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

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS461/R.

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ANNEX A

WORKING PROCEDURES OF THE PANEL

Adopted on 7 February 2014

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. Upon indication from any of the parties, at the latest two weeks before the delivery of the submission or statement, of its intention to submit information that requires protection beyond that provided for under these Working Procedures, the Panel, after consultation with the parties, shall decide whether to adopt appropriate additional procedures. These procedures might include the possibility, prior to circulation of the final report to the Members, for any of the parties to request the Panel to remove business confidential information from the final report.

4. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. Should a party wish to request a preliminary ruling of the Panel, it shall do so at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Panama requests such a ruling from the Panel, Colombia shall respond to the request in its first written submission. If Colombia requests such a ruling, Panama shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in the light of the request. The Panel may grant exceptions to this rule upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttals, answers to questions or comments on answers provided by the other party. The Panel may grant exceptions to this rule where good cause is shown. Where such exception has been granted,

the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of exhibits submitted to the Panel is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission to which the exhibits are annexed at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation shall be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions, attached in annex, to the extent that it is practical to do so.

11. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by Panama could be numbered PAN 1, PAN 2, etc. If the last exhibit in connection with the first submission was numbered PAN 5, the first exhibit of the next submission would be numbered PAN 6.

Questions

12. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

13. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and at least two working days ahead of time.

14. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall first invite Panama to make an opening statement to present its case. Subsequently, the Panel shall invite Colombia to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters through the Panel secretariat. Each party shall supply the Panel and the other party with a final version of its statement, preferably at the end of the meeting, and in any event no later than 5 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask the other party questions or to make comments through the Panel. Each party shall then have an opportunity to answer those questions orally. Each party shall send in writing, within a time-frame to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the questions of the other party within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a time-frame to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Panama presenting its statement first.

15. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask Colombia if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite Colombia to present its opening statement, followed by Panama. If Colombia chooses not to avail itself of that right, the Panel shall invite Panama to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters through the Panel secretariat. Each party shall supply the Panel and the other party with a final version of its statement, preferably at the end of the meeting, and in any event no later than 5 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask the other party questions or to make comments through the Panel. Each party shall then have an opportunity to answer those questions orally. Each party shall send in writing, within a time-frame to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the questions of the other party within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a time-frame to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first presenting its closing statement first.

Third parties

16. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

17. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and at least two working days ahead of time.

18. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. The third party shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5 p.m. on the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a time-frame to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have the opportunity to answer these questions orally. The Panel shall send in writing, within a time-frame to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

19. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and the third parties, which shall be attached as annexes to the report. These executive summaries shall not serve in any way as a substitute for the submissions of the parties and the third parties in the Panel's examination of the case.

20. Each party shall provide executive summaries of the facts and arguments as presented to the Panel, in accordance with the timetable adopted by the Panel. These summaries may also include a summary of the replies to questions. These summaries shall not exceed 15 pages each. The Panel shall not summarize the parties' replies to the questions in the descriptive part, nor shall it annex them to its report.

21. Each third party shall submit an executive summary of its arguments as presented to the Panel in its written submission and its declaration of conformity with the timetable adopted by the Panel for its work. This summary may also include a summary of the replies to questions, where applicable. The executive summary to be provided by each one of the third parties shall not exceed six pages.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, like the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file four paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD ROMs/DVDs, four CD ROMs/DVDs and three paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD ROM, a DVD or as an email attachment. If the electronic copy is provided by email, it should be addressed to *****@wto.org, and cc'd to the Secretariat staff to be specified at a later date. If a CD ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5 p.m. (Geneva time) on the dates established by the Panel. A party or third party may transmit its documents to the other party or third party in electronic form only, subject to prior written consent of the notified party or third party and provided the Panel secretariat is informed.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

26. The Panel reserves its right to amend these procedures, where necessary, after consultation with the parties.

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ANNEX B

ARGUMENTS OF THE PARTIES

PANAMA

COLOMBIA

ANNEX B-1

FIRST PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF PANAMA

1 INTRODUCTION

1.1. This dispute concerns the compound tariff that Colombia applied to imports of textiles, apparel and footwear classified in Chapters 61, 62, 63 and 64 of Colombia's Customs Tariff contained in Decree 4927 of 26 December 2011 (Customs Tariff of Colombia).[1] This compound tariff (the measure) was introduced by Decree of the President of the Republic No. 74 of 23 January 2013 (Decree 74/2013)[2] and amended by Decree of the President of the Republic No. 456 of 28 February 2014 (Decree 456/2014).[3]

1.2. Colombia's compound tariff is composed of an *ad valorem* levy and a specific levy. The *ad valorem* levy amounts to 10% in all cases. The specific levy, however, varies according to the product and to its declared f.o.b. price:

- In the case of the products classified in Chapters 61, 62 and 63 and under heading 6406.10.00.00, the amount of the specific duty is US$5 per gross kilo when the price is less than or equal to US$10 per gross kilo, and US$3 per gross kilo when the price exceeds US$10 per gross kilo.[4]

- In the case of the products classified in Chapter 64, with the exception of heading 64.06, the specific tariff amounts to US$5 per pair when the price is less than or equal to US$7 per pair, and US$1.75 per pair when the price exceeds US$7 per pair.[5]

1.3. Moreover, when an import involves the entry of products under the same tariff heading but with declared prices that are higher or lower than the respective thresholds (i.e. US$10 and US$7), the higher of the specific levy is applied, that is to say US$5 per kilo/pair.

1.4. Finally, the compound tariff does not apply to imports "originating in countries with which Colombia has free trade agreements in force".[6]

2 PANAMA'S CLAIMS

2.1 The compound tariff is inconsistent with the first sentence of Article II:1(b) of the GATT and with Colombia's Schedule of Concessions

2.1. The compound tariff on the importation of certain textiles, apparel and footwear results in the imposition of levies in excess of the *ad valorem* tariff bound in Colombia's Schedule of Concessions. Consequently, the compound tariff in question is inconsistent with the first sentence of Article II:1(b) of the GATT and Colombia's Schedule of Concessions.

2.2. In the specific case in which a Member imposes a duty on the importation of a product, that Member is in breach of the obligation set forth in the first sentence of Article II:1(b) of the GATT where:

(i) the product in question is listed in that Member's Schedule of Concessions and is subject to a bound tariff;

[1] Colombia's Customs Tariff and its schedule of products are contained in Decree of the President of the Republic No. 4927 of 26 December 2011 (Decree 4927/2011) (Exhibit PAN-1).
[2] Decree 74/2013 (Exhibit PAN-2).
[3] Decree 456/2014 (Exhibit PAN-3).
[4] Article 1 of Decree 456/2014.
[5] Article 2 of Decree 456/2014.
[6] Article 5, paragraph 1 of Decree 456/2014.

(ii) the duty in question qualifies as an ordinary customs duty;

(iii) the duty in question exceeds the bound tariff.

2.3. In the case at issue, these three conditions are met. To begin with, Colombia's compound tariff affects textile, clothing and footwear products classified in Chapters 61, 62, 63 and 64 of Colombia's Tariff.[7] All of these are listed in Colombia's Schedule of Concessions.[8] Under that Schedule, these products are entitled to a bound tariff of 40% *ad valorem*, except in certain cases where the bound rate is 35% *ad valorem*.[9]

2.4. Secondly, the compound tariff introduced by Colombia is an "ordinary customs duty" within the meaning of the first sentence of Article II:1(b) of the GATT. The actual text of Decree 456/2014 recognizes this to be the case when it refers to a "mixed tariff"[10] or an "*ad valorem* tariff of 10%, plus a specific tariff" that must be paid "*for the importation* of the products [concerned]".[11] This is a duty that becomes payable at the time and as a result of the importation of the goods concerned. Moreover, it is a duty which modifies and replaces the duty that was in force prior to Decree 74/2013[12], and upon expiry of the two-year period is to be replaced by the duty provided for in Decree 4927 of 2011.

2.5. Finally, as explained below, the compound tariff exceeds the bound tariff when the products concerned are imported at prices equal to or below certain thresholds.

Textiles, clothing and uppers

2.6. In the case of textiles, clothing and uppers in Chapters 61, 62 and 63 and under heading 6406.10.00.00 of Colombia's Tariff, the *ad valorem* tariff equivalent to the compound tariff exceeds the bound tariff (40% or 35% depending on the product) when the price of the products is less than or equal to US$10 per kilo - in which case the specific tariff of US$5 per kilo applies (rather than US$3 per kilo).

- For products whose bound tariff rate is 40%, the break-even price that would ensure equivalence between the compound tariff and the bound tariff is US$16.67 per kilo. Below that price, application of the compound tariff leads to a charge higher than the bound tariff. Since this compound tariff (10% *ad valorem* plus US$5/kilo) applies when the price per kilo is less than or equal to US$10, all of the goods to which this compound tariff is applied are effectively subjected to a higher charge than would be the case if the bound tariff of 40% were applied.[13]

- For products whose bound tariff rate is 35% (i.e. sacks and bags classified under subheading 6305.32) the break-even price is US$20 per kilo. Since the goods that are subject to this compound tariff (10% *ad valorem* plus US$5/kilo) are those with a price that is less than or equal to US$10 per kilo, they are effectively always subject to a charge higher than would be the case if the bound tariff of 35% were applied.[14]

2.7. In the case of the sacks and bags classified under tariff heading 6305.32, the *ad valorem* tariff equivalent to the compound tariff also exceeds the bound tariff of 35%, even when the price of the sacks and bags exceeds US$10 per kilo. In that case, the specific levy of US$3 per kilo (rather than US$5 per kilo) is applied, and consequently, the break-even price is US$12 per kilo. This means that any goods with a price lower than US$12 per kilo are subject to a charge that exceeds the bound rate of 35%. Since the goods to which this compound tariff (10% *ad valorem*

[7] Exhibit PAN-1.
[8] Exhibit PAN-4.
[9] The products in question that are subject to a bound tariff of 35% are those contained in headings 630532, 640110, 6401191, 640192, 640199, 640212, 640219, 640220, 640230, 640291, 640299, 640312, 640319, 640320, 640330, 640340, 640351, 640359, 640391, 640399, 640411, 640419, 640420, 640510, and 640590. (Exhibit PAN-4).
[10] Article 2, paragraph 2 of Decree 456/2014.
[11] Articles 1 and 2 of Decree 456/2014 (emphasis added).
[12] Article 5 of Decree 74/2013.
[13] Panama's first written submission, paras. 4.20-4.23.
[14] Panama's first written submission, paras. 4.24-4.26.

plus US$3/pair) is applied are those with a price greater than US$10 per kilo, all of the goods with a price of US$10 to US$12 are subject to a higher charge than would be the case if the bound tariff of 35% were applied.[15]

Footwear

2.8. Regarding footwear products under Chapter 64, with the exception of heading 6406, of Colombia's Tariff (i.e. uppers), the *ad valorem* tariff equivalent to the compound tariff exceeds the bound rate whenever the price of the footwear is less than or equal to US$7 per pair, in which case the specific levy of US$5 per pair is applied (rather than US$1.75 per pair).

- For footwear products whose bound tariff rate is 40% (i.e. footwear classified under subheading 6405.20), the break-even price that would ensure equivalence between the compound tariff and the bound tariff is US$16.67 per pair. Below that price, application of the compound tariff results in a charge higher than the bound tariff. It must be borne in mind that this compound tariff (10% *ad valorem* plus US$5/pair) applies only when the price per pair is less than or equal to US$7. This means that all of the footwear under subheading 6405.20 to which this compound tariff applies is effectively subjected to a higher charge than would be the case if the bound tariff of 40% were applied.[16]

- For footwear products whose bound tariff rate is 35%, the break-even price is US$20 per pair. Since the only footwear products that are subject to this compound tariff (10% *ad valorem* plus US$5/pair) are those with a price that is less than or equal to US$7 per pair, all of these products are effectively subject to a charge higher than would be the case if the bound tariff of 35% were applied.[17]

2.9. In short, the structure and design of the Colombian compound tariff is such that when shipments contain only goods at prices below certain thresholds (i.e. generally speaking, US$10/kilo for clothing and US$7/pair for footwear[18]), its imposition leads to the application of tariffs whose *ad valorem* equivalent 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.

2.10. In fact, even in the case of those products whose prices exceed the thresholds of US$10 per kilo or US$7 per pair, to the extent that they are imported together with other products under the same headings with prices below those thresholds, the compound tariff based on the specific levy of US$5 per kilo or per pair will apply. This will inevitably lead to the imposition of a tariff charge higher than the bound tariff. Thus, for instance, if two articles of clothing costing US$8 and US$15 respectively were imported as part of the same shipment, under the paragraph in Article 1 of Decree 456/2014, the specific levy of US$5 per kilo would apply even though a specific levy of US$3 per kilo should be applied to the US$15 article.

2.11. The switch from an *ad valorem* tariff system to another type of system does not, as such, constitute a violation of WTO law. As the Appellate Body has pointed out, it is possible for a Member to design a legislative "ceiling" or "cap" on the level of duty applied which would ensure that the new duties applied would not exceed the *ad valorem* duties provided for in the Member's Schedule.[19] In that case, a Member would be able to maintain a tariff system like the Colombian one.

2.12. However, the situation is different in the case of Colombia's compound tariff. Decree 456/2014 merely establishes the compound tariff, and there is no "ceiling" or mechanism similar to the one suggested by the Appellate Body. Panama is not aware, nor has it been informed by Colombia, of any instrument under Colombian law separate from Decree 456/2014 that provides for a "cap" mechanism to guarantee full compliance with the bound tariffs.

[15] Panama's first written submission, paras. 4.30-4.32.
[16] Panama's first written submission, paras. 4.35-4.38.
[17] Panama's first written submission, paras. 4.39-4.41.
[18] Remembering, however, that in the case of subheading 6305.32, the bound rate is also exceeded when the price is greater than US$10/kilo and less than US$12/kilo.
[19] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 54.

2.13. In conclusion, as a result of the compound tariff imposed by Colombia on the products in question, ordinary customs duties are imposed in excess of those set forth in Colombia's Schedule of Concessions. Consequently, *prima facie*, the measure adopted by Colombia is inconsistent with the first sentence of Article II:1(b) of the GATT and Colombia's Schedule of Concessions.

2.2 The compound tariff is inconsistent with Article II:1(a) of the GATT

2.14. The Appellate Body has observed that the application of customs duties in excess of those provided for in a Member's Schedule, in violation of the first sentence of Article II:1(b) of the GATT, also constitutes "less favourable" treatment under the provisions of Article II:1(a) of the GATT.[20] Similarly, the Panel in *EC – IT Products* recalled that a violation of Article II:1(b) necessarily resulted in less-favourable treatment that was inconsistent with Article II:1(a).[21]

2.15. As is clear from the previous claim, the measure at issue is inconsistent with the first sentence of Article II:1(b) of the GATT. Consequently, in the light of what was pointed out by the Appellate Body, the measure at issue is necessarily also inconsistent with Article II:1(a) of the GATT and Colombia's Schedule of Concessions.

3 THE COMPOUND TARIFF CANNOT BE JUSTIFIED UNDER ARTICLE XX OF THE GATT

3.1. As Panama mentioned in its oral statement and in the replies to the questions of the Panel, the defences raised by Colombia on the basis of Article XX(a) and XX(d) of the GATT are unfounded.

3.2. It is clear to Panama that the purpose of the measure at issue is not to protect public morals or to secure compliance with Colombian money laundering laws and regulations as Colombia contends. Panama wonders how a change in tariff is, as such, a measure linked to morals or a measure taken in compliance with a penal code. Nothing in the design, structure and architecture of Decree 456/2014 helps to answer that question or suggests that the measure was conceived to combat money laundering operations. Nowhere is there any statement of reasons, and nowhere in the Decree, including the preamble, is there any mention of money laundering as one of the reasons for the Decree. Nor did the domestic debate in Colombia on Decree 456/2014 ever even refer to money laundering. Rather, what the debate reveals is a division among economic operators regarding a measure whose economic impact in the country is uneven, a measure which pushes up the cost of trade and the cost of living of the lowest-income consumer segments in Colombian society.[22]

3.3. In any case, there are less restrictive alternative measures reasonably available to Colombia that would contribute to achieving the objectives it pursues. We recall that according to Colombia itself, the purpose of Decree 456/2014 is to "discourage imports of apparel and footwear at artificially low prices".[23] Thus, the target of the compound tariff is the under-invoicing of goods or their import at *artificially* low prices. In this context, Panama, like the European Union and the Philippines, believes that the Agreement on Customs Valuation would provide a much more effective and targeted solution than the imposition of a compound tariff on imports in each and every case.[24] Indeed, the Agreement on Customs Valuation is designed to enable the customs value to be adjusted in such a way as to preclude the utilization of arbitrary or fictitious values, and provides various methods for doing so. By using these methods, Colombia would be able to

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

[21] Panel Report, *EC – IT Products*, paras. 7.1504-1505.

[22] Note from the National Office of FENALCO (National Federation of Traders) – "The specific tariff on footwear: a controversial decision causing considerable collateral damage" (Exhibit PAN-11). Press release from *El Nuevo Siglo*:"FENALCO asks for lower tariffs on textiles and footwear" (Exhibit PAN-12). Press release from *El Economista*: "Controversy over the footwear import Decree" (Exhibit PAN-13). Press release from *La República*: "FENALCO and the Chamber of Clothing reach an agreement to modify tariffs" (Exhibit PAN-14). Press release from *La República*: "The Agreement between the clothing manufacturers and FENALCO fails to convince the importers" (Exhibit PAN-15). Note from the National Office of FENALCO: "FENALCO rejects the Decree on tariffs for clothing and footwear, which would be a first step towards isolating the economy" (Exhibit PAN-16).

[23] Colombia's first written submission, para. 35.

[24] European Union's third-party written submission, para. 45. See also the Philippines' third-party written submission, para. 4.81.

identify and revalue shipments that have been under-invoiced or whose prices are artificially low, without restricting imports whose prices are more competitive for legitimate reasons.

3.4. Moreover, Colombia itself has recognized that customs cooperation is a perfectly viable alternative. Colombia maintains that in its fight against the use of imports for money laundering purposes, it has sought to expand its cooperation with the customs authorities of its trading partners, and has established mechanisms for customs cooperation and the exchange of information with a number of them. These customs cooperation and information exchange mechanisms have for the most part been established in the framework of the free trade agreements (FTAs) concluded since 2004. According to Colombia, this is one of the reasons why Decree 456/2014 "does not apply to imports from the countries with which it has concluded free trade agreements".[25] If Colombia exempts from the compound tariff imports from the countries with which it has an FTA because there is a customs cooperation mechanism, it is surely because Colombia itself understands that this mechanism contributes so significantly to the objective it pursues that it is no longer necessary to impose the compound tariff. Thus, if we follow Colombia's reasoning, the customs cooperation mechanisms are clearly a less restrictive alternative to the compound tariff. We note that there is a customs cooperation agreement between Colombia and Panama that was signed in 2006. This mechanism provides for instruments of cooperation designed to meet customs information needs and which constitute an alternative and reasonable measure that is fully WTO-consistent.

3.5. Finally, if what is worrying Colombia is the importation of apparel and footwear at artificially low prices, the Colombian Government might consider contracting for or mandating the use of preshipment inspection activities as provided for in Article 1.2 of the Agreement on Preshipment Inspection. Thus, activities would be conducted in the territory of the exporting Member "relating to the verification of the quality, the quantity, the *price* … and/or the customs classification of goods to be exported to the territory of the user Member".[26] Article 2.20 of the Agreement on Preshipment Inspection contains guidelines for the inspection entities to follow in conducting price verifications "in order to prevent over- and under-invoicing and fraud". Ultimately, the Agreement on Preshipment Inspection provides Colombia with tools that are specifically designed for "price verification" that would be much more effective and less restrictive than a compound tariff applied across the board that penalizes all of the imports with legitimately competitive prices.

3.6. In the light of the above considerations, the compound tariff provided for under Decree 456/2014 is clearly not a measure that is designed, much less "necessary", to protect public morals or secure compliance with Colombian laws and regulations within the meaning of Article XX(a) and (d) of the GATT.

3.7. Nor, in Panama's view, does the measure comply with the requirements of the preamble of Article XX of the GATT. Decree 456/2014 is applied in a manner which constitutes "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or "a disguised restriction on international trade". It excludes imports of textiles and footwear from countries with which Colombia has FTAs in force. And yet, if Colombia's real concern is money laundering, an FTA in no way meets that concern. On the contrary, the absence of the tariff merely increases the incentive to import more at lower prices. Colombia merely states that in the case of imports through FTAs "there is less incentive to establish artificially low prices for the purpose of money laundering".[27] It provides no further explanation, and for Panama this is yet a further demonstration that the measure was not imposed for the reasons that Colombia now adduces in these proceedings.

4 CONCLUSIONS

4.1. For the above reasons, Panama respectfully requests the Panel to find that the compound tariff imposed by Decree 456/2014 is inconsistent with the first sentence of Article II:1(b) of the GATT, with Article II:1(a) of the GATT, and with Colombia's Schedule of Concessions, and that it is not justifiable under Articles XX(a) and XX(d) of the GATT.

[25] Colombia's first written submission, para. 111.
[26] Article 1.3 of the Agreement on Preshipment Inspection (emphasis added).
[27] Colombia's first written submission, para. 112.

4.2. Further, since the inconsistency of the disputed measure is contrary to one of the basic principles of the system – namely legal certainty and predictability of the outcome of multilateral negotiations in the form of tariff concessions – Panama respectfully requests the Panel to exercise its authority to make suggestions regarding implementation. In this connection, Panama asks the Panel to suggest that Colombia introduce a cap mechanism to guarantee compliance with the relevant bound tariffs or that it revert to an *ad valorem* tariff system without exceeding the 35% and 40% *ad valorem* limits depending on the product, as required by its Schedule of Concessions.

ANNEX B-2

SECOND PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF PANAMA

1 CLAIMS PUT FORWARD BY PANAMA

1.1 Colombia has failed to rebut the claim that the compound tariff is inconsistent with the first sentence of Article II:1(b) of the GATT

1.1.1 The legal standard under the first sentence of Article II:1(b) of the GATT

1.1. Case law has clearly and consistently shown that in specific cases in which a Member applies an import duty on a product, that Member will be in violation of its obligation under Article II:1(b) of the GATT when:

(i) the product in question is included in the Member's Schedule of Concessions and is subject to a bound tariff;

(ii) the duty in question qualifies as an ordinary customs duty, that is, the obligation to pay it accrues at the moment and by virtue of importation;

(iii) the duty in question exceeds the bound tariff. Members may modify their *ad valorem* tariffs or apply a compound tariff provided they establish a "ceiling" or "cap" mechanism which ensures that the *ad valorem* equivalents of the compound tariff do not exceed the bound tariffs.

1.2. Colombia has no major objections as regards this legal standard. All Colombia does is to argue that Article II of the GATT does not apply to "illegal trade", which it appears to define (albeit not very clearly) as imports that enter at artificially low prices for the purposes of money laundering. In Panama's view, in interpreting the first sentence of Article II:1(b) of the GATT, Colombia not only commits a conceptual error, but also, even within its own *sui generis* interpretation, gives the terms a meaning that is not supported.

1.3. Regarding the error of interpretation, Panama already referred during the first hearing to the legal saying that where the law does not distinguish, neither should we distinguish. Article II of the GATT refers to "commerce" in general, and does not distinguish between different categories of commerce. Consequently, Article II applies to *all* types of trade, regardless of the adjective that might qualify it (legal, illegal, fair, responsible, sustainable, ecological, etc.). A Member that considers it necessary to take measures that could be inconsistent with Article II of the GATT, for example to tackle drugs or arms trafficking or money laundering, may have recourse to the GATT exceptions, such as Articles XX or XXI, to justify those measures. These exceptions are broad enough to cover measures adopted for reasons of national security or the protection of human life or health, or even the protection of public morals. However, in no case may the *applicability* of the GATT be questioned, particularly of Article II, when the measure is related to tariffs applied by a Member on "trade" with the other Members.

1.4. Not only does Colombia erroneously maintain that the scope of Article II of the GATT is limited to "legal trade", but it also has a rather peculiar view of what constitutes "illegal trade". Colombia remarks that Article II:1(b) of the GATT lays down obligations that apply to products "on their importation". According to Colombia, "importation" occurs when a product enters the territory of a Member in compliance with all of the legal formalities and requirements of the country of destination. Panama does not dispute this. However, Colombia, ignoring its own definition of the term "importation", adduces that goods entering at prices considered artificially low, for the alleged purpose of money laundering, cannot be considered "imports". According to Colombia, these goods are not covered by Article II of the GATT, since they are the result of "illegal trade". For Panama, this argument is flawed both from a legal and a factual standpoint. The term "illegal trade" refers to activities whose purpose is in itself illegal. A typical example of illegal trade would be the sale of illegal, counterfeit or pirated goods. Imports that are legally submitted

to the customs entry procedures, and whose declared value is unsatisfactory to Colombia because it is below certain unilaterally established prices, are a very different matter. Such cases clearly do not qualify as a type of illegal operation.

1.1.2 Application of the legal standard

1.1. Colombia does not question the fact that in this case, the three criteria established in case law to determine a violation of the first sentence of Article II:1(b) of the GATT have been met, nor does it dispute that the apparel and footwear affected by Decree No. 456 are products that are included in its Schedule of Concessions and that they are subject to a bound tariff of 40% *ad valorem*, with the exception of a few cases for which the bound tariff is 35% *ad valorem.* Nor does Colombia deny that the compound tariff is an "ordinary customs duty" which becomes payable at the moment and by virtue of importation of the products concerned. Colombia does not even contest that the compound tariff exceeds the bound tariff when the affected goods are imported at prices equal to or lower than certain thresholds, and that there is no "ceiling" or "cap" mechanism to ensure that the *ad valorem* equivalent of the compound tariff does not exceed the bound rates.

1.2. All that Colombia is doing is simply re-reading the provisions of Article II of the GATT in the hope of finding a way out for the compound tariff provided for in Decree No. 456. Colombia interprets the terms "importation" and "commerce" in Article II:1 of the GATT in such a way as to arrive at the conclusion that the provision in question does not apply to certain imports, namely those which enter at artificially low prices. As Panama has already stated, this reading does not stand up to a simple objective evaluation in the light of the text of Decree No. 456 itself, which does not state that imported products below certain thresholds are to be excluded from the importation process or should no longer be considered to be "importations". On the contrary, Articles 1 and 2 expressly refer to "importation" of the products classified under Chapters 61 to 64 of Colombia's Customs Tariff.

1.3. Colombia simply adds that "Panama must prove its *prima facie* case with something more than hypothetical cases". As repeatedly stated, Panama's complaint is based on the design, structure and architecture of the compound tariff, and Panama does not have the burden of proving the adverse economic effects or presenting real cases. In spite of this, Panama submitted exhibits PAN-18 and PAN-19, which show beyond doubt that Colombia applies the compound tariff to the products affected at the time of their importation into Colombia, and that this results in the imposition of levies in excess of the bound rate.

1.4. In conclusion, Colombia has failed to rebut Panama's *prima facie* case that the compound tariff provided for in the Decree No. 456 is inconsistent with the first sentence of Article II:1(b) of the GATT.

1.2 Colombia failed to rebut the case that the compound tariff is inconsistent with Article II:1(a) of the GATT

1.5. Colombia has not succeeded in rebutting Panama's *prima facie* case that the compound tariff provided for in Decree No. 456 is inconsistent with the first sentence of Article II:1(b) of the GATT. Consequently, in the light of the case law[1], the measure at issue is *necessarily* also inconsistent with Article II:1(a) of the GATT and Colombia's Schedule of Concessions.

2 DEFENCES RAISED BY COLOMBIA

2.1. Colombia holds that even if it were determined that Decree No. 456 was inconsistent with Article II of the GATT, the Decree is justified under GATT Article XX. In particular, Colombia argues that the compound tariff is justified under subparagraphs (a) and (d) of Article XX.

2.2. The burden of demonstrating that the measure can validly be justified under Article XX of the GATT unquestionably lies with the respondent. If the respondent fails in any aspect of that demonstration, a panel exercising its function under Article 11 of the DSU would have no

[1] Appellate Body Report, *Argentina – Textiles and Apparel,* para. 47; and Panel Report, *EC – IT Products,* paras. 7.1504-1505.

alternative but to find that the measure at issue was not justified under Article XX of that GATT. In this case, Colombia failed in its attempt to justify the compound tariff either provisionally under subparagraphs (a) and (d) of Article XX of the GATT, or under the *chapeau* of Article XX.

2.1 Colombia failed to demonstrate that the compound tariff is provisionally justified under Article XX(a) of the GATT

2.1.1 Legal standard under Article XX(a) of the GATT

2.3. Article XX(a) of the GATT covers measures that are "necessary to protect public morals". According to the case law, and as Colombia has also observed, the determination that a measure is provisionally justified under GATT Article XX(a) takes place in two parts.

2.4. First, the challenged measure must be "to protect public morals". There must be "a sufficient nexus" or "degree of connection" between the measure and the interest of protecting public morals (which denotes "standards of right and wrong conduct maintained by or on behalf of a community or nation") for it to be understood that the measure is designed to achieve that objective.[2] Moreover, in identifying the objective pursued by a Member through a specific measure, a panel is not bound by a Member's characterizations of such objective(s). A panel must conduct an objective assessment of the matter under Article 11 of the DSU, and is in no case "bound by the objectives asserted by the regulating Member".[3] The Appellate Body further established that in order to make an "objective and independent assessment of the objective", the panel "must take account of all the evidence put before it in this regard, including 'the texts of statutes, legislative history, and other evidence regarding the structure and operation'" of the measure at issue.[4]

2.5. Second, the measure must be "necessary" to protect public morals. Case law has established that the evaluation of necessity requires a process of "weighing and balancing" of the following factors: (i) the degree of contribution to the objective; (ii) the restrictive effects of the measure on international trade; and (iii) the relative importance of the interests.[5] Then, as shown further on, the availability of alternative measures that could achieve the same objective with less impact on international trade needs to be assessed. If it established that there are alternative measures that achieve the same objective of protecting public morals with less impact on international trade, it should be concluded that there is no need to resort to the measure at issue to achieve the objected pursued.

2.1.2 Application of the legal standard

2.1.2.1 The compound tariff is not designed to protect public morals

2.6. Panama questions the claim that the compound tariff in Decree No. 456 is effectively a measure that addresses money laundering concerns, and that is hence designed to achieve the objective of protecting public morals. It is clear to Panama that the alleged objective of fighting money laundering does not follow from Decree No. 456, but was conveniently adduced by Colombia *ex post facto* in the specific framework of this dispute.

2.7. As Panama pointed out, the Appellate Body has established that "in order to make an objective and independent assessment of the objective that a Member seeks to achieve, the panel must take account of all the evidence put before it in this regard, including 'the texts of statutes, legislative history, and other evidence regarding the structure and operation'" of the measure at issue.[6] Panama sees no cogent reasons in this case for the Panel to depart from the approach established by Appellate Body case law. The Panel should take into account, at the very least, the elements expressly identified by the Appellate Body (i.e. the text of the measure, the legislative history, and the structure and application) in its assessment of whether the measure was designed to fight money laundering.

[2] Appellate Body Reports, *US – Gambling*, para. 292; *US – Gasoline*, p. 18.
[3] Panel Report, *EC – Seal Products*, para. 7.378.
[4] Appellate Body Report, *US – COOL*, para. 371.
[5] Appellate Body Report, *Korea – Various Measures on Beef,* paras. 162 and 163.
[6] Appellate Body Report, *US – COOL*, para. 371.

2.8. With regard to the text of the measure, Panama has repeatedly stated that there is no reference to the fight against money laundering in Decree No. 456. Nor is there any reference to this alleged objective in the text of Decree No. 74 (the predecessor of Decree No. 456), which introduced the compound tariff on imports of apparel and footwear. The absence of any reference to the fight against money laundering in the text of the legal instrument at issue is a first indication that the measure was not conceived or designed to pursue that objective.

2.9. As regards the legislative history of the measure, all that Colombia has provided us are documents and statements issued by its authorities when the proceedings before this Panel were already under way, and very probably when Colombia was in the midst of planning its defence strategy. Both the minutes of the Triple A Committee and the statement by President Santos submitted by Colombia are *subsequent* to the initiation of this dispute, and consequently, their probative value as documents that objectively reflect the measure's objective is dubious - the more so in the light of the documentary evidence submitted by Panama, which illustrates how the imposition of the compound tariff was the result of an internal debate between the government, the clothing industry, importers and traders of apparel and footwear that aimed to protect the domestic industry without raising the prices of products that were not produced in Colombia.[7] Thus, for example, *prior* to the entry into force of the compound tariff provided for in Decree No. 74, the Colombian Ministry of Finance said that the purpose of the measure was to "defend those sectors [apparel and footwear] from any unfair competition from other countries" and that the reason for the worry was that China had decided to maintain "its dynamic economy with an annual growth rate of 8%". There is not a single reference to the fight against money laundering before 1 March 2013, the date on which the compound tariff provided for in Decree No. 74 entered into force.

2.10. Finally, the structure and application of the compound tariff is the third probative item for the Panel to take into consideration, and here there can be little doubt that the measure does not pursue the objective of fighting money laundering. There are several elements of the structure and application of the compound tariff which clearly show that it was not adopted for the purpose now claimed by Colombia, but rather to protect the domestic industry from imports at more competitive prices: (i) the compound tariff applies exclusively to apparel and footwear, when the universe of products that could also be involved in "smuggling" is much broader; (ii) while the compound tariff does not apply to raw materials for the production of footwear, it does apply to the final product that competes with the imports; (iii) the compound tariff does not apply to goods entering the Special Customs Zones in Colombia or under temporary admission for inward processing mechanisms, including the Plan Vallejo, in spite of the fact that Colombia itself has stated that the risk of illegal operations is greater under export processing or free-zone regimes; (iv) the duration of the compound tariff is limited to two years in spite of the immensity of the objective that Colombia is allegedly pursuing; (v) the compound tariff provides for a single threshold for apparel and footwear that does not take account of the differences between the products classified under each tariff subheading, whereas the actual DIAN database contains a variety of reference prices, many below US$10 per kilo (for apparel) and US$7 per kilo (for footwear).[8]

2.11. In view of the above considerations, Panama submits that the compound tariff is not a measure designed to protect public morals.

2.1.2.2 The measure at issue is not "necessary"

2.12. Even in the unlikely case that the Panel were to consider that the compound tariff pursues the objective of protecting public morals, the measure is not "necessary" to such protection.

2.13. As regards the contribution of the compound tariff to the alleged objective pursued, given that the measure does not even *pursue* the objective of fighting against money laundering, it clearly cannot *contribute* to the achievement of that objective. Colombia itself recognizes that the payment of the compound tariff does not prevent money laundering operations from being completed, and confirmed this during the second substantive meeting. Clearly, it is possible for an

[7] See exhibit PAN-14 in which the National Federation of Tradesmen of Columbia stated that "we wanted an in-depth study to ensure that certain articles that were not produced nationally were not taxed".

[8] This information is available to the public on DIAN's website: http://www.dian.gov.co/DIAN/13Normatividad.nsf/pages/Precios_referencia_sectores.

importer to pay the compound tariff provided for in Decree No. 456 and still use the operation for the purposes of money laundering. Furthermore, the limited coverage of the compound tariff (apparel and footwear), its short duration (only two years) and the exemptions (it does not apply to uppers or to imports into the special customs zones) merely confirm that the measure cannot and does not contribute to the alleged objective.

2.14. Regarding the trade restrictiveness of Decree No. 456, Colombia itself has also recognized that following the issue of Decrees Nos. 74 and 546, imports of apparel and footwear decreased. At the end of 2013, re-exports of the products affected from Panama to Colombia fell sharply, by as much as 18%, so that only one year after the entry into force of the measure, Panama's re-exports of apparel and footwear to Colombia fell from approximately 41 million kilos to 33.67 million.

2.15. Panama does not dispute the enormous social interest or value of the fight against money laundering and financing of terrorism. However, for the reasons set out above, it does not seem to Panama that the compound tariff was genuinely introduced to protect those interests. Attention should perhaps be given, instead, to other legitimate values or interests in Colombia that are being undermined by the imposition of the compound tariff.

2.16. In any case, there are less restrictive alternative measures reasonably available to Colombia that would contribute to achieving the objectives allegedly pursued by Colombia.

2.17. The most effective and targeted measure that Panama has been suggesting from the outset – as have the European Union and the Philippines – is the **proper valuation of the goods**. This is something that Colombia appears to have disregarded when qualifying the goods entering below the thresholds as entering at "artificially low prices". Since the compound tariff is supposed to compensate for imports of apparel and footwear at "artificially" low prices, it would be much more efficient (and WTO-consistent) for Colombia to carry out a proper valuation exercise and use the tools provided for in the Agreement on Customs Valuation to determine whether the prices are in fact "artificially low"; or to produce an adjusted determination of the value of any shipments arriving at Colombian Customs that may be under-invoiced.

2.18. Panama has also noted since the beginning that **customs cooperation** is another less restrictive solution, and one that Colombia itself has suggested as a perfectly viable alternative. Panama has pointed out that there is a customs cooperation agreement between Colombia and Panama, signed in 2006, which provides for cooperation instruments designed to address the need for information on customs matters, and which constitutes an alternative, reasonable and fully WTO-consistent measure. While Colombia has shown little interest in responding to Panama's requests, Panama's national customs authorities have in fact been responding to the requests of the DIAN. In any case, although there may be room for improvement in the information exchange mechanism, this is no reason for Colombia to violate its obligations under the GATT.

2.19. Moreover, following a question by the Panel concerning other alternative measures, Panama conducted a thorough search of the covered agreements to establish whether – bearing in mind Colombia's alleged purposes – there were other possible alternatives to the compound tariff at issue. In that context, Panama referred to the **Agreement on Preshipment Inspection**, whose aim, *inter alia,* is to verify "the … price of the imported goods". While Panama is aware that according to Article 10.5 of the Agreement on Trade Facilitation Members shall not require the use of preshipment inspections in relation to customs valuation, that Agreement is not yet in force, so that for the moment, preshipment inspection is a measure that is available under WTO law and, unlike the compound tariff, it is *consistent* with WTO law. It is precisely because the Agreement on Trade Facilitation does not provide for the use of preshipment inspection (but rather, for a customs cooperation mechanism that takes account of some of those concerns) that Panama only turned on this option after having presented what it considered to be better alternatives in the case at hand: proper and effective valuation, taking account of the obligations laid down in Agreement on Customs Valuation, and/or customs cooperation under the various mechanisms currently available.

2.20. It is therefore clear that the compound tariff is not a measure "necessary" to protect public morals within the meaning of Article XX(a) of the GATT.

2.1.3 Conclusion

2.21. In view of the above considerations, Colombia has failed in its attempt to demonstrate that the compound tariff provided for in the Decree No. 456 is a measure designed to "protect public morals" and that it is "necessary" for that purpose. Consequently, it is not a measure provisionally justified under Article XX(a) of the GATT.

2.2 Colombia failed to demonstrate that the compound tariff is justified under Article XX(d) of the GATT

2.2.1 Legal standard under Article XX(d) of the GATT

2.22. Article XX(d) of the GATT covers measures "necessary to secure compliance with laws or regulations which are not inconsistent with the [GATT]". The determination of whether a measure is provisionally justified under Article XX(a) of the GATT takes place in two parts.

2.23. First, it is necessary to examine whether the measure is "designed" (or intended) "to secure compliance with" particular laws and regulations. To that end, the responding Member must:

a. Identify the relevant laws or regulations: "laws or regulations" means rules or regulations that form part of the domestic legal system of the responding Member i.e. legal instruments that establish rights and obligations within the jurisdiction of the responding Member. It does not refer to international rules that generate obligations for other WTO Members.[9] It is also necessary to identify the specific provisions or obligations in the legislation of the responding Member that are supposed to be fulfilled through the measures at issue. A simple reference to a law or regulation, or even a chapter of that law or regulation when it contains multiple provisions, is insufficient.[10]

b. Demonstrate the GATT consistency of the laws or regulations: the laws or regulations with which the measure purportedly secures compliance must be consistent with the GATT. It is up to the respondent to demonstrate that consistency. The respondent is at least expected to provide an explanation in this respect.[11]

c. Show that the measure has been designed to secure compliance with the laws or regulations concerned and that it does secure that compliance: this demonstration relates to the "design of the measure sought to be justified"[12], which has been described to mean "to enforce obligations"[13], or more specifically, "to prevent actions that would be illegal under the laws or regulations."[14] To that end: (i) an analysis must be carried out of the design, structure and architecture of the measure at issue, checking that it has been *genuinely* designed as a compliance mechanism[15]; (ii) the circumstances that led to the introduction of the measure must be evaluated[16]; (iii) the practices or actions that are contrary to the obligations under national laws or regulations and which the measures at issue seek to prevent must be identified; (iv) real evidence must be provided of the existence of practices or actions that threaten compliance with the law or regulation in question; (v) consideration must be given to whether the practices or actions that the measure at issue is intended to prevent are really inconsistent with the laws or regulations in question; (vi) one aspect which casts doubt on the design of the measure is the fact that there is another compliance mechanism that already targets practices or actions considered illegal under the law or regulation in question[17]; (vii) finally, if a challenged measure does not in fact serve to ensure the effective enforcement of the

[9] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras. 71-73, 75.
[10] Appellate Body Report, *Thailand – Cigarettes (Philippines),* fn 271.
[11] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 179.
[12] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 72.
[13] Panel Report, *Colombia – Ports of Entry*, para. 7.538.
[14] Report of the GATT Panel, *EEC – Regulation on Imports of Parts and Components*, para. 5.16.
[15] Panel Reports, *Colombia – Ports of Entry*, paras. 7.539-7.542; *China – Auto Parts*, paras. 7.309-7.312; *Korea – Various Measures on Beef,* paras. 655-658.
[16] Panel Reports, *Colombia – Ports of Entry,* paras. 7.542-7.543; *China – Auto Parts*, paras. 7.309-7.312; *Korea – Various Measures on Beef*, paras. 655-658.
[17] Panel Report, *China – Auto Parts*, paras. 7.315-7.345.

obligations contained in a law or regulation, that measure is not "designed" to achieve that enforcement.

2.24. Second, as mentioned earlier, a necessity analysis involves a process of "weighing and balancing" a series of factors, including: (i) the importance of the objective; (ii) the contribution of the measure to that objective; (iii) the trade restrictiveness of the measure. The Appellate Body has further explained that, in most cases, a comparison between the challenged measure and possible alternatives should then be undertaken.[18]

2.2.2 Application of the legal standard

2.2.2.1 The compound tariff is not designed to secure compliance with laws and regulations which are not inconsistent, as such, with the GATT

2.25. Colombia begins with a defence relating to compliance with anti-money laundering rules. However, already at the explanatory stage Colombia extends this to laws against the funding of other criminal activities, and finally, adds references to rules against the financing of terrorism. Nowhere does Colombia describe the alleged relevant laws and regulations. Nor is this ambiguity cleared by the few provisions expressly mentioned in its first submission. Although Colombia refers to Articles 323 and 345 of the Penal Code, the reference is merely a general one. Despite having the burden of proof, Colombia does not bother to set out the text of the legislation or to provide any documentary evidence to verify its existence, its scope and the meaning of its terms. In other words, the invocation of Articles 323 and 345 of the Penal Code is no more than an assertion by a party. The same is true of the provisions listed by Colombia in its reply to question 51 of the Panel. None of these provisions were mentioned in Colombia's submissions prior to the first substantive meeting. Not only did the reference come late, but Colombia has supplied no supporting evidence that would enable an objective assessment of the facts to be made. In Panama's view, to accept the laws and regulations mentioned by Colombia without proper supporting evidence would be to rely on a mere assertion by a party, and would therefore be far removed from the kind of objective assessment of the facts that Article 11 of the DSU requires.

2.26. Special mention should be made of the International Convention for the Suppression of the Financing of Terrorism and the United Nations Convention Against Transnational Organized Crime, as well as the Protocol to Prevent, Supress and Punish Trafficking in Persons, Especially Women and Children. In these cases, the relevant "laws or regulations" are international, and as such, under the Appellate Body ruling in *Mexico – Tax on Soft Drinks,* they do not qualify as domestic "laws or regulations" within the meaning of GATT Article XX(d).

2.27. Apart from merely asserting that the cited legislation is not inconsistent, as such, with the provisions of the GATT, and that it fulfils international commitments that Colombia has entered into, Colombia has made no attempt to demonstrate that its domestic laws are consistent with the GATT. In keeping with the Appellate Body Report in *Thailand – Cigarettes (Philippines)*, Colombia should also be found to have "engaged in no effort to establish that such laws and regulations are consistent with the GATT 1994".[19]

2.28. Nor did Colombia take the trouble to explain how the compound tariff secures compliance with the specific obligations contained in the laws and regulations at issue. The ambiguity in identifying the laws and regulations and Colombia's own decision to identify a great variety of rules and obligations further increases Colombia's burden. A look at the actual text of Decree No. 456 reveals that there is no evidence either in the preamble or in the operative part that the compound tariff was introduced in response to problems of non-compliance with each and every one of the provisions cited by Colombia. Nor has Colombia explained why there would be problems of non-compliance[20] with each and every one of the many provisions cited as a result of the importation of apparel and footwear below the thresholds of the compound tariff. Similarly, Colombia has failed to explain why the importation of apparel and footwear below the respective thresholds is in itself a violation of the rules for which compliance is sought through the compound tariff. Rather, Colombia has declared that it is not in fact known whether there has been anything

[18] Appellate Body Report, *EC – Seal Products*, para. 5.214.
[19] Appellate Body Report, *Thailand – Cigarettes (Philippines), para. 179.*
[20] Panel Reports, *Colombia – Ports of Entry*, paras. 7.542-7.543; *China – Auto Parts*, paras. 7.309-7.312; *Korea – Various Measures on Beef*, paras. 655-658.

unlawful until a *post*-importation monitoring of the goods is carried out. Consequently, it is clear that the practice targeted by the compound tariff does not, *per se*, lead to a violation or a criminal act at the time of importation.

2.29. Thus, in the light of all of the above considerations, the compound tariff is not a measure designed to secure compliance with the multiple provisions cited by Colombia and consequently, the measure is not justified under Article XX(d) of the GATT.

2.2.2.2 The measure at issue is not "necessary"

2.30. Even if the Panel were to consider that the compound tariff is a measure designed to secure compliance with the multiple provisions cited by Colombia, it is not a measure that is "necessary" for that purpose.

2.31. Colombia has not proved that the compound tariff contributes materially to enforcing the domestic laws and regulations that it cites. As regards money laundering, payment of the compound tariff does not prevent anyone with the intention of money laundering from using the sale of the imported goods to legalize money of illicit origin. Moreover, we have seen that the limited coverage of the compound tariff (apparel and footwear only), its limited duration (only two years), and its exemptions (it does not apply to uppers or to imports entering the special customs zones) merely confirm that the measure cannot and does not contribute to its alleged objective of fighting money laundering in any general way. As regards the restrictive effects of the compound tariff on international trade, Colombia itself has recognized that following the issuance of Decrees No. 74 and 546, imports of apparel and footwear decreased. Panama does not dispute that the fight against money laundering and the financing of terrorism should be considered as social interests of great importance. However, it does not seem to Panama that the compound tariff was genuinely introduced to enforce rules aimed at achieving those goals. Finally, there are less restrictive alternative measures reasonably available to Colombia that would contribute to achieving the objectives it allegedly pursues, for instance, recourse to the mechanisms provided for in the Agreement on Customs Valuation, or use of the 2006 customs cooperation agreement between Colombia and Panama.

2.2.3 Conclusion

2.32. In the light of the above, Colombia has failed in its attempt to demonstrate that the compound tariff provided for in Decree No. 456 is a measure that is "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATT]", and hence that it is provisionally justified under Article XX(d) of the GATT.

2.3 Colombia failed to demonstrate that the compound tariff is applied in conformity with the *chapeau* of Article XX of the GATT

2.3.1 Legal standard under the *chapeau* of Article XX of the GATT

2.33. The *chapeau* of Article XX requires that the measures at issue are not *applied* in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where similar conditions prevail, or a disguised restriction on international trade. As the Appellate Body stated in *United States – Gasoline,* the burden of demonstrating that a measure provisionally justified under one of the exceptions of Article XX does not constitute an abuse of such an exception under the *chapeau* rests with the party invoking the exception.[21]

2.34. The Appellate Body noted that the *chapeau* of Article XX of the GATT by its terms addresses the "manner" in which a measure is "applied".[22] However, the question of whether a measure applies in a particular manner "can most often be discerned from the design, the architecture, and the revealing structure of the measure."[23] Moreover, the panel in *US – Gambling* pointed out that "the *absence of consistency* [with regard to its application] may lead to a conclusion that the measures in question are applied in a manner that constitutes 'arbitrary and unjustifiable

[21] Appellate Body Report, *US – Gasoline*, p. 21.

[22] Appellate Body Reports, *US – Gasoline*, p. 21; *US – Shrimp,* para. 115; *Brazil – Retreaded Tyres*, para. 215.

[23] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 27.

discrimination between countries where like conditions prevail' and/or a 'disguised restriction on trade'."[24] The Appellate Body has confirmed this standard of "consistency".[25]

2.35. The Appellate Body also explained that discrimination within the meaning of the *chapeau* of Article XX of the GATT "results […] when countries in which the same conditions prevail are differently treated".[26] The analysis of whether that discrimination is "arbitrary or unjustifiable" within the meaning of the *chapeau* "should focus on the cause of the discrimination, or the rationale put forward to explain its existence."[27] One of the most important factors in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified.[28] Thus, in *Brazil – Retreaded Tyres*, the Appellate Body considered this factor particularly relevant in assessing the merits of the explanations provided by Brazil as to the cause of the discrimination.[29] Also, in *US – Shrimp*, the Appellate Body considered this factor as one element in a "cumulative" assessment of "unjustifiable discrimination".[30] More recently, in *EC – Seal Products*, the Appellate Body confirmed that "the relationship of the discrimination to the objective of a measure is one of the most important factors … that is relevant to the assessment of arbitrary or unjustifiable discrimination."[31]

2.3.2 Application of the legal standard

2.3.2.1 Means of arbitrary and unjustifiable discrimination between countries where similar conditions prevail and disguised restriction on trade.

2.36. Panama believes that the application of the compound tariff does not meet the requirements of the *chapeau* of Article XX of the GATT, and under Decree No. 456, it is applied in a manner which constitutes "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail".

2.37. In support of its argument, Panama explains that imports of apparel and footwear from countries with which Colombia has concluded international trade agreements are exempted from the measure. Panama does not see any reason for this. If Colombia's real concern is money laundering, a free trade agreement does not do anything to alleviate that concern.

2.38. Colombia merely states that in the case of imports through FTAs, "there is less incentive to apply artificially low prices for the purposes of money laundering". Nowhere does Colombia explain this statement, which is devoid of any logical meaning. On the contrary, it would appear that the absence of tariffs, and hence the reduced exposure to customs control, would increase the incentive to use imports at low prices for money laundering purposes. In any case, problems of money laundering can originate anywhere in the world, and there is no rational link between the alleged objective of fighting money laundering and the exemption of imports from Colombia's trading partners.

2.39. Finally, Panama considers the measure to be a disguised restriction on trade, since it is not relevant to the fight against money laundering and the financing of terrorism. The fact that goods entering the free zones are exempted from the measure is proof of this. If the measure were really inspired by the fight against these problems, it should also apply to goods entering the free zones.

2.3.3 Conclusion

2.40. The compound tariff does not comply with the requirements of the *chapeau* to Article XX of the GATT.

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[24] Panel Report, *US – Gambling,* para. 6.584 (emphasis added).
[25] Appellate Body Report, *US – Gambling*, paras. 348-351.
[26] Appellate Body Report, *US – Shrimp*, para. 165.
[27] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 226.
[28] Appellate Body Report, *EC – Seal Products*, para. 5.306 (referring to the Appellate Body Reports in *US – Shrimp,* para. 165; and *Brazil – Retreaded Tyres*, paras. 227, 228, and 232).
[29] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227.
[30] Appellate Body Report, *US – Shrimp*, para. 176.
[31] Appellate Body Report, *EC – Seal Products*, para. 5.321.

3 CONCLUSIONS

3.1. For the reasons set out above, Panama once again requests the Panel to find that the compound tariff imposed by Decree No. 456/2014 is inconsistent with the first sentence of Article II:1(b) of the GATT, Article II:1(a) of the GATT, and Colombia's Schedule of Concessions, and that it cannot be justified under Articles XX(a) and XX(d) of the GATT.

3.2. Furthermore, bearing in mind that the inconsistency of the challenged measure undermines one of the fundamental principles of the system – namely, legal certainty and predictability of the results of the multilateral negotiations in the form of tariff concessions – Panama respectfully asks the Panel to exercise its authority to make suggestions regarding implementation. In this connection, Panama would ask the Panel to suggest that Colombia introduce a cap mechanism that would secure compliance with the relevant bound tariffs, or return to an *ad valorem* tariff system without exceeding the *ad valorem* limits of 35% and 40% depending on the product, as required by Colombia's Schedule of Concessions.

ANNEX B-3

FIRST PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF COLOMBIA

I. Introduction

1. Panama attempts to present this dispute as a case that can be resolved in a theoretical manner on the basis of abstract formulas. The reality is much more complex and, regrettably, more obscure. In reality, this dispute is a case concerning the misuse of foreign trade operations, by drug cartels and other criminal groups, for the purpose of laundering the proceeds of their illegal activities. The use of foreign trade operations for illicit purposes particularly affects Colombia due to its central role in the war against drug trafficking and its more than 60 years of internal conflict. However, smuggling problems and money laundering also affect other countries within and outside the region, as is shown by research conducted by international bodies and the authorities of other countries. The WTO rules cannot be turned into instruments that facilitate the misuse of foreign trade operations.

2. Colombia will demonstrate that Panama's claims have no legal basis, for which reason the Panel should reject them in their entirety. First, Colombia will demonstrate that Panama has failed to show that Decree No. 456 is inconsistent with Colombia's obligations under the first sentence of Article II:1(b), and Article II:1(a), of the General Agreement on Tariffs and Trade 1994 (GATT 1994). Secondly, it will be established that, even if the Panel were to determine the inconsistency of Decree No. 456 with Article II:1(b), first sentence, and Article II:1(a), of the GATT 1994, this Decree would be fully justified under Article XX of the GATT 1994 and, in particular, paragraphs (a) and (d).

II. Statement of facts

A. Drug trafficking and money laundering

3. Colombia is one of the countries to have made the most sacrifices in the fight against drug trafficking. In Colombia, drug trafficking has funded terrorist groups and fuelled an internal conflict that has ravaged the country for more than 60 years. More than 200,000 Colombians have lost their lives as a result of the armed conflict.[1] In 2008 alone, for instance, drug trafficking revenue amounted to US$7 billion, the equivalent of 2.5% of Colombia's GDP for the same year.[2] Thanks to this considerable income, illegal groups are able to terrorize and intimidate Colombian society. In the meantime, the Colombian State has limited resources and tools to combat these groups and their criminal practices.

4. Money laundering is a key link in the drug trafficking chain. Through laundering operations, criminal groups are able to repatriate and disguise money made from selling drugs abroad. This money enables the groups to fund their criminal operations, buy weapons, order murders and kidnappings, bribe public officials, and engage in countless other criminal activities. Initially, drug trafficking used the financial system to move and launder money made through the sale of illicit drugs. However, as governments have increased financial controls, criminal organizations have had to find alternative ways to launder their revenues. Foreign trade operations are one of the most effective mechanisms used by illegal groups to launder their ill-gotten gains. Criminal groups are, in effect, making use of economic internationalization to conduct their illegal activities.

[1] Centro Nacional de Memoria Histórica, "¡Basta Ya! Colombia: Memorias de Guerra y Dignidad: Informe General Grupo de Memoria Histórica", 2013, p. 20 (Exhibit COL-01). See also "Seis millones de víctimas deja el conflicto en Colombia", Revista Semana, 2 February 2008, available at http://www.semana.com/nacion/articulo/victimas-del-conflicto-armado-en-colombia/376494-3 (Exhibit COL-02).

[2] Mejía, Daniel, and Rico, Daniel M. (2010), *La microeconomía de la producción y tráfico de cocaína en Colombia*, Centro de Estudios sobre Desarrollo Económico (CEDE), Universidad de los Andes (Exhibit COL-05).

B. The use of foreign trade operations to launder money

5. Illegal trade is the "dark side" of world trade expansion[3] and the magnitude and importance of this problem is increasing in a way that gives cause for concern. According to the United States Department of State, illicit trade may account for 8% to 15% of world GDP.[4]

6. While investigating this phenomenon, and on the basis of actual cases, Colombia's Information and Financial Analysis Unit (UIAF) and National Customs and Excise Directorate (DIAN) made a detailed study of the various foreign trade methods that are used by criminal groups for illicit purposes.[5] The study describes 12 "typologies" or techniques used by criminal groups to launder their illicit funds.

7. The use of foreign trade operations to launder money has also been documented by international bodies such as the Financial Action Task Force (FATF). The FATF study describes the following factors that facilitate the use of foreign trade operations for illicit purposes:

- the enormous volume of trade flows, which obscures individual transactions;
- the complexities associated with the use of foreign exchange transactions and diverse financing arrangements;
- the additional complexity arising from the practice of commingling illicit funds with the cash flows of legitimate businesses;
- the lack of verification procedures or programmes to exchange customs data between countries; and
- the limited resources that most customs agencies have available to detect suspicious trade transactions.[6]

8. According to the FATF study, money is laundered through foreign trade transactions by misrepresenting the price, quantity or quality of imports or exports.[7] One of the money laundering techniques detected by the FATF, which is analysed in the study, consists of understating the value of the imported product. The study explains that the exporter invoices the goods at a price lower than their market value and that, on this basis, the importer, when selling the goods, would be laundering the difference in revenue between the value recorded in the invoice and the sales price in the destination market. The FATF concludes that "such a situation would not make sense unless the exporter and importer were colluding in a fraudulent transaction".[8]

9. The FATF, the International Monetary Fund[9] and governments[10] monitoring the problem of illegal trade and its use as a means to launder assets and conduct other criminal activities have discovered that free zones are particularly vulnerable to being used for these purposes. Another study conducted by the FATF explains that the incentives offered by free zones, such as exemption from duties and taxes and simplified administrative procedures, may also result in a reduction in financial and customs controls, thus creating opportunities for money laundering and the financing of terrorist activity.[11] According to this study, free zones have the following systemic weaknesses that make them more vulnerable to being used by criminal groups for illicit activities:

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[3] Naim, M., *Illicit: How Smugglers, Traffickers, and Copycats Are Hijacking the Global Economy*, Doubleday, 2005.

[4] Luna, David, "The Destructive Impact of Illicit Trade and the Illegal Economy on Economic Growth, Sustainable Development, and Global Security", Statement prepared for the OECD High-Level Risk Forum, 26 October 2012 (Exhibit COL-09).

[5] National Customs and Excise Directorate (DIAN) and Information and Financial Analysis Unit (UIAF), "*Tipologías de Lavado de Activos Relacionadas con Contrabando*", January 2006 (Exhibit COL-10).

[6] Trade-Based Money Laundering, p. 2 (Exhibit COL-11).

[7] Trade-Based Money Laundering, p. 3 (Exhibit COL-11).

[8] Trade-Based Money Laundering, p. 5 (Exhibit COL-11).

[9] International Monetary Fund Legal Department, "Financial Sector Assessment Program, Republic of Panama, Detailed Assessment of Anti-Money Laundering and Combating the Financing of Terrorism", September 2006, p. 6 (http://www.cfatf.org/profiles/media/PANAMA/20AMLCFT/20Detailed/20Assessment/20Report.pdf) (Exhibit COL-13).

[10] US Department of State, International Narcotics Control Strategy Report (INCSR), 2014 (Exhibit COL-14).

[11] Financial Action Task Force, "Money Laundering Vulnerabilities of Free Trade Zones", March 2010 (Exhibit COL-12).

- inadequate safeguards to combat money laundering and the financing of terrorism;
- relaxed oversight by competent domestic authorities;
- weak procedures for inspecting goods and registering legal entities, including inadequate record-keeping and information technology systems; and
- lack of cooperation between free zone and customs authorities.12

10. It should be noted, as is done in the FATF study, that the misuse of free zones impacts all jurisdictions, including those without free zones in their territories, as goods originating in or transiting through these zones are not always subject to adequate export controls.[13]

C. Illegal trade in articles of apparel and footwear

11. It is estimated that in 2012 between 30% and 60% of the textiles and apparel sold in Colombia entered the country illegally. The sales value of these products was between US$2.5 billion and US$4 billion. Around 20 million pairs of footwear, with a sales value of between US$200 million and US$300 million, were imported illegally.[14]

12. The UIAF-DIAN investigation concluded that the incidence of smuggling is higher for high-demand low-priced items bearing no minimum descriptions to distinguish them from other products, as these characteristics facilitate rapid marketing, as in the case of apparel and footwear.[15] An international study carried out by the Organisation for Economic Co-operation and Development (OECD) and the FATF confirmed that products with "high turnover" rates are more at risk of being used to launder money.[16] In the specific case of imports of apparel and footwear, these products are attractive to money launderers for the following reasons:

(i) they cover a wide range of goods, which makes customs and post-customs control more difficult;

(ii) the wide range of goods also hinders the use of reference prices to define risk profiles and exercise better customs control;

(iii) their prices are relatively low compared to the prices of other goods;

(iv) they have a high turnover rate because of their low prices, which enables criminal groups to sell them quickly and easily once they have entered Colombia and in this way launder the proceeds. Apparel and footwear imported at artificially low prices are typically sold in a matter of weeks, providing criminal groups with rapid access to their illicit gains.[17] The high turnover rate also enables criminal groups to change their trade name, use different trade names to evade controls, or combine legal and illegal transactions, at legal and illegal prices, thus making it very difficult to monitor such activities;

(v) capital can be rotated several times a year, which increases the volumes of money laundered, as well as the profits;

(vi) the under-invoicing of imports reduces the transaction costs of laundering operations; and

(vii) low traceability and a high turnover also favour the creation of "ghost companies" that can be created and dissolved rapidly, thus making it difficult for the customs authority to exercise control.

13. The under-invoicing of imports of apparel and footwear relates to the need to bring money made principally from drug trafficking into Colombia while concealing its illicit origin. Foreign trade operations in Colombia must pass through the exchange market established for this purpose under Colombian legislation. Banks are the main exchange market operators. Imports are paid for through the exchange market with foreign currency that is legally held abroad or purchased with pesos in Colombia. However, the money that is laundered is mainly illegally acquired foreign currency, and its conversion into Colombian pesos is extremely difficult due to the exchange controls established by the Colombian authorities. Money launderers therefore pay for imports

[12] "Money Laundering Vulnerabilities of Free Trade Zones", para. 2 (Exhibit COL-12).
[13] "Money Laundering Vulnerabilities of Free Trade Zones", para. 5 (Exhibit COL-12).
[14] Ortega, Juan Ricardo, "Contrabando y Lavado de Activos", July 2013 (Exhibit COL-15).
[15] Tipologías, para. 9 (Exhibit COL-10).
[16] Trade-Based Money Laundering, p. 24 (Exhibit COL-11).
[17] Trade-Based Money Laundering, p. 24 (Exhibit COL-11).

using the foreign currency they hold abroad, in combination with considerably smaller amounts of legally held pesos that are present in the Colombian financial system. The value of the operation will ultimately be recorded in pesos, as it is impossible to justify the foreign currency. The under-invoiced value of the goods is equivalent to the amount in pesos that the criminal group holds, lawfully, in bank accounts in Colombia. The difference between the commercial value and the under-invoiced value of the goods is paid in foreign currency outside of Colombia and is represented in the goods that are then imported into Colombia, making the total value of the goods appear legal. This type of operation is made easier when there are few or no money laundering controls in the financial system and the company (or corporate) system of the country where the criminal organization's transaction takes place.

14. The use of imports at artificially low prices is reflected in the import figures for apparel and footwear before the introduction of Decrees No. 074 and No. 456. Between 2009 and February 2013, the date of issue of Decree No. 074, more than 480,000 import transactions took place, 390,000 of which concerned apparel and 90,000 footwear, involving countries for which no trade agreement was in force with Colombia (this figure does not include operations within the framework of Special Import-Export Systems (SIEX)). During this period, the average price for imports of apparel was US$56.6 per kilo, while the average price for footwear was US$24.2 per pair. What is most striking about the import figures in the period leading up to the introduction of Decree No. 456 is the unreasonably high variation in prices per kilo. C.i.f. prices for apparel range from US$0.01 per kilo to US$224,000 per kilo, while those for footwear range from US$0.01 per pair to US$1,844 per pair. Such broad price ranges are unrealistic.

15. At first sight, moreover, the prices in the lowest range are alarming in themselves. For apparel and footwear, imports were recorded at US$0.01 per kilo and US$0.01 per pair, prices which clearly do not represent real prices. This price would not cover transport or transaction costs. Nor would it cover wage costs. The cost of unprocessed cotton alone is almost US$2 per kilo.

16. Another important indication of the artificially low prices of imports can be seen by comparing the unit prices for imports originating in China and recorded as being purchased in Panama with imports originating in China but purchased directly in China. This exercise shows that in many cases the prices of goods purchased in Panama and originating in China are lower than when the same goods enter directly from China.

D. Decree No. 074 of 2013

17. On 23 January 2013, the Colombian Government issued Decree No. 074 as one of various measures taken to discourage the use of foreign trade operations and, in particular, imports of apparel and footwear, as a means of laundering illicit funds.[18] This Decree established an *ad valorem* tariff of 10% and a specific tariff of US$5 per kilo for apparel, and an *ad valorem* tariff of 10% and a specific tariff of US$5 per pair for footwear. The application of the compound tariff provided for in Decree No. 074 sought to discourage criminal groups from importing apparel and footwear at artificially low prices in order to launder funds. The compound tariff reduces the artificial margin that can be obtained by the importer when selling the goods in Colombia. This, in turn, reduces the amount of money that criminal groups can legalize through each import transaction and, by reducing the amount of money they can launder, lowers their operating capacity.

E. Decree No. 456 of 2014

18. On 28 February 2014, the Government issued Decree No. 456, which modified the compound tariff established in Decree No. 074.[19] For articles of apparel (classified in Chapters 61, 62 and 63 of the Customs Tariff), Decree No. 456 established an *ad valorem* tariff of 10% and a tariff of US$5 per gross kilo for products with a declared f.o.b. value of US$10 per gross kilo or less. Articles of apparel with a declared f.o.b. value higher than US$10 per gross kilo are subject to an *ad valorem* tariff of 10% and a specific tariff of US$3 per gross kilo. For footwear, Decree No. 456 establishes an *ad valorem* tariff of 10% and a specific tariff of US$5 per pair for products with a declared f.o.b. value of US$7 per pair or less. Footwear valued at more than US$7 per pair is subject to an *ad valorem* tariff of 10% and a specific tariff of US$1.75 per pair. Under

[18] Exhibit COL-16.
[19] Exhibit COL-17.

paragraph 2 of Article 2, Decree No. 456 excludes imports under tariff heading 64.06, except for subheading 6406.10.00.00.

19. There were two reasons for the adjustments made to the compound tariff by Decree No. 456. First, they reinforce the aim of Decree No. 074, which is to discourage imports of apparel and footwear at artificially low prices, where there is the greatest risk of the imports being used to launder assets. Like Decree No. 074, the compound tariff in Decree No. 456 reduces the artificial profit margin that the importer can obtain when selling the goods in Colombia, which, in turn, reduces the amount of money that can be legalized by criminal groups through each import transaction. Secondly, Decree No. 456 introduces a ceiling for the tariffs, which, in their *ad valorem* equivalent, do not exceed Colombia's WTO-bound levels, when operations are at market prices.

20. Since the free trade agreements signed by Colombia include customs information-exchange commitments and other customs cooperation mechanisms, and there is a considerably lower risk that imports exempt from the payment of tariffs will be used to launder money, the paragraph under Article 5 stipulates that the *ad valorem* and specific tariffs established in Decree No. 456 shall not apply to imports originating in countries with which Colombia has trade agreements in force.

F. Decree No. 456 is part of a broader strategy to combat money laundering and other criminal activities

21. Decree No. 456 forms part of a much broader strategy developed by Colombia to combat money laundering and the funding of other criminal activities. Colombia has been fighting hard to stem the profits of drug trafficking by, *inter alia*:

- instituting criminal proceedings for money laundering offences;
- extending to other sectors the obligation to report suspicious operations;
- restructuring the Financial Supervisory Authority with a view to strengthening its money laundering prevention and control activities;
- regulating the professional activity of buying and selling foreign currency and traveller's cheques through the Integrated System for the Prevention and Control of Money Laundering (SIPLA);
- creating a task force of judicial police and investigators;
- seizing assets to prevent criminal organizations from enjoying their illicit gains; and
- strengthening the extradition process.

22. In view of the importance given by Colombia to the fight against drug trafficking and the funding of illegal groups, the various activities carried out on this front have been grouped together under the National Policy to Combat Money Laundering and the Financing of Terrorism.[20] Within this framework, the Colombian Government has introduced a draft law[21] to strengthen the institutional capacity and tools that public bodies have to prevent, control and penalize illegal foreign and domestic trade, money laundering and tax evasion operations. The draft law, which is currently before the Colombian Congress[22], seeks to establish mechanisms to prevent, control and penalize smuggling and, consequently, money laundering and tax evasion. To this end, the draft law covers various issues that are in some way related to smuggling. The law updates and modifies Colombian legislation with a view to strengthening the State's institutional capacity, establishing mechanisms that make it easier for the competent authorities to prosecute and punish persons and businesses engaged in or related to this type of activity, and ensuring the adoption of pecuniary measures to discourage and punish this type of behaviour.

23. The Colombian Government also conducts activities in other sectors where the use of foreign trade operations for money laundering or funding other illegal activities has been detected. These activities relate to, *inter alia*, imports of gasoline, cigarettes, liquor and rice, and exports of gold.[23]

[20] Exhibit COL-19.

[21] Draft Law No. 94 of 2013 adopting instruments to prevent, control and penalize smuggling, money laundering and tax evasion, Congress of the Republic of Colombia (Exhibit COL-20).

[22] Report of the rapporteur for the first discussion of Draft Law No. 94 of 2013 (Exhibit COL-21).

[23] Ortega, R., "Contrabando y Lavado de Activos" (Exhibit COL-15).

24. The Government is also implementing a series of recommendations from the Higher Council for Foreign Trade, most notably the following:

- ensure that the fight against illegal trade, and smuggling as one of the manifestations of such trade, is made a national priority, on account of the close links between these activities and organized crime, money laundering and other criminal activities;
- request that the Higher Council for Criminal and Penitentiary Policy prioritize the fight against smuggling in the country's criminal policy, particularly in the agro-industrial, manufacturing and precious metal sectors;
- instruct the National Customs and Excise Directorate (DIAN) and the Productive Transformation Project to implement media plans and prepare and disseminate publicity materials that promote a culture of lawfulness among the population;
- request support from the Ministry of Telecommunications and the institutional channel (*Canal Institucional*) to disseminate these products;
- instruct the Ministry of Trade, Industry and Tourism to organize working sessions with various countries in order to establish joint strategies to fight this scourge, with the support of the Ministry of Foreign Affairs, the Ministry of Finance and Public Credit, and DIAN, among others;
- broaden the composition and powers of the Commission on Inter-Institutional Cooperation against Money Laundering;
- expand the functions of the Information and Financial Analysis Unit (UIAF) so that it provides support in identifying and analysing smuggling activities related to money laundering; and
- enhance security arrangements for officials from various bodies in high-risk and other areas.[24]

G. Colombia and other WTO Members have undertaken an international commitment to combat money laundering

25. Colombia is a party to the United Nations Convention against Transnational Organized Crime, which has been signed by 147 countries, most of which are WTO Members.[25] Under this Convention, the States Parties undertake to combat money laundering and the funding of criminal activities.[26]

26. Colombia and other WTO Members have also undertaken international commitments obliging them to take action against the financing of terrorism.[27] The International Convention for the Suppression of the Financing of Terrorism was approved by the United Nations General Assembly in 1999 and entered into force in 2002. It has 186 States Parties.[28] Under this Convention, the States Parties undertake to adopt such measures as may be necessary to establish as having caused a criminal offence, and to punish by appropriate penalties, any person that "by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out" acts of terrorism.[29]

27. Colombia is also a member of the Financial Action Task Force on Money Laundering in South America (GAFISUD) which forms part of the Financial Action Task Force (FATF). The FATF has adopted a series of recommendations on international standards for combating money laundering and the financing of terrorism and proliferation.[30] By discouraging criminal groups from using imports of apparel and footwear to launder illicit funds, Decree No. 456 forms part of the

[24] Minutes of the 94th session of the Higher Council for Foreign Trade, 1 April 2013 (Exhibit COL-23).
[25] Panama is also a State Party. Colombia and Panama ratified the Convention in 2004. See https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xviii-12&chapter=18&lang=en (Exhibit COL-24).
[26] United Nations Convention against Transnational Organized Crime (Exhibit COL-24).
[27] Panama ratified the Convention on 3 July 2002.
[28] Resolution A/RES/54/109 of 9 December 1999. Colombia ratified the Convention in 2004 and Panama in 2002. See: http://cns.miis.edu/inventory/pdfs/apmunterII.pdf (Exhibit COL-25).
[29] Articles 2 and 4 of the Convention (Exhibit COL-24).
[30] Financial Action Task Force, "International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations", February 2012 (Exhibit COL-26).

action taken by Colombia to meet its commitments to the international community. Colombia would, however, be acting in a manner inconsistent with these commitments if, after finding that imports of apparel and footwear are being used to launder drug-trafficking money and finance other criminal activities, it were to fail to take action in this respect.

III. Panama has failed to establish that Decree No. 456 is inconsistent with Article II of the GATT 1994

A. Article II of the GATT 1994 is applicable exclusively to legal trade

28. Article II:1(b) sets forth obligations applicable to products "on their importation". "Importation" occurs when a product enters the territory of a Member complying with all the legal formalities and requirements of the destination country. Foreign trade operations conducted for the purpose of money laundering or for other illicit purposes cannot be considered as "importation" within the meaning of Article II:1(b) of the GATT 1994. This interpretation is supported by Article II:1(a), which provides for treatment no less favourable for the "commerce" of other Members. The term "commerce" necessarily refers to legal trade. It would make no sense for Article II to oblige a Member to accord favourable treatment to the entry of goods that violate the legal formalities and requirements of the destination country.

29. Other provisions of the GATT 1994 lend additional support to this interpretation of Article II. Article VII of the GATT 1994 is usually invoked in relation to alleged abuses committed by customs authorities in applying arbitrary values to imported goods. Article VII is also relevant, however, to imports entering at artificially low prices.

30. When imports enter at artificially low prices and for the purpose of laundering funds, they cannot be considered to be entering at "actual value". It should be recalled that Article VII:2(b) defines "actual value" as "the price at which, at a time and place determined by the legislation of the country of importation, such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions". Imports using artificially low prices and entering for the purpose of laundering illicit funds are not "sold or offered for sale in the ordinary course of trade under fully competitive conditions". In fact, the prices declared for these imports bear no relation to commercial reality. The prices are "arbitrary or fictitious", as they do not result from market operations.

31. The interpretation is also consistent with the WTO Agreement on Customs Valuation. This Agreement establishes a preference for the "transaction value", which is defined as "the price actually paid or payable for the goods when sold for export". In this respect, it should be emphasized that the "transaction value" is the value *actually* paid. The values declared at artificially low prices, typically used to launder money, do not reflect "actual values". They cannot therefore be considered "transaction values".

32. With regard to object and purpose[31], the preamble to the GATT 1994 highlights some of the Agreement's objectives, which include: (i) raising standards of living; (ii) ensuring full employment and a large and steadily growing volume of real income and effective demand; (iii) developing the full use of the resources of the world; and (iv) expanding the production and exchange of goods. As explained above, there is a strong likelihood that trade in goods at artificially low prices is linked to money laundering and other unlawful activities. Money laundering provides criminal groups with access to the financial resources generated by their criminal activities, which are used to fund their criminal operations and activities. Extending the benefits of Article II to foreign trade operations that seek to finance criminal activities is clearly inconsistent with the objective of raising the population's living standards.[32] Illegal trade also distorts real income and aggregate demand. Illegal trade in goods is therefore inconsistent with the objectives and purposes of the GATT 1994. Interpreting Article II to include illegal trade would not be consistent with the objectives of the GATT 1994.

33. It is important to bear in mind that under Article 31 of the Vienna Convention a treaty shall be interpreted in "good faith". In this regard, the Panel in *US — Gambling* noted that "the principle of good faith in the process of interpretation underlies the concept that interpretation should not

[31] Appellate Body Report, *Japan — Alcoholic Beverages II*, p. 16.

[32] Luna, David, Opening Remarks, OECD Workshop - The Destructive Impact of Illicit Trade and the Illegal Economy, Paris, 26 October 2012.

lead to a result which is manifestly absurd or unreasonable".[33] To interpret Article II in such a way as to extend its benefits to import transactions that do not comply with a country's legislation would clearly be absurd and unreasonable. The provisions of the GATT 1994, including Article II, were not designed to facilitate criminal activities.

34. In conclusion, Article II of the GATT 1994 covers legal trade only. It cannot therefore be extended to imports that enter at artificially low prices and violate the rules of the importing country.

B. Panama has failed to demonstrate that Decree No. 456 is inconsistent with Article II:1 of the GATT 1994

35. As was clarified by the Appellate Body in *Argentina - Textiles and Apparel*, and as is recognized by Panama in its first written submission, a Member with bound *ad valorem* tariff levels is entitled to apply specific tariffs providing that these tariffs do not infringe their bound levels.[34] One way of preventing the specific tariffs from exceeding bound *ad valorem* levels is by establishing a legislative ceiling.

36. As recommended by the Appellate Body in *Argentina — Textiles and Apparel*, Decree No. 456 includes a legislative ceiling that prevents the compound tariff from exceeding Colombia's bound levels and therefore complies with Article II:1(b). The Colombian authorities consider prices lower than these levels to be artificially low, which means there is a high risk that imports entering at these price levels are being used to launder money. For such imports, Decree No. 456 establishes a compound tariff which seeks to discourage imports at artificially low prices, reduce the artificial profit margin that may be obtained by the importer when selling goods in Colombia, and prevent criminal groups from continuing these money laundering operations.

37. The Panel should also consider that in so far as prices not exceeding US$10 per kilo for apparel and US$7 per pair for footwear are not market prices, imports declared at such prices would not be covered by the first sentence of Article II:1(b). This is because Article II:1(b) covers legal trade and cannot cover operations that show signs of being conducted at artificially low prices in order to launder money. Colombia cannot therefore be considered to be in breach of Article II:1(b) with regard to the compound tariff applied to these imports.

38. Furthermore, Panama should base its *prima facie* case on something more than hypotheses. In its first written submission, Panama failed to submit any evidence that imports of apparel and footwear were entering at prices that infringed the levels bound by Colombia. Nor did Panama submit, as it should have done, evidence to show that the bound levels would be infringed for goods declared at actual and not hypothetical prices. In *Argentina - Textiles and Apparel*, the complainant, the United States, submitted to the Panel various actual examples and more than 95 pages of customs documents showing that the bound level was being systematically violated by Argentina.[35] Both the Panel and the Appellate Body based their conclusions and recommendations on this evidence and not, as is sought in this case, exclusively on hypothesis.

39. Colombia considers that, insofar as the obligations of Article II:1(b) are only applicable to legal trade, it is part of Panama's burden, as the complaining country, to demonstrate that the compound tariffs under Decree No. 456 exceed bound levels in the case of imports entering at market prices and not at artificially low prices.[36]

40. Even if the Panel were to consider it unnecessary for Panama to demonstrate, as part of its initial burden, that the compound tariffs under Decree No. 456 exceed the bound levels for imports entered at market prices and not at artificially low prices, Colombia believes that it has submitted sufficient evidence that the imports at prices lower than the thresholds established in Decree No. 456 are imports entered at artificially low prices with a high risk of being used for money laundering. It would therefore also fall to Panama to submit evidence showing that the compound

[33] Panel Report, *US - Gambling*, para. 6.49 (referring to Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 2nd edition, 1984, p. 120).

[34] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 46; Panama's first written submission, para. 1.4.

[35] Panel Report, *Argentina - Textiles and Apparel*, para. 3.48.

[36] In order to establish a *prima facie* case, a party must adduce evidence sufficient to raise the presumption that what is claimed is true. See Panel Report, *EU - Footwear (China)*, footnote 1400.

tariffs under Decree No. 456 exceed the bound levels in the case of imports entering at market prices and not at artificially low prices. Colombia reiterates that Panama has failed to meet this burden of proof.

41. Given the absence of evidence from Panama, the Panel must conclude that Panama has not established this case *prima facie*, since it has failed to meet its burden of demonstrating that Decree No. 456 is inconsistent with the first sentence of Article II:1(b) of the GATT 1994. Colombia recalls that Panama's claim that Decree No. 456 is inconsistent with Article II:1(a) of the GATT 1994 is based exclusively on the assumption that Decree No. 456 violates the first sentence of Article II:1(b). Hence, in rejecting Panama's claim under the first sentence of Article II:1(b), the Panel would necessarily have to reject Panama's claim under Article II:1(a).[37]

IV. Even if Decree No. 456 is determined, on a preliminary basis, to be inconsistent with Article II of the GATT 1994, it is justified under Article XX of the GATT 1994

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

42. Decree No. 456 is a measure to combat money laundering. Pursuant to Article 323 of the Colombian Criminal Code, money laundering is a criminal activity punishable by imprisonment in a detention facility. The financing of terrorism is also punishable by imprisonment. Article 345 of the Colombian Criminal Code makes it an offence to administer money or goods related to terrorist activities. Decree No. 456 therefore relates to "standards of right and wrong conduct" defined by Colombian society.[38] Money laundering and the financing of terrorism are forms of conduct also condemned at international level. Colombia, like other WTO Members, has undertaken international commitments to combat money laundering and the financing of other criminal activities. Money laundering is not only a criminal act in itself; it also provides criminal groups with the financial resources to carry out other criminal activities.

43. As a measure against money laundering, which is a criminal offence in Colombia, Decree No. 456 is clearly related to "standards of right and wrong conduct" defined by Colombian society. Moreover, given that the international community has undertaken to combat money laundering and the financing of criminal activities, Decree No. 456 also reflects the "standards of right and wrong conduct" of the international community. The Panel in *US - Gambling* considered measures addressing concerns pertaining to money laundering and organized crime to be measures designed to protect public morals.[39] Decree No. 456 pursues similar aims and should therefore be considered as a measure that protects public morals. Consequently, Decree No. 456 protects public morals within the meaning of Article XX(a) of the GATT 1994.

44. The Appellate Body has clarified that the determination of necessity involves an analysis of the following factors: the importance of the interests or values at stake; the extent of the contribution to the achievement of the measure's objective; and its trade restrictiveness. The interests and values at stake in this case are vital and important in the highest degree. As explained above, money laundering is a key link in the drug trafficking chain. Through laundering operations, criminal groups are able to repatriate and disguise the proceeds of foreign drug sales. This money then enables these groups to finance their operations, purchase weapons, order murders and kidnappings, bribe public officials and carry out countless other criminal activities. More than 200,000 Colombians have lost their lives in the internal conflict that has been funded by drug trafficking activities.[40] This case therefore relates to an activity that has affected the lives of thousands of Colombians and the stability of Colombian democracy.

45. Similarly, in *US - Gambling*, the challenged measures sought to protect US citizens from the risks deriving from money laundering and organized crime. The Panel in that dispute found that it was "clear [...] that the interests and values protected" by the challenged measures "serve very important societal interests that can be characterized as 'vital and important in the highest degree' in a similar way to the characterization of the protection of human life and health against a

[37] The Panel in *US — Shrimp and Sawblades* notes that a panel errs when it rules on a claim for which the complaining party has failed to make a *prima facie* case (see Panel Report, *US — Shrimp and Sawblades*, para. 7.8).

[38] Panel Report, *US - Gambling*, para. 6.465; Appellate Body Report, *EC — Seal Products*, para. 5.199.

[39] Panel Report, *US - Gambling*, paras. 6.486 and 6.487.

[40] Basta ya (Exhibit COL-01).

life-threatening health risk by the Appellate Body in *EC - Asbestos*".[41] In view of Colombia's special role in the fight against drug trafficking, and the links between drug trafficking and the country's internal conflict, the interests and values protected by Decree No. 456 should be considered no less vital and important.

46. As explained above, Decree No. 456 discourages the use of imports of apparel and footwear for money laundering purposes and for generating resources to fund the activities of criminal groups. In this respect, Decree No. 456 is appropriate to its objective. Import trends show the effectiveness of the measure. Decree No. 456 has led to an increase in the unit price of imports, thereby reducing the artificially high margin that in turn encourages the use of imports of apparel and footwear to launder money and finance the activities of criminal groups.

47. Decree No. 456 does not impose quantitative limits on imports of apparel and footwear. The measure is also carefully designed to target imports that are more likely to be used to launder assets. Thus, the aggregate trade effect of Decree No. 456 is moderate and it creates opportunities for those importing at market prices and discourages imports at artificially low prices, as has been argued throughout this submission. For the above-mentioned reasons, Decree No. 456 is necessary to protect public morals within the meaning of Article XX(a) of the GATT 1994.

B. Decree No. 456 is a measure necessary to secure compliance with Colombian anti-money laundering legislation

48. Article XX(d) of the GATT 1994 permits Members to adopt the measures necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of that Agreement. Regarding the first element of paragraph (d), the Appellate Body has explained that the term "laws or regulations" covers rules that form part of the domestic legal system of a WTO Member.[42] Regarding the terms "to secure compliance", the Appellate Body explained that they speak to "the types of measures that a WTO Member can seek to justify under Article XX(d)" and "relate to the design of the measures sought to be justified."[43]

49. Decree No. 456 seeks to reduce the risk of imports of apparel and footwear being used by criminal groups to launder assets. In this respect, Decree No. 456 seeks to secure compliance with Colombian laws and regulations against money laundering and the financing of other criminal activities. As was explained earlier, pursuant to Article 323 of the Colombian Criminal Code, money laundering is a criminal activity punishable by imprisonment in a detention facility. The activity includes any conduct involving the acquisition, protection, investment, transportation, processing, safekeeping or administration of goods that originate, directly or indirectly, in activities involving extortion, unlawful acquisition of wealth, kidnapping for ransom, rebellion, arms trafficking, crimes against the financial system and general government, or relating to the proceeds of a criminal conspiracy linked to the trafficking of toxic drugs, narcotics or psychotropic substances, or which seek to legalize or give a cloak of legality to goods derived from such activities or to conceal or disguise the true nature, origin, location, destination or movement of such goods or the rights relating thereto, or which involve any other act to conceal or disguise their illegal origin.

50. The financing of terrorism is another form of conduct punishable by imprisonment. The administration of money or goods relating to terrorist activities is considered an offence under Article 345 of the Colombian Criminal Code.

51. The above-mentioned legislation against money laundering and the financing of terrorism is not in itself inconsistent with the provisions of the GATT 1994. Moreover, it secures compliance with international commitments undertaken by Colombia and other members of the international community. It should also be recalled that the Appellate Body has emphasized that a responding Member's law will be treated as WTO-consistent until proven otherwise.[44]

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[41] Panel Report, *US - Gambling*, para. 6.492 (referring to Appellate Body Report, *EC – Asbestos*, para. 172).

[42] Appellate Body Report, *Mexico - Taxes on Soft Drinks*, para. 69.

[43] Appellate Body Report, *Mexico - Taxes on Soft Drinks*, para. 72.

[44] Appellate Body Report, *US – Carbon Steel*, para. 157. See also Appellate Body Report, *Dominican Republic - Import and Sale of Cigarettes*, para. 111, Appellate Body Report, *US - Gambling*, para. 138; see also Panel Report, *Colombia – Ports of Entry*, paras. 7.531-7.532.

52. It has been demonstrated that criminal groups import apparel and footwear at artificially low prices in order to launder drug trafficking money and fund criminal activities. The Office of the Public Prosecutor has conducted a significant number of investigations into money laundering activities where smuggling through imports and exports was the *modus operandi*.[45] There are also signs that imports of apparel and footwear have been used for criminal purposes, as explained in Section II.C.

53. Decree No. 456 is designed to secure compliance with Colombian anti-money laundering legislation, as it discourages criminal groups from using imports of apparel and footwear to launder money. This is because the compound tariff applied through Decree No. 456 minimizes the incentive for criminal groups to import apparel and footwear at artificially low prices, thus reducing the margin between the price declared for the goods and the domestic selling price. Reducing the margin reduces the amount of money that can be laundered through each import transaction.

54. When goods are imported at artificially low prices, the margin between the declared price and the selling price is also artificial. It does not reflect the real difference between the cost of the goods for the importer and the domestic selling price. This artificially high profit margin enables importers to legalize their illegal earnings in the form of high profits, which do not correspond to the exercise of any legal economic activity. If the artificial profit margin declared by criminal groups is reduced, the amount of money these groups can launder through each operation decreases. Reducing the amount of money that can be laundered through each operation increases the costs incurred by criminal groups in laundering operations and lowers the incentive for using imports of apparel and footwear for money laundering purposes.

55. The Appellate Body has made it clear that "a measure can be said to be designed 'to secure compliance' even if the measure cannot be guaranteed to achieve its result with absolute certainty".[46] Colombia is therefore not required to demonstrate that Decree No. 456 has secured compliance with Colombian legislation on money laundering and the financing of terrorism. Nevertheless, imports show that Decree No. 456 has had an impact on the unit price of articles of apparel and footwear. The unit price of imports of articles of apparel rose from an average of US$12.6 per kilo for the period January 2011-March 2013 to US$23.5 for the period April 2013-June 2014 - an increase of 86.7%. For footwear, the average price was US$7.2 per pair from January 2011 to March 2013, while for the period April 2013-June 2014, the average price rose to US$11.9 per pair, an increase of 65.3%.

56. This change in the price per kilo for imported apparel and the price per pair for imported footwear supports the conclusion that Decree No. 456 discourages criminal groups from using imports of these products at artificially low prices to launder money and generate illicit resources, and that, consequently, Decree No. 456 is an instrument designed to secure compliance with Colombian laws and regulations on money laundering.

57. As regards "necessity", the interests and values at stake in this case are vital and important in the highest degree, given that money laundering is a key link in the drug trafficking chain and enables criminal groups to fund their operations, purchase weapons, pay for murders and kidnappings, bribe public officials, and carry out countless other criminal activities. Decree No. 456 discourages the use of imports of made-up articles and footwear for money laundering purposes or for generating resources to fund terrorist activities. Decree No. 456 is therefore appropriate to its objective. Import trends show the effectiveness of the measure. Decree No. 456 has led to an increase in the unit price of imports, thereby reducing the artificially high profit margin that in turn encourages the use of imports of apparel and footwear for money laundering purposes or for generating resources to fund terrorism.

58. Lastly, Decree No. 456 does not impose quantitative limits on imports of apparel and footwear, and is carefully calibrated to ensure that the "legislative ceiling" applies to imports with a low probability of being used to launder assets. The trade-restrictive effect of Decree No. 456 is moderate for importers operating under market conditions.

[45] Observatorio de Drogas de Colombia, "El Problema de las Drogas en Colombia – Acciones y Resultados 2011-2013", p. 145 (Exhibit COL-27).

[46] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 74. (emphasis added; footnotes omitted).

59. For the above-mentioned reasons, Decree No. 456 is a measure necessary to secure compliance with Colombian laws and regulations on money laundering which are not inconsistent with the provisions of the GATT 1994 within the meaning of Article XX(d).

C. Panama has not demonstrated the existence of alternative measures reasonably available to Colombia

60. It falls to Panama, as the complainant in this dispute, to identify alternative measures to Decree No. 456 which meet the objective of combating money laundering through imports at artificially low prices. However, it is not sufficient for Panama to list alternative measures. Panama has the burden of proving that the alternative measures: (i) are less restrictive; (ii) achieve the same level of protection as Decree No. 456; and (iii) are reasonably available to Colombia.[47]

61. The suggestion that Colombia could address the problem of under-invoicing by using the Agreement on Customs Valuation ignores the magnitude of the problem and assumes that the Colombian customs authorities have the same capacity and level of sophistication as the customs authorities of developed countries. While the Customs Valuation Agreement permits customs to question individual imports, the instruments it establishes were defined taking into account isolated cases of customs fraud. The Agreement does not provide effective tools to address such a widespread, massive and serious problem as that faced by Colombia. In this case, the Colombian customs authorities are facing transnational criminal groups that have enormous financial resources at their disposal, thanks to drug trafficking, and operate on a large scale. It is implausible to suggest that the Colombian customs authorities are able, or have the resources, to address the problem by vetting import transactions on a case-by-case basis. The application of the Customs Valuation Agreement would not achieve the same level of protection as Decree No. 456 and would not necessarily be less restrictive. Furthermore, it would not be appropriate to consider that Colombia, as a developing country, and one with other priorities also requiring State resources, could in the short term have sufficient customs capacity to address this problem effectively.

D. Decree No. 456 is consistent with the introductory paragraph of Article XX of the GATT 1994

62. Decree No. 456 applies to all imports of apparel and footwear, except those from countries with which Colombia has signed a free trade agreement, an exemption justified under Article XXIV of the GATT 1994.

63. In addition to being justified under Article XXIV, the exemption for imports from countries with which Colombia has a free trade agreement is "rationally related to"[48] the policy objective pursued by Decree No. 456, namely, the fight against money laundering. In its fight against money laundering and, in particular, the use of imports to launder assets, Colombia has sought to enhance cooperation with the customs authorities of its trading partners and has adopted customs cooperation and information exchange mechanisms with a number of them. As shown in the table in Exhibit COL-28, Colombia's customs cooperation and information exchange mechanisms exist mainly within the framework of free trade agreements signed since 2004.

64. For these reasons, the exemption for imports from countries with which Colombia has a free trade agreement is "rationally related to" the policy objective pursued by Decree No. 456, namely, the fight against money laundering. Therefore, the exemption under Decree No. 456 for imports from countries with which Colombia has signed a free trade agreement cannot be considered as arbitrary or unjustifiable discrimination or as a disguised restriction on trade within the meaning of the introductory paragraph of Article XX of the GATT 1994.

65. Colombia and Panama have signed a free trade agreement containing provisions on customs cooperation and the exchange of information. When the agreement enters into force, the provisions of the above-mentioned Decree will not be applied to imports originating in Panama. In the meantime, Colombia has tried to negotiate a customs cooperation and information exchange agreement with Panama, as yet to no avail.

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[47] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156. See also Appellate Body Report, *US - Gambling*, para. 309.

[48] Appellate Body Report, *EC — Seal Products*, para. 5.306.

V. Conclusion

66. In conclusion, Colombia requests that the Panel reject all of Panama's claims.

67. Even if - for the sake of discussion, and contrary to what has been demonstrated - the Panel were to determine that Decree No. 456 is inconsistent with Article II:1(b), first sentence, of the GATT 1994, it would be inappropriate for it to rule on Article II:1(a). Panama's complaint under Article II:1(a) is based exclusively on the assumption that there will be a determination of inconsistency with Article II:1(b), first sentence. Panama has not explained why an additional finding under Article II:1(a) would contribute to the prompt settlement of the dispute. For this reason, Colombia considers that the Panel should refrain from making a finding under Article II:1(a) of the GATT 1994.

68. In addition, the Panel should decline Panama's invitation to make a suggestion on the way in which Colombia might implement the recommendation to bring the measure into conformity under Article 19.1 of the DSU. As the Appellate Body has noted on a number of occasions, "Articles 19.1 and 21.3 of the DSU suggest that alternative means of implementation may exist and that the choice belongs, in principle, to the implementing Member".[49] The Appellate Body has also clarified that panels are not obliged to make a suggestion under Article 19.1 of the DSU. Indeed, Article 19.1 provides for discretionary authority.[50] In any event, as determined by the Appellate Body in *EC – Bananas III (Article 21.5 - Ecuador II) / EC - Bananas III (Article 21.5 - US)*, suggestions made under Article 19.1 are not binding. Given that it falls to the responding Member to choose the way in which it will implement the DSB's recommendations and rulings, that it is not mandatory for a panel to make a suggestion, and that even when a panel chooses to make a suggestion, the suggestion is not binding, it would be of no value for the Panel to make a suggestion in this case under Article 19.1 of the DSU.

[49] Appellate Body Report, *US — Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 184.

[50] Ibid., para. 183.

ANNEX B-4

SECOND PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF COLOMBIA

I. Introduction

1. Decree No. 456 is a measure designed to combat money laundering. The use of imports of apparel and footwear at artificially low prices to launder the illicit funds of groups operating outside the law is extensively documented by the Colombian and international authorities[1], such as the Financial Action Task Force (FATF), among others. The FATF has also established that the risk of commercial operations being carried out for illicit purposes is higher when the goods transit through free zones, owing to the more lenient controls exercised in those zones.[2]

2. Panama appears to expect the Colombian Government to remain idle while criminal groups use these imports to introduce illicit funds into the Colombian economy, funds which are then used to finance illegal activities. On the one hand, Panama attempts to distinguish import operations from laundering operations. There is no such distinction. A money laundering operation is a chain of illicit acts which covers the entire process of importation of goods. The objective of the import operation is to launder assets, and the achievement of that objective depends on the cooperation of the exporter, who takes advantage of the lack of controls in the country of export.

3. Panama also attempts to convince the Panel that WTO rules prevent Members from adopting measures against illegal trade. Panama's position is that the Colombian authorities should stand idly by, on pain of infringing WTO rules, while criminal groups introduce millions of dollars into the Colombian economy by means of imports of clothing and footwear; the foregoing without regard to the fact that those same funds will be used subsequently by the groups in question to finance their criminal activities. Colombia cannot accept such a rigid interpretation of WTO rules. Those rules do not protect illicit trade. The tariff commitments assumed by Colombia and the other WTO Members are not intended to facilitate the operations of transnational criminal groups, for which reason such operations are not sheltered by the obligations arising from Article II of the GATT 1994, and it is clearly recognized that Members have a sovereign right to adopt measures to combat illicit trade under Articles XX(a) and XX(d) of the GATT.

4. Otherwise, the only option available to Members like Colombia, which face serious problems of illicit trade, would be to invoke the national security clause provided for in Article XXI of the GATT 1994, with the attendant difficulties that would entail. It should be recalled that illicit trade in the Colombian context is a national security problem. The funds laundered through imports of apparel and footwear are used to finance murders, kidnappings, bribery and other criminal activities and fuel the internal conflict that Colombia has suffered for more than 60 years.

5. Reciprocity and cooperation are central elements of the multilateral trading system. The liberalization of trade barriers requires that commercial operations are not used to subvert the criminal laws and essential values of the importing country. Although much of the burden of supervision and control rests on the importing country, it cannot depend exclusively on that country. There must be cooperation and reciprocity in the exercise of control and supervision between the importing country and the exporting country. Exporting countries must also exercise effective control and supervision to prevent the use of commercial operations for illicit purposes.

6. In view of the foregoing, Colombia has constantly sought to strengthen international cooperation in its fight against money laundering. In the case of money laundering via foreign trade transactions, Colombia has sought to strengthen the mechanisms of customs cooperation and exchange of information with its trading partners. However, the introduction and effective implementation of these mechanisms require the collaboration and consent of the other party. Following arduous negotiations, Colombia and Panama concluded a free trade agreement at the end of 2013 which includes a mechanism for customs cooperation and exchange of information. However, Panama has not carried out the legislative procedures for bringing the agreement into

[1] Exhibits COL-10, COL-11 and COL-15.
[2] Exhibit COL-12.

force and recently announced that it will not submit the agreement for legislative approval.[3] Given the impossibility of implementing this cooperation mechanism, Colombia has no choice but to continue applying Decree No. 456 in order to combat money laundering through imports of clothing and footwear.

II. The WTO must provide its Members with instruments to combat illicit trade

7. As stated in the WTO Agreement, the objectives of trade liberalization include raising standards of living, ensuring full employment and increasing real income. Colombia is convinced that trade liberalization through the WTO Agreements has contributed to global economic growth and poverty reduction. For this reason, Colombia firmly supports the WTO and its liberalization initiatives.

8. Unfortunately, international trade is not always used for the purposes that led to the establishment of the WTO. The reduction of trade barriers and customs controls also facilitates the use of foreign trade operations, by criminal groups, for illicit purposes. These criminal groups traffic drugs, arms, counterfeit products and endangered animal species. They also use foreign trade operations to launder assets and finance their criminal activities. The growing use of trade for illicit purposes has been documented by international bodies such as the Organization for Economic Cooperation and Development[4], the FATF[5] and the World Customs Organization.[6] This, then, is the reality, and neither the WTO nor its Members can continue ignoring it.

9. Illicit trade is a cross-border problem. Illicit trade operations, being international trade operations, necessarily take place in at least two jurisdictions and frequently involve more countries. On the one side are the country of origin of the goods and the country of final destination, but on the other there may also be one or more countries through which the goods transit before reaching the country of destination. There may be some who believe that the responsibility for control lies exclusively with the country of final destination. However, this is neither efficient nor effective, much less equitable. In the area of cross-border operations, the most effective way to combat money laundering is through international cooperation.

10. The need to combat the phenomenon through international cooperation is clearly illustrated in this case. Panama and some third parties appear to believe that the problem of the use of apparel and footwear imports at artificially low prices to launder illicit funds is an exclusively Colombian problem. How can it be an exclusively Colombian problem when: (i) the illicit money originates in a third country where the narcotic drugs are consumed; (ii) the money laundering operation is only possible with the complicity of the exporter who provides the importer with a fictitious invoice; and (iii) the Colombian authority necessarily requires the cooperation of the exporting country's authorities to verify the information declared by the importer? Nor should it be forgotten that these are international criminal groups which not only operate illegally in Colombia but also commit criminal activities in other countries, so that the need for cooperation is all the more imperative.

11. Given the transnational nature of the problem, and taking account of the fact that cooperation is the most effective mechanism for dealing with it, the WTO and its agreements should provide instruments for joint action to combat illicit trade in all its aspects. Failing this, the WTO rules cannot prevent its Members from adopting measures to address this problem, and there can be no question of these rules being interpreted in such a way as to protect illicit trade activities.

12. As was explained in its first written submission, Colombia considers that the GATT 1994 permits Members to adopt measures such as Decree No. 456 to combat illicit trade. The Colombian position is that, first of all, the benefits of Article II of the GATT 1994 do not extend to illicit trade and that, secondly, even if it is determined that a measure taken against illicit trade is at first sight inconsistent with the provisions of that article, the measure in question is covered by the general exceptions provided for in subparagraphs (a) and (d) of Article XX of the GATT 1994.

[3] Exhibit COL-39.
[4] Exhibit COL-09.
[5] Exhibits COL-11 and COL-12.
[6] Exhibit COL-08.

III. Panama has not demonstrated that Decree No. 456 is inconsistent with Article II of the GATT 1994

A. Panama has not met its obligation to establish a *prima facie* case

13. As the complaining country, Panama bears the burden of demonstrating that Decree No. 456 is inconsistent with Articles II:1(a) and II:1(b), first sentence, of the GATT 1994.[7] Although it has presented its written submissions, taken part in the hearings and submitted responses to the Panel's written questions, Panama has not met this burden.

14. As Panama acknowledges[8], the Appellate Body has ruled that Members have the power to apply specific tariffs, even if they have bound *ad valorem* tariffs in their schedules of concessions.[9] Therefore, the application of specific tariffs under Decree No. 456 is not, as such, inconsistent with Article II:1(b), first sentence, of the GATT 1994.

15. Moreover, the Appellate Body has stated that Members which have bound *ad valorem* tariff levels may utilize a "legislative ceiling" as a mechanism to prevent a specific tariff from infringing its bound tariff levels.[10] As Colombia has explained on previous occasions[11], Decree No. 456 incorporates a legislative ceiling which prevents the compound tariff from exceeding its bound levels, and Decree No. 456 therefore complies with the provisions of Article II:1(b). Indeed, Panama recognizes that Decree No. 456 does not result in tariff levels higher than the bound rates when imports are introduced at prices higher than US$10 per gross kilo in the case of apparel and US$7 per pair in the case of footwear.[12]

16. At this stage in the proceedings, Panama has submitted no evidence whatsoever to demonstrate that inputs of apparel and footwear are being introduced at prices which infringe Colombia's tariff bindings. The only evidence produced by Panama in its first written submission, in an attempt to meet its burden of proof, concerned some hypothetical examples. However, Colombia demonstrated in its first written submission that the examples submitted by Panama exhibit serious deficiencies and could not support Panama's claim.[13] Panama failed to reply to the questions raised by Colombia regarding the examples. Rather, in its oral statement, Panama abandons the examples, recognizing that they "do not in any way alter the relevant facts"[14], so that Panama itself admits that the examples have no probative value.[15]

17. Panama claims that it is a "definite, undisputed and confirmed" fact that Decree No. 456 results in the application of tariffs above the bound level.[16] The only "definite, undisputed and confirmed" fact is that Panama bears the burden of proving that Decree No. 456 has resulted in tariffs higher than the levels bound by Colombia. Panama has not met this burden and a mere assertion, regardless of the number of accompanying adjectives, is not sufficient to meet this burden. Colombia recalls that in *Argentina – Textiles and Apparel* the Panel received from the complainant, the United States, various real examples and rather more than 95 pages of customs documents demonstrating that the tariff binding was being systematically violated by Argentina.[17] Both the Panel and the Appellate Body based their conclusions and recommendations on these probative elements and not exclusively on hypothesis, as is being attempted in this case.

18. Panama appears finally to have accepted, in its responses to the Panel's questions, that it is required to provide evidence to demonstrate that Decree No. 456 has resulted in tariffs that exceed the bound levels. Thus, Panama submits two import declarations as Exhibits PAN-18 and PAN-19. Neither of the two documents has probative value for the reasons set forth below.

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[7] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[8] Panama's first written submission, para. 1.4.
[9] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 54.
[10] Ibid. para. 46.
[11] Colombia's first written submission, paras. 35 and 64; and oral statement at the first meeting with the Panel, paras. 37-44.
[12] Panama's first written submission, paras. 4.22 and 4.37.
[13] Colombia's first written submission, paras. 70-72.
[14] Panama's opening statement at the first meeting with the Panel, para. 1.16.
[15] Ibid.
[16] Panama's oral statement at the first meeting with the Panel, para. 1.16.
[17] Panel Report, *Argentina – Textiles and Apparel*, para 3.48.

19. The first document, PAN-18, is illegible, which prevents Colombia from collating and comparing the information contained in the declaration. This in itself is sufficient to discredit the document. In addition, however, Panama has erased the serial number and the information identifying the importer in both documents. Without the form number and the identification of the importer, it is impossible for Colombia to search for the two declarations in its own registers in order to verify the authenticity of the documents and of the information contained therein. Nor can Colombia make the necessary enquiries to assess the credibility of the evidence presented by Panama. Given the impossibility of checking the authenticity of the documents and the other defects identified, the Panel cannot accord probative value to Exhibits PAN-18 and PAN-19.

20. Apart from lacking probative value, if the Panel bases its findings on Exhibits PAN-18 and PAN-19, it would be violating Colombia's due process rights. The Appellate Body has explained that "the obligation to afford due process is 'inherent in the WTO dispute settlement system'" and has emphasized that "[d]ue process protection guarantees that the proceedings are conducted with fairness and impartiality, and that one party is not unfairly disadvantaged with respect to other parties in a dispute".[18] The right to contradict evidence is a central element of due process. The Appellate Body accordingly held that "a panel must also be careful to observe due process, which entails providing the parties adequate opportunity to respond to the evidence submitted".[19] It also clarified that this is not a mere formality, but that "that opportunity must be meaningful in terms of that party's ability to defend itself adequately".[20] Colombia has not therefore had a "meaningful opportunity" to respond to this evidence and defend itself adequately. This being the case, the Panel could not consider Exhibits PAN-18 and PAN-19 without infringing Colombia's due process rights.

21. Colombia recalls that the proceedings before this Panel are confidential, as stipulated in paragraph 2 of the Working Procedures adopted by this Panel. Moreover, if Panama had so wished, it would have had the opportunity to ask the Panel to adopt additional procedures to provide it with additional protection for Exhibits PAN-18 and PAN-19.[21] Thus, any requirement to maintain the confidentiality of information does not justify the submission of strike-through versions of Exhibits PAN-18 and PAN-19. Furthermore, Panama's interest in maintaining the confidentiality of information cannot take precedence over Colombia's due process rights.

22. In any event, and taking account of the fact that Decree No. 456 entered into force on 31 March 2014[22], Exhibit PAN-18 appears on its face to relate to goods that entered Colombia in 2013, that is, before Decree No. 456 came into force. The foregoing deprives Exhibit PAN-18 of probative value.

23. Exhibit PAN-19, for its part, illustrates the problems that arise in connection with imports at artificially low prices. As far as can be ascertained, the merchandise declared in Exhibit PAN-19 was purchased on 26 September 2013 and shipped on 3 October 2013. Importation into Colombia did not take place until 12 November 2014, that is, more than a year later. This already creates doubts about the merchandise. Moreover, the declaration appears to refer to the importation of 84 pairs of shoes which were somehow packed in 35 packages. This means that 2.4 pairs of shoes would have been packed in each package, which gives rise to additional doubts. The declared freight charge is only US$34.39, which is low considering that the merchandise was shipped to Colombia from China. These points also highlight the importance to Colombia of being able to verify the authenticity of the document and investigate the credibility of the information it contains, for which reason the declaration number, the name of the importer and the supporting invoice are required, none of which was presented by Panama.

24. In short, Panama has provided no evidence whatsoever to demonstrate that Decree No. 456 is in breach of Colombia's tariff bindings. Given the absence of evidence submitted by Panama, the Panel must conclude that Panama has not established a *prima facie* case, having failed to meet its

[18] Appellate Body Reports, *US / Canada – Continued Suspension*, para. 433 (citing Appellate Body Report, *Chile – Price Band System*, para. 176).
[19] Appellate Body Report, *Australia – Salmon*, para. 272.
[20] Appellate Body Report, *US – Gambling*, para. 270.
[21] See Working Procedures, para. 3.
[22] Exhibit COL-17.

burden of demonstrating that Decree No. 456 is inconsistent with Article II:1(b), first sentence, of the GATT 1994.[23]

25. Panama also alleges that Decree No. 456 is inconsistent with Article II:1(a) of the GATT 1994. However, this claim is based exclusively on the assumption that Decree No. 456 violates Article II:1(b), first sentence. Therefore, in disregarding Panama's claim under Article II:1(b), first sentence, the Panel would necessarily have to disregard Panama's claim under Article II:1(a).[24]

B. Even if the Panel determines that Panama has made a *prima facie* case, Colombia has adduced evidence and argument sufficient to establish that the prices below the legislative ceiling established in Decree No. 456 are artificially low and that imports of apparel and footwear at those prices are used to launder assets and are therefore not covered by Article II of the GATT 1994

26. Colombia has submitted evidence that shows conclusively how criminal groups use imports of apparel and footwear at artificially low prices to launder money. This evidence includes investigations by international bodies such as the FATF and the OECD.[25] Colombia has also provided the results of investigations of specific cases carried out by the Colombian authorities, in particular the National Customs and Excise Directorate (DIAN) and the Information and Financial Analysis Unit (UIAF).[26] Colombia has also presented evidence from international bodies, showing that imports that come from or transit through free zones, being subject to more lenient controls, are more susceptible to being used for illicit purposes, such as money laundering.[27] Panama has produced no evidence that contradicts the body of evidence presented by Colombia to demonstrate that imports of apparel and footwear at artificially low prices are not used to launder money. On the contrary, Panama acknowledges that there are "criminals behind apparel and footwear import operations".[28]

27. In addition, Colombia has adduced evidence to show that the apparel and footwear prices below the legislative ceilings established in Decree No. 456 are artificially low and do not reflect market conditions. In order to determine the level of the thresholds, the Colombian Government undertook a comparative analysis using benchmarks that reflect national and international market prices. These benchmarks are in all cases higher than the thresholds established in Decree No. 456. The first elements taken were the average import prices recorded between January 2009 and February 2013, i.e. in the four years prior to the issuance of Decree No. 074. In the case of apparel, the average import price was US$56.6 per kilo, which is more than 460% higher than the threshold established in Decree No. 456. In the case of footwear, the average import price was US$24.2 per pair, which is approximately 240% higher than the threshold under Decree No. 456. Another benchmark that was used in the case of apparel was the average producer price for raw materials used in the different stages of production of a made-up article. The average producer price per kilo for a made-up article, using inputs that reflect world prices, is 70% higher than the threshold established in Decree No. 456. A third benchmark analysed by the Colombian Government was the unit import price of two of the largest clothing importers in the Colombian market. These prices are 115% and 210% higher, respectively, than the threshold established in Decree No. 456.

28. In the case of footwear, apart from the average import prices for the period preceding the issuance of Decree No. 456, two additional benchmarks were used. The first additional benchmark was the average import prices recorded in other countries. These prices are situated between 132% and 53% above the threshold established in Decree No. 456. The second additional benchmark used in the case of footwear was the average import price in Colombia of a regional chain of megastores which, by virtue of its size, has considerable bargaining power with its international suppliers. The average import price of that importer is 30% higher than the threshold established in Decree No. 456.

[23] Panel Report, *EU – Footwear (China)*, fn 1400.
[24] Panel Report, *US – Shrimp and Sawblades*, para. 7.8.
[25] Exhibits COL-11 and COL-12.
[26] Exhibit COL-10.
[27] Exhibit COL-12.
[28] Panama's opening oral statement at the first meeting of the Panel, para. 1.13.

29. The foregoing analysis shows that import prices below the thresholds established in Decree No. 456 are not prices that reflect market conditions. If this result is considered in conjunction with the evidence provided by Colombia of the use of imports of clothing and footwear at artificially low prices to launder money, the conclusion reached is that imports of clothing and footwear at prices below the thresholds established in Decree No. 456 are imports at artificially low prices used in operations geared to the purpose of money laundering. It is important to reiterate that, while Colombia has provided a body of evidence to support this conclusion, Panama has provided no evidence to disprove that prices below the thresholds established in Decree No. 456 are prices that reflect market conditions, or to disprove the conclusion that imports at prices below the thresholds are being used to launder money.

30. Article II of the GATT 1994 covers only lawful trade and in no way protects illicit trade.[29] Colombia has also established a presumption that prices below the legislative ceiling provided for in Decree No. 456 are not prices that reflect market conditions, and that imports of apparel and footwear at those prices are for the purpose of money laundering and constitute illicit trade. Therefore, imports of apparel and footwear at prices below the legislative ceiling provided for in Decree No. 456 are not covered by Article II and cannot support a finding of inconsistency with that provision. Consequently, the Panel must disregard Panama's claims under Article II:1(b), first sentence, and Article II:1(a).

IV. Even if a preliminary determination is made that Decree No. 456 is inconsistent with Article II, it would be justified by Article XX

A. Article XX(a) of the GATT 1994

1. Decree No. 456 is a measure adopted or enforced to protect public morals

31. Money laundering is defined as criminal conduct in Colombia by Article 323 of the Colombian Criminal Code. Article 323 prohibits a wide range of forms of conduct and transactions that are considered money laundering, including foreign trade transactions. In the case of Colombia, the fight against money laundering is a central pillar of the National Drug Control Policy.[30] Such is the importance of the fight against this offence in Colombia's security and justice policies that the Government has adopted a National Policy to Combat Money Laundering and Financing of Terrorism.[31] The fight against money laundering has now become a State policy in Colombia, inasmuch as the authorities have realized that better and more substantial results are obtained by weakening the finances of criminals and directly attacking their sources of funding. The fact that it is considered a form of criminal conduct punishable by custodial sentences shows that the prohibition of money laundering forms part of the "standards of right and wrong conduct" adopted by Colombia. Furthermore, the Criminal Code specifically refers to money laundering through foreign trade operations, which demonstrates that the Colombian "standards of right and wrong conduct" specifically include money laundering through foreign trade.

32. Such conduct is also censured by the international community. Under the United Nations Convention against Transnational Organized Crime, to which 147 countries are parties, most of them being WTO Members, States Parties are required to adopt such legislative and other measures as may be necessary to establish as criminal offences the activities described in the preceding paragraph. In other words, the convention requires States Parties to prohibit and enforce criminal sanctions against any person involved in money laundering. Thus, the prohibition of money laundering also forms part of the international community's "standards of right and wrong conduct".

33. Colombia has therefore prescribed that the prohibition of money laundering in general, through foreign trade activities in particular, forms part of the country's "standards of right and wrong conduct". The prohibition of money laundering also forms part of the international community's "standards of right and wrong conduct". As a result, any Colombian measure adopted to combat money laundering must be considered a measure designed to protect "public morals" within the meaning of Article XX(a). It has already been recognized by WTO panels that measures

[29] Colombia's first written submission, paras. 51-62; and opening statement at the first meeting with the Panel, paras. 45-56.

[30] Exhibit COL-06.

[31] Exhibit COL-19.

adopted to combat money laundering and organized crime are measures designed to protect public morals.[32]

34. Panama accepts that a measure to combat money laundering is a measure that can be justified under Article XX(a) of the GATT 1994. In response to a question asked by the Panel, Panama makes it clear that "it is not disputed that problems relating to money laundering 'fall within the scope of public morals'", as indicated by the Appellate Body in *US – Gambling* and that "nor is it disputed that the fight against money laundering serves a social interest that can be characterized as 'vital and important in the highest degree'".[33] Panama also accepts that the issue as to whether interests are vital and important in the highest degree is one that is to be determined by the country applying the measure, in this case Colombia.[34]

35. Given that public morals are directly relevant to highly sensitive issues integral to the sovereignty of Members, panels have acted with a high degree of deference and have refrained from second-guessing a Member that declares that its measure was adopted or enforced to protect public morals. In *China – Publications and Audiovisual Products*, the Panel accepted that the measures were aimed at protecting public morals without examining whether the measures explicitly identified the objective they pursued.[35] The measures in *China – Publications and Audiovisual Products* were measures aimed at controlling the content of books and other imported cultural goods. It would be illogical if the WTO standard applied to reviewing the grounds for such measures were more flexible than that applied to measures designed to combat money laundering, such as Decree No. 456.

36. A similar approach has been adopted in relation to Article XX(b). In *Brazil – Retreaded Tyres* Brazil was not obliged to demonstrate a link between the measure and the declared objective. The Panel accepted the policy objective "declared" by Brazil – to protect human life and health and the environment – despite the European Communities' claim that "the real aim of Brazil's import ban is not the protection of life and health but the protection of Brazil's domestic industry".[36]

37. In accordance with the Panel's guidelines in *Brazil – Retreaded Tyres*, this Panel's analysis must focus on the issue of whether the declared policy objective of a measure is included in the policy category referred to in the relevant subparagraph of Article XX. As was explained above, Colombia has demonstrated that the prohibition of money laundering is a policy objective covered by subparagraph (a) of Article XX. Moreover, as was mentioned earlier, the Panel in *US - Gambling* recognized that the measures adopted to address concerns pertaining to money laundering and organized crime were measures designed to protect public morals.[37] Decree No. 456 pursues similar objectives, for which reason it, too, should be considered as a measure that protects public morals. The problem of organized crime and money laundering is equally or more serious in the case of Colombia than in the case of the United States. It would be inadmissible for the WTO to consider that measures taken against money laundering by the United States are justifiable measures, designed to protect public morals under the general exceptions, whereas the measures adopted by Colombia are not.

38. In any event, Colombia has adduced evidence and argument sufficient to show that Decree No. 456 is a measure to combat money laundering. In the first place, Colombia has demonstrated that criminal groups use imports of apparel and footwear at artificially low prices to launder illicit funds.[38] The use of apparel and footwear at artificially low prices to launder money has been confirmed not only by the competent Colombian authorities, such as the DIAN and UIAF[39], but also by international bodies that have been monitoring the subject, such as the FATF and the OECD.[40] Secondly, Colombia has demonstrated that, owing to the foreign exchange controls exercised in Colombia, laundering depends on the use of declared import prices that are

[32] Panel Report, *US – Gambling*, paras. 6.486-6.487.
[33] Panama's response to Panel question No. 7.
[34] Ibid.
[35] See Appellate Body Report, *China – Publications and Audiovisual Products*, para. 7.766.
[36] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 7.101.
[37] Panel Report, *US – Gambling*, paras. 6.486-6.487.
[38] Colombia's first written submission, paras. 11-24; and opening statement at the first meeting of the Panel, paras. 15-25. Further evidence is provided by the seizures of apparel and footwear. See the table supplied in Colombia's response to Panel question No. 36, para. 88.
[39] Exhibit COL-10.
[40] Exhibits COL-11 and COL-12.

artificially low and therefore fictitious.[41] Otherwise, it is not possible for the importer to open the foreign exchange channel whereby the money can be legalized. Thirdly, Colombia has demonstrated that the design and structure of Decree No. 456 operate as a disincentive to imports of apparel and footwear at artificially low prices.[42] By reducing imports of apparel and footwear at artificially low prices, Decree No. 456 also reduces money laundering.

39. In addition, Colombia has submitted statements by the President of Colombia confirming that the purpose of Decree No. 456 is to combat money laundering through imports of apparel and footwear at artificially low prices. Thus, the President stated that "the mixed tariff that we established has produced very good results and, when it expires in March, we will renew it with the necessary adjustments agreed with the sector, so as to punish imports effected at low prices by way of smuggling and money laundering, but not legal importers".[43] This statement by President Santos makes it clear that the purpose of Decree No. 456 is to combat money laundering. Panama itself has emphasized that the authority for expressing the intention of the State at the highest level of the Colombian institutional hierarchy in official statements "is not in question".[44] As is stated by Panama, it would be inappropriate for this Panel to call "into question" the statements of President Santos regarding the purpose of Decree No. 456.

40. Decree No. 456 was the subject of internal review by the Customs, Tariffs and Foreign Trade Committee ("Triple A Committee") before its adoption. The relevant discussion took place on 23 January 2014. The minutes of that discussion provide additional confirmation that Decree No. 456 was adopted for the purpose of "genuinely punishing imports effected at artificially low prices by way of smuggling to launder money".[45] The statements of President Santos and the minutes of the Triple A Committee not only confirm that Decree No. 456 was adopted for the purpose of combating money laundering. They also directly contradict Panama's claim that money laundering is not mentioned in the internal debate concerning Decree No. 456.[46] Moreover, they directly contradict Panama's claim that the anti-money laundering objective "was conveniently adduced *ex post facto* by Colombia in the specific context of the dispute that concerns us".[47] Both President Santos's statements and the minutes of the Triple A Committee predate the adoption of Decree No. 456, so that the objective cannot, by definition, have been "adduced *ex post facto*".

41. The lack of explicit identification of the objective of the challenged measure does not, in itself, have any probative value for purposes of the analysis required under Article XX of the GATT 1994 or Article XIV of the GATS. Each WTO Member has its own legal system and the content of legal instruments therefore varies from Member to Member. Not all systems of law require that legal instruments include a statement of reasons. A Member cannot therefore be required to identify explicitly the objective of every measure that it seeks to justify under Article XX of the GATT 1994 (or Article XIV of the GATS). The Article XX analysis (and the GATS Article XIV analysis) must respect the differences in the legal systems of Members. Therefore, the lack of explicit identification of the objective has no probative weight whatsoever.

42. In conclusion, Colombia has demonstrated that Decree No. 456 is a measure that protects public morals within the meaning of Article XX(a) of the GATT 1994.

2. Decree No. 456 is a necessary measure

43. Colombia has also presented evidence and argument sufficient to establish that Decree No. 456 is a "necessary" measure for purposes of Article XX(a). Regarding the first factor of the necessity analysis, Colombia has shown that in its case the interests and values at stake in the fight against money laundering are vital and important in the highest degree. Drug trafficking is a criminal phenomenon that has particularly afflicted Colombia. In the Colombian context, drug trafficking has provided financing for terrorist groups and has fuelled a domestic conflict that has

[41] Colombia's closing statement at the first meeting with the Panel, paras. 13-19.
[42] Colombia's opening statement at the first meeting with the Panel, paras. 26-28.
[43] Exhibit COL-35.
[44] Panama's opening statement at the first meeting with the Panel, para. 1.6.
[45] Exhibit COL-34.
[46] Panama's opening statement at the first meeting with the Panel, para. 1.21.
[47] Panama's response to Panel question No. 17.

plagued the country for more than 60 years. The armed conflict has cost the lives of more than 200,000 Colombians.[48]

44. Money laundering is a key link in the drug trafficking chain. Criminal groups use laundering operations to repatriate and disguise the proceeds of foreign drug sales. These are the funds that enable the groups in question to finance their criminal operations, purchase weapons, order killings and kidnappings, and bribe public officials, apart from countless other criminal activities. It must be made clear: anyone participating in foreign trade operations that are used to launder money is helping to finance murders, kidnappings and other criminal activities in Colombia.

45. The importance of the fight against money laundering as a public policy objective for Colombia is clearly reflected in the statements of its most senior officials and in the Government's public policy documents. President Juan Manuel Santos clearly articulated Colombia's commitment to combat drug trafficking in the speech he delivered to the United Nations General Assembly in 2011.[49] The National Development Plan 2010-2014, which is the Government policy blueprint established by the President of the Republic for his period in office, explains that "drug trafficking has become the main source of revenue bolstering" groups outside the law.[50] For this reason, the National Development Plan prioritizes strengthening the role of all State organs to counter the criminal activities specific to each of the facets of the global drug problem, including the control of money laundering.[51] To implement this guideline, the Government has adopted a national anti-drug policy[52] and a national policy against money laundering and financing of terrorism.[53] The adoption of a specific national policy on money laundering reflects the priority given to this topic by the Colombian Government.

46. The particular significance to Colombia and its people of the fight against money laundering is also reflected in the fact that Colombia commemorates the National Day for the Prevention of Money Laundering. This commemoration was held on 29 October of last year. The initiative for a National Day for the Prevention of Money Laundering, which originated in Colombia, has been imitated in other countries of the region. The interest shown by Colombia and Colombian civil society in this matter is explained by the close link between money laundering and the violence that has plagued our country in recent decades.

47. It is vitally important for Colombia, particularly at this time when an end to the internal conflict is within sight, to be able to reduce the power and influence of drug trafficking. For that purpose, Colombia is conducting an all-out campaign against all elements of the drug trafficking chain. This includes actions to curb the capacity of drug traffickers to repatriate and legalize the proceeds of their criminal activities.

48. The second factor that forms part of the necessity analysis is the measure's contribution to the achievement of its objective. Colombia has shown that Decree No. 456 is a measure "apt to make a material contribution"[54] to the fight against money laundering, by preventing the use of one of the mechanisms used by criminal groups to launder money. Colombia has demonstrated, on the basis of evidence from national and international authorities, that criminal groups use imports of apparel and footwear at artificially low prices to launder money. Colombia has also demonstrated that this type of money laundering operation depends on the use of an artificially low price in the import declaration, which opens the foreign exchange channel, and this in turn makes it possible for illicit funds to be legalized. The use of artificially low prices maximizes the amount of money that can be laundered and also reduces the time required to carry out the operation as this creates higher goods turnover.

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[48] *Centro Nacional de Memoria Histórico* (National Centre for Historical Memory), *"Basta Ya! Colombia: Memorias de Guerra y Dignidad: Informe general Grupo de Memoria Histórica"* (Enough Already! Colombia: Memories of War and Dignity: General Report of the Historical Memory Group), 2013, p. 20 (Exhibit COL-01). See also *"Seis millones de victimas deja el conflicto en Colombia"* (Six Million Victims from the Conflict in Colombia), *Revista Semana,* 2 February 2008, viewed at: http://www.semana.com/nacion/articulo/victimas-del-conflicto-armado-en-colombia/376494-3. (Exhibit COL-02)

[49] Exhibit COL-32.

[50] Exhibit COL-33, p. 505.

[51] Exhibit COL-33, p. 506.

[52] Exhibit COL-06.

[53] Exhibit COL-19.

[54] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

49. Colombia has also demonstrated how Decree No. 456 discourages imports of apparel and footwear at artificially low prices on the basis of actual cases.[55] By discouraging such operations, Decree No. 456 prevents the use of imports of apparel and footwear at artificially low prices to launder money. Furthermore, by preventing the use of one of the mechanisms employed by criminal groups to launder money, Decree No. 456 makes a material contribution to the fight against money laundering.

50. Panama has alleged that "even assuming that the money laundering operation described by Colombia might occur in some circumstances", the application of Decree No. 456 "would only reduce the amount of money that can be laundered in each import operation".[56] By accepting that Decree No. 456 would reduce the amount of money that can be laundered in each operation, Panama acknowledges that Decree No. 456 is a measure "apt to make a material contribution" to the fight against money laundering, which is precisely the contribution required under the standard of necessity developed by the Appellate Body and previous panels.

51. Colombia has also provided quantitative evidence to demonstrate the contribution of Decree No. 456. This quantitative evidence shows that Decree Nos. 074 and 456 have considerably reduced the opportunities available to criminal groups to use imports of apparel and footwear at artificially low prices in the business of laundering money or generating financial resources for other criminal activities, as is shown by the pattern of imports.[57] The change in the price per kilo and per pair of imported clothing and footwear is a result of the disincentive to imports at artificially low prices, since during this period there have been no changes in consumer preferences or other variables that might explain the pattern of consumption.

52. The under-invoicing indexes submitted by Colombia are further quantitative evidence of the contribution made by Decree No. 456 to the achievement of its objective.[58] As Colombia has explained, the effect of Decree No. 456 can be observed in the ratio of unit prices for imports originating from China but recorded as being purchased in Panama, to imports originating from China and purchased directly in China. The results of the aforementioned comparison were used to construct a ten-digit under-invoicing index based on the national tariff, which shows the percentage of tariff subheadings originating from China which are purchased more cheaply in Panama than when they are purchased directly from China. The aggregate results show that the under-invoicing index fell after the issuance of Decree Nos. 074 and 456.

53. The analysis of the contribution of Decree No. 456 to the fight against money laundering is broadly speaking similar to the analysis carried out by the Panel and the Appellate Body in *Brazil - Retreaded Tyres*. In a similar way as with the Brazilian measure, Decree No. 456 reduces imports of apparel and footwear at artificially low prices, which in turn contributes to reducing the risks associated with money laundering. Furthermore, as with the Brazilian measure, Decree No. 456 "must be viewed in the broader context of the comprehensive strategy designed and implemented" by Colombia to combat money laundering. Decree No. 456 is a component of the comprehensive strategy implemented by the Colombian Government to combat money laundering and criminal groups. Each component of this strategy contributes to the overall objective and the different components are mutually supportive. If one element is removed, the effectiveness of the other components and of the overall strategy is adversely affected, since the criminal groups simply divert their illicit funds to sectors where they encounter less resistance. This is precisely what would happen if Decree No. 456 were eliminated. In that respect, Decree No. 456 can be characterized as an essential measure.

54. The third and final factor that must be evaluated in the "necessity" analysis is the degree of trade restrictiveness entailed by the measure. In this connection, Colombia has demonstrated that the restrictive effect of Decree No. 456 is moderate.

55. Decree No. 456 establishes neither a prohibition nor a quantitative restriction. Decree No. 456 is therefore less restrictive than measures that have been considered "necessary" in previous cases, such as the measures in *EC - Seal Products*, *Brazil - Retreaded Tyres*,

[55] Colombia's opening statement at the first meeting of the Panel, paras. 26-28.
[56] Panama's response to Panel question No. 39.
[57] Colombia's first written submission, para. 37; and opening statement at the first meeting of the Panel, paras. 29-33; Exhibit COL-30.
[58] Colombia's opening statement at the first meeting of the Panel, paras. 34-36; Exhibit COL-30.

US - Gambling and *EC – Asbestos*. Decree No. 456 is carefully calibrated so as to affect imports more likely to be used for money laundering and not other imports.[59] It should also be noted that the variables that may explain trade flows include the level of economic activity and the real exchange rate. Panama argues that Decree No. 456 has reduced its exports of apparel and footwear to Colombia. However, it provides no evidence to show that the changes in its exports are due to the introduction of Decree No. 456. In short, the aggregate trade effect of Decree No. 456 is moderate, it opens up opportunities for parties importing at market prices and it discourages artificially low-priced imports. Thus, any restrictive effect that Decree No. 456 may have is moderate.

3. No alternative measures are reasonably available to Colombia that would achieve the same level of protection as Decree No. 456 and that are less restrictive

56. Panama has the burden of demonstrating that Colombia has alternative measures available to it that would achieve the same level of protection as Decree No. 456, that they are reasonably available to Colombia and are less restrictive.[60] Panama has also failed to meet this burden in the present dispute.

57. Panama suggested in the first instance that Colombia could make use of "the disciplines contained in the Customs Valuation Agreement".[61] However, Panama submitted no evidence or explanations to show that the application of the disciplines contained in the Customs Valuation Agreement would achieve the same level of protection and that it would be less restrictive. In any event, the application of the Customs Valuation Agreement does not constitute an alternative measure for purposes of the "necessity" analysis. As Colombia has explained[62], the Colombian authorities already apply the disciplines of the Customs Valuation Agreement. Accordingly, the application of the Customs Valuation Agreement and Decision No. 456 are complementary, not substitute measures. Pre-existing measures applied in parallel to the challenged measure 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*.[63] Therefore, this Panel must conclude that the application of the Customs Valuation Agreement is not a measure alternative to Decree No. 456.

58. Even if the application of the Customs Valuation Agreement were an alternative measure - which it is not - it would not be a measure that would achieve the same level of protection as Decree No. 456. Colombia has explained that Decree No. 456 discourages imports of apparel and footwear at artificially low prices, thus closing one of the channels used for money laundering. The application of the Customs Valuation Agreement does not, in the case of Colombia, make it possible to achieve the same level of protection. It is precisely for that reason that the Colombian Government adopted Decree No. 456. The mechanisms envisaged in the Customs Valuation Agreement and the Decision concerning cases where the customs administrations have reasons to doubt the veracity or exactitude of the declared customs value are not commensurate with the problems faced by Colombia, where imports at artificially low prices are directly linked to money laundering and drug trafficking.

59. Although the Customs Valuation Agreement and the above-mentioned Decision permit customs to question individual imports, the instruments they establish were defined in the light of situations separate from customs fraud. The Agreement and the Decision do not provide effective tools to address such a widespread, massive and serious problem as that faced by Colombia. It must not be forgotten that, in this case, the Colombian customs are faced with transnational criminal groups having at their disposal huge financial resources derived from drug trafficking, and which operate on a large scale. The most efficient customs authorities manage to exercise control over approximately 10% of total imports. In the case of Colombia, as footwear and apparel are high-risk goods, the level of customs control is 30% rather than 10%. It is not possible to increase any further the customs controls on footwear and apparel because not only would that

[59] See the analysis presented by Colombia in response to Panel question No. 57, paras. 124-127.

[60] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156. See also Appellate Body Report, *US - Gambling*, para. 309.

[61] Panama's opening statement, para. 1.24.

[62] See Colombia's response to Panel question No. 31, paras. 77-79.

[63] 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.

strain the capacity of the national customs (DIAN), but it would delay all foreign trade operations, generating high costs for the entire national economy, and would run counter to the interests of Member countries in facilitating trade.[64] Colombian customs have neither the capacity nor the resources to tackle the problem by vetting import operations on a case-by-case basis. The Appellate Body has warned that it cannot be considered that a measure is "reasonably available" to the responding Member when "the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties".[65]

60. Another alternative measure proposed by Panama is the application of the Protocol of Procedure for Cooperation and Exchange of Customs Information between Customs Authorities of the Republic of Panama and the Republic of Colombia.[66] As this is an existing measure applied in parallel to Decree No. 456, the Protocol also does not constitute an alternative measure for the purposes of the necessity analysis under Article XX of the GATT 1994.[67] Apart from not being an alternative measure, the Protocol cannot be considered a measure that makes the same contribution to the objective pursued, insofar as it establishes a process leading to uncertain results. In *US - Gambling*, the Appellate Body reversed the Panel's finding in which the latter suggested, as an alternative measure, that the United States should have engaged in consultations with Antigua with a view to arriving at a negotiated settlement. As the Appellate Body explained, "[e]ngaging in consultations with Antigua, with a view to arriving at a negotiated settlement that achieves the same objectives as the challenged United States' measures, was not an appropriate alternative for the Panel to consider because consultations are by definition a process, the results of which are uncertain and therefore not capable of comparison with the measures at issue in this case".[68] In a similar way as with the situation in *US - Gambling*, the Protocol provides for a process for exchange of information and the results of that process are uncertain. Therefore, in accordance with the ruling of the Appellate Body in *US - Gambling*, the application of the Protocol does not constitute an alternative measure comparable with Decree No. 456. Indeed, the results of applying the Protocol show that the latter is not effective and would not, therefore, achieve the same level of protection as Decree No. 456.[69] As is demonstrated in the following table, the Panamanian authorities fail to respond to requests for information within the period provided for in the Protocol:

Year	Total requests	Total requests answered within the time-limits laid down in the Protocol (20 calendar days)	Rate of compliance
2011	484	0	0.00%
2012	305	0	0.00%
2013	300	0	0.00%
2014	47	0	0.00%

Source: DIAN, calculations by the Ministry of Commerce, Industry and Tourism.

61. Finally, Panama suggests that Colombia "could apply the disciplines contained in the Agreement on Preshipment Inspection".[70] The use of preshipment inspection mechanisms is a measure more restrictive than Decree No. 456 and is not more effective. In fact, Colombia applied the preshipment inspection regime up to the year 2000, and scrapped it because it gave rise to corruption and increased the administrative costs of importers, and the information it generated was not representative for resolving such problems as under-invoicing, given the unreliability of inspection agencies, among other problems. The WTO, the WCO and other entities[71] have expressed concerns about the restrictiveness and lack of effectiveness of preshipment inspection mechanisms. For example, a report of the WTO Working Party on Preshipment Inspection explains that "both the governments and traders of many exporter countries have

[64] Colombia's opening statement at the first meeting of the Panel, para. 72.
[65] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156; and Appellate Body Report, *US - Gambling*, para. 308.
[66] Panama's opening statement at the first meeting with the Panel, para. 1.25.
[67] 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.
[68] Appellate Body Report, *US – Gambling*, para. 317.
[69] See also the analysis submitted by Colombia in the response to Panel question No. 65, paras. 151-152.
[70] Panama's response to Panel question No. 67.
[71] G/PSI/WP/W/19 (Exhibit COL-40).

claimed that recourse to PSI has created delays to shipments and incurred additional costs to international trade".[72] The report adds that governments and traders "raised concerns that on occasion PSI companies resorted to arbitrary methods, failed to keep inspection appointments, required additional documentation, demanded confidential business information, and arbitrarily uplifted invoice values".[73] The fact that preshipment inspection mechanisms generate so many obstacles to trade, and the doubts about their effectiveness, have led the WCO to oppose the use of these mechanisms.[74]

62. A consensus currently exists among WTO Members that preshipment inspection is a restrictive and ineffective mechanism. This consensus is reflected in the new Agreement on Trade Facilitation in which the WTO Members have agreed to abandon this mechanism. Colombia would be in breach of its obligations under Articles 10.5.1 and 10.5.2 if it were to introduce a preshipment inspection mechanism as suggested by Panama. Colombia has been a promoter of the Agreement on Trade Facilitation and has undertaken to implement Article 10 as part of its Category A commitments.[75] Colombia has no intention of adopting a measure contrary to its commitments under the Agreement on Trade Facilitation and is surprised that Panama, which is also a party to the Agreement, should suggest that it do so. In short, the application of the Agreement on Preshipment Inspection is not an alternative measure for the purposes of the necessity analysis under Article XX of the GATT 1994, given that it is a more restrictive and less effective measure and is contrary to the Agreement on Trade Facilitation.

63. In view of the foregoing, Panama has failed to demonstrate that Colombia has alternative measures available to it that would achieve the same level of protection as Decree No. 456, that they are reasonably available to Colombia and are less restrictive than the measure under discussion.

4. Conclusion as to "necessity" under Article XX(a) of the GATT 1994

64. In this case, Colombia has shown that the interests and values at stake are vital and important in the highest degree. Colombia has also shown that Decree No. 456 is apt to make a material contribution to the fight against money laundering. Panama itself has acknowledged that Decree No. 456 is a measure "apt to make a material contribution" to the fight against money laundering by reducing the amount of money that can be laundered in each operation. Colombia has also explained that, from the broader standpoint of the comprehensive strategy against money laundering, Decree No. 456 may be characterized as indispensable.[76] Furthermore, Colombia has shown that the restrictive effect of Decree No. 456 is moderate. Finally, Colombia has shown that Panama has failed to identify any alternative measure that would achieve the same level of protection as Decree No. 456, that is reasonably available to Colombia and that is less restrictive. In view of the foregoing, the inescapable conclusion is that Decree No. 456 is a measure necessary to protect public morals within the meaning of Article XX(a) of the GATT 1994.

B. Article XX(d) of the GATT 1994

1. Decree No. 456 is a measure designed to "secure compliance" with laws or regulations which are not inconsistent with the GATT 1994

65. Decree No. 456 is aimed at securing compliance with Colombian laws and regulations against money laundering and the financing of other criminal activities. Money laundering, which is prohibited in Colombia, is punishable by a custodial sentence under Article 323 of the Colombian Criminal Code. The financing of terrorism is also prohibited in Colombia and punishable by imprisonment. Article 345 of the Criminal Code makes it an offence to administer money or goods related to terrorist activities. Apart from prohibition and punishment by imprisonment, Colombia has adopted a series of administrative measures to control certain types of transactions that are likely to be used to launder money and finance criminal activities, in order to prevent their use for those purposes.

[72] G/L/300 (Exhibit COL-41).
[73] Ibid.
[74] Vinod Rege (ed.), Preshipment Inspection: Past Experiences and Future Directions (Commonwealth Secretariat, 2001), p. 21.
[75] WT/PCTF/N/COL/1 (Exhibit COL-42).
[76] Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

66. The Colombian rules against money laundering and financing of terrorism are not in themselves inconsistent with the provisions of the GATT 1994. In addition, these rules comply with international commitments undertaken by Colombia and other countries of the international community. It is also worth recalling that the Appellate Body has emphasized that a responding Member's law will be treated as WTO-consistent until proven otherwise.[77] Panama has not alleged in this dispute that the Colombian rules against money laundering and financing of terrorism are inconsistent with the GATT 1994, nor has it presented evidence to support that position. On the contrary, Panama has accepted that money laundering is an "illicit activity that must be punished with the full weight of the law" and that "if a Member considers it necessary to take measures that might be inconsistent with the GATT to address those matters, it will have at its disposal the mechanisms of GATT Article XX in order to attempt to justify those measures as necessary".[78] In addition, Panama has stated that "any situation of illicit or illegal trade must be dealt with in the context of Article XX of the GATT 1994 (for instance, Article XX(d))".[79]

67. Colombia has demonstrated the manner in which Decree No. 456 operates as a measure whereby compliance with the Colombian regulations against money laundering is secured. Colombia has established that criminal groups use imports of apparel and footwear at artificially low prices to launder illicit money.[80] The use of imports of apparel and footwear at artificially low prices to launder money has been confirmed not only by the competent Colombian authorities, such as the DIAN and UIAF[81], but also by international bodies that have been following this issue, such as the FATF and OECD.[82]

68. In addition, Colombia has shown that, on account of the existence of foreign exchange controls in Colombia, money laundering operations depend on the declaration of artificially low and therefore fictitious import prices.[83] Otherwise, it is not possible for the importer to open the foreign exchange channel whereby the money is to be legalized.

69. Furthermore, Colombia has demonstrated that Decree No. 456 is designed and structured to discourage imports of artificially low-priced apparel and footwear that are used to launder money.[84] By discouraging imports of artificially low-priced apparel and footwear, Decree No. 456 reduces the amount of illicit money entering the Colombian economy and prevents criminal groups from using this mechanism to evade the other controls applied by the Colombian authorities.

70. Colombia has also submitted statements by the President of Colombia confirming that the purpose of Decree No. 456 is to combat money laundering through imports of apparel and footwear at artificially low prices.[85] The statements of President Santos make it clear that the purpose of Decree No. 456 is to combat money laundering. The minutes of the Triple A Committee also confirmed that Decree No. 456 was adopted for the purpose of combating money laundering.[86] The lack of explicit identification of the objective of the challenged measure does not, in itself, have any probative value for the purpose of the analysis required under Article XX of the GATT 1994 or Article XIV of the GATS. Every WTO Member has its own legal system and the content of legal instruments therefore varies from Member to Member. The analysis of Article XX (and of GATS Article XIV) must respect the differences in the legal systems of Members.

[77] Appellate Body Report, *US – Carbon Steel*, para. 157. See also Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 111, and Appellate Body Report, *US – Gambling*, para. 138; see also Panel Report, *Colombia – Ports of Entry*, paras. 7.531-7.532.

[78] Panama's opening statement at the first meeting with the Panel, para. 1.14.

[79] Panama's response to Panel question No. 3.

[80] Colombia's first written submission, paras. 11-24; and opening statement at the first meeting of the Panel, paras. 15-25.

[81] Exhibit COL-10.

[82] Exhibits COL-11 and COL-12.

[83] Colombia's closing statement at the first meeting with the Panel, paras. 13-19.

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

[85] Exhibit COL-35.

[86] Exhibit COL-34.

71. Panama claims that Decree No. 456 is a border measure which has the nature of an indirect tax and that "it fails to understand how an indirect tax can be transformed into a tool for enforcement of a Criminal Code" when "the money laundering problem occurs internally in Colombia, after the imports have crossed the border".[87] Panama's argument ignores the Colombian regulations on money laundering. As Colombia has indicated, Article 323 of the Colombian Criminal Code, which defines the offence of money laundering, is not confined to conduct occurring internally in Colombia.[88] The prohibition under Article 323 covers money laundering through foreign trade operations and through the introduction of goods into the national territory. Moreover, Article 323 increases the penalties in those circumstances. Thus, contrary to what is alleged by Panama[89], there does exist a genuine means-to-end relationship between Decree No. 456 and Articles 323 and 345 of the Colombian Criminal Code.

72. Panama also claims that, in order to comply with subparagraph (a), it must be demonstrated that "the non-existence of the measure in question leads to the commission of violations of national legislation" and that this "means that, in the absence of the compound tariff, there would be a genuine concern about the violation of Articles 323 and 345 of the Criminal Code".[90] The interpretation proposed by Panama is erroneous and contrary to the interpretation of subparagraph (d) developed by the Appellate Body. As was explained by the Appellate Body, "Article XX(d) requires that the measure be *designed* 'to secure compliance with laws or regulations which are not inconsistent with the provisions of' the GATT 1994".[91] The Appellate Body has never required that the absence of the challenged measure should lead to the violation "of laws or regulations" with which it is sought to secure compliance. In fact, the Appellate Body has stated that Article XX(d) does not require that the measure sought to be justified results in securing compliance with absolute certainty.[92] The interpretation proposed by Panama implicitly requires that the challenged measure should secure compliance "with absolute certainty", for which reason it is not consistent with the interpretation of subparagraph (a) developed by the Appellate Body. In any event, Colombia has shown that, in the absence of Decree No. 456, there does exist "a genuine concern about the violation of Articles 323 and 345 of the Criminal Code".[93] Thus, Decree No. 456 complies with Article XX(a) even under the interpretation proposed by Panama.

73. For these reasons, Decree No. 456 is a measure designed to "secure compliance" with laws or regulations that are not in themselves inconsistent with the GATT 1994.

2. Decree No. 456 is a "necessary" measure

74. The "necessity" test under subparagraph (d) proceeds along the same lines as the "necessity" analysis under subparagraph (a), and hinges on the same three factors that must be weighed up by the Panel. For the sake of avoiding repetition, Colombia includes in this section the arguments and evidence developed in Sections IV.A.3 and IV.A.4 concerning the "necessity" analysis under Article XX(a).

C. Decree No. 456 complies with the introductory paragraph of Article XX of the GATT 1994

75. Decree No. 456 applies to all imports of apparel and footwear, except those from countries with which Colombia has signed and brought into force a free trade agreement, an exemption justified under Article XXIV of the GATT 1994.

76. Article XXIV:8 provides that, in order for a free trade area or customs union to be established, customs duties must be eliminated among its Members. Panama has characterized the challenged measure as "ordinary customs duties".[94] In that case, Panama must recognize that the elimination of those customs duties in respect of the countries with which Colombia has

[87] Panama's response to Panel question No. 8.
[88] See Section IV.A.2 above.
[89] Ibid.
[90] Panama's response to Panel question No. 54.
[91] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 79. (Emphasis added by Colombia.)
[92] Ibid.
[93] Panama's response to Panel question No. 54.
[94] Panama's opening statement at the first meeting of the Panel, para. 1.4.

agreements establishing free trade areas or customs unions is explicitly permitted by Article XXIV:5 of the GATT 1994. Something that is explicitly permitted by Article XXIV of the GATT 1994 cannot in turn be prohibited by Article XX of the GATT 1994.

77. Apart from being justified by Article XXIV, the exemption of imports from countries with which Colombia has free trade agreements is "rationally related"[95] to the policy objective pursued by Decree No. 456, that is, to the fight against money laundering. As specified in the table contained in Exhibit COL-28, the mechanisms of customs cooperation and exchange of information available to Colombia have mainly taken shape in the context of the free trade agreements signed since 2004. This is one of the reasons why Decree No. 456 is not applicable to imports from countries with which Colombia has signed free trade agreements.

78. Colombia and Panama have signed a free trade agreement which includes mechanisms for customs cooperation and information exchange. The Panamanian Government has unfortunately decided not to submit the agreement for legislative approval.[96]

79. Although the existing Protocol of Procedure for Cooperation and Exchange of Customs Information between Customs Authorities of the Republic of Panama and the Republic of Colombia refers to the Convention on Cooperation and Mutual Assistance between the Customs Administrations of Latin American, Spain and Portugal (COMALEP), it is equivalent to a memorandum of understanding and, as was shown earlier, its terms have not been complied with. Similarly, the direct settlement mechanism is not binding and offers no effective remedies in cases where cooperation is not extended. Unlike the Protocol, the free trade agreement subjects the Chapter 4 commitments on customs and trade facilitation in Annex 4-A on Customs Cooperation and Mutual Assistance to the dispute settlement mechanism provided for in the Agreement itself, as referred to in Article 21.2 of the Agreement, which is confirmed by Article 15.2 of the aforementioned Annex. The Agreement is also more constructive than the Protocol because it requires the parties to maintain institutions to administer the treaty, in the form of permanent enquiry or liaison points between customs authorities, a committee to administer customs and mutual assistance matters (Sub-Committee on Rules and Procedures of Origin, Trade Facilitation, Technical Cooperation and Mutual Assistance in Customs Matters), made up of the authorities of each customs administration that seeks to serve as a standing body for exchange and dialogue between the authorities of the two countries.

80. For the foregoing reasons, the exemption from Decree No. 456 applied to imports from countries with which Colombia has signed a free trade agreement cannot be considered arbitrary or unjustifiable discrimination, or a disguised restriction on trade, under the introductory paragraph of Article XX of the GATT 1994.

V. CONCLUSION

81. In conclusion, Colombia requests the Panel to reject all of Panama's complaints.

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[95] Appellate Body Report, *EC – Seal Products*, para. 5.306.
[96] Exhibit COL-39.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES[*]

A. Third Party Oral Statement of the United States of America

I. The Scope of Article II:1 of the GATT 1994

1. Article II:1(a) states that Members "shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for" in their respective tariff schedule. Article II:1(b) sets forth a specific type of practice that would also be inconsistent with paragraph (a), providing that the products listed in a Member's Schedule shall on their importation be exempt from "ordinary customs duties in excess of those set forth and provided therein."

2. Colombia asserts that the goods at issue are imported at artificially low prices and are likely being used to launder money and that, consequently, such goods are "illegal" trade not covered by Article II:1, which applies only to *legitimate* "imports" and "commerce." However, the text of Article II:1 does not appear to support such an interpretation. Article II:1 refers to "trade" and "commerce" without qualifying the nature or context of such transactions. Further, whether a particular transaction or type of trade is illegal depends on its status under a Member's domestic laws. Were such status to affect the scope of a Member's WTO obligations, the Article II:1 obligation might apply to trade in a good when destined for one Member's market but not when destined for another's, and a Member's obligation might change depending on whether trade in a good was deemed "illegal" after the commitment was inscribed in the Member's Schedule. Such an outcome is not consistent with the ordinary meaning of Article II:1 and could make a Member's commitments less secure. A Member's characterization of a measure under municipal law is not dispositive of its status under the WTO Agreements, which should be determined in relation to WTO legal concepts, as the Appellate Body has found elsewhere.

II. Requirements of a *Prima Facie* Case under Article II:1(b)

3. Article II:1(b) of the GATT 1994 states that the products listed in a Member's Schedule shall, on their importation, "be exempt from ordinary customs duties in excess of those set forth" in such Schedules. Panama claims that Colombia's measure breaches this article "as such" because, for certain imports, the *ad valorem* equivalent of the compound tariff imposed under Decree 456 will exceed Colombia's tariff bindings. Colombia does not dispute that this will be the case for the categories of imports Panama identifies. Rather, Colombia argues that Panama has not presented a *prima facie* case because Panama relies on hypothetical examples of Decree 456 resulting in tariffs exceeding Colombia's commitments. In Colombia's view, Panama must prove actual instances where Decree 456 resulted in tariffs in excess of Colombia's bindings.

4. The complaining Member has the burden of presenting a *prima facie* case that the measure at issue is inconsistent with the relevant treaty obligation. In the case of an "as such" claim, such as Panama's challenge, the complaining party has the burden of substantiating its claim by "introducing evidence as to the scope and meaning of [the challenged] law" as understood within the domestic legal system of the Member maintaining the measure. This evidence may include the text and operation of the relevant instrument as well as evidence of its application. However, a complainant need not prove that the measure has been applied in a WTO-inconsistent manner in a particular instance; an analysis of the measure may be sufficient. Thus, to satisfy its burden, Panama must show that Decree 456, in certain circumstances, will necessarily impose tariffs in excess of those provided in Colombia's Schedule. It is not necessary for Panama to present examples of actual products that are subject to WTO-inconsistent tariffs due to the challenged measure.

[*] The text was originally submitted in English by the United States.

III. Article XX(a) of the GATT 1994

5. Article XX(a) provides that, subject to the chapeau requirements, the GATT 1994 does not prevent Members from adopting or enforcing any measure that is "necessary to protect public morals." A Member asserting an Article XX(a) defense must show first "that it has adopted or enforced a measure 'to protect public morals.'" Only after this showing is made does a panel inquire whether the measure is "'necessary' to protect such public morals." Colombia asserts that Decree 456 is a measure "to protect public morals" because it is an anti-money laundering measure. Colombia argues that Decree 456 is suitable for achieving its purported objective because, by increasing the unit price of covered imports, it reduces profit margins and thereby reduces the incentives to use of apparel and footwear to launder money.

6. A panel considering a Member's assertion that a measure falls within the scope of Article XX(a) should consider the Member's characterization of the measure's objective, but it is not bound by such characterization. The *EC – Seal Products* panel found the "primary objective" of the measure based on an "examination of the text and legislative history of the [measure], as well as other evidence pertaining to its design, structure and operation." The Appellate Body confirmed this analysis. Colombia has not referred to the text of the measure, 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 is sufficient to show that its objective is reducing or preventing money laundering.

7. There is no "pre-determined threshold of contribution in analysing the necessity of a measure." Rather, this analysis involves determining whether a measure contributes to a covered objective and, if so, whether that contribution is such that the measure is "necessary." Contribution to a covered objective exists when there is "a genuine relationship of ends and means between the objective pursued and the measure at issue." A "necessary" measure is "significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to' [its objective]." Generally, the analysis may also entail consideration of whether a complaining party has identified a reasonably available, less trade-restrictive alternative.

8. Colombia argues that Decree 456 is "suitable for achieving" the objective of preventing money laundering and that it contributes to this objective by increasing the unit price of covered imports, which reduces profit margins and, in turn, reduces incentives to use these products to launder money. Therefore, the panel must analyze 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 the measure has on trade. If a less trade-restrictive alternative is reasonably available, the measure will not be "necessary," and several examples of alternative measures have been suggested that the Panel might evaluate.

IV. Article XX(d) of the GATT 1994

9. To be justified under Article XX(d), a measure must be: (1) "designed to 'secure' compliance with laws or regulations" not inconsistent with the GATT 1994; and (2) "'necessary' to secure such compliance." To "secure compliance" "has been described to mean 'to enforce obligations' rather than 'to ensure the attainment of the objectives of laws and regulations.'"

10. Colombia argues that Decree 456 is designed to reduce the incentives to use clothing and footwear imports to launder money derived from criminal activities and, in that sense, is designed to secure compliance with Colombia's anti-money laundering law. However, it is unclear whether the relationship that Colombia has described between Decree 456 and the anti-money laundering law falls within the scope of to "secure compliance." In the U.S. view, the text of Article XX(d) would not support an interpretation that enforcement measures having any relationship, even if coincidental, with a WTO-consistent measure can be considered "necessary to secur[ing] compliance" with such measure. Rather, necessity under Article XX(d) requires "a genuine relationship of ends and means between the objective pursued and the measure at issue." It is not clear that the arguments and evidence in relation to Decree 456 establish that it is apt to secure such compliance with the anti-money laundering law through its asserted price effects.

B. Responses of the United States To the Panel's Questions for the Third Parties Following the First Panel Meeting

Question 1: The United States pointed out that in the case of "as such" claims, the complaining party has the burden of "introducing evidence as to the scope and meaning of [the challenged] law". The United States asserts that in order to satisfy this burden the complainant does not need to demonstrate that the measure has been applied in a WTO-inconsistent manner, since "an analysis of the measure itself may be sufficient". Please comment on these assertions.

1. A complaining Member raising an "as such" claim has the burden of "introducing evidence as to the scope and meaning of [the challenged measure]," as understood within the legal system of the responding Member, to demonstrate that the measure is inconsistent with a provision of the covered agreements. The scope and meaning of a domestic law instrument is not an issue of WTO law; the instrument needs to be understood for what it means and what effects it has in the Member's domestic legal order. A panel determines as a matter of fact the meaning and effect that legal system would give the instrument in order to determine the action that would result and the consistency of the measure with the covered agreements.

2. The type and extent of evidence that will be required to satisfy this burden of proof will vary from dispute to dispute. In *US – Carbon Steel*, the Appellate Body stated: "Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by 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." The United States understands this statement not to mean that in every case the text of the relevant legal instrument will be sufficient. Rather, it means that, absent contrary argument or evidence, it may be sufficient for a Member to raise a *prima facie* case of the meaning of a domestic legal instrument if its meaning and effect are clear from the text, but where the text supports different meanings, or where its meaning has been contested, it is for the complaining party to present additional evidence supporting its understanding. That evidence would need to be relevant within the legal system of the Member complained against. Where the Member's legal system provides rules for determining the meaning of domestic law, a panel would need to apply those rules to arrive at the meaning that the domestic legal system would provide.

3. Further, it is clear that the focus of the examination in evaluating an "as such" challenge is to ascertain the meaning of the law itself, and not whether any particular instance of application was inconsistent with the provision. Even if a law has been applied in a manner that is inconsistent with a WTO provision, such application would not render the law itself inconsistent with that provision. Rather, a complaining party must demonstrate that the challenged measure will "necessarily" result in WTO-inconsistent application.

4. Thus, the Panel must examine the measure to determine its meaning under Colombian law. If the Panel finds that the law will, in certain circumstances, necessarily impose tariffs in excess of those provided in Colombia's Schedule, that would be sufficient to support a finding that the measure is inconsistent, "as such," with Article II:1 of the GATT 1994.

Question 2: Please comment on the statement by the European Union that neither the under invoicing of goods, nor the fact that the transaction is being used to launder money, necessarily renders the operations illegal, but what may be illegal is the money laundering activity per se.

5. The United States considers that whether the importation of products for purposes of laundering money is illegal under Colombian law is not relevant to whether Decree 456 falls within the scope of Article II:1.

Question 3: Please comment on the statements by the European Union and the United States to the effect that the material scope of what is covered under the GATT 1994 is not circumscribed to what a particular Member would autonomously determine is illegal under its own jurisdiction.

6. Article II:1(b) applies to "products described in Part I of the Schedule relating to any Member" "on their importation" and requires that they be exempt from duties in excess of those provided in that Member's schedule. The text of Article II:1(b) does not support an interpretation

that would limit the scope of the provision based on the circumstances of the import transactions at issue. Similarly, the text of Article II:1(a) indicates that it applies to all "commerce of the other Members" covered by the "appropriate Schedule." Nothing in the text of Article II:1(a) suggests a limitation on the commerce that would be covered, or indicates that the obligation contained in that provision only applies to legal "commerce."

7. Further, the consequences of adopting Colombia's proposed interpretation of Article II:1 would be serious. Under this interpretation, since the legal or illegal status of trade in a particular product would depend on the laws of each Member, the Article II:1 obligation could apply to trade in a good imported from one Member but not from another. Additionally, Members could alter the scope of their WTO obligations by making illegal trade in certain types of products. Under Colombia's interpretation, if a Member made trade in a certain type of product illegal, that restriction would be immune from challenge under the WTO agreements.

Question 4: Colombia refers to Article 31 of the Vienna Convention on the Law of Treaties which states that a treaty shall be interpreted in "good faith". Please explain or comment on the relevance of the argument that, when interpreting the provisions of the GATT 1994, it must be borne in mind that these provisions "were not designed to facilitate criminal activities".

8. The reference to good faith has been interpreted to mean that the purpose of treaty interpretation is to reach the interpretation that reflects the common intent of the parties. In this dispute, the customary rules of interpretation require the Panel to interpret the relevant provisions of the GATT 1994, including Article II:1, with the purpose of ascertaining the common intent of the WTO Members. Such an interpretation would focus on the text of the provision, based on its ordinary meaning, in its context, and in light of the treaty's object and purpose.

Question 5: Please comment on the Philippines' statement that where a Member uses tariff differentiation based on an import price threshold to separate a class of allegedly illegally traded goods from legal ones, that Member would have to show that as a class all items imported below the determined threshold price have "artificially low" prices and are illegally traded.

9. The Philippines' statement is based on the premise that the GATT 1994 does not cover "imports entering at artificially low prices and violat[ing] the rules of the importing country." As explained above, the United States does not agree with this premise and considers that the text of Article II:1 does not support the interpretation that a measure is outside the provision's scope where the measure makes illegal certain transactions. The United States considers that the Philippines' statement is not relevant to whether a measure falls within the scope of Article II:2.

Question 6: Are there situations in which the products subject to Decree No. 456 are imported at prices below the threshold of US$10 per gross kg (apparel) and US$7 per pair (footwear) indicated in the Decree, but have been legitimately traded and not under-invoiced?

10. Theoretically at least, it is possible that goods traded at the prices indicated could be legally traded and not under-invoiced. It is also possible that goods traded as part of a money laundering scheme may be sold at normal or even unusually high prices. The United States does not consider that whether transactions covered by a challenged measure are illegal under the domestic law of the responding Member is relevant to whether the challenged measure falls within the scope of Article II:1 of the GATT 1994. This issue could be relevant, instead, to a panel's consideration of a responding party's defenses under Article XX of the GATT 1994.

Question 7: Regardless of whether or not the measure in dispute is designed to protect public morals and to combat money laundering, is it possible to consider the fight against money laundering to be an objective that is both vital and important for Colombia and that it constitutes an objective that can be included among the policies aimed at protecting public morals?

11. The United States agrees that the objective of combatting money laundering could be among the policy objectives covered by Article XX(a) of the GATT 1994. The questions of it is, in fact, a public moral and, if so, whether a challenged measure is "adopted or enforced" to protect that public moral are questions that a panel must consider on a case-by-case basis.

Question 8: The United States notes that it is unclear whether the relationship that Colombia has described between Decree No. 456 and the anti-money laundering law falls within the scope of to "secure compliance" in Article XX(d). The United States points out that Article XX(d) requires "a genuine relationship of ends and means between the objective pursued and the measure at issue", and that this provision 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 secur[ing] compliance" with such measure. Please comment.

12. The approach that the Appellate Body and previous panels have taken in determining whether a challenged measure meets the Article XX(d) requirements illustrates the type of relationship that should exist between a challenged measure and the WTO-consistent law or regulations with which it is designed to secure compliance. With respect to the first prong, panels have looked to evidence surrounding the enactment and operation of the challenged measure to ascertain whether it was, in fact, designed to secure compliance with a WTO-consistent law or regulation. It is not sufficient for a challenged measure merely to secure compliance with the *objectives* of WTO-consistent laws and regulations. Concerning the second prong, the Appellate Body and panels have considered the extent of a challenged measure's contribution to its objective and whether that contribution is such that the measure can be considered "necessary." The challenged measure must actually make a significant contribution to its objective in order to be considered "necessary."

Question 9: Colombia states that in the case of "imports exempt from tariffs, there is less incentive to establish artificially low prices for the purpose of money laundering". The Philippines, states that importers involved in money laundering could have a greater incentive to supply themselves with products from the countries with which Colombia has a free trade agreement in order to maximize their profits. Please explain or comment on this argument.

13. The United States considers that the issue of whether incentives to establish artificially low prices for the purposes of laundering money are relatively less or greater with respect to countries with which Colombia has a free trade agreement could be relevant to the analysis of whether the challenged measure is applied consistent with the Article XX chapeau.

Question 10: Assuming that the practice of under-invoicing imports can affect a number of WTO Members, please explain or comment on whether, in the case of Colombia, such practices could require the adoption of exceptional measures.

14. To the extent that any "exceptional measures" taken by a Member to address under-invoicing comply with the requirements of Article XX, those measures would not be inconsistent with a Member's obligations under the GATT 1994.

ANNEX C-2

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE PHILIPPINES[*]

1 MEASURE AT ISSUE

1.1. The measure at issue is Colombia's Decree No. 456 of 28 February 2014 (hereafter Decree 456), on the importation of certain textiles, apparel and footwear, which will be in effect until 30 March 2016. This Decree repealed Decree 74/2013, which was originally the measure at issue in Panama's request for the establishment of a panel.[1]

2 CLAIMS

2.1. It appears that it is not disputed that the goods covered by the measure are listed in Colombia's Schedule of Concessions, and that the measure is a customs duty itself.

2.2. What is contested is whether the measure, which provides for a compound tariff, exceeds the bound rates, in contravention of Article II:1(b), Colombia's Schedule of Concessions, and Article II:1(a) of the GATT 1994.

2.3. The findings in *Argentina – Textiles and Apparel* are relevant to a determination of whether or not Colombia's measure exceeds the bound rates. In *Argentina – Textiles and Apparel*, it was ruled that Argentina had not adopted any mechanism of "ceiling" or "cap", which would ensure that the *ad valorem* equivalents of the measure at issue did not exceed the bound *ad valorem* tariffs.[2] This "ceiling" or "cap" translates to a corresponding "floor" value or price for the imported good, below which the imposition of the tariff would result in a breach of the bound rate.

2.4. Given the computations, it appears that Colombia may have breached its bound rates for certain items covered in Decree 456.

2.5. A finding that the compound duties imposed on the subject goods are in excess of those provided in a Member's Schedule of Concessions would result in a finding that the measure is contrary to the first sentence of Article II:1(b) of the GATT 1994.

2.6. A finding that the compound tariff is inconsistent with Article II:1(b), first sentence of the GATT 1994 and Colombia's Schedule of Concessions would also result in a finding of less favorable treatment inconsistent with Article II:1(a) of the GATT 1994, as previously found by the Appellate Body.[3]

3 COUNTER-ARGUMENTS

3.1. Colombia argues that the GATT 1994 cannot be applied to imports valued below the thresholds since these are imports entering at artificially low prices and violate the rules of the importing country.[4]

3.2. The current dispute appears to be the case where, having determined the threshold below which goods are determined to be artificially low-priced (and illicitly financed), a Member uses tariff differentiation to separate a class of allegedly illegally traded goods from legal ones, and to penalize and dissuade the illegal activity by imposing higher duties on this class of goods.

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[*] The text was originally submitted in English by the Philippines.

[1] Panama's request for the establishment of a panel, page 1.

[2] Appellate Body Report, *Argentina - Textiles and Apparel*, para. 54.

[3] As found by the Appellate Body in *Argentina - Textiles and Apparel* and by the Panel in *EC - IT Products*, and as noted by Panama in its first written submission (para. 4.56-4.58).

[4] Colombia's first written submission, para. 62. Colombia asserts that since Article II of the GATT 1994, in accordance with Article 31 of the Vienna Convention on the Law of Treaties of 1969, applies only to legitimate trade, and since foreign trade operations performed in order to launder money or for other illegal purposes could not be considered legitimate imports within the meaning of Article II:1(b) of the GATT 1994, then the GATT 1994 does not apply to the disputed measure. (paras. 51 to 53).

3.3. A Member implementing the diffentiated tariff treatment would have the burden to show that all items below the threshold or import price "floor", as a class, have artificially low prices, and are illegally traded.

3.4. Colombia raised an affirmative defense, similar to the invocation of Article XX of the GATT 1994. As such, the burden of proof to show that all items imported below the determined threshold price have "artificially low" prices and are illegally traded lies with the respondent.[5] Given the nature of the goods and the alleged reason for considering them outside the coverage of the GATT 1994, i.e., the neutral or harmless nature of the goods that are deemed illegitimately traded due to the manner in which they are financed and their use as conduits for illegal activity, it would be difficult to distinguish this class of goods from other similar goods simply by setting an across-the-board "floor" price below which goods are deemed priced in an artificially low manner.[6] The respondent would have to show conclusively that any piece of apparel or pair of shoes is illegally traded simply by falling below a certain threshold price.

3.5. Even if the respondent were to make the case that these goods are to be considered illegally traded, there are concerns regarding the use of higher tariffs on the subject goods as a remedy, in lieu of other available alternatives such as proper customs valuation, confiscation, or perhaps criminal proceedings.[7] If these goods are considered illicit, imposing higher tariffs on them does not appear to be a reasonable response.

3.6. Colombia further argues that even if it were determined that Decree 456 is inconsistent with Article II of the GATT 1994, it is justified under the General Exceptions of Article XX of GATT 1994 as it is necessary to protect public morals, allowed under Article XX(a), and is necessary to secure compliance with Colombian laws and regulations against money laundering, as permitted by Article XX(d).

3.7. On the relevant factors in determining whether a measure is "necessary", it appears that the interests or values that the measure seeks to address, i.e., the fight against money laundering and consequently, organized crime and drug trafficking, are at least as important as values upheld by the Appellate Body in other disputes as meeting one of the factors of the necessity test.[8]

3.8. On the extent of contribution to the achievement of the objectives, an increase in prices *per se* does not necessarily mean a reduction of laundered imports. While a reduction of profit margins may create a disincentive for the use of apparel or footwear imports for money laundering, a causal link must be shown. It should be established that the quantity of money-laundered imports has been reduced, and that the increase in import prices could be directly attributed to the reduction in the quantity of money-laundered imports, and not just by mere correlation. An increase in average prices does not *per se* mean that the imports financed through money laundering have been reduced or prevented from entering Colombia's ports.

3.9. Another factor to consider is the extent to which the compliance measure produces restrictive effects on international commerce. The lack of certainty that only illegitimate imports are affected by the measure, and the figures and assertions on the detrimental trade effects, could mean that legitimately and competitively priced imports may have been affected by the measure.

3.10. If Colombia were able to demonstrate those factors to establish "necessity", the burden would shift to Panama to demonstrate that there are less trade-restrictive measures providing an equivalent contribution to the goal that Colombia could reasonably be expected to employ and are reasonably available.

3.11. Certain alternative measures may be considered, such as: proper customs valuation on a case-by-case basis to address artificially low prices; import licensing regime to weed out alleged perpetrators of illegal activities; pursuit of exchange of customs information and other mechanisms of customs cooperation; or perhaps the confiscation of, or imposition of fines on, the laundered goods.

[5] Philippines' responses to the Panel's questions, para. 1.2.
[6] Philippines' first written submission, para. 4.29.
[7] Philippines' first written submission, para. 4.30
[8] Using the analysis undertaken in *Brazil – Retreaded Tyres* and *Korea – Various Measures on Beef.*

3.12. If the respondent were to establish that the measure is provisionally justified by falling under one of the sub-paragraphs of Article XX, the measure is further appraised under the introductory clauses, or chapeau, of Article XX.

3.13. Colombia's measure, Decree 456, applies to all imports of apparel and footwear, except those from countries with which Colombia has signed a free trade agreement.[9]

3.14. As noted in paragraph 3.11, there may be other direct or more appropriate means to achieve the objective. Furthermore, as noted in paragraph 3.5, imposing higher tariffs on goods that are considered illicit does not appear to be a reasonable response in relation to the issue sought to be addressed. The 'rational relation' to the policy objective is further challenged in this case, where Colombia has undertaken non-tariff measures to address the concern with its FTA partners, i.e., customs cooperation and information exchange. The recourse to customs cooperation and information exchange with FTA partners characterizes the problem sought to be addressed in a different light; rather than a concern that could be resolved through a tariff measure, it is one that could be addressed.

3.15. The rational relation is further questioned when comparing the profit margins from dutiable imports from economies without preferential trade agreements (PTAs) with Colombia against the profit margins from similar duty-free imports from economies with PTAs with Colombia. *Ceteris paribus*, it would appear that an importer could gain greater profit margins by importing duty-free than by merely undervaluing customs values in order to reduce duties.[10] However, even if there might be greater profit margins from duty-free importation, and consequently possibly greater propensity to use economies with PTAs with Colombia as sources of imports, customs monitoring and information exchange programs with these economies are deemed effective measures to achieve Colombia's objective, rather than raising tariffs on apparel and footwear.

4 CONCLUSION

4.1. A finding that the compound tariff embodied in Decree 456 is a customs duty that exceeds Colombia's bound rates for certain apparel, textile and footwear products, results in an inconsistency with Article II:1(b), first sentence of the GATT 1994, Colombia's Schedule of Concessions, and Article II:1(a) of the GATT 1994.

4.2. The measure appears to be aimed at protecting public morals and is intended to ensure compliance with Colombian laws and regulations against money laundering. However, whether the measure meets the requirements of the necessity test for invoking an affirmative defense under Article XX(a) and Article XX(d) of the GATT 1994, particularly the extent of contribution to the achievement of the objective and the degree of restraint on trade, would have to be closely examined. Less trade-restrictive alternative measures appear to be available and may be considered.

4.3. Furthermore, compliance with the chapeau of Article XX of GATT 1994 would have to be examined. The discrimination of treatment between countries with trade agreements with Colombia and those without trade agreements with Colombia does not seem to be rationally related to the policy objective.

[9] Colombia's first written submission, para. 113.
[10] Philippines' responses to the Panel's questions, paras. 2.3 and 2.4.

ANNEX C-3

SUMMARY OF THE ARGUMENTS OF HONDURAS*

Honduras is grateful for this opportunity to state its position on certain aspects of this dispute. We are particularly concerned by the failure to recognize tariff concessions negotiated by Members of this Organization, and the invocation of the public morals exception to justify this non-recognition.

It is critical that the Panel should confirm the validity and enforceability of the tariff concessions granted by Members. Otherwise, all of the efforts of the negotiators in the successive negotiating rounds will have been in vain. For example, the negotiations leading to the Bali Package, in particular the Agreement on Trade Facilitation, would lose their effect and meaning if a Member, after undertaking to fulfil an obligation, could decide unilaterally not to apply the agreement in question to a given segment of its trade. It seems to Honduras that this is what happens in the case of the distinction put forward by Colombia with respect to trade in goods as a standard for applying the GATT. If the Panel were to give any indication that the security of concessions was in doubt, this would transmit a signal to the negotiators and would bring uncertainty to an area that relies on the dispute settlement system to provide support and guarantees rather than to cast doubt.

Secondly, it is a source of concern for Honduras that a clause which is of the utmost importance to the system, namely Article XX(a) of the GATT on public morals, should be invoked in an attempt to justify a simple change of tariff. Honduras has reviewed the text of the measure at issue and fails to see how it relates in any way to public morals. It seems to us that when it comes to the categorization of a matter as a public morality issue, the Panel must consider the specific circumstances of the society of each Member to determine whether the public morals assertion is in keeping with the common values of that jurisdiction, and whether the measure reflects that circumstance.

Honduras respectfully requests the Panel to consider this matter with caution. If a written measure contains no indication that it is addressing a public morals issue, the Panel should not accept an *ex post facto* argument, raised exclusively in the context of a dispute, that the measure relates to public morals. Otherwise, in all of the other disputes, it would be possible to try to justify any type of measure by merely asserting that it was taken to protect public morals in the Member country concerned.

* The Oral Statement of Honduras was used as a summary.

ANNEX C-4

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION[*]

A. The measure at issue

1. The European Union understands that the Decree of the President of the Republic No 456 of 28 of February 2014 (Decree 456/2014) provides for the application of a compound tariff. All products classified in Chapters 61, 62, 63 and 64 of Colombia's Customs Tariff, contained in the Decree of the President of the Republic No. 4297 of 26 December 2011 (Decree 4297/2011), are subject to an *ad valorem* duty of 10%, plus a specific levy (per gross kilo or per pair, as appropriate) which varies depending on the Chapter where the product is classified and the declared price of the good itself at the time of importation.

2. Since products presenting low prices are imposed a more onerous specific duty than those having high prices, the application of the compound tariff has as a consequence that the lower the declared value of the product is, the higher the compound tariff burden becomes.

3. The result of the calculations undertaken by the European Union shows that the application of the compound tariffs appears to result in the collection of tariffs higher than the ones foreseen in Colombia's Schedule of Concessions at least in the following instances: (i) for products classified in Chapters 61, 62 and 63 including products classified under the heading 64.06.10.00.00, when their price is equal to or less than 10 USD per kilo and their consolidated *ad valorem* duty is either 35% or 40%; (ii) for products classified under the heading 63.05.32, when their consolidated *ad valorem* duty is 35% and their price is higher than 10 but lower than 12 USD per kilo; and (iii) for products classified under the heading 64.05.20 when their price is equal or lower than 7 USD per pair and their consolidated *ad valorem* duty is either 35% or 40%. In instances of higher declared customs values, the compound tariffs do not seem to exceed the bound levels foreseen in Colombia's Schedule of Concessions.

B. Panama's claim under Article II:1(b) first sentence of the GATT 1994

4. The European Union notes that when transforming the compound tariffs at issue in their *ad valorem* equivalent, it appears that there are several instances where they would exceed Colombia’s bound levels. As noted by the EU in its response to Question number 1 from the Panel, even assuming that those instances are hypothetical, the design, structure and expected operation of the measure at issue are capable of capturing situations in which Colombia's bound levels would be exceeded. Therefore, it would appear that the measure at issue leads to the imposition of ordinary customs duties in excess of those provided for in Colombia's Schedule of Concessions in some instances.

5. In addition, the European Union further notes that Colombia seeks to create a disincentive against artificially low price imports, which are likely involved in money laundering operations. While admitting that the GATT 1994 provisions were not designed to facilitate criminal activities, the European Union submits that, as stated in its answer to Question number 4 from the Panel, nothing in the GATT 1994 supports the conclusion that measures intended to fight illicit activities are immediately "carved out" from its scope of application. Such conclusion would reduce the GATT 1994 provisions, including the general exceptions, to redundancy or inutility, given that the mere characterisation by a Member of the relevant operation as "illegal" would suffice to justify as permissible an otherwise GATT incompatible measure without resorting to the exemptions embodied in Article XX of the GATT 1994.

6. Consequently, while not taking a definitive position on the facts of this case, the European Union requests the Panel to make an objective assessment of the measure at issue in order to determine, *inter alia*, whether its design and structure show that the compound tariff burden results in the imposition of duties in excess of those contained in Colombia's Schedule of Concessions in some instances.

[*] The text was originally submitted in English by the European Union.

C. Panama's claim under Article II:1(a) of the GATT 1994

7. Article II:1(a) of the GATT 1994 requires WTO Members to provide the other Members a treatment at least as favourable as the one foreseen in their Schedule.

8. In *Argentina- Textiles and Apparel* the Appellate Body stated with regard to the relationship between Articles II:1(a) and Article II:1(b) of the GATT 1994 that "paragraph (b) prohibits a specific kind of practice that will always be inconsistent with paragraph (a)". Thus, whenever an applied tariff exceeds the amount of the binding tariff foreseen in a Member's Schedule and is declared incompatible with the first sentence of the Article II:1(b), such a tariff would also amount to a less favourable treatment within the meaning of Article II:1(a) of the GATT 1994.

9. Should the Panel find that the measure at issue is inconsistent with Article II:1(b) first sentence of the GATT 1994, the European Union considers that the violation of Article II:1(a) of the GATT 1994 would be the natural consequence.

D. Colombia's defence under Article XX of the GATT 1994

1. Article XX(a) of the GATT 1994

10. As noted by the European Union in its response to the Question number 5 from the Panel, in the present case the burden is on Colombia to prove its allegation that the products at issue below a certain threshold are artificially low priced and linked to money laundering associated to drug trafficking and other criminal activities and hence that the measure is justified under Article XX. Furthermore, the defending party has the burden to prove that the measure is necessary to protect public morals, and hence, the duty to prove that the measure actually bears a genuine relationship of ends and means with the objective allegedly pursued of curbing money laundering in Colombia.

11. When determining whether the measure at issue was necessary to achieve its goal, the Panel will have to examine in particular whether there is a sufficient nexus between the measure and the interest protected. It would appear that Decree 456/2014 makes no reference to the purpose of fighting against money laundering. The Panel will also need to examine if the measure at issue makes a material contribution to the alleged objective. This contribution can be assessed as part of and in the context of a wider set of measures which Colombia may be taking. In this respect, the Panel may look into whether Colombia imposes the same requirements on products other than textiles, apparel and footwear, where the money laundering risks may also exist.

12. Finally, the Panel would also have to look at the possible alternative measures which may be WTO consistent or less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued. In *Korea - Various Measures on Beef* the Appellate Body also took into account whether an alternative measure that is not inconsistent with other GATT 1994 provisions exists and is reasonably available.

13. Possible alternatives meeting the requirements of Article XX may be the application of the different methods of customs valuation, in the order prescribed in the Customs Valuation Agreement; the conclusion and effectiveness of an anti-money laundering agreement between Colombia and Panama, or Colombia, Panama and affected importing countries; and the conclusion and effectiveness of a customs cooperation and information exchange agreement between Colombia and Panama, or Colombia, Panama and affected importing countries, containing similar provisions to those Colombia has already in place with other trade partners in the framework of its RTAs, while the provisions of the Agreement on Trade Facilitation may also serve as a model.

14. While the European Union considers that fighting against money laundering could possibly fall under Article XX(a) of the GATT 1994, it leaves open the question as to whether, in the present dispute, Colombia has demonstrated that the measure at issue is in fact necessary to protect public morals concerns related to money laundering.

2. Article XX(d) of the GATT 1994

15. The European Union recalls that it will be up to the Panel, taking into account the facts of the present case, to assess if the measure at issue is necessary to secure compliance with a national law or regulation, which is not in itself incompatible with the GATT 1994.

16. As submitted in its answer to Question number 8 from the Panel, the European Union considers that a clear nexus should exist between the measure in dispute and the law or regulation with which compliance is sought. The intensity of that nexus should be assessed on the facts of each case, taking into account the suitability of the measure for reaching the alleged objective.

17. In the present case the European Union wonders whether Colombia could not have resorted to alternative measures that tackle the problem of deceptive practices more directly and instead considers that the present measure is in fact "necessary". In this regard, the European Union is of the view that there may be other alternatives that may be WTO consistent or less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued.

3. The *chapeau* of Article XX of the GATT 1994

18. The European Union understands that the Colombian measure applies to all imports of textiles, apparel and footwear coming from all countries, with the exception of countries that have signed a preferential trade agreement with Colombia, containing customs cooperation provisions. Accordingly, the European Union is of the view that the Colombian measure would not be seen as discriminatory as long as the difference in treatment is based on objective factors.

19. However, the European Union has doubts about the appropriateness of applying customs duties in excess to those contained in Colombia's Schedule of Concessions to imports of those products based solely on their low declared customs values. The European Union could imagine that there may be situations when there is a genuine low price of importation for some products which is not related to money laundering activities of the criminal groups. However, even in those cases the respective textiles or shoes will be charged the compound tariff as if they were part of the money laundering process.

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