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

### RECOURSE TO ARTICLE 21.5 OF THE DSU BY PANAMA

#### REQUEST FOR THE ESTABLISHMENT OF A PANEL

The following communication, dated 10 May 2017, from the delegation of Panama to the delegation of Colombia and the Chairperson of the Dispute Settlement Body, is circulated in accordance with Article 21.5 of the DSU.

On 22 June 2016, the Dispute Settlement Body (DSB) adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body, in the case *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear (Colombia – Textiles)*.<sup>1</sup> The Panel and the Appellate Body found that Colombia's compound tariff, contained in Decree No. 456/2014<sup>2</sup>, was inconsistent with Article II:1(a) and II:1(b), first sentence, of the General Agreement on Tariffs and Trade 1994 (GATT 1994), since in certain instances it exceeded the bound tariff rates in Colombia's Schedule of Concessions for imports of textiles and footwear classified in Chapters 61, 62, 63 and 64<sup>3</sup> of Colombia's Customs Tariff (Decree No. 4297/2011<sup>4</sup>). Consequently, the DSB recommended that Colombia bring the offending measure into conformity with its obligations under the GATT 1994.<sup>5</sup>

Pursuant to Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), on 8 August 2016 Panama requested that the reasonable period of time for compliance be determined through binding arbitration.<sup>6</sup> During that arbitration, Colombia stated that the implementation process would consist of the joint implementation of tariff measures and anti-money laundering customs measures, to be implemented by issuing "two 'mutually supportive decrees' as part of the implementation process".<sup>7</sup> The Arbitrator appointed in accordance with Article 21.3(c) of the DSU determined that the "reasonable period of time in the present dispute should include the time needed to enact both the tariff measure and the customs measure"<sup>8</sup>, and granted Colombia a "reasonable period of time" for compliance of seven months from the date of adoption of the Panel and Appellate Body reports.<sup>9</sup> The reasonable

<sup>1</sup> Dispute Settlement Body, minutes of the meeting held on 22 June 2016 (WT/DSB/M/380), para. 9.7. See also Action by the Dispute Settlement Body, adoption of the Panel report, as modified by the Appellate Body report, in *Colombia – Textiles* (WT/DS461/10).

<sup>2</sup> Decree of the President of the Republic of Colombia No. 456 of 28 February 2014 "partially amending the Customs Tariff" (Decree No. 456/2014).

<sup>3</sup> Except for heading 64.06, but including tariff line 6406.10.00.00 (uppers).

<sup>4</sup> Decree of the President of the Republic of Colombia No. 4927 of 26 December 2011, "adopting the Customs Tariff and other provisions" (Decree No. 4297/2011).

<sup>5</sup> Appellate Body report, *Colombia – Textiles*, para. 6.12.

<sup>6</sup> Request by Panama for Arbitration Under Article 21.3(c) of the DSU (WT/DS461/11).

<sup>7</sup> Award of the Arbitrator, *Colombia – Textiles*, (Article 21.3(c)), para. 3.34 (referring to Colombia's submission, para. 29) (emphasis added).

<sup>8</sup> Award of the Arbitrator, *Colombia – Textiles*, (Article 21.3(c)), para. 3.42.

<sup>9</sup> Award of the Arbitrator, *Colombia – Textiles*, (Article 21.3(c)), para. 4.1.

period of time for compliance expired on 22 January 2017.<sup>10</sup> Nevertheless, in Panama's view, Colombia has thus far failed to comply with the DSB's recommendations and rulings.

On 2 November 2016, Colombia adopted two decrees that modify the tariff and customs regime for the importation of textiles and footwear: (i) Decree No. 1744 of 2 November 2016 "partially modifying the Customs Tariff" (Decree No. 1744/2016); and (ii) Decree No. 1745 of 2 November 2016 "adopting measures for the prevention and control of customs fraud in connection with imports of apparel and footwear" (Decree No. 1745/2016). The adoption of these two decrees was recommended by the Committee on Customs, Tariffs and Foreign Trade of Colombia at the same session, No. 299, of 7 October 2016.<sup>11</sup> Moreover, both decrees refer expressly to Decree No. 456/2014 containing the compound tariff found to be inconsistent with Colombia's WTO obligations.<sup>12</sup>

Panama is of the opinion that these amendments, far from bringing the measure into conformity with Colombia's WTO obligations, perpetuate the nullification and impairment of benefits accruing to Panama directly or indirectly under the GATT 1994.

On 9 March 2017, Panama requested consultations with Colombia under Article 21.5 and Article 4 of the DSU, Article 19 of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement), and Article XXII of the GATT 1994 with respect to certain implementing measures resulting from the implementation of the DSB's rulings and recommendations in this case.

The consultations took place in Geneva on 28 March 2017. Unfortunately, they failed to resolve the dispute. Consequently, Panama requests the establishment of a panel under Article 21.5 of the DSU.

## **I. MEASURES IN DISPUTE**

### **A. SECURITY FOR RELEASE OF GOODS**

Decree No. 1745/2016 introduces special customs controls for the importation of apparel and footwear classified in Chapters 61, 62 and 64 of Colombia's Customs Tariff when the declared f.o.b. value of such products is less than or equal to the thresholds established in Article 3 of that Decree.<sup>13</sup> No expiry date has been set for Decree No. 1745/2016.

In order to guarantee the payment of such customs duties and penalties as may apply, Article 7 of Decree No. 1745/2016 provides that as a prerequisite for the release of the goods referred to in Article 3 of the Decree, the importer shall furnish security in the form of "a specific bank or insurance guarantee of 200% of the unit 'threshold' price established in [ ] Article [3], multiplied by the quantity imported, for a period of three (3) years ..." (hereinafter the security).

The same article also provides that "[s]hould the obligation to post a guarantee in a valuation dispute coincide with the obligation mentioned in this article, the latter shall prevail and the procedures provided for in the customs legislation governing the approval, control and safekeeping of guarantees shall apply in determining the customs value of the imported goods and the penalty".

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<sup>10</sup> Award of the Arbitrator, *Colombia – Textiles*, (Article 21.3(c)), para. 4.1.

<sup>11</sup> See Recital 7 of the preamble to Decree No. 1745/2016 and Recital 2 of the preamble to Decree No. 1744/2016.

<sup>12</sup> The preamble to Decree No. 1745/2016 points out that "the customs measures set forth in this Decree are applied to ensure continued compliance with the policy objective pursued by the measures contained in Decree 456 of 2014 and the amendments thereto". (Recital 8 of the preamble to Decree No. 1745/2016) (emphasis added). Similarly, the preamble to Decree No. 1744/2016 mentions that "bearing in mind that the implementation period stipulated in Article 5 of Decree 456 of 2014, extended by Decrees 515 of 2016 and 1229 of 2016, expires on 1 November 2016, it is necessary to apply the exception provided for in Article 2, paragraph 2 of Law 1609 of 2013, in order to ensure continued compliance with the policy objective pursued by that measure". (Recital 3 of the preamble to Decree No. 1744/2016) (emphasis added).

<sup>13</sup> Articles 2 and 3 of Decree No. 1745/2016.

Thus, the security has the following characteristics:

- Its purpose is to guarantee the payment of such customs duties and penalties as may apply<sup>14</sup>;
- It applies to imports of apparel and footwear classified in Chapters 61, 62 and 64 of Colombia's Customs Tariff when the declared f.o.b. value of such products is less than or equal to the thresholds established in Article 3 of Decree 1745/2016<sup>15</sup>;
- It consists of a specific bank or insurance guarantee of 200% of the corresponding unit threshold price multiplied by the quantity imported, for a three-year period<sup>16</sup>;
- It prevails in cases where it coincides with the obligation to post a guarantee in a valuation dispute<sup>17</sup>; and
- It enters into force indefinitely as from 2 November 2016.<sup>18</sup>

Panama understands that this measure is contained in the following legislation:

- (i) Decree No. 1745/2016; and
- (ii) Decree No. 4297/2011 of 26 December 2011 as regards the definition of the products covered by the nomenclature of Chapters 61, 62 and 64 of Colombia's Customs Tariff.

#### B. ENTRY RESTRICTED TO SPECIFIC PORTS OF ENTRY

Article 5 of Decree No. 1745/2016 provides that within ten days following the Decree's entry into force, the National Customs and Excise Directorate (DIAN) shall announce the locations that are authorized to import apparel and footwear classified in Chapters 61, 62 and 64 of Colombia's Customs Tariff whose declared f.o.b. price is less than or equal to the thresholds established in Article 3 of the Decree.<sup>19</sup> No expiry date has been set for Decree No. 1745/2016.<sup>20</sup>

A DIAN Draft Resolution<sup>21</sup> states that "the entry and importation of apparel and footwear classified in Chapters 61, 62 and 64 of the Customs Tariff and listed in Article 3 of Decree 1745 of 2 November can only take place through public ports, airports and places of arrival located in the jurisdiction of the Sectional Directorates of Buenaventura, Cartagena and Santa Marta".<sup>22</sup>

Panama understands that this measure is contained in the following legislation:

- (i) Decree No. 1745/2016;
- (ii) Decree No. 4297/2011 of 26 December 2011 as regards the definition of the products covered by the nomenclature of Chapters 61, 62 and 64 of Colombia's Customs Tariff; and

<sup>14</sup> Article 7 of Decree No. 1745/2016.

<sup>15</sup> Articles 2 and 3 of Decree No. 1745/2016.

<sup>16</sup> Article 7 of Decree No. 1745/2016. Note that this article also states that "having provided a general security or not having the obligation to do so shall not exempt the importer from the obligation mentioned herein".

<sup>17</sup> Article 7 of Decree No. 1745/2016.

<sup>18</sup> Article 11 of Decree No. 1745/2016.

<sup>19</sup> Articles 2 and 3 of Decree No. 1745/2016.

<sup>20</sup> Article 11 of Decree No. 1745/2016.

<sup>21</sup> DIAN Draft Resolution "adding a subparagraph to Article 39 of Resolution 4240 of 2000". DIAN Resolution 4240 of 2 June 2000 regulates Decree 2685 of 28 December 1999 "amending the Customs Legislation". Article 39 of Resolution 4240 refers to "restrictions on entry of goods".

<sup>22</sup> See Article 1 of the DIAN Draft Resolution (emphasis added). Although Panama understands that the DIAN did not issue the *final* resolution concerning the locations authorized to import the apparel and footwear in question, the DIAN Draft Resolution confirms that the ports of entry for these goods are to be established. As explained further on, Panama reserves the right to challenge the DIAN's final resolution on this matter as well as any amendments, extensions or additions to this measure.

(iii) The DIAN Draft Resolution.<sup>23</sup>

#### C. CUSTOMS DUTY

Decree No. 1744/2016 introduces a new tariff regime for imports of apparel and footwear classified in Chapters 61, 62 and 64 of Colombia's Customs Tariff when the declared f.o.b. value of such products is less than or equal to the thresholds established in that Decree.<sup>24</sup> In principle, Decree No. 1744/2016 is valid for one year.<sup>25</sup>

Article 1 of Decree No. 1744/2016 establishes a tariff of 40% ad valorem for imports classified in Chapters 61 and 62 of Colombia's Customs Tariff whose declared f.o.b. price is less than or equal to 10 US dollars per gross kilogram.

Article 2 of Decree No. 1744/2016 establishes a tariff of 35% ad valorem for imports classified under the tariff headings of Chapter 64 of Colombia's Customs Tariff whose declared f.o.b. price is less than or equal to the thresholds established in that article.<sup>26</sup> The paragraph under Article 2 provides that imports classified under tariff heading 6406.10.00.00 (uppers) whose declared f.o.b. price is less than or equal to 5 US dollars per gross kilogram shall be subject to a tariff of 35% *ad valorem*.

Article 3 of Decree No. 1744/2016 states that "products classified in Chapters 61, 62 and 64 of the Customs Tariff that are not subject to the tariffs set forth in Articles 1 and 2 of this Decree shall be subject to the tariff provided for in Decree 4927 of 2011 [Colombia's Customs Tariff] and its amendments".<sup>27</sup> Certain goods are also exempted from the application of Decree No. 1744/2016.<sup>28</sup>

Panama understands that this measure is contained in the following legislation:

- (i) Decree No. 1744/2016; and
- (ii) Decree No. 4297/2011 of 26 December 2011 as regards the determination of products covered by the nomenclature of Chapters 61, 62 and 64 of Colombia's Customs Tariff.

#### D. CUSTOMS AND TARIFF REGIME APPLICABLE TO GOODS WHOSE PRICES ARE LESS THAN OR EQUAL TO THE THRESHOLDS ESTABLISHED BY COLOMBIA

Decree No. 1745/2016 and Decree No. 1744/2016 constitute a new customs and tariff regime applicable to imports of apparel and footwear classified in Chapters 61, 62 and 64 of Colombia's Customs Tariff when the declared f.o.b. value of such products is less than or equal to the thresholds established in those decrees.<sup>29</sup>

Under this regime, importers not only have to provide a security for release of the goods, use specific ports of entry, and pay customs duties amounting to 40% *ad valorem* (apparel) or 35% *ad valorem* (footwear)<sup>30</sup>, but they also have to comply with documentary, certification, monitoring, and other requirements.

<sup>23</sup> DIAN Draft Resolution "adding a subparagraph to Article 39 of Resolution 4240 of 2000".

<sup>24</sup> Articles 1 and 2 of Decree No. 1744/2016.

<sup>25</sup> Article 6 of Decree No. 1744/2016 states that the Decree shall remain in force for one year starting on 2 November 2016, and that once it has expired, the duties set forth in Colombia's Customs Tariff (Decree No. 4927/2011 and its amendments) shall be reinstated.

<sup>26</sup> The thresholds established are the following: heading 6401 (6 US dollars per pair); heading 6402 (6 US dollars per pair); heading 6403 (10 US dollars per pair); heading 6404 (6 US dollars per pair); heading 6405 (7 US dollars per pair).

<sup>27</sup> That is, a tariff of 15% *ad valorem*.

<sup>28</sup> Articles 4 and 5 of Decree No. 1744/2016 exempt the following goods from the application of the Decree: (i) goods from a Special Customs Regime Zone or a free zone, provided such goods do not enter other parts of the country's customs territory, and (ii) residues and/or waste of commercial value from the clothing industry covered by the Plan Vallejo.

<sup>29</sup> Articles 2 and 3 of Decree No. 1745/2016, and Articles 1 and 2 of Decree No. 1744/2016.

<sup>30</sup> Note that Article 3 of Decree No. 1744/2016 provides that "products classified in Chapters 61, 62 and 64 of the Customs Tariff that are not subject to the tariff set forth in Articles 1 and 2 of this decree shall be subject to the tariff provided for in Decree 4927 of 2011 [Customs Tariff of Colombia] and its amendments".

Regarding the documentary and certification requirements, Article 4 of Decree No. 1745/2016 requires that for each shipment the importer submit to the Customs Operation Management Division (or whichever service is acting on its behalf) of the Sectional Customs and Excise Directorate with jurisdiction over the place of arrival, one month ahead of time and in addition to the advance declaration and the identity and liability form, the following five documents<sup>31</sup>:

- Certification from the foreign supplier, legalized, with an official Spanish translation, providing evidence of the intention to sell to the importer in Colombia and indicating, where appropriate, the type of economic relationship with the importer in accordance with the Tax Code, also providing the address, telephone number and email address of the supplier as well as the six-digit tariff subheading containing the detailed description of the products to be exported, the quantity, and their respective prices.<sup>32</sup>
- Certification of the existence of the foreign supplier, legalized, with an official Spanish translation, issued by the foreign entity that keeps the official register of producers or commercial agents or, should no such entity exist, by the foreign supplier under oath.<sup>33</sup>
- List of distributors in Colombia of the imported goods, including their Tax Identification Number (NIT), business name, address, telephone number and email address.<sup>34</sup>
- Declaration signed by the legal representative of the Customs Agency, where appropriate, certifying that they have conducted a background check on the customer for the importer, established how long the parties have been working together, and acted as customs broker.<sup>35</sup>
- Signed declaration by the importer or the importer's legal representative certifying the following: (i) that the value to be declared for the imported goods corresponds to the price actually paid or to be paid; (ii) the address of the storage facilities for the imported goods; (iii) detailed information on the distribution and marketing chain for the imported goods in Colombia; (iv) that they are aware that the customs authorities are entitled to submit the documents related to the import transaction to the Office of the Public Prosecutor and the Financial Information and Analysis Unit (UIAF).<sup>36</sup>

Regarding the special monitoring requirements, Article 8 of Decree No. 1745/2016 states that "importers that declare goods ... indicated in Article 3 of this Decree, at a price lower than or equal to the threshold established in that Article, must be reported to the Operational Analysis Management Sub-Directorate of the National Customs and Excise Directorate so that the information concerning such operations can be incorporated in the risk management system". Furthermore, Article 6 of the same Decree provides that "import operations observers" shall "examine the information [provided by DIAN] and alert the customs authorities, and also closely monitor the inspection and valuation process with respect to the goods classified under the headings listed in Article 3 of this Decree".

Panama understands that this measure is contained in the following legislation:

- (i) Decree No. 1745/2016;
- (ii) Decree No. 1744/2016;

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Consequently, imports of the products in question whose f.o.b. value exceeds the established thresholds are subject to a 15% *ad valorem* tariff.

<sup>31</sup> Article 4(1) of Decree No. 1745/2016.

<sup>32</sup> Article 4(1)(a) of Decree No. 1745/2016.

<sup>33</sup> Article 4(1)(b) of Decree No. 1745/2016.

<sup>34</sup> Article 4(1)(c) of Decree No. 1745/2016.

<sup>35</sup> Article 4(1)(d) of Decree No. 1745/2016.

<sup>36</sup> Article 4(1)(e) of Decree No. 1745/2016.

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

(iv) the DIAN Draft Resolution.

## II. LEGAL CLAIMS

The implementing measures adopted by Colombia are inconsistent with its obligations under the Agreement Establishing the World Trade Organization (WTO Agreement). Specifically, the measures display the following inconsistencies:

### A. SECURITY FOR RELEASE OF GOODS

(i) This measure is a "restriction[ ]" on "importation" in violation of Article XI:1 of the GATT 1994 in that its inordinately high amount and the fact that it is required for each and every shipment operate as a condition that limits the importation of the textile and footwear products concerned.

(ii) Insofar as the security is imposed because "it becomes necessary to delay the determination of the value" of the goods, this measure is inconsistent with Article 13 of the Agreement on Customs Valuation in that it exceeds the amount necessary "to cover the ultimate payment of customs duties for which the goods may be liable".

(iii) Insofar as the security for release of the goods is not applied in a uniform, impartial and reasonable manner, this measure is inconsistent with Article X:3(a) of the GATT 1994.

### B. ENTRY RESTRICTED TO SPECIFIC PORTS OF ENTRY

(i) This measure is a "restriction[ ]" on "importation" in violation of Article XI:1 of the GATT 1994 in that it limits the entry into Colombia of the textile and footwear products concerned to specific ports of entry.

(ii) Insofar as the entry restricted to specific ports of entry is not applied in a uniform, impartial and reasonable manner, this measure is inconsistent with Article X:3(a) of the GATT 1994.

### C. CUSTOMS DUTY

(i) Insofar as the security provided for in Decree No. 1745/2016 covers the payment of the relevant customs duties, the "tariff" provided for in Decree 1744/2016 would be a "duty or charge" *other* than ordinary customs duties inconsistent with Article II:1 (b), second sentence, of the GATT 1994.

(ii) Insofar as the customs duty is not applied in a uniform, impartial and reasonable manner, this measure is inconsistent with Article X:3(a) of the GATT 1994.

### D. CUSTOMS AND TARIFF REGIME APPLICABLE TO GOODS WHOSE PRICES ARE LESS THAN OR EQUAL TO THE THRESHOLDS ESTABLISHED BY COLOMBIA

(i) This measure is a "restriction[ ]" on "importation" in violation of Article XI:1 of the GATT 1994 in that the joint application of more onerous customs and tariff measures to textile and footwear products whose prices are less than or equal to the thresholds established by Colombia has a paralyzing effect on imports of the products concerned.

(ii) Moreover, this more burdensome customs and tariff regime operates in practice as an incentive to raise the prices of the goods artificially, introducing *de facto* minimum customs values in violation of Articles 1, 2, 3, 5, 6 and 7.2(f) of the Agreement on Customs Valuation.

- (iii) Insofar as the customs and tariff regime applicable to goods whose prices are less than or equal to the thresholds established by Colombia is not applied in a uniform, impartial and reasonable manner, this measure is inconsistent with Article X:3(a) of the GATT 1994.

Panama has identified the rules which, in its view, underpin the measures at issue. Nevertheless, this list is without prejudice to any other rules, administrative or judicial decisions, acts, practices, guidance or guidelines issued by Colombia that may be relevant in examining this dispute. Accordingly, the scope of this request covers all of the aforementioned rules as well as any possible amendments, extensions or additions where applicable.

Given the inconsistencies described above, pursuant to Article 3.8 of the DSU, Panama considers that the measure at issue nullifies or impairs the advantages accruing to Panama under the provisions mentioned in this request.

Panama requests that, pursuant to Articles 6 and 21.5 of the DSU, the DSB establish a panel to examine this matter. Panama further requests that the panel be given the standard terms of reference provided for in Article 7.1 of the DSU.

Panama asks that this request for the establishment of a panel be included in the agenda of the DSB meeting scheduled for 22 May 2017.

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