Article II of the GATT 1994 raised by Colombia, the Panel has found that the measure at issue is structured and designed to be applied to all imports of the products concerned, without distinguishing between "licit" and "illicit" trade. Moreover, no legal provision that bans the importation of goods whose declared prices are below the thresholds established in Decree No. 456 has been identified. For these reasons, in the context of the present dispute, it is unnecessary for the Panel to issue a finding with regard to whether the obligations contained in Articles II:1(a) and II:1(b) of the GATT 1994 are applicable to "illicit trade".

8.2. With respect to imports of products classified in Chapters 61, 62, and 63 and tariff line 6406.10.00.00, the compound tariff constitutes an ordinary customs duty which exceeds the levels bound in Colombia's Schedule of Concessions and is therefore inconsistent with Article II:1(b), first sentence, of the GATT 1994, in the following circumstances:

a. The tariff consisting of an *ad valorem* component of 10% plus a specific component of US$5/kg, when the f.o.b. import price is US$10/kg or less;

b. The tariff consisting of an *ad valorem* component of 10% plus a specific component of US$5/kg, when products of the same subheading are imported, some at f.o.b. import prices above and others at f.o.b. import prices below the threshold of US$10/kg; and

c. With respect to subheading 6305.32, the tariff consisting of an *ad valorem* component of 10% plus a specific component of US$3/kg, when the f.o.b. import price is greater than US$10/kg but less than US$12/kg.

8.3. With respect to imports of products classified in various tariff headings of Chapter 64 subject to the measure at issue, the compound tariff constitutes an ordinary customs duty which exceeds the levels bound in Colombia's Schedule of Concessions and is therefore inconsistent with Article II:1(b), first sentence, of the GATT 1994, in the following circumstances:

a. The tariff consisting of an *ad valorem* component of 10% plus a specific component of US$5/pair, when the f.o.b. import price is US$7/pair or less; and

b. The tariff consisting of an *ad valorem* component of 10% plus a specific component of US$5/pair, when products of the same subheading are imported, some at f.o.b. import prices above and others at f.o.b. import prices below the threshold of US$7/par.

8.4. In the circumstances indicated in the preceding paragraphs, the compound tariff also accords treatment less favourable than that envisaged in Colombia's Schedule of Concessions, in a manner inconsistent with Article II:1(a) of the GATT 1994.

8.5. Colombia has failed to demonstrate that the compound tariff is a measure necessary to protect public morals within the meaning of Article XX(a) of the GATT 1994.

8.6. Colombia has also failed to demonstrate that the compound tariff is a measure necessary to secure compliance with the Colombian anti-money laundering legislation, and more specifically Article 323 of the Criminal Code, within the meaning of Article XX(d) of the GATT 1994.

8.7. Even assuming that Colombia had succeeded in demonstrating that its measure is provisionally justified under Article XX(a) or Article XX(d) of the GATT 1994, the compound tariff is

not applied in a manner that meets the requirements of the *chapeau* of Article XX of the GATT 1994.

8.8. In accordance with Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits accruing under the agreement in question. In view of the foregoing, the Panel concludes that, insofar as Colombia has acted in a manner inconsistent with the provisions of the GATT 1994, it has nullified or impaired benefits accruing to Panama under that agreement.

8.9. For the reasons indicated in the report, the Panel refrains from making a suggestion as to the way in which Colombia could implement the DSB's recommendations and rulings in the present dispute.

8.10. In accordance with the provisions of Article 19.1 of the DSU, the Panel recommends that Colombia bring the disputed measure into conformity with its obligations under the GATT 1994.

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