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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY COLOMBIA

RECOURSE TO ARTICLE 21.5 OF THE DSU BY PANAMA

REPORT OF THE PANELS

Addendum

This addendum contains Annexes A to C to the Report of the Panels to be found in document WT/DS461/RW.

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ANNEX A

WORKING PROCEDURES OF THE PANELS

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Harmonized Working Procedures of the Panels[1]

Adopted on 15 September 2017

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 harmonized 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. 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.

4. 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.

5. The Panel shall hold a joint substantive meeting and shall issue a single report concerning both proceedings.

Submissions

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

7. Should a party wish to request a preliminary ruling, 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 one of the parties requests such a ruling from the Panel in its capacity as complainant, the other party shall respond to the request in its first written submission as respondent. If one party requests such a ruling in its capacity as respondent, the other party shall submit its response to the request prior to the joint substantive meeting, within the period specified by the Panel. Exceptions to this rule may be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the joint substantive meeting, except with respect to evidence necessary for answering questions or making 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 joint 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 at the same time submit a translation of such exhibits into a WTO working language. The Panel may grant reasonable extensions of time for the translation of

[1] To facilitate understanding of these Working Procedures, the term "Panel" will be used in the singular where appropriate.

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 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 a single record for both proceedings and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of both proceedings. For example, exhibits submitted by Colombia could be numbered COL-1, COL-2, etc., without distinguishing between proceedings. If the last exhibit in connection with the first submission as complainant was numbered COL-5, the first exhibit of its next submission as either complainant or respondent would be numbered COL-6.

Questions

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

Joint substantive meeting

13. Each party shall provide to the Panel the list of members of its delegation in advance of the meeting and no later than 5 p.m. on the previous working day.

14. The joint substantive meeting shall be conducted as follows:

a. The Panel shall first invite Colombia to make an opening statement to present its case as complainant. Then Panama, as respondent, shall be invited to present its point of view. Subsequently, the Panel shall invite Panama to make an opening statement to present its case as complainant. Then Colombia, as respondent, shall be invited to present its point of view. This order may be modified by the Panel should it deem it necessary to do so in light of the development of the proceedings.

   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. Each party shall make available to the Panel and the other party the final version of its opening and closing statements, 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 such 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 such 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, following the order of statements set forth in (a.) above.

Third parties

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

the Panel. Those Members that have reserved their third-party rights in both proceedings shall have the opportunity to present their comments jointly in that submission.

16. Each third party shall also be invited to present its views orally during a session of the joint 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 no later than 5 p.m. on the previous working day.

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

a. For logistical reasons, all third parties may be present during the entirety of this session even if they have not reserved their third-party rights in both proceedings under Article 21.5 of the DSU.

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. Third parties 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 such 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

18. The description of the arguments of the parties and third parties in the descriptive part of the single Panel report shall consist of integrated 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.

19. Each party shall provide a single integrated executive summary of the facts and arguments as presented to the Panel in its written submissions and oral statements concerning both proceedings, in accordance with the timetable adopted by the Panel for its work. This summary may also include a summary of the replies to questions. These summaries shall not exceed 30 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.

20. Each third party shall submit an integrated executive summary of its arguments as presented to the Panel in its written submission and its statement concerning both proceedings, as appropriate, in accordance 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 integrated executive summary to be provided by each one of the third parties shall not exceed six pages.

Interim review

21. Following issuance of the interim report, each party may submit a written request for a review of 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.

22. 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.

23. 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

24. 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 **two** paper copies of all documents it submits to the Panel. 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. The written submissions of the parties and the third parties shall, wherever possible, be submitted in Microsoft Word format. In cases where, owing to their size, it is not possible to send the documents by email, they shall be submitted on a USB key, CD-ROM or DVD. In this case, **four** USB keys, CD-ROMs or DVDs shall be filed. Electronic copies shall be sent by email to DSRegistry@wto.org, with a copy to ****.****@wto.org, ****.****@wto.org, ****.****@wto.org, ****.****@wto.org and ****.****@wto.org. If USB keys, CD-ROMS or DVDs are provided, they 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 joint 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 (paper copies and, where necessary, USB keys, CD-ROMs and/or DVDs) 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.

f. The Panel shall provide the parties with an electronic version of the descriptive part, of the interim report and of 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.

25. The Panel reserves the right to modify these procedures, as necessary, after consultation with the parties.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF COLOMBIA

I. INTRODUCTION

1. The Dispute Settlement Body (DSB)'s recommendations and rulings in the original proceedings were concerned with a compound tariff that was found to exceed Colombia's bound tariffs. Colombia repealed the compound tariff; and its new tariffs do not exceed its tariff commitments. Colombia is, therefore, in full compliance with the DSB's recommendations and rulings.

2. The original dispute concerned the imposition by Colombia of a compound tariff on the importation of certain apparel and footwear classified under Chapters 61 through 64 of Colombia's Customs Tariff.[1] In the original proceedings, the original panel and the Appellate Body found that the compound tariff exceeded the bound tariff rates in Colombia's Schedule of Concessions in the instances identified in the Panel Report, and was, therefore, inconsistent with Articles II:1(a) and II:1(b) of the General Agreement on Tariffs and Trade 1994 (GATT 1994).[2] On 2 November 2016, Colombia replaced the compound tariff provided for by Decree 456 with new tariffs established by Decree 1744.[3] Decree 1744 established an *ad valorem* tariff that does not exceed Colombia's World Trade Organization (WTO) bound tariffs. Consequently, Colombia has brought the measure found to be inconsistent with the GATT 1994 into conformity with its WTO obligations by removing the measure found to be inconsistent by the DSB and by establishing a new tariff with a rate that does not exceed the bound rate in Colombia's Schedule of Concessions.

3. The customs bond and the customs formalities challenged by Panama in these compliance proceedings are not "measures taken to comply" with the DSB's recommendations and rulings in the original proceedings. These measures therefore fall outside the scope of these Article 21.5 proceedings, and, are not proper subjects of the Panel's compliance review. Even assuming *arguendo* that the measures challenged by Panama are properly within the Panel's jurisdiction, Colombia submits that these measures are not only consistent with Article XI:1 of the GATT 1994, but expressly permitted under the Covered Agreements (the Customs Valuation Agreement, Agreement on Trade Facilitation, and the Anti-Dumping Agreement). Furthermore, Panama's claims that the customs bond and the customs formalities constitute prohibited restrictions under Article XI:1 of the GATT 1994 are based on speculative allegations. Panama fails to substantiate its claims with evidence and ultimately fails to substantiate the allegations that the customs bond and customs formalities have a limiting effect on imports. Moreover, even under the assumption that the customs bond and customs formalities are inconsistent with Article XI:1 of the GATT 1994, they are justified under Article XX, subparagraphs (a) and (d), of the GATT 1994.

II. FACTUAL BACKGROUND

4. The original dispute concerned the imposition by Colombia of a compound tariff on the importation of certain apparel and footwear classified under Chapters 61 through 64 of Colombia's Customs Tariff.[4] The compound tariff under Decree 456 was composed of an *ad valorem* levy, expressed as a percentage of the customs value of goods, and a specific levy, expressed in units of currency per unit of measurement. The original panel found, and the Appellate Body upheld, that the compound tariff was inconsistent with Articles II:1(a) and II:1(b), first sentence, of the GATT 1994.[5]

5. On 2 November 2016, the Colombian Government issued Decree 1744 of 2016, which repealed the compound tariff and modified the tariffs applicable to imports of products classified in Chapters 61, 62 and 63 and certain items in Chapter 64. Decree 1744 sets an *ad valorem* MFN tariff of 40% for imports of products classified in Chapters 61 and 62 of the Customs Tariff of the Republic of Colombia when the declared f.o.b. import price is less than or equal to ten ($10) US dollars per gross kilogram. This tariff is equal to the bound tariff in Colombia's Schedule. As regard to imports

[1] Original Panel Report, para. 2.1.
[2] Original Appellate Body Report, para. 6.3; and Original Panel Report, paras. 8.2-8.4.
[3] Decree 1744 (Exhibit COL-1).
[4] Original Panel Report, para. 2.1.
[5] Original Panel Report, paras. 8.2 and 8.4; and Original Appellate Body Report, para. 6.3.

of products classified under tariff headings 6401, 6402, 6403, 6404, and 6405, an MFN tariff of 35% *ad valorem* is applied when the declared f.o.b. import price is less than or equal to prices that vary between six ($6) US dollars and ten ($10) US dollars per pair.[6] For imports of products classified under subheading 6406.10.00.00, an MFN tariff of 35% *ad valorem* will be applied when the declared f.o.b. price is less than or equal to five ($5) US dollars per gross kilogram. These tariffs are equal to the tariff bound in Colombia's Schedule. In cases where the import price for these products exceeds the above-mentioned prices, the MFN tariff is provided in Decree 4927 of 2011 (as amended by Decree 2153 of 2016) or any amending decree. Imports of the other products that were covered by the compound tariffs introduced by Decree 456 of 2014 are subject to the MFN *ad valorem* tariff set forth in Decree 4927 of 2011 (as amended by Decree 2153 of 2016) or any amending decree.[7]

III. BURDEN OF PROOF

6. It is a "generally-accepted canon of evidence" that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."[8] To make out a *prima facie* case of breach of a WTO Agreement, the complaining party must provide both adequate evidence and legal argument tying the alleged facts to a legal claim.[9] As in original proceedings, it is for the complaining party to establish in Article 21.5 proceedings that the respondent party has failed to bring itself into compliance with the DSB recommendations and rulings. Accordingly, Panama, as the complaining party, bears the burden of demonstrating that Colombia has failed to comply with the DSB recommendations and rulings. Failure of Panama to make out a *prima facie* case must lead to the dismissal of its claims.

7. In *US / Canada – Continued Suspension*, the Appellate Body considered that in Article 21.5 proceedings, the original respondent has a limited burden of proof. The original respondent must "show that its implementing measure has cured the defects identified in the DSB's recommendations and rulings".[10] For this purpose, it is sufficient for the original respondent to provide "a clear description of its implementing measure, and an adequate explanation regarding how this measure rectifies the inconsistencies found in the original proceedings, so as to place the Article 21.5 panel in a position to make an objective assessment of the matter and, in the absence of rebuttal, to rule in favour of the original respondent".[11] In accordance with the Appellate Body's guidance in *US / Canada – Continued Suspension*, Colombia has demonstrated in these proceedings that Decree 1744 "has cured the defects identified in the DSB's recommendations and rulings" and, as a result, Colombia's tariffs for the relevant products are in compliance with its Schedule of Concessions.

IV. COLOMBIA HAS BROUGHT THE COMPOUND TARIFF INTO COMPLIANCE WITH ITS WTO OBLIGATIONS

8. Colombia's bound rate in its Schedule of Concessions for products classified in Chapters 61 and 62 is 40%. Decree 1744 sets an *ad valorem* MFN tariff of 40% for imports of products classified in Chapters 61 and 62 of the Customs Tariff of Colombia when the declared f.o.b. import price is less than or equal to ten ($10) US dollars per gross kilogram. The *ad valorem* tariff is the only tariff imposed in such circumstances. In cases where the import price for products classified in Chapters 61 and 62 exceeds ten ($10) US dollars, the MFN tariff will be the one provided in Decree 4927 (as amended by Decree 2153 of 2016) or any amending decree, containing the Customs Tariff of the Colombia. Also, for import of products classified under Chapter 63, the applicable tariff is the MFN *ad valorem* tariff set forth in Decree 4927. In no case does the applied tariff rate exceed the tariff rates bound in Colombia's Schedule of Concessions. The tariffs are consistent with Colombia's obligations under Article II:1(b) of the GATT 1994.

9. Colombia's bound rate in its Schedule of Concessions for products classified in tariff headings 6401, 6402, 6403, 6404 and 6405 is 35%, except for 640520 which has a bound level of 40%. For

[6] Decree 1744 (Exhibit COL-1).
[7] Decree 1744 (Exhibit COL-1); Decree 4927 (Exhibit COL-2); and Decree 2153 (Exhibit COL-3).
[8] Appellate Body Report, *US – Wool Shirts and Blouses*, at p. 14. See also Panel Report, *China – Autos (US)*, para. 7.6.
[9] Appellate Body Report, *US – Gambling*, para. 140 (quoting Appellate Body Report, *US – Wool Shirts and Blouses*, at p. 16). (emphasis in original)
[10] Appellate Body Report, *US / Canada – Continued Suspension*, para. 362.
[11] Appellate Body Report, *US / Canada – Continued Suspension*, para. 362.

these tariff headings, Decree 1744 set an MFN tariff of 35% *ad valorem* which is applied when the declared f.o.b. import price is less than or equal to prices that vary between six ($6) US dollars and ten ($10) US dollars per pair. Colombia's bound rate in its Schedule of Concessions for products classified under subheading 6406.10.00.00 is 40%. For imports of products classified under this subheading, Decree 1744 set an MFN tariff of 35% *ad valorem* when the declared f.o.b price is less than or equal to five ($5) US dollars per gross kilogram. The tariffs are consistent with Colombia's obligations under Article II:1(b) of the GATT 1994.

10. In cases where the import price for these products exceeds the above-mentioned prices, the MFN tariff will be the one provided in Decree 4927 (as amended by Decree 2153) or any amending decree, and, as such, neither of the two mentioned levies will exceed Colombia's bound tariffs. Also for products classified in the headings of Chapter 64 not mentioned above, the applicable tariff is the MFN *ad valorem* tariff set forth in Decree 4927 (as amended by Decree 2153). These tariff rates do not exceed Colombia's Schedule of Concessions. Therefore, the tariffs applied by Colombia for Chapter 64 are consistent with Colombia's obligations under Article II:1(b) of the GATT 1994.

11. The original panel's finding that, in the circumstances it had identified, the compound tariff also accorded treatment less favourable than that envisaged in Colombia's Schedule of Concessions, in a manner inconsistent with Article II:1(a) of the GATT 1994 was entirely dependent on its finding under Article II:1(b).[12] As the tariffs set under Decree 1744 are consistent with the levels bound in Colombia's Schedule of Concessions and no longer result in a breach of Article II:1(b), Decree 1744 brings Colombia into conformity also with Article II:1(a) of the GATT 1994.

12. For the reasons set out above, Colombia respectfully requests the Panel to find that Colombia has complied with the DSB recommendations and rulings in the original proceedings.

V. TERMS OF REFERENCE

13. First, in the Article 21.5 proceedings initiated by Colombia, Panama challenges the customs bond and special import regime established in Decree 1745 of 2016 under Articles XI:1 and X:3(a) of the GATT 1994. The Panel's terms of reference in these Article 21.5 proceedings are confined to examining "the matter referred to the DSB by Colombia in document WT/DS461/17".[13] The "matter" in these Article 21.5 proceedings consists, in turn, of the measure(s) and claim(s) set out in Colombia's panel request, that is, document WT/DS461/17.[14] As regards to the measures, document WT/DS461/17 refers only to Decree 1744. In terms of claims, document WT/DS461/17 refers only to the claims that were the subject of the DSB's recommendations and rulings, namely, consistency with Articles II:1(a) and II:1(b) of the GATT 1994. Accordingly, the Panel in the Article 21.5 proceedings initiated by Colombia is limited to examining the consistency of the Decree 1744 with Articles II:1(a) and II:1(b) of the GATT 1994. Thus, the customs bond and special import regime established in Decree 1745 of 2016, as well as Panama's claims under Articles XI:1 and X:3(a) of the GATT 1994, fall outside of the Panel's terms of reference in these Article 21.5 proceedings initiated by Colombia.

14. Second, proceedings under Article 21.5 concern a disagreement as to the "existence" or "consistency with a covered agreement" of measures "taken to comply" with the recommendations and rulings of the DSB in the original proceedings. Therefore, proceedings under Article 21.5 do not concern just any measure, but rather, are limited to those measures that are taken to comply with the recommendations and rulings of the DSB.[15] The scope of the measures "taken to comply" must be determined by reference to the recommendations and rulings of the DSB in the original proceedings and to the original measures at issue.[16] In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body also agreed with the Panel that "if a claim challenges a measure which is not a 'measure taken to comply', that claim cannot properly be raised in Article 21.5 proceedings."[17]

15. The original dispute concerned the imposition by Colombia of a compound tariff on the importation of certain apparel and footwear classified under Chapters 61 through 64 of Colombia's

[12] Original Panel Report, para. 7.192.
[13] WT/DS461/24.
[14] Panel Report, Australia – Automotive Leather (Article 21.5 – US), para. 6.4.
[15] Appellate Body Report, Canada – Aircraft (Article 21.5 – Brazil), para. 36.
[16] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 201.
[17] Appellate Body Report, EC – Bed Linen (Article 21.5 – India), para. 78.

Customs Tariff.[18] The original panel and Appellate Body findings regarded the consistency of this compound tariff with Colombia's Schedule of Concessions. The DSB recommendations and rulings in the original proceedings concerned exclusively the compound tariff on the importation of certain apparel and footwear classified under Chapters 61 through 64 of Colombia's Customs Tariff. The compound tariff found to be inconsistent in the original proceedings has been repealed and replaced with an *ad valorem* tariff that is consistent with Colombia's bound tariffs in its Schedule of Concessions.

16. The Panel is precluded from examining the customs bond and special import regime established in Decree 1745 in both Article 21.5 proceedings because they are not measures taken to comply with the recommendations and rulings of the DSB. Panama makes no attempt to link the challenged measures to the DSB's recommendations and rulings and generally fails to make a prima facie case that Decree 1745 is a "measure taken to comply" within the meaning of Article 21.5 of the DSU. This failure should lead to the conclusion that Panama has failed to establish that the challenged measures fall within the scope of Article 21.5.[19] In fact, in the Article 21.3(c) proceedings, Panama recognized that measures other than repeal or modification of the compound tariff would not have the necessary links to the DSB's recommendations and rulings to constitute a "measure taken to comply".[20]

17. The drafting history of Decree 1744 confirms that it is the only measure taken to comply by Colombia. The minutes of the Triple A Committee meeting where the draft decree was considered clearly show that implementation of the DSB's recommendations and rulings was the very purpose of Decree 1744 and that no other implementation measures were considered.[21] No reference was made to the DSB's recommendations and rulings when the draft of Decree 1745 was considered.[22]

18. Panama's use of the "closely connected" test developed in *US – Zeroing (EC)* is contradictory. The premise of the "closely connected" test is that the measure being considered is not a measure taken to comply. Yet, Panama has repeatedly characterized the customs bond and the special import regime as "measures taken to comply".[23] This is inherently contradictory. Moreover, even if it were applicable, Panama would have failed to demonstrate that the customs bond and the special import regime are sufficiently connected to Decree 1744 so as to fall within the scope of these Article 21.5 proceedings.

19. Panama first alleges that Decree 1745 was enacted after the adoption of the DSB's recommendations and rulings.[24] The mere fact that a measure was enacted subsequent to the adoption of the DSB's recommendations and rulings does not make such measure a "measure taken to comply". Panama next refers to Decree 1745 having been adopted on the same day as Decree 1744.[25] Adoption of a law or regulation on the same day as the measure taken to comply does turn the former into another measure taken to comply.

20. The nature of Decree 1745 is significantly different to that of Decree 1744. Decree 1745 is a customs measure whereas Decree 1744 is a tariff measure. Indeed, the object of Decree 1744 is to establish import tariffs.[26] By contrast, the object of Decree 1745 is to establish a mechanism to strengthen the risk management and customs control system.[27] Also, Decree 1744 was adopted pursuant to Colombia's tariff code, that is, Decree 4927 and subsequent amendments.[28] By contrast, Decree 1745 was adopted pursuant to Law 1762 of 2015.[29] That the two measures are enacted pursuant to different legal frameworks is further evidence of their different nature. The fact that

[18] Original Panel Report, para. 2.1.
[19] The Appellate Body has noted that the complaining party "bears the burden of establishing that its claims are properly before the Panel" (Panel Report, *Korea - Certain Paper (Article 21.5 - Indonesia)*, para. 6.4).
[20] Award of the Arbitrator, *Colombia – Textiles (Article 21.3(c))*, para. 3.23 (referring to Panama's submission (English translation), para. 125).
[21] Exhibit COL-4.
[22] Exhibit COL-4.
[23] See, for example, Panama's First Written Submission (Article 21.5 – Colombia), para. 32.
[24] Panama's First Written Submission (Article 21.5 – Colombia), para. 42.
[25] Panama's First Written Submission (Article 21.5 – Colombia), para. 43.
[26] Exhibit PAN-1.
[27] Exhibit PAN-2, Article 1.
[28] Exhibit PAN-1.
[29] Exhibit PAN-2.

both Decrees 1744 and 1745 were reviewed by the Triple A Committee does not mean that the two decrees are similar in nature. The Triple A Committee has jurisdiction over a broad range of trade policy instruments.[30]

21. The product coverage of both decrees is not identical. Decree 1744 applies to all products under HS chapters 61 and 62 and headings 64.01-6405.[31] Meanwhile, Decree 1745 applies only to apparel and footwear classified under chapters 61, 62, and 64 that are imported at prices below certain thresholds.

22. Panama also errs in arguing that a common objective between the measure challenged in the original proceedings and Decree 1745 is an appropriate basis to characterize the latter as a measure taken to comply. WTO Members take numerous measures that pursue a similar policy objective. The compound tariff was taken with the objective of fighting money laundering. Colombia has a broad, comprehensive and multi-disciplinary regime to fight money laundering, of which the compound tariff was a part. It would be a misuse of Article 21.5 to allow Panama to challenge in compliance proceedings any measure taken by Colombia to fight money laundering since the adoption of the DSB's recommendations and rulings in the original proceedings.

23. Panama refers to the alleged "effects", arguing that the "restrictiveness to trade that is being mitigated by the new tariff is again undermined by the various measures contemplated in Decree No. 1745".[32] Panama then alleges "banking costs" linked to the customs bond and "logistical hindrances" resulting from the special import regime.[33] Yet, these allegations are entirely unsubstantiated. Panama does not provide any information about the "banking costs" of the customs bonds or of the so-called "logistical hindrances" of the special import regime. Nor does Panama provide any support for its assertion that the "banking costs" or "logistical hindrances" have trade restrictive effects. Given that Panama's allegations are unsubstantiated, they do not provide a basis for the Panel to consider "effects" in assessing Panama's claim that the customs bond and special import regime are measures taken to comply.

24. In sum, Panama has failed to establish that the customs bond and special import regime are "measures to comply" within the meaning of Article 21.5 of the DSU. Consequently, Panama's claims against the customs bond and special import regime fall outside of the scope of both Article 21.5 proceedings for this reason, and should be dismissed by the Panel.

25. Allowing Decree 1745, a measure that was not the subject of the original proceedings, to be reviewed in these Article 21.5 proceedings would deprive Colombia of its rights under the DSU. Should the Article 21.5 Panel find that Decree 1745 is inconsistent with the GATT 1994, Colombia would be unfairly denied the right to a reasonable period of time to bring the Decree into compliance. In addition, Colombia would be denied the right to negotiate compensation before being subject to the suspension of concessions or other obligations.

26. Lastly, Panama's claims under the Customs Valuation Agreement and Article VIII of the GATT 1994 are outside of the Panel's terms of reference and they do not form part of the "matter" before the Panel. In any event, Colombia's measures are consistent with the Customs Valuation Agreement and Article VIII of the GATT 1994.

VI. PANAMA HAS FAILED TO DEMONSTRATE THAT THE CUSTOMS BOND OR THE CUSTOMS FORMALITIES ESTABLISHED IN DECREE 1745 IS INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994

A. Panama has failed to establish that the customs bond is a prohibited "restriction" under Article XI:1

27. Customs bonds are routinely used to guarantee the payment of customs duties and are expressly recognized as permissible instruments by the WTO agreements. Article 13 of the Customs Valuation Agreement authorizes customs authorities to require a customs bond covering the ultimate payment of customs duties. The use of customs bonds is also specifically contemplated

[30] Decree 3303 de 2006, Article 1 (Exhibit COL-6).
[31] Exhibit PAN-1, Articles 1 and 2.
[32] Panama's First Written Submission, para. 46.
[33] Panama's First Written Submission, para. 47.

in the new Agreement on Trade Facilitation. Furthermore, the Ad note to Article VI:1 of the GATT 1994 provides for the use of customs bonds in connection with anti-dumping or countervailing duty proceedings. The Ad note also expressly recognizes that there are "many other cases in customs administration" where it is permissible for a Member to require reasonable security in the form of a bond or cash deposit.

28. These provisions provide contextual guidance for the interpretation of the term "restriction" in Article XI:1 of the GATT 1994. Because customs bonds are permissible measures under the GATT 1994 and other WTO agreements, the requirement of a customs bond, and any associated administrative burden, cannot in themselves constitute prohibited "restrictions" under Article XI:1 of the GATT 1994. Furthermore, Article VIII of the GATT 1994 recognizes that there may be fees associated with customs formalities. Thus, the fact that a customs bond has associated fees or costs cannot, without more, give rise to a prohibited "restriction" under Article XI:1 of the GATT 1994.

29. Article XI:1 only covers "those prohibitions or restrictions that have a limiting effect on the quantity or amount of a product being imported or exported".[34] Panama has failed to provide any evidence that the customs bond limits the quantity or amount of the imported product. The customs bond does not impose a limitation on the quantity or amount of products covered by the customs bond requirement that may be imported. Indeed, Panama has not identified any numerical quota or other quantitative limitation on imports of the products subject to the customs bond requirement.

30. Panama complains that the customs bond makes the import process for the subject merchandise "considerably costly".[35] Yet, Panama provides no evidence of the cost associated with the customs bond. The customs bond seeks to guarantee the payment of both the customs taxes and any fines or penalties imposed by customs authorities. There is a relationship between the amount of the customs bond and the obligations it seeks to guarantee.

31. Moreover, Panama also asserts that there is an alleged correlation between the conditions that affect an individual importer and the conditions that affect the importation of a product.[36] This argument suggests that Article XI:1 requires that equal conditions be maintained for all Colombian importers (particularly those that are not credit worthy). However, Panama fails to address why the customs formalities imposed on risky importers end up affecting the importation of these products. In addition, Article XI:1 refers to limitations on the importation of products, not to limitations on importation by particular importers. Limitations on importation by particular persons (or groups of persons) would be relevant to the Panels' analysis only to the extent that the limitations on individuals' ability to import are a limitation or a limiting condition on importation, or have a "limiting effect" on importation of the relevant products.[37]

32. Panama also asserts that the "cost is variable because it will depend on the criteria for issuance of each participating financial entity or insurance company, on the risk profile of the importer, and on the magnitude of the covered operation".[38] However, apart from some disconnected assumptions and random estimations, Panama offers no evidence that the cost is variable or of the factors that affect the costs of the customs bond. Panama's assertions are all entirely speculative. On the contrary, based on the evidence submitted by Colombia, it is clear that the value of the bond is quite low compared to the overall value of the operation:

[34] Appellate Body Report, *China – Raw Materials*, para. 320.
[35] Panama's First Written Submission (Article 21.5 – Colombia), para. 56.
[36] See Panama's Responses to the Panel's Questions, page 30.
[37] See United States ' Third Party Submission, para. 44.
[38] Panama's First Written Submission (Article 21.5 – Panama), para. 37.

Decree	1745/2016		2218/2017
Importer	**IMPORTER 1**	**IMPORTER 2**	**IMPORTER 3**
Heading	6402	6401	6210
Quantity	19130	18349	2240
Origin	Mexico	Ecuador	Mexico
Port of entry	Buenaventura	Ipiales	Buenaventura
Insurance Company	Confianza	Seguros del Estado	Bolívar
Threshold (USD)	$ 2,00	$ 3,00	$ 9,00
FOB Value (USD)	$ 31.972,40	$ 35.852,97	$ 14.830,40
Declared price (USD)	$ 1,67	$ 1,95	$ 6,62
Covered value (USD)	$ 76.520,00	$ 110.094,00	$ 10.659,20
Prime (USD)	$ 1.140,35	$ 990,89	$ 203,92
Prime percentage	3,57%	2,76%	1,4%

Source: COL-22, COL-18, COL-27.

33. Furthermore, there is an inherent contradiction in Panama's argument. If the costs are variable as Panama alleges, and if they depend on factors such as the risk profile of the importer and the magnitude of the covered operation, the costs would be rationally related to such factors and could not be excessive. After all, insurance companies and banks operate under market conditions.

34. Panama also asserts that there is "uncertainty" because of the involvement of a third party.[39] Yet, Panama's argument is entirely speculative. The only reason Panama offers for the alleged "uncertainty" is that obtaining the customs bond depends on a decision of the banking entity or insurance company.[40] Panama offers no evidence of any requirements imposed by these banking entities or insurance companies that create the uncertainty. There is nothing inherent in the involvement of third parties that generates uncertainty. Moreover, these types of bonds "for the fulfillment of legal obligations" are quite common in the Colombian financial market. More than 24 insurance companies in Colombia issue these bonds on a regular basis and they are quite common in the business operations of legal importers.[41]

35. In addition, Panama points to the customs bond being calculated on the basis of threshold levels rather than the values declared by importers.[42] Panama fails to mention that the imports subject to the customs bond are those that are suspected to have declared values that are artificially low. In such circumstances, it is entirely appropriate to use the threshold for purposes of calculating the value of a customs bond. In fact, if the value of the customs bond were calculated on the basis of the declared value, this would allow importers using artificially low prices to continue to avoid paying the full duties and any applicable fines or penalties. Panama also refers to importers who already have a global bond.[43] Panama fails to point out that not all importers of the product subject to the customs bond will have a global bond since it is only available to importers and exporters that undertake a large number of operations. Furthermore, where imports at artificially low prices constitute an important share of the total imports, the global bond would be insufficient, as has been already proved by Colombia.[44]

36. Panama alleges that the customs bond involves the payment of a premium or financial commission and the submission of certain documents, and also argues that the outcome of the application may be "favorable or unfavorable depending on the appreciation of the bank or insurance company".[45] Panama then refers to the commission allegedly charged by three Colombian financial entities.[46] The three Colombian financial entities to which Panama refers are privately owned, and thus the costs and documents to which Panama refers are charges and requirements determined

[39] Panama's First Written Submission (Article 21.5 – Colombia), para. 55.
[40] Panama's First Written Submission (Article 21.5 – Colombia), para. 55.
[41] Exhibit COL-14.
[42] Panama's First Written Submission (Article 21.5 – Panama), para. 39.
[43] Panama's First Written Submission (Article 21.5 – Colombia), para. 54.
[44] Colombia's Responses to the Panel's Questions, page 19.
[45] Panama's Second Written Submission (Article 21.5 – Panama), para. 72.
[46] Panama's Second Written Submission (Article 21.5 – Panama), para. 73.

and collected by private actors.[47] The fees that each bank charges for the customs bond are freely determined by each bank and are calculated based on the risk model of the financial entity and the risk profile of the applicant. Thus, the costs of the customs bond do not stem from Decree 1745, and the Colombian government does not provide administrative instructions or guidance to these private financial actors. Panama likewise complains that the customs bond guarantee "conditions the access of products to the will of a financial entity to the detriment of the predictability of the conditions for importation".[48] By Panama's own admission, the restrictive effects about which it complains result from the conduct of a private actor and not from government conduct. For these reasons, the cost and potential restrictive effects of the customs bond cannot be attributed to the Colombian government and, consequently, cannot provide a basis for a claim that the customs bond constitutes a "restriction" within the meaning of Article XI:1 of the GATT 1994.

37. Ultimately, Panama's claim that the customs bond is a prohibited "restriction" under Article XI:1 is entirely based on unsubstantiated assertions. For these reasons, Colombia respectfully requests that the Article 21.5 Panel find that Panama has failed to establish that the customs bond in Decree 1745 is inconsistent with Article XI:1 of the GATT 1994. Colombia also recalls that Decree 1745 is no longer in force.

B. Panama has failed to establish that the special import regime is inconsistent with Article XI:1

38. Panama challenges the special import regime separately from the customs bond requirement under Article XI:1 of the GATT 1994. However, the customs bond requirement is a component of the special import regime, as Panama has described it. Therefore, Panama is improperly challenging the same measure twice. Since the customs bond requirement is an integral part of the special import regime as described by Panama, and since Panama has not made a separate claim against the special import regime exclusive of the customs bond, Panama's claim against the special import regime must also fail.

39. In any event, customs formalities are a necessary component of international trade. While Article VIII:3 of the GATT 1994 and the Agreement on Trade Facilitation pursue the objective of reducing customs formalities, they recognize that such formalities are permissible. It follows that, because customs formalities are permissible measures under the GATT 1994 and other WTO agreements, the imposition of a customs formality, and any associated administrative burden, cannot in themselves constitute prohibited "restrictions" under Article XI:1 of the GATT 1994. Furthermore, Article VIII of the GATT 1994 recognizes that there may be fees associated with customs formalities. Thus, the fact that a customs formality has associated fees or costs cannot, without more, give rise to a prohibited "restriction" under Article XI:1 of the GATT 1994.

40. Panama alleges that the special regime makes the import process "considerably 'costly' or 'onerous'".[49] However, customs authorities have the right to require that importers comply with certain formalities as part of the import process. Article VIII of the GATT 1994 recognizes that such formalities may generate fees or charges, which are not prohibited.

41. Panama first refers to translation fees.[50] However, Panama's official language is Spanish[51], and Panama fails to explain why its exporter would seek to translate their export documentation. In any event, the fees for translation are not charged by the Colombian government. These are fees charged by private parties. The requirement to submit translated documents is entirely reasonable. WTO Members are not required to operate in a language other than their own.[52]

42. Panama also complains about the "lack of availability of official translators of certain languages" in Colombia and asserts that this is trade restrictive.[53] The premise underlying Panama's argument is that a Member may require official translations only if it ensures that there is an official

[47] Exhibits COL-9.
[48] Panama's Second Written Submission (Article 21.5 – Panama), heading III.6.
[49] Panama's First Written Submission (Article 21.5 – Colombia), para. 59.
[50] Panama's First Written Submission (Article 21.5 – Colombia), para. 60.
[51] Article 7 of Panama's Constitution (Exhibit COL-7).
[52] See, for example, Article 10.8 of the TBT Agreement and Article 1.1.2 of the Agreement on Trade Facilitation.
[53] Panama's Second Written Submission (Article 21.5 – Panama), para. 125.

translator for each and every language used in the world. The unreasonableness of this proposition is self-evident.[54] WTO Members cannot be expected to ensure that they designate an official translator for each language in the world in each of their ports before they can require official translations of documents that are to be submitted to the government. In any event, Panama fails to point out that Colombia's Ministry of Foreign Affairs has established procedures for situations where an official translator is not available.[55]

43. Panama also asserts that official translations are only required for footwear and apparel.[56] Panama, however, does not provide any explanation as to why the product coverage gives rise to a prohibited "restriction". Article XI:1 of the GATT 1994 does not include a requirement that all customs formalities be applied horizontally to all products. The fact that a measure applies to one or more categories of products does not turn that measure into a prohibited "restriction".

44. Panama then refers to alleged certification costs.[57] The certification of documents in connection with importation is a formality that is expressly permitted under Article VIII of the GATT 1994. Given that certification requirements are permitted and that Members are allowed to charge fees for their services, there is no support for Panama's contention that the certification requirement or its costs constitute prohibited restrictions under Article XI:1 of the GATT 1994. Colombia recalls that, during the negotiations of the Agreement on Trade Facilitation, some WTO Members proposed to eliminate certification requirements.[58] This proposal was ultimately unsuccessful. If such measures were already prohibited under Article XI:1, they would not have been any point to Members proposing to eliminate them in the context of the negotiations of the Agreement on Trade Facilitation.

45. Panama further alleges that an existence certificate costs US$ 30.[59] The fee of US$ 30 is charged by, and paid to, an agency of the Panamanian State, and thus Panama is improperly seeking to attribute to Colombia fees that are determined and collected by Panama itself. Panama equally complains about the fee charged by the Panamanian Ministry of Foreign Affairs for the apostille or legalization. Panama again improperly attempts to attribute to the Colombian government fees that are determined and collected by the Panamanian government. Fees determined and collected by the Panamanian government cannot give rise to a "restriction" that is "instituted or maintained by" Colombia under Article XI:1 of the GATT 1994.

46. Colombia notes that Panama describes the certification of intent to sell in Colombia as "a disguised charge on the importer".[60] Panama's argument is an admission that the certification is not inconsistent with Article XI:1 of the GATT 1994. This is because Article XI:1 only applies to "restrictions other than duties, taxes or other charges".[61] "Charges" are expressly excluded from the scope of Article XI:1.

47. Panama next makes vague references to so-called "logistical costs".[62] Despite the label, these "logistical costs" seem to simply refer to the effort it takes an importer to execute the formalities. As the formalities are allowed, the time that it may take an importer to execute the formalities must also be permissible. In any event, Panama fails to explain how the costs of the formalities have a limiting effect on imports. Panama is simply asking the Panel to assume from the existence of the formalities, and from the mere existence of a cost associated to the formality that there are limiting effects such that there is a prohibited restriction under Article XI:1. Under Panama's theory, all formalities imposed in connection with importation would constitute a prohibited restriction under Article XI:1 of the GATT 1994.

48. As to the requirement to indicate, where applicable, the economic relationship between the supplier and the importer, questioning the need for such information and arguing that it requires retaining a tax attorney or accountant[63], it is generally recognized that a relationship between the

[54] Panama's Second Written Submission (Article 21.5 – Panama), paras. 124-126 and 131.
[55] Exhibit COL-10.
[56] Panama's Second Written Submission (Article 21.5 – Panama), para. 132.
[57] Panama's First Written Submission (Article 21.5 – Colombia), para. 60.
[58] TN/TF/W/22 (United States and Uganda).
[59] Panama's Second Written Submission (Article 21.5 – Panama), para. 135.
[60] Panama's Second Written Submission (Article 21.5 – Panama), para. 142. (underlining added)
[61] Underlining added.
[62] Panama's First Written Submission (Article 21.5 – Colombia), para. 60.
[63] Panama's Second Written Submission (Article 21.5 – Panama), para. 142.

supplier and the importer may affect the reliability of the declared price.[64] Furthermore, there is no requirement in Article 4.1(a) of Decree 1745 to retain a tax attorney or accountant.

49. Panama additionally complains about the requirement that the importer, the importer's legal representative, or an agent be present during the inspection of the merchandise by Colombia's customs authorities. Panama has not challenged the right of Colombia's customs authorities to inspect the merchandise. The presence of the importer, his/her legal representative, or agent is intended to safeguard the importer's due process rights. It is also an important element to ensure that the entities listed as importers are not shell companies being misused to conceal irregular operations and to evade the customs authorities. The use of shell companies in trade-based money laundering operations is a practice that has been identified by law enforcement authorities.[65] While Panama claims this requirement imposes additional costs, it provides no evidence of such costs.[66] Panama has failed to provide any evidence as to how the mere presence of an individual acting for the interests of the importer during a customs inspection has limiting effects on the quantities of imports such that it constitutes a prohibited restriction under Article XI:1 of the GATT 1994.

50. Panama's allegation that the formalities limit the importer's flexibility is also unpersuasive.[67] The fact remains that it is the importer that decides the quantity of the products to import and the importer remains free to import as large a quantity of the products as it wants. The importer also retains the right to change the quantity of the imports. If the quantity changes after it has submitted the documentation, it is free to re-file the documentation. Panama provides no evidence of how the formality has limiting effects on the quantity of the product such that it constitutes a prohibited import restriction under Article XI:1 of the GATT 1994.

51. Finally, Panama alleges that the customs formalities established in Decree 1745 "discourage" imports of the relevant merchandise.[68] Panama supports its position by making the remarkable statement that importers may either comply with the formalities or "modify the declared values" of the merchandise they are importing.[69] Panama's statement acknowledges the problem that the customs bond and the formalities are seeking to address: importers of apparel and footwear declaring a customs value that does not represent the actual price paid for the goods being imported. The suggestion that an importer simply "modify" the declared price shows a rather disappointing disregard for the customs legislation of the importing country. Declaring a fictitious customs value, even if it is a higher one, involves a false statement in an official document and would constitute customs fraud. In any event, Panama's logic is flawed. If the importer modifies the customs value, it does not necessarily mean that it is importing lower quantities of the good in question.

52. For these reasons, Panama has failed to establish its claim that the special regime is inconsistent with Article XI:1 of the GATT 1994. Colombia therefore respectfully requests that the Panel reject Panama's claim.

VII. PANAMA HAS FAILED TO DEMONSTRATE THAT THE ADMINISTRATION OF THE CUSTOMS BOND ESTABLISHED IN DECREE 1745 IS INCONSISTENT WITH ARTICLE X:3(a) OF THE GATT 1994

A. Panama has failed to establish that decree 1745 falls within the scope of Article X:3(a)

53. The Appellate Body has stated that Article X:3(a) makes a distinction between the legal instrument being administered and the legal instrument that regulates the application or implementation of that instrument.[70] A party may challenge under Article X:3(a): (1) the manner in which legal instruments are applied or implemented in a particular case; and (2) the legal instruments that regulate such application or implementation.[71] As Panama acknowledges, where a

[64] Article 1 of the Customs Valuation Agreement.
[65] Original Exhibit COL-11.
[66] Panama's First Written Submission (Article 21.5 – Colombia), para. 60.
[67] Panama's First Written Submission (Article 21.5 – Colombia), para. 62.
[68] Panama's First Written Submission (Article 21.5 – Colombia), para. 64.
[69] Panama's First Written Submission (Article 21.5 – Colombia), para. 64.
[70] Appellate Body Report, *EC – Selected Customs Matters*, para.200.
[71] Appellate Body Report, *EC – Selected Customs Matters*, para. 200.

party challenges a legal instrument that administers another measure, the latter measure falls outside the scope of Article X:3(a).[72]

54. Panama's claim under Article X:3(a) is directed against the customs bond established in Decree 1745 (the "special bond" in Panama's terms).[73] Yet, Panama fails to explain, much less substantiate with evidence, that Decree 1745 "administer[s]" another legal instrument. Panama does not provide any explanation or evidence that Decree 1745 somehow "administer[s]" requirements in Decrees 2685 and 390. That Decree 1745 establishes a customs bond and that Decrees 2685 and 390 may also contemplate customs bond is insufficient to establish that the former "administer[s]" the latter within the meaning of Article X:3(a).

55. Colombia encourages the Panel to review Panama's description of the operation of the customs bond established in Decree 1745.[74] This description does not characterize Decree 1745 as an instrument that "administer[s]" requirements provided for elsewhere. In fact, Panama itself characterizes the customs bond requirement as emanating directly from Decree 1745 and makes no mention of Decree 1745 administering a requirement established in a separate legal instrument.[75]

56. For these reasons, Colombia respectfully requests that the Panel find that Panama has failed to establish that Decree 1745 falls within the scope of Article X:3(a).

B. Decree 1745 is in any case consistent with Article X:3(a)

57. Even if Decree 1745 were to fall within the scope of Article X:3(a), it is consistent with the provision.

58. First, uniform administration requires that Members ensure that their laws are applied consistently and predictably, and uniformly between individual traders.[76] The panel in *US – Stainless Steel (Korea)* noted that the requirement of uniform administration of laws and regulations must be understood to mean uniformity of treatment in respect of persons similarly situated, and does not require identical results where relevant facts differ.[77] Article X:3(a) should not be read as a broad anti-discrimination provision, and should not be interpreted to require that all products be treated identically.[78] The panel in *Argentina – Hides and Leather* dismissed the complaining party's argument that it was improper for Argentina to construct a special set of procedures for administering its export laws for only one type of product (hides) while other products were treated differently.[79]

59. The same logic applies in the context of the customs bond requirement. The customs bond requirement applies to all apparel and footwear under certain value thresholds. All importers of these products can expect treatment of the same kind, in the same manner, both over time and in different places and with respect to other persons. Therefore, Colombia requests the Panel to find that the customs bond requirement does not lead to non-uniform treatment within the meaning of Article X:3(a).

60. Second, impartial administration has been considered to mean the application or implementation of the relevant laws and regulations in a fair, unbiased and unprejudiced manner.[80] Panama has not explained why it considers the measure to be partial, and more specifically, why the fact that the percentage set out in the bond requirement is fixed means that the requirement is not impartial. It has therefore not shown how and *why* those provisions necessarily lead to impartial administration. The measure applies equally to all importers of covered apparel and footwear, and Panama has not explained to what entity Colombia is partial to and what interests it is favoring in applying the measure. Therefore, Panama has not discharged its burden of substantiating how and

[72] Panama's First Written Submission (Article 21.5 – Colombia), para. 75.
[73] Panama's First Written Submission (Article 21.5 – Colombia), para. 76.
[74] See Panama's First Written Submission (Article 21.5 – Colombia), paras. 34-35.
[75] Panama's First Written Submission (Article 21.5 – Colombia), para. 34.
[76] Panel Report, *Argentina – Hides and Leather*, para. 11.83. See also Panel Reports, *China – Raw Materials*, para. 7.692; and *US – COOL*, para. 7.876.
[77] Panel Report, *US – Stainless Steel (Korea)*, para. 6.51.
[78] Panel Report, *Argentina – Hides and Leather*, para. 11.84.
[79] Panel Report, *Argentina – Hides and Leather*, paras. 11.58 and 11.85.
[80] Panel Report, Thailand – Cigarettes (Philippines), para. 7.899.

why those provisions necessarily lead to administration that is not impartial and has not made a *prima facie* case in this respect.

61. Third, reasonable administration means administration that is equitable, appropriate for the circumstances and based on rationality.[81] In previous disputes, the requirement of reasonable administration was understood as requiring the examination of the features of the administrative act at issue in the light of its objective, cause or the rationale behind it.[82] Panama's allegation of unreasonable treatment is confined to the requirement that a customs bond is required of holders of a global bond.[83] However, as already explained, where imports at artificially low prices constitute an important share of the total imports, the global bond would be insufficient. Thus, Panama has failed to show that Decree 1745 leads to unreasonable administration.

62. For the reasons set out above, Colombia respectfully requests that the Panel reject Panama's claim that the customs bond is inconsistent with Article X:3(a) of the GATT 1994.

VIII. EVEN IF THE CUSTOMS BOND AND THE SPECIAL IMPORT REGIME WERE INCOMPATIBLE WITH ARTICLES X:3(a) OR XI:1 OF THE GATT 1994, THEY ARE JUSTIFIED UNDER ARTICLE XX OF THE GATT 1994

A. The customs bond and customs formalities are measures necessary to protect public morals

1. The customs bond and the customs formalities in Decree 1745 are measures taken to protect public morals

63. Article XX(a) provides a justification for measures that are necessary to protect public morals.[84] Provisional justification under Article XX(a) requires a Member to demonstrate: (i) that it has adopted or enforced the measure "to protect public morals"; and (ii) that the measure is "necessary" to protect such public morals.[85]

64. The Appellate Body has interpreted the term "public morals" to denote standards of right and wrong conduct maintained by or on behalf of a community or nation.[86] The content of public morals can vary from Member to Member, depending upon a range of factors, including prevailing social, cultural, ethical, and religious values. Members should be given some discretion to define and apply for themselves the concept of public morals in their respective territories, according to their own systems and scales of values.[87] Members also have the right to determine the level of protection they consider appropriate.[88] Money laundering is one of the forms of public morals found to fall within the scope of Article XX(a).[89]

65. The Appellate Body has further found that a measure is designed to protect public morals if it is not incapable of protecting public morals, such that there is a relationship between the measure and the objective of protecting public morals.[90] To determine the existence of such relationship, a panel must examine evidence regarding the design of the measure, including its content, structure, and expected operation.[91]

66. A principal policy objective of Decree 1745 is to combat money laundering. In the case of Colombia, the fight against money laundering is a matter of "public morals", as recognized by the panel and the Appellate Body in the original proceedings.[92] The policy objectives of Decree 1745 are

[81] Panel Report, *China – Raw Materials*, para. 7.696.
[82] Panel Report, *US – COOL*, para. 7.851.
[83] Panama's First Written Submission (Article 21.5 – Colombia), para. 88.
[84] Original Appellate Body Report, para. 6.20.
[85] Appellate Body Report, *EC – Seal Products*, para. 5.169 (referring to Panel Report, *US – Gambling*, para. 6.455).
[86] Appellate Body Report, *US – Gambling*, para. 299.
[87] Panel Report, China – Publications and Audiovisual Products, para. 7.759.
[88] Appellate Body Report, *EC – Seal Products*, para. 5.119.
[89] Original Panel Report, para. 7.339.
[90] Original Appellate Body Report, para. 6.23.
[91] Original Appellate Body Report, para. 6.22.
[92] Original Panel Report, para. 7.339; and Original Appellate Body Report, para. 5.105.

set out in the Decree's preamble.[93] It explains that trade transactions are being utilized by criminal organizations to launder money, finance terrorism, and generate unfair competition. The Decree further explains that one of the modalities used by criminal organizations consists of using practices involving customs fraud. It adds that the footwear and apparel sectors have been significantly affected by money laundering and other illicit transactions and that, consequently, it is necessary to implement new mechanisms to control and counter this scourge. The minutes of the Triple A Committee confirm that one of the principal policy objectives of Decree 1745 is to fight money laundering.[94]

67. In short, Decree 1745 is a measure adopted to protect public morals within the meaning of Article XX(a) of the GATT 1994.

2. The customs bond and the customs formalities in Decree 1745 are necessary

68. The examination of "necessity" involves, in each case, a process of "weighing and balancing" the following factors: (i) the extent to which the measure sought to be justified contributes to the realization of the end pursued; (ii) the relative importance of the societal interest or values that the measure is intended to protect; and (iii) the trade-restrictiveness of the challenged measure.[95] After this preliminary analysis of necessity, this result must be confirmed by comparing the measure with its possible alternatives.[96] However, each Member has the right to determine the level of protection they consider appropriate, and the alternative suggested must be capable of achieving this level of protection.[97]

69. First, as to the importance of the interests protected, the objective of combating money laundering reflects societal interests that are vital and important in the highest degree.[98] Money laundering is linked to drug trafficking and the financing of criminal groups, so that the measures also seek to reduce the operational capacity of drug traffickers and criminal groups. The importance of the fight against money laundering as an objective of Colombian public policy is reflected in statements made by high-ranking officials.[99] Also, it has been recognized in other disputes that measures which address concerns relating to money laundering and organized crime protect values and interests that could be considered vital and important in the highest degree.[100]

70. Second, as to the contribution, the measures are capable of making a material contribution to combating money laundering, because they reduce the incentives for using imports of apparel and footwear at artificially low prices for money laundering purposes. The customs bond ensures the payment of duties and any fines or penalties on the importation of the goods, discourages under-invoicing, and allows the collection of fines in those instances.

71. The customs formalities provide information that permits customs authorities to undertake a more informed risk assessment, ensure that there is a legitimate relationship between the importer and the exporter, and also ensure that the supplier declared by the importer is actually the entity that supplied it with the products being imported. The certificate of existence and incorporation issued by the relevant national authority of the exporter's country helps confirm that the exporting company actually exists, and it not merely a shell company. The information of the distributors in Colombia allows the DIAN to assess whether the commercial activities claimed by the importer are real and not fictitious, and to keep a record of the shelter companies, people, partners, fiscal supervisors, and persons participating in the scheme. The signed statement by the legal representative of the importer certifying the accuracy of the commercial information provided to the DIAN, which acknowledges the legal right of the DIAN to send the customs information to other relevant governmental agencies, helps to identify precisely the person in charge of the importation

[93] Exhibit PAN-2.
[94] Exhibit COL-4.
[95] Appellate Body Report, *India – Solar Cells*, para. 5.59; and Original Appellate Body Report, paras. 5.71-5.73 and 5.77.
[96] Panel Report, *EC – Seal Products*, para. 7.630.
[97] Panel Report, *US – Gambling*, para. 6.465; and Appellate Body Report, *EC – Seal Products*, para. 5.279.
[98] Original Appellate Body Report, para. 5.105.
[99] National Planning Department, National Development Plan (2010-2014) (extracts) (Original Exhibit COL-33); and National Council for Economic and Social Policy, National Policy against Money Laundering and the Financing of Terrorism, 18 December 2013 (Original Exhibit COL-19).
[100] See Panel Report, *US – Gambling*.

and can be held as evidence of its participation in the operation. Some of these documents should be apostilled or legalized and have an official translation in Spanish. The purpose of the legalized/apostilled documents is to confirm that they are indeed issued by the relevant authority of the exporting country.

72. Panama argues that there is an alternative instrument that could also contribute to the fulfillment of these objectives.[101] As a matter of logic, the existence of an alternative measure that can contribute to the fulfillment of a particular objective does not in itself mean that the challenged measure is not apt to make a material contribution to the fulfillment of the same objective. Also, the assessment of contribution under the necessity test articulated by the Appellate Body evaluates the aptness of challenged measure and does not call for a comparison of its contribution with another measure.[102] Thus, in this particular context, that another measure can contribute to the objective does not exclude that the customs bond and customs formalities in Decree 1745 contribute to the fulfillment of the same objective.

73. Colombia also recalls that the Appellate Body has clearly rejected a requirement to quantify the contribution of the challenged measures, explaining that the analysis of contribution "can be done in either quantitative or in qualitative terms".[103] The Appellate Body has additionally observed that a measure may be justified under Article XX even if its contribution "is not immediately observable".[104] Therefore, Panama's attempt to require quantification of the contribution of the measure to the fulfillment of the objectives pursued is misplaced.[105]

74. Third, the measures are not trade restrictive in any way. Neither of the measures restricts the quantity of imports and therefore do not restrict trade. The measures do not impose any quantitative limits on imports, and are carefully calibrated to affect imports likely to be used for money laundering. Furthermore, the customs bond is a contingent liability. Thus, to the extent it is found to have any restrictive effects, those would be significantly lower than requiring the payment of duties.

75. Panama's allegations on the trade restrictiveness of the measure are unpersuasive. In the context of the customs bond, Panama merely lists features of the measures, but provides no analysis of how each of these features gives rise to trade restrictiveness.[106] Furthermore, Panama fails to make any link between these features and its conclusion that the customs bond is "highly trade restrictive".[107] In the context of the customs formalities, Panama's main complaint is that the measure encourages importers to shift from artificially low priced goods to higher priced goods.[108] Rather than demonstrating that the regime is "highly trade restrictive"[109], Panama's own assertion recognizes that, while the importer may vary the composition of the apparel and footwear goods it purchases, it can and will still import goods to Colombia. This scenario cannot reasonably be described as "highly trade restrictive".

76. As an alternative less restrictive measure, Panama refers to a customs bond required after a customs controversy has arisen, which Panama claims makes an equivalent contribution.[110] However, Panama has not demonstrated that the "valuation controversy" bond would make an equivalent contribution to reducing undervaluation and combatting money laundering. The effectiveness of Panama's proposal is limited by the resources of the customs administration and the possibility of human error. These factors create a risk that irregular transactions will not be detected and therefore the undervalued imports being used for money laundering purposes will be entered without the posting of a customs bond. This risk is not present in the case of the customs bond in Decree 1745 because it applies to all import transactions of the covered products.

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[101] Panama's Second Written Submission (Article 21.5 – Panama), paras. 207, 208, 227, and 251.
[102] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.
[103] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 146.
[104] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.
[105] Panama's Second Written Submission (Article 21.5 – Panama), para. 209 (referring to Original Appellate Body Report, para. 5.110).
[106] Panama's Second Written Submission (Article 21.5 – Panama), para. 213.
[107] Panama's Second Written Submission (Article 21.5 – Panama), para. 214.
[108] Panama's Second Written Submission (Article 21.5 – Panama), para. 239.
[109] Panama's Second Written Submission (Article 21.5 – Panama), para. 239.
[110] Panama's Second Written Submission (Article 21.5 – Panama), paras. 215-219.

77. Panama also proposes using the invoice as an alternative to the supplier's sales certificate.[111] This alternative also does not make an equivalent contribution because it does not address the risk that the information in the invoice may be inaccurate.[112] Manipulation of the information provided in the invoice is one of the practices used in trade-based money laundering. The supplier's sales certificate provides a means to confirm the information provided in the invoice. The other alternative measures proposed by Panama have an element in common, which is that the information would be supplied after the withdrawal of the merchandise.[113] Thus, Panama does not question the value of the information itself, but rather the moment when it is submitted. However, the submission of this information after withdrawal of the merchandise does not address the problem posed by shell companies, which are a technique used for trade-based money-laundering.[114] The use of shell companies allows criminal groups to evade the customs authorities' efforts to investigate and prosecute suspicious transactions after the merchandise has been withdrawn from customs. In such situations, the criminal groups will use a different shell company for subsequent imports. In sum, the alternative proposed by Panama does not make an equivalent contribution to the policy objectives pursued by Colombia.

78. For all these reasons, it is clear that both the customs bond and the special import regime are necessary to protect public morals in the meaning of Article XX(a).

B. The customs bond and special import regime are measures necessary to secure compliance with GATT-consistent laws and regulations

79. Article XX(d) provides a justification for measures that are necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATT 1994. A measure can be said to secure compliance with laws or regulations when its design reveals that it secures compliance with specific rules, obligations, or requirements under such laws or regulations, even if the measure cannot be guaranteed to achieve such result with absolute certainty.[115] The necessity test under Article XX(d) proceeds along similar lines as the necessity test under Article XX(a).

80. Decree 1745 combats money laundering and therefore seeks to secure compliance with Article 323 of Colombia's Criminal Code, which addresses money laundering. In the original proceedings the Appellate Body recognized the link between undervaluation and money laundering in Colombia.[116] The Appellate Body also recalled the original panel's finding that "there is no reason to consider that Article 323 of the Colombian Criminal Code is itself inconsistent with the provisions of the GATT 1994."[117]

81. The customs bond and special import regime are also measures to secure compliance with Colombia's customs laws and regulations, including Decrees 390 of 2016[118] and 2685 of 1999.[119] As indicated in Article 1 of the Decree, its objective is to reinforce Colombia's risk management and customs control system.[120] Colombia's customs laws and regulations are consistent with GATT 1994.[121]

82. Colombia has established that Decree 1745 makes a contribution to the fight against money laundering, that the fight against money laundering involves vital and important interests of the highest degree in Colombia[122], and that the customs bond and formalities established under Decree 1745 do not have restrictive effects of trade. In the circumstances, Decree 1745 must be found to be a measure necessary to secure compliance with Article 323 of the Colombian Criminal Code. In addition, by guaranteeing the payment of the customs duties, taxes and possible penalties,

[111] Panama's Second Written Submission (Article 21.5 – Panama), paras. 247 and 251.
[112] Original Exhibit COL-11.
[113] Panama's Second Written Submission (Article 21.5 – Panama), paras. 248-251.
[114] Original Exhibit COL-11.
[115] Appellate Body Report, *Argentina – Financial Services*, para. 6.203.
[116] Original Appellate Body Report, para. 5.145.
[117] Original Appellate Body Report, para. 5.139 (referring to Original Panel Report, para. 7.512).
[118] Exhibit PAN-4.
[119] Exhibit PAN-3.
[120] Exhibit PAN-2.
[121] Appellate Body Report, *US – Carbon Steel*, para. 157; see also Panel Report, *Colombia – Ports of Entry*, paras. 7.531-7.532.
[122] Original Appellate Body Report, para. 5.105.

the customs bond contributes to guaranteeing customs obligations.[123] The customs formalities provide information to the customs authority that allows it to detect and control transactions that do not comply with Colombia's customs laws and regulations.

83. Panama has not provided any rebuttal arguments or evidence under subparagraph (d) of the Article XX and, consequently, the Panel should find that the customs bond and customs formalities in Decree 1745 are justified under Article XX(d) of the GATT 1994.

C. The customs bond and special import regime are compatible with the chapeau of Article XX of the GATT 1994

84. The chapeau of Article XX requires that measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. Whether discrimination is arbitrary or unjustifiable, however, depends on the cause or rationale of the discrimination, not on the effects of the discrimination.[124] The existence of a "disguised restriction on international trade" might be derived where a restriction on international trade, arising in the application of a measure provisionally justified under a specific paragraph of Article XX, would lead to that exception being abused or illegitimately used.[125]

85. The customs bond and the special import regime comply with the chapeau of Article XX of the GATT 1994, because they are not applied in a manner which constitutes a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade.

86. The customs bond and customs formalities established in Decree 1745 are applicable to imports from all origins. Moreover, customs bonds and customs formalities are legitimate instruments that are permitted under the GATT 1994 and the Agreement on Trade Facilitation. Furthermore, there is nothing concealed or unannounced about the customs bond and customs formalities. Both the customs and the customs formalities are set out in a decree that was published in Colombia's *Diario Oficial*.[126] Therefore, the customs bond and the customs formalities established in Decree 1745 are not "disguised restrictions" for purposes of the chapeau of Article XX of the GATT 1994.

87. In sum, the customs bond and customs formalities in Decree 1745 are consistent with the chapeau of Article XX of the GATT 1994.

IX. CONCLUSION

88. Colombia requests that the Article 21.5 Panels find that Colombia has implemented the recommendations and rulings of the DSB to bring its measures into conformity with its obligations under the GATT 1994.

[123] Panel Report, *US – Certain EC Products*, para. 6.41.
[124] Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 226–228.
[125] Panel Report, *Brazil – Retreaded Tyres*, para. 7.320.
[126] Exhibits COL-12 and COL-13.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF PANAMA

I. INTRODUCTION

1. More than a decade has passed since Panama called on Colombia to comply with its obligations under the agreements of the World Trade Organization (WTO) and cease causing impediments to trade. Not only has Colombia failed to heed these requests; it has continued exploring new subtle ways of hindering the international import trade. Panama considers this to be unacceptable and asks the Panels to find once again that Colombia is openly breaching its obligations to this international organization and that they issue recommendations and rulings on the inconsistency with WTO law of the specific bond and the special import regime imposed by Decrees Nos. 1745 and 2218.

2. The picture of compliance presented by Colombia in this dispute is incomplete. From a factual standpoint, Colombia refers to a tariff shift as the only measure of compliance, whereas it is clear that there are other Colombian compliance-related measures forming a complex system of customs control to restrict imports below certain thresholds. From the standpoint of the policies that are involved, Colombia alleges that this matter concerns its intention to combat underinvoicing and money laundering. However, it submits no item of evidence that the imports at issue have been condemned by judicial or administrative authorities as acts involving underinvoicing and the offence of money laundering. What Colombia fails to mention is that the establishment and maintenance of the measures at issue are underpinned by purposes of industrial protection, promotion of competitiveness, protection of jobs and policy coordination.

3. The regulatory regime provided for explicitly and organically in Colombian legislation is a regime that represents a major logistical challenge, expenditure of time and money, reputational and risk-management impact, ex-post control activities and possible criminal investigations in respect of money laundering and customs fraud.[1]

4. Panama considers that the special import regime is inconsistent with Articles VIII:3, X:3(a) and XI:1 of the General Agreement on Tariffs and Trade (the GATT 1994), and Articles 1, 2, 3, 5, 6 and 7 of the Customs Valuation Agreement (CVA). Panama also considers that the specific bond provided for in that regime is inconsistent with Articles X:3(a) and XI:1 of the GATT, and with Article 13 of the Customs Valuation Agreement. Panama observes that both these claims and the changes in regulatory instruments under the new Decrees No. 1786 and No. 2218, are duly covered by the collective terms of reference of these Panels. Panama is of the view that none of these measures is justified by Articles XX(a) and XX(d) of the GATT.

II. THE MEASURES CONTAINED IN DECREES NO. 1745 AND NO. 2218 AND PANAMA'S CLAIMS ARE COVERED BY THE PANELS' TERMS OF REFERENCE

5. Colombia has introduced regulatory changes affecting the already precarious competitive status of imports in the clothing and footwear sectors, to which the sectors of textiles, fibres and yarns ("imports") have now also been added. On 27 December 2017, Colombia issued Decree No. 2218, replacing Decree No. 1745, as the legal basis of the specific bond and the special import regime.[2]

6. Colombia seeks to shirk its obligations by arguing that Panama's claims are not covered by the Panels' terms of reference. Colombia argues that the mandate of the Panel requested by Colombia is confined to the measures and provisions contained in its panel request.[3] Hence, according to Colombia, the measures contained in Decree No. 1745 and Panama's claims under

[1] Customs Agency, Repremundo, "Arancel y medidas de importación confecciones y calzado – Dec. 1744 y 1745, de 2016", 29 November 2017, Exhibit PAN-91.

[2] Panama notes that Decree No. 1744 has also recently been amended by Decree No. 1786 of 2 November 2017 "partially amending the Customs Tariff" (Decree No. 1786), Exhibit PAN-45.

[3] Colombia's rebuttal as complainant, paras. 3-14.

Articles XI:1, X:3(a), VIII:3 of the GATT and Articles 1, 2, 3, 5, 6 and 7 of the Customs Valuation Agreement are not covered by the terms of reference of that Panel.[4]

7. However, Colombia's arguments are unconvincing. Panama considers that there is no procedural limitation preventing the panels from ruling on all the measures at issue and all the claims submitted by Panama. Both the measures contained in Decree No. 1745 and Panama's claims under the aforementioned provisions form part of the terms of reference of the Panel requested by Colombia and the Panel requested by Panama, except for Article VIII of the GATT, which only forms part of the terms of reference of the Panel requested by Colombia.

8. As is well-known, the terms of reference of the Panel requested by Colombia are set out in its request for the establishment of a compliance panel, document WT/DS461/17. This document, which contains the *matter* referred to the DSB by Colombia, includes the *ad valorem* tariff of Decree No. 1744, Article II of the GATT, as well as "[Panama's] concerns regarding Colombia's compliance with the DSB's recommendations and rulings", in particular, [Panama's] [dis]agree[ment] that Decree 1744 […] is consistent with the covered agreements and brings the compound tariff into conformity with the GATT 1994".[5] These three issues, therefore, including Panama's disagreement, form part of the "matter" that has been referred to the Panel requested by Colombia, and fall within the terms of reference of that Panel. The mandate foreseen by Article 11 of the DSU in order for the Panel to make an "objective assessment of the matter" implies that the Panel requested by Colombia must, at the very least, determine the nature of Panama's disagreement, and verify whether it is well-founded.

9. Panama has complied with the requirement to give explicit expression to that disagreement in its respective submissions and to enable the Panel requested by Colombia to discharge its functions. As is well-known, Panama's position which gave rise to this disagreement is that the differential *ad valorem* tariff under Decree No. 1744 is not the only compliance measure, but that there are also the measures contained in Decree No. 1745, and that these measures are inconsistent with the GATT and the Customs Valuation Agreement for numerous reasons, as explained in its submissions as both respondent and complainant.

10. Panama likewise recalls that the terms of reference of a compliance panel are determined in the light of Articles 6.2 and 21.5 of the DSU taken together.[6] It is well-established that the requirements of DSU Article 6.2 must be interpreted in accordance with the scope and the function of the compliance proceedings[7], and that this function is one of examining *fully* the "consistency with a covered agreement" of the "measures taken to comply" with the recommendations and rulings of the DSB so as to ensure real and effective compliance.[8]

11. It is for this reason that the compliance panel requested by Colombia should examine the compliance measures *fully*, that is, both the declared compliance measures and those measures that are *not* declared but which have a particularly close relationship or close nexus, in terms of timing, nature and effects, to the declared compliance measure and the recommendations and rulings of the DSB in accordance with the Appellate Body's jurisprudence on the close nexus.[9] Panama sees no logical or legal impediment to prevent these jurisprudential criteria from being applied in this case.

12. In its previous submissions, Panama has demonstrated that the specific bond and the special import regime are "undeclared measures" with a particularly close relationship to Decree No 1744, in terms of timing, nature and effects, and to the recommendations and rulings of the DSB.[10] Accordingly, all these measures must be considered as compliance measures duly covered by the terms of reference of the Panel requested by Colombia. It should be noted that the regulatory changes recently adopted by Colombia by means of Decree No. 2218 do not affect the terms of

[4] Ibid., paras. 3-14.

[5] Colombia's compliance panel request, p. 2 and footnote 7.

[6] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10 referring to para. 4 of the preliminary ruling in respect of its terms of reference.

[7] Appellate Body Report, *US – Zeroing (Article 21.5 – Japan)*, para. 1.25.

[8] Appellate Body Report, Canada – Aircraft (Article 21.5 – Brazil), para. 41.

[9] Appellate Body Report, US – Softwood Lumber IV (Article 21.5 – Canada), para. 77; US – Zeroing (EC) (Article 21.5 – EC), para. 204.

[10] See Panama's first written submission as respondent, paras. 15-48; Panama's rebuttal as complainant, paras. 6-57 and Panama's rebuttal as respondent, paras. 37-134.

reference of the Panel requested by Colombia. Decree No. 2218 simply replaces Decree No. 1745 without changing the intrinsic nature of the compliance measures as customs controls. It has to be borne in mind that it is wrong to say that Decree No. 2218 is a new "measure"; it is simply a new "normative act"[11] which extends the validity of existing measures.

13. However, in demonstrating that Colombia's compliance measure is broader than the declared measure, it is only to be expected that concerns pertaining to compliance other than those raised in the text of Colombia's panel request would arise. Thus, with respect to all the controls, requirements and conditions of the special import regime, Panama has serious concerns regarding compliance under Articles XI:1, X:3(a), and XIII:3 of the GATT; and Articles 1, 2, 3, 5 and 7 of the Customs Valuation Agreement. These are not new concerns and the Colombia Panel can testify to their existence as early as the first occasion used by Panama to give its views as respondent, i.e. in its first written submission as respondent, on 29 November 2017.[12]

14. Such being the case, it is logical, without there being any contrary legal impediment in the DSU, that issues of compliance concerning undeclared measures should be covered by the mandate of the Panel requested by Colombia. In other words, and without prejudice to the fact that these issues form part of the "matter" referred to in Colombia's panel request as such, it may be asked what would be the point of accepting that certain undeclared measures form part of a panel's terms of reference in order subsequently to reject various compliance issues stemming from those same measures.

15. Furthermore, Panama considers that such a contrived approach would not help the compliance Panel requested by Colombia to relieve itself of its obligations under Article 11 of the DSU, inasmuch as it would not be able to evaluate *fully* the matter of compliance by Colombia.[13] An objective and full assessment of compliance could not be made if the Panel were unable to assess the compliance of the undeclared measures with WTO provisions other than Article II of the GATT. Such an assessment would be based on an incomplete and even skewed or biased framework, as it would have been defined exclusively by one of the parties to the dispute. In addition, an analysis of this nature would run counter to achieving a "satisfactory settlement" of the dispute in accordance with Article 3.4 of the DSU, and to achieving a "prompt settlement" and "prompt compliance" in accordance with Articles 3.3 and 21.1 of the DSU.[14]

16. In conclusion, Panama has no doubt that the measures contained in Decree No. 1745 and its claims under Articles XI:1, X:3(a), and XIII:3 of the GATT, as well as under Articles 1, 2, 3, 5 and 7 of the Customs Valuation Agreement are duly covered by the terms of reference of the Panel requested by Colombia.

17. Panama observes that, in any case, even if the Panel requested by Colombia were to consider that the measures under Decree No. 1745 do not form part of its terms of reference, these measures are nevertheless covered by the terms of reference of the Panel requested by Panama.[15] In its panel request, Panama identified the specific bond and the special import regime as "the specific measures at issue".[16] Similarly, even if the Panel requested by Colombia were to consider that Panama's claims under Articles X:3(a) and XI:1 of the GATT and under Articles 1, 2, 3, 5 and 7 of the Customs Valuation Agreement do not form part of the terms of reference of the Panel requested by Colombia, they are covered by the terms of reference of the Panel requested by Panama.[17] Thus, there is no procedural limitation preventing the Panels from ruling on the measures at issue and Panama's claims.

18. That having been said, Panama observes that Article VIII of the GATT is not identified in its compliance panel request. At the time it submitted that request, the requirements of Decree No. 1745 had been in force for only a few months and, as a matter of good faith, Panama saw no cause for concern. Doubts began to arise, however, when regulatory changes were introduced by Colombia. Already in its first submission as respondent, Panama placed on record its

[11] Panama's rebuttal as respondent, paras. 5 and 7.
[12] Panama's first submission as respondent, para. 66(a).
[13] Appellate Body Report, Canada – Aircraft (Article 21.5 – Brazil), para. 41.
[14] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10, referring to para. 27 of the preliminary ruling in respect of its terms of reference.
[15] WT/DS461/25 and WT/DS461/22.
[16] WT/DS461/22, paras. I.A. and I.D.
[17] WT/DS461/22, paras. II.A and II.D.

concern that the stringency of certain formalities represented a problem of compliance by Colombia with Article VIII:3 of the GATT.

19. However, the concern became critical with the entry into force of Decree No. 2218 of 27 December 2017, given the extreme nature of the legal effects of that regulation. As will be recalled, as soon as Panama learned of that regulatory measure, it communicated that information to the Panels and underscored its claim under Article VIII:3 at the earliest available opportunity: its rebuttal as respondent.[18] Panama could not have acted more quickly. In particular, Panama could not have included this claim in its compliance panel request, because the legal consequence underpinning the claim was a novel element of Decree No. 2218 that had not existed at the time the request was made. Even under these circumstances, Panama commented that, in view of the importance of this claim and of due process, Panama was placing itself at the disposal of the Panels in order, if appropriate, to look at additional options that the Panels might consider relevant in order to ensure the due engagement of the parties on this matter.[19]

20. Panama considers it important to specify that, although the regulatory action of Colombia has not changed the measure intrinsically, it has introduced features into the measure which have obliged Panama to react in respect of steps to prevent Colombia from presenting an imprecise picture of compliance. Panama has addressed this (unexpected) situation in good faith and with a cooperative attitude, seeking to adapt its submissions and arguments to the volatile and changing regulatory environment prevailing in Colombia in respect of yarns, textiles, apparel and footwear. Panama would be dismayed if, despite its actions being attuned to a moving target, its complaint concerning the violation of Article VIII:3 of the GATT were affected by procedural uncertainty regarding the precise limits of the terms of reference of a compliance panel requested by the original respondent. Thus, a measure obviously inconsistent with WTO law would circumvent the authority and jurisdiction of these courts, leaving Panama with no other remedy than having to bring a second Article 21.5 appeal under the Dispute Settlement Understanding, which would run counter to the system's objective of achieving "prompt settlements".

21. In conclusion, for the reasons set forth above, Panama requests the Panels to reject Colombia's claim that the measures in dispute and the corresponding claims of Panama do not form part of the terms of reference of the Panels.

III. THE SPECIFIC BOND AND THE SPECIAL REGIME ARE "COMPLIANCE MEASURES"

22. For the purposes of these proceedings, Colombia has conveniently decided to declare only the differential *ad valorem* tariff of Decree No. 1744 as the compliance measure and to deny the relevance of the measures contained in Decree No. 1745, as currently reflected in Decree No. 2218. However, this obvious attempt by Colombia to circumvent the compliance disciplines under Article 21.5 of the DSU is at odds with the facts and with the Appellate Body's "close nexus" jurisprudence.

23. The close nexus analysis has been used by numerous panels and the Appellate Body in the past to determine that an undeclared measure has a close nexus to the declared compliance measure, and is therefore duly covered by the mandate of the compliance panel.[20]

24. Thus, Panama considers that an "undeclared measure" must be considered as a "compliance measure" when it has a particularly close nexus to the "declared measure". All the third parties that submitted replies to the Panels' questions agree on this point.[21] In practice, this nexus has been determined in terms of timing, nature and effects as between the two measures, as well as between the measures themselves and the recommendations and rulings of the DSB.[22]

[18] Panama's rebuttal as respondent, paras. 9-10, 423-433.

[19] Panama's rebuttal as respondent, para. 12.

[20] See, inter alia, Australia – Salmon (Article 21.5 – Canada), US – Zeroing (EC) (Article 21.5 – EC), US – Upland Cotton.

[21] Ecuador's response to the Panels' question No. 6; United States' response to the Panels' question No. 1, para. 3; Japan's response to the Panels' question No. 1; European Union's response to the Panels' question No. 1, para. 1.

[22] Appellate Body Reports, US – Softwood Lumber IV (Article 21.5 – Canada), para. 77; US – Zeroing (EC) (Article 21.5 – EC), para. 204.

25. The nexus is clear in this dispute.[23] In particular:

- Colombia explained during the Article 21.3(c) proceedings that its compliance measure would consist in the combined implementation of tariff measures and customs measures, in order to address money laundering issues; and that it would therefore resort to the publication of "two 'mutually supportive decrees' as part of the implementation process";

- Colombia has argued that the specific bond of Decree No. 1745 is essential for charging the tariffs of Decree No. 1744 in Exhibit COL-4;

- the customs measures of Decree No. 1745 are a direct consequence of the recommendations and rulings of the DSB. Colombia has endeavoured to rectify the inconsistency with Article II of the GATT by means of Decree No. 1744, which imposes a purely ad valorem differential tariff. At the same time, Colombia seeks to address the same policy objectives that supported its attempted justification of the compound tariff under Articles XX(a) and (d) of the GATT by means of Decree No. 1745, which imposes customs "control" measures similar in effect to the specific component of the compound tariff in terms of its lack of sensitivity to price variations. As in the case of the compound tariff, Colombia, through these measures, limits access to the local market for imported products (in this instance in a manner contrary to Article XI:1 of the GATT), and seeks to justify the inconsistency of these measures with Articles XX(a) and (d) of the GATT;

- in terms of timing, Decrees Nos. 1744 and 1745 were adopted simultaneously on the same day following the adoption of the DSB recommendations;

- in terms of nature, the measures under Decrees Nos. 1744 and 1745 are analogous to the compound tariff of Decree No. 456, in the sense that they include a price-sensitive component, the ad valorem tariff of Decree No. 1744, and a specific component that is not price-sensitive.

[23] See, for example, Panama's rebuttal as complainant, paras. 6-57; Panama's rebuttal as respondent, paras. 37-134.

<table>
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<tr><td colspan="2">Use of thresholds to apply tariff
Presumption of unlawfulness below the threshold</td></tr>
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(price sensitive)
10%</td><td>Specific component
(not price sensitive)
US$5 or US$3 (above or below threshold)
US$5 or US$1.75 (above or below threshold)</td></tr>
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<table>
<tr><th>Decree No. 1744</th></tr>
<tr><td>Use of thresholds to apply tariffs</td></tr>
<tr><td>Differential ad valorem tariff
(price sensitive)
15% (above threshold) or
35-40% (below threshold)</td></tr>
</table>

<table>
<tr><th colspan="2">Decree No. 1745 (Decree No. 2218)</th></tr>
<tr><td colspan="2">Presumption of unlawfulness below threshold</td></tr>
<tr><td>Specific charges</td><td>Estimated costs</td></tr>
<tr><td>Specific bond</td><td>US$1.29-6.45/kg
(depending on heading)</td></tr>
<tr><td>Certificate of supplier’s existence</td><td>US$30/shipment</td></tr>
<tr><td>Nexus analysis</td><td>US$66.41/shipment</td></tr>
<tr><td>Translation of certificates</td><td>US$61.20/shipment</td></tr>
<tr><td>Apostille/legalization</td><td>US$20/shipment</td></tr>
<tr><td>Presence of importer or legal representative</td><td>US$292.18-2.058.57/shipment</td></tr>
<tr><td colspan="2">Requirement of time-limits and list of customers make the importation process unwieldy</td></tr>
</table>

- In addition, the measures at issue are activated with regard to certain thresholds established by Colombia and have the same public policy objective as Decree No. 456; moreover, these measures apply to the same relevant products and were issued by the same entity during the same session;

- Furthermore, on the same day that Decrees Nos. 1744 and 1745 were adopted, the Minister of Trade, Industry and Tourism of Colombia referred to these instruments collectively, stating that "the measures we have designed [Decrees Nos. 1744 and 1745] enable us to combat illegal phenomena efficiently, but at the same time we were careful not to adversely affect formal trade and to fully comply with the WTO mandate"24;

- It should be noted that these measures were designed "to achieve on an ongoing basis the policy objective pursued by the measures provided for in Decree 456 of 2014 and the amendments thereto"25, and that "the adoption of the strategies" envisaged in both

[24] Exhibit PAN-46.

[25] Eighth preambular paragraph of Decree No. 1745 (emphasis added). Similarly, the third preambular paragraph of Decree No. 1744 states that "taking into account the fact that the implementation period provided for 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 enforce the exception provided for in Article 2, paragraph 2, of Law 1609 of 2013, in order to achieve on an ongoing basis the policy objective pursued by this measure". (emphasis added).

Decrees were adopted on the basis of the recommendation of the Inter-Institutional Commission against Smuggling at its special session on 24 August 201626; and,

- In terms of effects, Decree No. 1745 perpetuates the restrictive effect of the compound tariff by restricting imports of the relevant merchandise.

26. Moreover, Panama considers that it would *not* be appropriate for the Panels to determine whether Colombia has complied with the recommendations and rulings of the DSB, without reference to the existence of Decree No. 1745 and its respective amendments.[27] If the Panels were to work in this way, they would not be making an objective assessment of the facts as required by Article 11 of the DSU, since they would ignore an essential element of the facts relevant to compliance, thereby failing to perform their duty of examining the compliance measures "in their totality".[28]

27. Consequently, Panama considers that the measures challenged are "closely related" to the measure taken to comply and declared as such by Colombia, as well as to the recommendations and rulings of the DSB. In view of the foregoing, Panama reaffirms that the specific bond, as well as the special import regime, contained in Decree No. 1745, are "measures taken to comply" within the meaning of Article 21.5 of the DSU.

IV. THE SPECIFIC BOND AND THE SPECIAL IMPORT REGIME ARE RESTRICTIONS WITHIN THE MEANING OF ARTICLE XI:1 OF THE GATT

A. THE SPECIFIC BOND IS INCONSISTENT WITH ARTICLE XI:1 OF THE GATT

28. The specific bond imposed by Decree No. 1745, and currently in force under Decree No. 2218, is inconsistent with Article XI:1 of the GATT. It is an indispensable condition for the importation of fibres, yarns, textiles, apparel and footwear under Decrees No. 1745, and now No. 2218. This requirement has limited access to the Colombian market for such imports[29], has impaired and nullified competitive opportunities for imported products and importers[30], has affected the latter's investment plans, and has generated uncertainty and significant transaction costs.[31] At the outset, Colombia alleges that the specific bond, together with the other measures under Decree No. 1745, is designed to reduce incentives for importing apparel and footwear at "artificially low" prices[32], which is an explicit acknowledgement that the bond modifies the conditions of competition for imports in order to exert a restrictive effect on the latter.

29. The specific bond impedes access to the Colombian market for imports. Prior to Decree No. 1745, the prevailing regulatory conditions in Colombia, including the provisions of Decrees No. 2586[33], No. 4927[34], and No. 456[35], allowed market access to Colombia for subject goods with the tariff as the sole barrier.[36] Now, in addition to payment of the tariff, importers are required to obtain a specific bond and keep it in force for a period of three years.

30. Obtainment of the specific bond depends on certain documentary requirements being met; on the assessment of the applicant's creditworthiness, including its credit history, and the amount requested; and on the approval of a credit quota under the criteria laid down by the entities

[26] Sixth preambular paragraphs of Decrees No. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.

[27] Panel Report, US – Large Civil Aircraft (second complaint)(Article 21.5 – EU), para. 7.74.

[28] Appellate Body Report, US – Softwood Lumber IV (Article 21.5 – Canada) para. 67 referring to Appellate Body Report, US – Shrimp (Article 21.5 – Malaysia) para. 87.

[29] Panama's first written submission as complainant, para. 40; Panama's first written submission as respondent, para. 53; Panama's rebuttal as complainant, para. 98.

[30] Panama's first written submission as complainant, paras. 37-39; Panama's first written submission as respondent, para. 54; Panama's rebuttal as complainant, paras. 71-95.

[31] Panama's first written submission as complainant, para. 40; Panama's first written submission as respondent, para. 55; Panama's rebuttal as complainant, paras. 96-104.

[32] Colombia's rebuttal as complainant, para. 119.

[33] Decree No. 2685, Exhibit PAN-3.

[34] Colombian Customs Tariff. Exhibit PAN-1 (original panel).

[35] Exhibit PAN-3 (original panel).

[36] The tariff and the sales tax constitute the category of "customs taxes" under Colombian law. Article 1 of Decree No. 2685, Exhibit PAN-3.

concerned.[37] It is not an automatic approval process. If the banking evaluator does not consider an applicant to be qualified, for whatever reasons, it will not obtain the specific bond, and will not therefore be able to import the products in question. Thus, the need to obtain the specific bond directly limits the capacity of importers to import and in this way affects the access of imported products to the Colombian market.

31. Panama understands that this bond is required in all cases, as there will always be a dispute regarding the value of imported products. Article 128(5) of Decree No. 2685 describes the valuation dispute as "the doubts raised during the physical or documentary customs inspection process with regard to the declared value of the imported goods, because this value is considered *low* according to DIAN risk management system indicators".[38] If the importer does not provide the specific bond required by Decree No. 2218, there can be no release, and hence no importation. Moreover, the fact that, on its face, the specific bond of Decree No. 2218 is meant to be covered by the scope of Article 13 of the Customs Valuation Agreement does not detract from its restrictive character. Rather, Colombia's use of this rule is a tacit acknowledgement that the specific bond constitutes a restriction which, if the conditions imposed by Article 13 of the Customs Valuation Agreement are fulfilled, would in Colombia's view be covered by this rule.

32. The specific bond nullifies competitive and import opportunities for importers ineligible for a bank or insurance guarantee. Not all persons that could previously import the affected products by merely paying the tariff will have the same eligibility for banking or insurance credit. Thus, the specific bond excludes *ab initio* this category of importers for reasons unrelated to their import capacity.

33. The facts support this assessment. In a context in which banks attach great value to low credit risk, and where the Colombian Government announces that the transactions in question pose a high risk of fraud and money laundering, it is not unlikely that the level of refusal of loan applications will be high, and that the only importers who qualify will be those that already have an approved line of credit with the bank, or new importers with an impeccable credit history, a solid business track record and promising cash-flow prospects. Not all low-cost importers in Colombia, which usually import such products, would be in a position to satisfy these creditworthiness requirements, which are unrelated to their mere import capacity. The remainder will not enjoy the right to import the products affected by the specific bond.

34. The specific bond impairs competitive import opportunities because it entails a substantial cost that limits imports. Importers' investment budget for the purchase of low-cost imports is reduced by the increase in import-related costs caused by the introduction of the specific bond. These costs have been duly documented by Panama. As was seen in *Brazil – Retreaded Tyres*[39], the costs of the bond are of a magnitude such as to make it prohibitively expensive to enter the products subject to the decrees. The relative cost far exceeds the magnitude of Colombia's bound and applied tariffs of 35% and 40% *ad valorem*. There is no doubt that the imposition of a tariff, particularly a high tariff, may have a very restrictive effect on imports.[40] Therefore, while it is reasonable to expect that an excessively high tariff will have a highly restrictive (or even prohibitive) effect on imports, *a fortiori* a measure that imposes a much more onerous economic burden on importers than a tariff equivalent to the bound tariff will have much greater restrictive effects on imports.

35. The specific bond imposes an unwarranted cost because there is no real need to cover customs or tax contingencies. The specific bond is a hollow requirement. A careful assessment of the operation of the import regime under Colombian law shows that there are no major obligations justifying the requirement of the specific bond:

- the customs taxes, including the tariff, have already been paid when the import declaration is submitted, so that they cannot be subject to coverage by the specific bond41, and if in any case there were a doubt about the customs value of the goods, there is a guarantee

[37] Panama's first written submission as complainant, paras. 37 and 40; Panama's first written submission as respondent, para. 55; Panama's rebuttal as complainant, paras. 96-104. See also PAN-16 and PAN-23.

[38] Article 128(5) of Decree No. 2685, Exhibit PAN-3. (emphasis added)

[39] Panel Report, *Brazil – Retreaded Tyres*, para. 7.372.

[40] Panel Report, *Colombia – Textiles*, para. 7.441.

[41] Panama's rebuttal as complainant, para. 83.

mechanism under Colombian law which deals with this situation, so that the specific bond becomes superfluous or unnecessary[42];

- sanctions cannot be the subject of guarantees unless an offence requiring imposition of monetary penalties or fines has been detected, as required by Article 7(3)(4) of the Trade Facilitation Agreement, or unless under Article 8 of Decree No. 390 a primary customs liability has to be insured.[43]

36. The lack of substantiation becomes even more clear from the requirement of the specific bond in the case of importers which already hold a comprehensive guarantee.

37. In addition, by virtue of its design, a specific bond covering a pre-established and fixed amount for each import cannot bear any relation to specific obligations for each operation. The criterion of 200% coverage of the threshold price is arbitrary, is established on a theoretical basis, is unrelated to real values, and has no capacity to provide equally valid coverage for each and every transaction involved. It is improbable that all transactions affected by the specific bond have the same characteristics with regard to the risk of non-compliance, such that the choice of a single number like 200% to define the amount to be guaranteed would bear a close relationship to all of them.

38. The specific bond affects predictability in the investment plans of importers, since it generates uncertainty at different levels. For importers whose situation is uncertain *vis-à-vis* the financial system, the specific bond requirement introduces an element of uncertainty in their investment plans, because they do not know whether or not they will be eligible for credit with a financial institution, and whether they will eventually be able to import. Moreover, Colombia's continual and unexpected regulatory changes generate legal uncertainty regarding which products are affected by the Colombian measures and what are the specific requirements for their importation. These uncertainties adversely affect importers' investment plans.

39. In view of the foregoing, it would appear that importers have two options: not to import; or to change their investment plans and import goods in a higher market segment. The second option seems to have been the one chosen by importers of textiles and footwear following the introduction of the compound tariff, as is shown by Colombia's reply, inasmuch as virtually all imports have entered above threshold levels. Panama considers that the introduction of the specific bond and its attendant costs involve a shift in imports towards those not restricted by this requirement but subject to higher costs. This means that the specific bond is a restrictive condition on the importation of the relevant products at competitive prices.

40. Consequently, the specific bond requirement provided for in Article 7 of Decrees No. 1745 and No. 2218 is inconsistent with Article XI:1 of the GATT.

B. THE SPECIAL IMPORT REGIME IS INCONSISTENT WITH ARTICLE XI:1 OF THE GATT

41. The special import regime imposed by Decree No. 1745, and now in force under Decree No. 2218, is inconsistent with Article XI:1 of the GATT. This regime consists of a blend of requirements, reports, legal consequences and, in general, disincentives which restrict imports priced at or below the thresholds of both decrees. The special import regime is presented as a set of "mechanisms to strengthen the customs risk management and control system in the face of possible situations involving customs fraud associated with imports" of products covered by each of the decrees.[44] In practice, however, these "mechanisms" have the effect of dissuading importers from buying imported products at competitive prices, in flagrant violation of Article XI:1 of the GATT. Panama has given this the title "special import regime". However, in an environment closer to the political and industrial level, both the Government itself and Colombian producers refer to it as the "customs ordeal".[45] This is so because, in the view of those familiar with Colombian customs processes, this regime involves a major logistical challenge, costs in terms of time and money, a reputational and risk management impact, post-clearance controls and possible criminal

[42] Ibid, para. 84.
[43] Ibid., paras. 86-87.
[44] Article 1 of Decree No. 1745, Exhibit PAN-2; Article 1 of Decree No. 2218, Exhibit PAN-43.
[45] Dinero, "El S.O.S de los empresarios para rescatar la industria de la confección", 18 January 2018, Exhibit PAN-90; Revista Industria y Comercio, "Los Retos del Comercio Exterior propuestos para el 2018", p. 36, Exhibit PAN-86.

investigations into money laundering and customs fraud.[46] In particular, this regime operates in the following manner.

42. *Prior* to importation, more than one month in advance, importers must produce a set of certificates and documents, requiring for their preparation the work or cooperation of third parties, such as the foreign supplier, the authority that apostilles or legalizes documents abroad, the official translator in Colombia, the customs broken in Colombia, and even the distributors and other marketers who would purchase the goods after importation. Compliance with these documentary requirements entails costs, time-limits, formalities, legalizations, official translations and the good will of third parties involved. This documentation has to be submitted to the DIAN one month before the arrival of the goods in Colombia.

43. However, in addition to the *ex ante* control, there is a control *during* the import process; where the self-declaration reflects a value not exceeding the thresholds, this value will be considered as "artificially low" by Colombia. This provides grounds for a customs inspection in the presence of an observer appointed and contracted by the industrial association concerned, which at any time may raise "fraud" alerts and submit "technical opinions" and "recommendations" to the agent of the DIAN. Moreover, the presence of the importer itself or a legal representative is required in order – according to Colombia – to ensure "due process". This substantiation put forward by Colombia in one of its submissions is now understood to mean that Colombia envisages the presence of an employee of the competent national authority at this inspection.

44. In addition, importation at or below threshold level necessarily implies an internal report on the importer in the DIAN risk assessment system, which has a reputational impact for the importer in terms of future imports and exports. In order to withdraw the goods, the importer will have to post a specific bond with a bank or insurance company, and once the bond has been granted, provide it to the DIAN. As is well-known, an internal clearance of the relevant bank or insurer is required to obtain this specific bond, and keeping it up to date entails a significant cost.

45. Finally, if all the necessary requirements were scrupulously satisfied, the goods would be released. However, in the event of non-compliance with the documentary or personal attendance requirements at the time of importation, neither preshipment, nor the "correction" of errors, nor again the "legalization" of the goods, or their recovery would be feasible. This means that, once the legal time-limit established in the Customs Statute has elapsed, the goods must be placed at the disposal of the DIAN.

46. As if this were not enough, *after* importation, the importer will have to maintain the specific bond for a period of three years. Apparently, it will also continue to be registered in Colombia's risk management system. The importer will be liable to inspection and verification with respect to the information provided before importation, including its distribution and marketing chain, with the possibility of being subject to criminal investigations by the Public Prosecutor's Office or the Financial Intelligence Unit.

47. The "customs ordeal" is in fact a bureaucratic torment having the clear and unambiguous aim of discouraging imports in order to benefit a domestic industry which faces serious problems of competitiveness and productivity, and which lobbies vigorously on the Colombian political scene for government intervention in the economy.[47] Some Colombian experts do not see this as the right way forward, and point out that "the future of the sector does not depend on the establishment or strengthening of protectionist measures".[48]

48. The special import regime has been highly successful for the Colombian Government. In the footwear sector, the DIAN reports substantial reductions in "illegal" imports of footwear, considered as "unfair" competition for Colombian businesses. The reduction was from 20 million to 1 million pairs in 2017. The Director of the DIAN states that "the good results are attributable to measures

[46] Customs Agency, Repremundo, "Arancel y medidas de importación confecciones y calzado – Dec. 1744 y 1745, de 2016", 29 November 2017, Exhibit PAN-91.

[47] El País, "Textileros salieron este martes a protestar por la crisis del sector", 3 October 2017, Exhibit PAN-92; El País, "Anuncian medidas para proteger al sector textil", 18 October 2017, Exhibit PAN-93; El Nuevo Siglo, Bogotá, "Aranceles: tela para proteger confecciones", Bogotá, 3 October 2017, Exhibit PAN-87.

[48] Fenalco, "Incremento de aranceles podría agravar situación del sector de confecciones y calzado", Bogotá, 24 August 2017, Exhibit PAN-95.

such as Decree 1745, which prevents the entry of footwear into the country at manifestly low prices", adding that:

> We must protect the footwear and leather goods sector, which generates a great deal of employment in the country. A year ago it was normal for the trade association to state that more than 20 million pairs of footwear were entering the country at ridiculously low prices, of less than one or two dollars, and thanks to the measure adopted that number fell to less than 1 million pairs. […].[49]

49. It is not surprising that the special import regime has been so successful in restricting imports. It is a regime that was conceived, designed and structured precisely in order to limit conditions of access and competitive opportunities for imports on the Colombian market. The signals sent to importers have an intimidating effect for those that decide to import at prices equal to or below the thresholds of Decrees No. 1745 and No. 2218. Thus, the special import regime, by its design, structure and architecture:

- excludes certain importers from the import process at the outset (i.e. those not given credit approval by a bank or insurance company to obtain the specific bond required by Article 7 of Decrees No. 1745 and No. 2218[50]);

- limits the capacity of importers to close transactions when they consider it appropriate to do so – it is impossible to purchase imported merchandise for early delivery owing to the obligation framed in Article 4(1) to supply documents, and specify the port, quantity and price at least one month in advance of the arrival of the merchandise[51];

- limits the capacity of importers to close transactions with anyone they consider appropriate – it does not appear to be possible for the importer to diverge from the marketing chain reported to the DIAN as part of the requirements laid down by Article 4(1)[52];

- limits the capacity of importers to import with the frequency and pace required by market conditions, owing to the time taken and the burdens generated by the procedures necessary for assembling the documentation required by Article 4(1)[53];

- imposes documentary requirements that are difficult to meet, either in terms of direct costs (e.g. fees for official translations or legalizations), indirect costs linked to obtaining such documents (e.g. assessment of economic relationship for the "certification of intention to sell"[54], or background check on the customer for the "declaration by the customs broker")[55], or logistical costs (Article 4.1)[56];

- ascribes a risk status to importers "that declare goods … at or below the threshold price [since] they must be reported to the Operational Analysis Management Subdirectorate of the [DIAN] so that the information concerning such operations can be incorporated in the risk management system" (Article 8)[57];

- requires the presence of the importer, his legal representative or his agent (other than the customs broker) during the customs inspection or valuation of the goods, with the attendant costs that this entails (Article 4.2)[58];

- authorizes the presence, together with the importer, of an import operations observer, who is a natural person appointed and paid by the local trade association[59], who receives

[49] Vanguardia, "Se redujo en más del 90% el ingreso de calzado subfacturado en Colombia", 31 December 2017, Exhibit PAN-50.
[50] Decrees Nos. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.
[51] Idem.
[52] Idem.
[53] Idem.
[54] Article 4(1)(a) of Decrees No. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.
[55] Article 4(1)(d) of Decrees No. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.
[56] Decrees No. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.
[57] Idem.
[58] Idem.
[59] DIAN, "Fijan funciones para Observadores de Operaciones de Importación", Exhibit PAN-58.

detailed information from the DIAN concerning the imports[60] in order to "alert the customs authority"[61], "closely monitor the process of inspection or valuation of the goods"[62], issue "technical opinions, dealing with the tariff classification, description, identification, quantity, weight, value or other aspects of the products under investigation"[63], and "make any recommendations he may deem [ ] appropriate [ ] to the inspector who carried out the process. These reports [ ] shall be submitted to the inspectors and in turn to the office of foreign trade, which shall serve as support for the DIAN".[64]

- prescribes a specific bond to cover customs obligations, including penalties and interest payments, the constitution and maintenance of which entail a cost (Article 7)[65];

- creates uncertainty among importers regarding the introduction of a restriction on ports of entry, given that Article 5 of Decree No. 1745 requires the DIAN to establish designated import locations, while Article 5 of Decree No. 2218 grants discretion ("may establish") for the establishment of customs controls upon entry, and expressly envisages the possibility of limiting the entry of imports[66];

- if the goods do not meet the requirements of Article 4, their reshipment may not be undertaken (Article 9 of Decree No. 2118), nor may they be recovered[67] or legalized[68] (Article 10 of Decree No. 2218), and consequently, after the completion of a period of "legal abandonment", the goods may be disposed of by the DIAN.[69]

50. Colombia itself has acknowledged that the purpose of these measures is to reduce incentives so as to prevent importation at prices equal to or below the thresholds[70], i.e. to impose restrictive conditions in order to discourage imports. Consequently, the special import regime imposes a minimum import price scheme which is inconsistent with Article XI:1 of the GATT.

V. FAILURE TO COMPLY WITH THE REQUIREMENTS OF DECREE NO. 2218 RESULTS IN A PENALTY INCONSISTENT WITH ARTICLE VIII:3 OF THE GATT

51. Panama considers that, as a result of the combined operation of Articles 4 and 9 and the paragraph of Article 10 of Decree No. 2218, the special import regime is patently inconsistent with Article VIII:3 of the GATT. This provision is categorical and prohibits the imposition of substantial penalties for minor infringements. It will be recalled that, if the requirements of Decree No. 2218 are not fulfilled, by virtue of Article 10 the goods will be apprehended, i.e. seized[71]; nor can they be legalized or recovered, by virtue of the paragraph of the same provision.[72] Furthermore, if the non-compliance relates to the documentary requirements of Article 4, Article 9 provides that the importer may not reship its goods. In practical terms, a minor error in the context of compliance with the documentary requirements of Article 4, for example, the presentation of an ordinary translation, instead of an official translation, or the omission of some general information which otherwise would be contained in another document, would necessarily result in the non-importability of the goods with no possibility of legalization, recovery or reshipment, so that after a certain period

[60] Resolution No. 000017 (22 March), regulating Article 6 of Decree No. 1745 of 2 November 2016, Exhibit PAN-59.
[61] Article 6 of Decrees No. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.
[62] Idem.
[63] Exhibit PAN-58.
[64] Idem.
[65] Decrees No. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.
[66] Idem.
[67] According to Article 229 of Decree No. 390, "Goods of foreign origin, regarding which any customs obligation has not been satisfied, may be recovered by virtue of an initial declaration of correction or modification, with or without payment of the recovery value. The customs declaration covering recovered goods does not determine their ownership, nor does it remedy the illicit acts involved in their acquisition." Exhibit PAN-4.
[68] According to Article 229, point 2.3.2, third paragraph, "Where reference is made in other regulations to legalization or declaration of legalization, this expression must be understood to refer to the recovery of goods using an initial customs declaration or a declaration of correction or modification, in which a recovery value is assessed". Exhibit PAN-4.
[69] Article 211 of Decree No. 390, Exhibit PAN-4.
[70] Colombia's rebuttal as complainant, para. 73.
[71] See Articles 550, 561, 562 and 563 of Decree No. 390, Exhibit PAN-2.
[72] Article 229 and point 2.3.2 thereof, third paragraph, Exhibit PAN-4.

of time laid down in Decrees Nos. 2685 and 390 (Colombian Customs Statute), they would be kept at the disposal of the Colombian State. Obviously, this consequence stemming from the actual design, structure and architecture of the special import regime, in the context of Colombia's ordinary customs procedures, is a very substantial penalty for a relatively minor offence in violation of Article VIII:3 of the GATT.[73]

VI. THE SPECIFIC BOND AND THE SPECIAL IMPORT REGIME ARE *NOT* ADMINISTERED IN A UNIFORM, IMPARTIAL AND REASONABLE MANNER IN ACCORDANCE WITH ARTICLE X:3(A) OF THE GATT

52. Panama also considers that Article 8 of Decree No. 390 is *not* administered in accordance with Article X:3(a) of the GATT.[74] In addition, Panama challenges the administration of the risk management and customs control system, as provided for in Articles 493 and 486 of Decree No. 390, by means of the special import regime under Article X:3(a) of the GATT.

A. DECREES NO. 1745 AND NO. 2218 ADMINISTER ARTICLES 8, 493 AND 486 OF DECREE NO. 390

53. Panama recalls that the term "administer" within the meaning of Article X:3(a) refers to "putting into practical effect" a legal instrument of the kind described in Article X:1.[75] Decree No. 390 is Colombia's Customs Statue. It is therefore a "regulation of general application" covered by Article X:1 of the GATT. Article 1 of Decree No. 390 provides that this rule "regulates the legal relations established between the customs administration and parties involved in the entry, retention, transfer and exit of goods." Thus, the Customs Statute establishes the guidelines governing the interaction between the "customs administration" and the parties involved in the import and export of goods in Colombia. The manner in which the customs administration (DIAN) handles this interaction is a matter of application or management of the Customs Statute.

54. Decrees No. 1745 and No. 2218 administer Article 8 of Decree No. 390. In the context of the "general provisions" of the Customs Statute, Article 8 of Decree No. 390 establishes the so-called "bond" mechanism as "an obligation ancillary to the customs obligation, to enforce payment of duties and taxes, penalties and interest resulting from non-compliance with a customs obligation provided for in this Decree".

55. The same rule does not specify the way in which the "bond" is to be "administered", but entrusts that function to the DIAN: "[t]he National Customs and Excise Directorate shall establish the type of bond that is to be posted in accordance with the corresponding customs obligation" and "the special rules in force governing each of them are to be applied". Thus, any act establishing the "type of bond that is to be posted in accordance with" the relevant obligations is an act of "administration" of the Customs Statute.

56. Article 9 of Decree No. 390 confirms that the determination of the bond applicable to specific cases is an act of administration by ordering that "[a]ny bond … must have as its insurance-related purpose that of guaranteeing the payment of duties and taxes, penalties and any interest that may be due, as a consequence of non-compliance with the obligations and responsibilities set out [in the Customs Statute of Colombia]".[76]

57. However, these decisions which, in normal circumstances, should be applied on a discretionary case-by-case basis by the DIAN are now taken *a priori* by Decrees No. 1745 and No. 2218. Article 7 of both decrees "puts into practical effect" Article 8 of Decree No. 390. These special rules specify "the type of bond that is to be posted" in relation to the imports covered by these decrees to "guarantee the payment of duties and taxes, penalties, and any interest that may be due, as a consequence of non-compliance with the obligations and responsibilities set out [in the Customs Statute of Colombia]".[77] Therefore, these rules necessarily give rise to the administration of a specific type of guarantee (among those provided for in the Customs Statute] in a specific type of

[73] Article 211 of Decree No. 390, Exhibit PAN-4. Panama's rebuttal as respondent, paras. 269, 338, 383, 421-433.

[74] Panama's first written submission as respondent, paras. 76-89.

[75] Appellate Body Report, *EC – Selected Customs Matters*, para. 224 and Panel Report, *US – COOL*, para. 7.821.

[76] Article 9 of Decree No. 390, Exhibit PAN-4. See also Article 8 of Decree No. 2685, Exhibit PAN-3.

[77] Articles 3 and 10 of Decree No. 1745; Articles 3 and 11 of Decree No. 2218, Exhibits PAN-2 and PAN-43, respectively.

circumstance. Consequently, Colombia's argument that Articles 7 of Decrees No. 1745 and No. 2218 are not measures of "administration" covered by Article X:3(a) is incorrect.

58. Decrees No. 1745 and No. 2218 administer Colombia's risk management system. This system is defined in Articles 493 and 486 of Decree No. 390. As previously observed, Decree No. 390 is the Customs Statute of Colombia and is therefore a "regulation of general application" under Article X:1 of the GATT. Article 1 of Decrees No. 1745 and No. 2218, entitled "Purpose" provides that "this Decree establishes mechanisms to strengthen the risk management and customs control system in the face of possible [relevant] situations of customs fraud associated with imports".[78] Consequently, the text of Decrees No. 1745 and No. 2218 itself makes it clear that their purpose is "to put into practical effect" the risk management and customs control system with regard to imports covered by the corresponding decrees.[79]

59. If the Panels were to consider that Decrees No. 1745 and No. 2218 are not acts "administering Article 8 and Articles 493 and 486 of Decree No. 390, this would mean that Decrees No. 1745 and No. 2218 impose a substantive requirement (i.e. posting of a specific bond for relevant imports, as well as other requirements under the special import regime), and at the same time the specific parameters for its administration). The fact that the substantive requirement and the parameters for its administration are in the same instrument should not affect the applicability of Article X:3(a) to Decrees No. 1745 and No. 2218. Different characteristics of the specific bond may give rise to concerns of a different kind. Otherwise, WTO Members could easily evade their obligations under Article X:3(a) by combining the substantive characteristics and the parameters of administration in the same instrument. Furthermore, Panama recalls that the application of Article XI:1 and Article X:3(a) is not mutually exclusive.[80]

B. THE SPECIFIC BOND AND THE SPECIAL IMPORT REGIME NECESSARILY RESULT IN AN ADMINISTRATION THAT IS *NOT* UNIFORM, IMPARTIAL AND REASONABLE IN ACCORDANCE WITH ARTICLE X:3(A) OF THE GATT

60. The compliance measures necessarily result in a *non-uniform* administration inasmuch as they treat similarly situated goods differently.[81]

- Both the specific bond – which is administered by Article 8 of the Customs Statute – and the special import regime – which is administered by the risk management system – apply only to imports covered by Decrees No. 1745 and No. 2218, but not to imports of other products "similarly situated" with regard to the problem of underinvoicing and money laundering according to Colombia, as is the case for spirits and cigarettes.[82]

- We also note that the thresholds of Decrees No. 1745 and No. 2218 are established arbitrarily, on the basis of conversations between government officials and national trade associations.[83] The setting of thresholds is very important, since they determine whether or not the special import regime and the specific bond apply to imported goods. Furthermore, Colombia determines the thresholds on the basis of the four-digit tariff heading, despite being aware of the existence of multiple relevant products under each heading. Thus, Colombia applies the same treatment to products as dissimilar as men's or boys' suits, ensembles, jackets, blazers, trousers, bib and brace overalls, breeches and shorts, all of which have as their only common feature the fact of coming under heading 6203.[84]

- Moreover, with respect to the specific bond of Decree No. 1745, Colombia determines the coverage of the bond on the basis of fixed parameters: the value of the relevant threshold

[78] Article 1 of Decrees No. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.
[79] Article 3 of Decrees No. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.
[80] Panel Report, *Argentina – Hides and Leather*, para. 11.58. See also paras. 11.35, 11.101, 12.1 and 12.2.
[81] Panel Report, *US – Stainless Steel*, para. 6.51.
[82] Panama's rebuttal as complainant, para 279; Panama's rebuttal as respondent, para. 312.
[83] Exhibit PAN-65.
[84] Panama's rebuttal as respondent, para. 351.

multiplied by 200%. The fact of applying fixed parameters, ignoring the real values of goods below the thresholds, results by definition in a non-uniform administration.[85]

- It would appear that Colombia seeks to release itself from any responsibility for the administration of the procedures for obtaining the specific bond by delegating the task of carrying out this administrative process to third parties. Panama considers that Colombia's failure to establish general criteria for third parties' compliance with the requirements for applying for a specific bond, and the considerations relevant to its approval, necessarily gives rise to a non-uniform administration of the process leading to obtainment of the specific bond.[86]

61. Panama also considers that the compliance measures are necessarily administered partially, since they are biased and based on prejudices.[87]

- In particular, with regard to the special import regime, Panama considers that the powers granted to the "import operations observer" result in an unfair and biased administration of Colombia's risk management system. The import operations observer is neither more nor less than the representative of the national producers' associations, i.e. those in direct competition with the imported goods. The national associations select, approve and hire a technical expert who is empowered by the Colombian State to generate alerts so that certain goods may be inspected, to be present during the customs inspection, to prepare technical opinions, and to put forward recommendations to the DIAN official responsible for inspection of the goods. Subsequently, the DIAN informs the Joint Commission, which includes the national associations, about the activities of the import operations observer. If the import operations observer were a government employee, there would be a clear conflict of interest. Obviously, an employee of the trade association would issue opinions and recommendations in favour of the association and detrimental to the imported goods. These opinions and recommendations form part of the "decision-making structure" of the DIAN and contribute to the final decisions concerning release of the merchandise.[88]

- Apparently, the import operations observer would also not be subject to any liability if he were to use confidential information from the importers, including information related to the importers' distribution and marketing chain, received in the context of the import process. Thus, Colombia apparently allows the import operations observer to share this information with his supervisor, the national producers' association, the importer and the seller of imported goods. Failure to protect the confidential information of importers results in the partial administration of Colombia's risk management system.[89]

- With regard to the administration resulting from the specific bond, Panama considers that to take it for granted that the customs taxes and possible penalties will always be equivalent to 200% of the threshold price multiplied by the corresponding quantity of shipped goods is prejudicial and inequitable.[90]

62. Similarly, Panama considers that the compliance measures are not administered in a reasonable manner as they are neither appropriate to the circumstances nor based on rationality.[91]

- With regard to the administration of the risk management system, Panama notes that both Decree No. 1745 and Decree No. 2218 result in an administration that is not based on rationality. Under Decree No. 1745, goods not complying with the documentary requirements of Article 4 were seized, and the importers had to pay fines if they wished to recover and legalize their goods. This is inflexible and unreasonable. However, under Decree No. 2218, the importer does not have the option of legalizing the goods, or even of reshipping them to the supplier's country. After a period of time stipulated by the

[85] Panama's rebuttal as complainant, paras. 275-278; Panama's rebuttal as respondent, paras. 314-315.
[86] Panama's rebuttal as respondent, paras. 330-331, 390-391.
[87] Panel Reports, *China – Raw Materials*, para. 7.694 (footnotes omitted).
[88] Panama's rebuttal as respondent, paras. 355-368.
[89] Panama's rebuttal as respondent, paras. 369-370.
[90] Panama's rebuttal as respondent, paras. 318 and 371.
[91] Panel Reports, *China – Raw Materials*, para. 7.696.

Customs Statute, the goods fall into legal abandonment and pass into the hands of the DIAN. This procedure defies reason, and clearly constitutes unreasonable administration.[92]

- At the same time, the requirement to present certain documents results in unreasonable administration of Colombia's risk management system. How can it be appropriate to the circumstances to request for each shipment the certification of the existence of the foreign supplier, with an officially apostilled or legalized translation, and why cannot copies of this certificate be accepted? While the first certificate could satisfy the purpose of confirming the existence of the supplier's enterprise, additional certificates serve no purpose and are therefore inappropriate to the circumstances. Moreover, Panama considers that the requirement to submit the "certification of intention to sell"[93] is not reasonable. According to Colombia, this requirement fulfils the purpose of "ensuring that the supplier declared by the importer is really the entity that supplied the imported goods".[94] However, this purpose is already met by the sales invoices. Therefore, requiring the "certification of intention to sell"[95] is inappropriate to the circumstances.[96]

- With regard to the administration resulting from the specific bond, Panama considers that it is unreasonable to require a specific bond when a comprehensive guarantee is available. If a comprehensive guarantee were not sufficient to cover the requirements of Decree No. 1745 or Decree No. 2218, the coverage of the specific bond should be equivalent to the amount that would not be covered by the comprehensive guarantee. However, Colombia requires the constitution of the specific bond in all cases without taking into account the coverage already provided by the comprehensive guarantee.[97] In addition, the guarantee under Decree No. 2218 continues requiring coverage that goes beyond that which is necessary to ensure compliance with the primary obligations, in some cases covering three times the value guaranteed.[98]

- Lastly, by distancing itself from ordinary Colombian legislation, which prohibits importers from choosing which guarantee to provide in order to ensure payment of the definitive duties to which the goods may be liable, Colombia applies this requirement unreasonably. It would appear that entrusting the approval and granting of guarantees to third parties has the effect of creating an additional level of administrative bureaucracy which discourages importation of the relevant goods.[99]

63. In view of the foregoing, Panama argues that the specific bond and the special import regime necessarily result in an administration that is *not* uniform, impartial and reasonable in accordance with Article X:3(a) of the GATT.

VII. COLOMBIA HAS *NOT* DEMONSTRATED THAT THE SPECIFIC BOND AND THE SPECIAL REGIME ARE JUSTIFIED UNDER ARTICLES XX(A) AND XX(D) OF THE GATT

64. Contrary to what is claimed by Colombia, Panama considers that neither the special import regime nor the specific bond are justified by Article XX(a) and Article XX(d) of the GATT. It would be frivolous to assert that the measures in question were designed solely to protect public morals and to ensure domestic compliance with the Colombian Criminal Code. Furthermore, Panama considers that Colombia has *not* demonstrated that these measures are necessary to achieve its declared objectives of discouraging imports used for money laundering purposes. In fact, Colombia has not even identified the level of protection sought by these measures, and it is important to identify the level of protection of a measure in order even to consider its necessity.[100]

65. The specific bond is *not* necessary for the protection of public morals under Article XX(a). Colombia asserts that the specific bond ensures the payment of duties and any fines or penalties on the importation of the goods, since it discourages underinvoicing by allowing the collection of

[92] Panama's rebuttal as respondent, paras. 375-387.
[93] Article 4(1)(a) of Decrees No. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.
[94] Colombia's written submission as respondent, para. 120.
[95] Article 4(1)(a) of Decrees No. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.
[96] Panama's rebuttal as respondent, paras. 373-374.
[97] Panama's rebuttal as respondent, paras. 320-324.
[98] Panama's rebuttal as respondent, paras. 325-328.
[99] Panama's rebuttal as respondent, paras. 332-333.
[100] Japan's third-party submission, para. 6.

customs duties and fines when the goods are found to have been declared below their real value.[101] This mere assertion, without supporting evidence, cannot qualify as conclusive proof for the purpose of demonstrating "the extent of the measure's contribution" to the objective of Article XX(a). Even if the assertion had any probative value, it is obvious that it also does not provide Colombia with the level of proof required by this same Panel (and endorsed by the Appellate Body) in the initial proceedings, to the effect that Colombia should specify "the amount or proportion of goods imported below the thresholds that are actually used for money laundering purposes, as well as the extent to which [the measure] acts as a disincentive to money laundering" in order to demonstrate "with sufficient clarity the *degree* of contribution made by [the measure] to the objective of combating money laundering."[102]

66. Moreover, a measure can only *contribute* to achieving an objective if the objective has not yet been achieved, and the measure gives added value to the achievement of the objective. If that is not the case, the measure becomes a mere ornamental requirement with no real utility, in other words a hollow requirement for which there is no real necessity. Nor has Colombia shown why it is that a money laundering problem could not arise with imports priced above the thresholds. It is equally plausible that a money laundering problem could be caused by the overvaluation of imports. What is more, the measures at issue have the paradoxical effect of *discouraging* imports *below* the thresholds, while at the same time *encouraging* imports *above* the thresholds. It should be borne in mind that money laundering in Colombia is also carried out by means of the overvaluation of imports.[103] No similar controls are in place to ascertain that imports above the thresholds are not intended for these purposes. Consequently, given their effects on imports, and without prejudice to the demonstration incumbent on Colombia, the contribution that the measures could make to the fight against money laundering is ambivalent, and possibly nil. Therefore, Colombia has failed to demonstrate the degree of contribution made by the specific bond to achieving the objective of discouraging imports used for money laundering.

67. As regards the demonstration of the degree of restrictiveness of the specific bond on international trade, Colombia seeks to demonstrate that the measures challenged, including the specific bond, are not trade restrictive in any way.[104] Colombia asserts that the measures do not restrict the quantity of imports and therefore do not restrict trade.[105] However, as is well-known, a measure that does not impose quantitative limits on imports can nevertheless limit trade in a manner inconsistent with Article XI:1 of the GATT.[106] Colombia also says that the measures are carefully calibrated to affect imports likely to be used for money laundering.[107] There is no evidence whatsoever of such careful calibration. The measures penalize all imports priced at or below the thresholds, regardless of whether or not they can be used for money laundering. Colombia also argues that the specific bond is a contingent liability.[108] This mere assertion demonstrates nothing. Execution of the bond is dependent on circumstances, and in that sense it is "contingent". However, its monthly cost (as well as all the other costs associated with constitution and paperwork) are "actual liabilities" and tangible. Therefore, the assertion is factually open to dispute.

68. Moreover, the special import regime is also not necessary to protect public morals under Article XX(a). Colombia asserts that it is necessary because it provides information that permits the customs authorities to undertake a more informed risk assessment.[109] However, Colombia again bases itself on general and vague explanations, without reference to evidence, in order to seek to substantiate the "degree of contribution" of the measure to the objective of Article XX(a). None of these assertions meets the applicable standard for Colombia.[110] Additionally, Colombia addresses its obligation to demonstrate the degree of contribution as if the measure consisted solely of some of the documentary requirements under Article 4.1 of Decrees No. 1745 and No. 2218. Colombia offers no demonstration of the degree of contribution of other elements of the special import regime, such as:

[101] Colombia's rebuttal as complainant, para. 127.
[102] Appellate Body Report, *Colombia – Textiles*, para. 5.110.
[103] See Exhibit COL-10 in the proceedings before the original panel, p. 29.
[104] Colombia's rebuttal as complainant, para. 127.
[105] Idem.
[106] Appellate Body Report, *Argentina – Import Measures*, paras. 5.286, 5.288 and 6.3(c).
[107] Colombia's rebuttal as complainant, para. 126.
[108] Colombia's first written submission as respondent, para. 126.
[109] Colombia's rebuttal as complainant, paras. 121-125.
[110] Appellate Body Report, *Colombia – Textiles*, para. 5.110.

- the requirement of a declaration signed by the legal representative of the Customs Agency, certifying that they have carried out a background check on the customer[111];

- the exclusion of certain importers from the import process (i.e. those that have no credit rating to obtain the specific bond)[112];

- the limitation of the capacity of importers to close transactions *when* they deem it appropriate to do so because of the requirement to specify the port, quantity and price at least one month in advance of the arrival of the goods[113];

- the limitation of the capacity of importers to close transactions with *anyone* they consider appropriate, owing to the marketing chain that has to be reported to the DIAN[114];

- the limitation of the capacity of importers to import with the frequency and pace required by the market, owing to the burdensome and costly procedures necessary for fulfilment of the documentary requirements[115];

- the requirement of the presence of the importer, his legal representative or his agent during the customs inspection or the valuation of the goods, with the attendant costs that this entails[116];

- the authorization of the presence of an observer appointed and paid by the local industry to generate alerts to the customs authority and closely monitor the process of inspection and valuation of the goods[117];

- the uncertainty created among importers regarding the introduction of a restriction on ports of entry and customs controls that limit the entry of imports[118];

- expropriation of the merchandise if it does not meet the requirements of Article 4.[119]

69. Colombia has therefore failed to demonstrate the degree of contribution made by the special import regime to the achievement of the objective of discouraging imports used for money laundering.

70. Regarding the demonstration of the degree of trade restrictiveness of the special import regime, Colombia's arguments are the same as those with which it seeks to demonstrate the zero degree of restrictiveness of the specific bond. Colombia also mentions that, while importation *below* the thresholds is discouraged, the importer may continue importing *above* the thresholds, and that, for this reason, this measure cannot be described as a highly restrictive measure.[120] What Colombia fails to mention is that the special import regime challenged by Panama concerns the treatment of imports *below* the thresholds, not *above*. Consequently, the reference to the treatment of imports *above* the threshold to justify treatment *below* is inadequate. However, in asserting that importation *below* the thresholds is not feasible, Colombia concedes that the restrictiveness is so high that it obliges importers to modify their business and investment plans with a view to avoiding imports of goods *below* the thresholds since this "option" would put them out of business. As a result, importers would be obliged to "adjust" the terms of their trade relations with customary suppliers, thereby incurring higher transaction costs. In fact, therefore, Colombia imposes a *de facto* prohibition on imports *below* the thresholds. An import ban is "by design as trade-restrictive as can be".[121]

[111] Article 4(1)(d) of Decree No. 1745, Exhibit PAN-2.
[112] Decrees No. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.
[113] Idem.
[114] Idem.
[115] Idem.
[116] Idem.
[117] Article 6 of Decrees No. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.
[118] Decrees No. 1745 and No. 2218, Exhibits PAN-2 and PAN-43, respectively.
[119] Article 211 of Decree No. 390, Exhibit PAN-4.
[120] Colombia's rebuttal as respondent, para. 144, referring to Panama's rebuttal as complainant, para. 239.
[121] Panel Report, *Brazil – Retreaded Tyres*, para. 7.211, upheld by Appellate Body Report, *Brazil – Retreaded Tyres*, para. 150.

71. Consequently, and following the Appellate Body's line of reasoning in this dispute, Panama considers that "[g]iven the lack of sufficient clarity regarding the degree of contribution of the measure to the objective of combating money laundering, and the degree of trade-restrictiveness of the measure"[122], the Panels should terminate their assessment of Colombia's defence under Article XX(a) at this stage.

72. In any event, Panama observes that, in the necessity analysis, both the degree of contribution and the degree of restrictiveness of the measures play a key role in "weighing and balancing" the different interests at stake. As for the policy objective, it will always be important.[123] It follows that the contribution made by the importance of the policy objective in the exercise of "weighing and balancing" is relatively invariable, and that the decisive factor is the interrelationship between the degree of contribution and the degree of restrictiveness of the measures. In this case, Panama considers that, although the alleged policy objective could be important, the contribution of the measures at issue is ambiguous or at best minimal, and in addition to this, the restrictiveness exhibited by the measures at issue is very high and in some cases absolute. Panama therefore considers that the measures at issue are not provisionally "necessary" to achieve their declared objective.

73. Panama suggests alternative measures that are less trade restrictive and which Colombia has not proved to be unavailable for addressing the concerns it faces:

Elements of the special import regime for which Colombia raised defences under Article XX(a)	Alternative less trade-restrictive measures that comply with the objectives claimed by Colombia and are reasonably available to Colombia
Specific bond	Valuation dispute bond
Supplier's certification of sale (officially translated and apostilled or legalized, as appropriate)	Sales invoices
List of distributors	Post-import list of distributors transmitted on a monthly basis to the DIAN
Certification of value, storage and distribution	Post-import certification transmitted monthly to the DIAN with respect to the distribution and marketing chain Notification of storage warehouses, where appropriate, following authorization of release
Certification of supplier's existence (officially translated and apostilled or legalized, as appropriate)	Annual presentation of an original certificate of the supplier's existence followed by presentation of copies of the certificate for subsequent shipments during the year in question

74. Colombia argues that the valuation dispute bond cannot be an alternative to the specific bond of Decree No. 1745, since it would not contribute with the same effectiveness to the objective of combating underinvoicing and money laundering, on account of two defects: the DIAN's resources and the possibility of human error. According to Colombia, if the valuation dispute bond were used, some irregular transactions might not be detected and the underinvoiced goods might be used to launder money.[124] However, it is the same Colombia that presents the bond under Decree No. 2218, of 27 December 2017, as a bond which, in its view, is "ad hoc or case by case", i.e. which would require for its administration human resources and value judgement (and probability of error), which it criticizes in the alternative put forward by Panama. Panama maintains its reservations about the way in which Colombia characterizes the bond under Decree No. 2218. However, it notes that it is Colombia's own actions and arguments that demonstrate that the specific bond of Decree No. 1745 is not "necessary" to achieve the proposed objectives. If this measure were necessary, Colombia would not have sought to present the appearance of a modification of the specific bond in Decree No. 2218.

[122] Appellate Body Report, *Colombia – Textiles*, para. 5.115.

[123] See, for example, Appellate Body Report, EC – Asbestos, para. 175; Panel Reports, Canada – Wheat Exports and Grain Imports, para. 6.224; Dominican Republic – Import and Sale of Cigarettes, para. 7.215; Brazil – Retreaded Tyres, para. 7.111.

[124] Panama's rebuttal as respondent, para. 125.

75. Consequently, Panama considers that Colombia has not demonstrated that the specific bond or the special import regime are necessary to protect public morals, and they are therefore not provisionally justified under Article XX(a) of the GATT.

76. The specific bond and the special import regime are *not* necessary under Article XX(d) of the GATT. Panama notes that Colombia wholly bases itself on the same arguments it put forward under Article XX(a) in order to argue the need for the specific bond and the special import regime under Article XX(d) of the GATT.[125] As Colombia develops no new argument beyond those already refuted by Panama in the context of Article XX(a), Panama considers that Colombia has failed to demonstrate that the specific bond and special import regime are necessary measures under Article XX(d) of the GATT for the same reasons, *mutatis mutandis*.

77. Colombia has *not* demonstrated that the specific bond and the special import regime meet the requirements of the *chapeau* of Article XX. In its rebuttal as complainant, Colombia presents *no* argument to illustrate how it is that the specific bond and the special import regime are applied in a manner such as not to constitute means of arbitrary or unjustifiable discrimination between countries where similar conditions prevail, or disguised restrictions on trade. Panama has already commented on this matter in a previous submission.[126] The Appellate Body has observed that the mere assertion that the measure in question complies with the requirements of the *chapeau* because it applies to all products is not sufficient to establish a *prima facie* defence under Article XX of the GATT.[127]

78. Without prejudice to the above, Panama considers that Colombia discriminates arbitrarily and unjustifiably against goods with prices below certain thresholds. Colombia assumes *a priori* that such goods have "artificially low prices" and that, in having low prices, they are used for underinvoicing and money laundering.[128] However, Colombia presents no evidence to substantiate this presumption of illegality. To date, Colombia has put forward no criminal sentence, no law, no statutory decision establishing that imports below the thresholds are illegal. What is more, with no evidence that an infringement or an offence has been committed. Colombia reports the importers of relevant goods as "subjects of risk" to the risk management system merely because they import goods at prices not agreeable to Colombia and the competition – domestic producers.

79. Moreover, in administering the measures under Decrees Nos. 1745 and 2218 on the basis of thresholds and ignoring the contingencies of each transaction, Colombia accords the same treatment to all transactions under the threshold. Thus, Colombia imposes the requirement of posting a specific bond to ensure payment of penalties on all transactions covered by Decrees Nos. 1745 and 2218, irrespective of whether infringements have been found in the relevant transaction.[129] Discrimination also occurs when dissimilar situations are treated in an identical manner.[130] It is arbitrarily discriminatory and unjustifiable for Colombia to require the posting of a specific bond in order to guarantee the payment of penalties in situations where no offences giving rise to penalties have been detected.

80. Similarly, Colombia also fails to explain in the context of the analysis of arbitrary or unjustifiable discrimination why it only applies the measures of Decree No. 1745 to apparel, footwear, textiles, fibres and yarns, and not to other products similarly situated[131], such as alcoholic beverages and cigarettes.[132] Even more importantly, according to the Report on the Estimated Level of Distortion in the Value of Colombian Imports 2016 (to which Colombia refers in Exhibit COL-38), underinvoiced imports of apparel and footwear account for only 6.1% of underinvoiced goods. Moreover, imports of textiles, fibres and yarns do not even figure among the ten types of goods most used for underinvoicing. On the contrary, according to the DIAN itself, the most commonly

[125] Colombia's rebuttal as complainant, paras. 133-134.
[126] Panama's rebuttal as complainant, paras. 255-261.
[127] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 179-180.
[128] Panama's rebuttal as respondent, para.
[129] European Union's third-party submission, paras. 51-52. It should also be noted that the guarantee referred to in Article 7(3)(4) of the Trade Facilitation Agreement applies only in cases where an offence requiring imposition of penalties has been detected, and not for transactions in the abstract. See Panama's rebuttal as complainant, paras. 86-87.
[130] European Union's third-party submission, paras. 51-52, referring to Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 87.
[131] Japan's third-party submission, para. 7.
[132] Panama's rebuttal as complainant, para. 279; Panama's rebuttal as respondent, para. 312.

underinvoiced imports are motor vehicles, tractors, cycles, parts and accessories (Chapter 87 of the Colombian Customs Tariff); mineral fuels and oils and products thereof (Chapter 27 of the Colombian Customs Tariff); and boilers, turbines, aircraft and marine propulsion engines, machinery and parts (Chapter 84 of the Colombian Customs Tariff), among others.[133]

81. Panama also fails to understand how it is that Colombia exempts from the application of Decree No. 2218 goods "owned by foreign companies or persons not resident in the country, which have been introduced from abroad to international logistical distribution centres for distribution in their entirety to the rest of the world"[134] and "owned by natural or legal persons resident in Colombia and recognized by the National Customs and Excise Directorate as authorized economic operators or trusted users".[135] If it is assumed that the goods covered by Decrees No. 1745 and No. 2218 are undervalued, it would appear that Colombia has no problem when the undervaluation leads to prices that do not compete with domestic industry prices, or to a situation of money laundering outside Colombia, but generates economic activity in Colombia, for example, in Colombia's international logistical distribution centres. Panama does not see how the protection of public morals could admit of such an exception. It seems to Panama that this exception strengthens the theory that the measures at issue contain discriminatory, arbitrary and unjustifiable requirements, rather than responding to the appeals of a domestic industry in crisis.

82. Moreover, Panama notes that, apart from including a reference to Article X:3(a) in the title of its defence under Article XX of the GATT, Colombia provides no specific argument to justify the incompatibility of the application of Article 8 of Decree No. 390 under the provisions of Article XX or the *chapeau*. Colombia makes absolutely no reference to the "application" or "administration" of the Customs Statute by means of the specific bond in its defence under subparagraphs (a) and (d) of GATT Article XX. Colombia does not explain how the use of "200%" in relation to the coverage of the specific bond contributes to the protection of public morals under Article XX(a) or to securing compliance with other laws or regulations which are not inconsistent with the GATT. Nor does Colombia explain how it is that requesting the constitution of a comprehensive guarantee when a specific bond is already available contributes to the protection of public morals or to securing compliance with other laws or regulations which are not inconsistent with the GATT. In addition, Colombia makes no reference to the "application" or "administration" of the Customs Statute through the specific bond under its defence relating to the *chapeau*. Of course, the mention of Article X:3(a) in the title is not sufficient to justify a measure under Article XX of the GATT. Consequently, Colombia has not put forward a valid defence to justify the administration of Article 8 of Decree No. 390 in a manner that is not uniform, impartial and reasonable.

VIII. THE SPECIAL IMPORT REGIME AND THE SPECIFIC BOND ARE INCONSISTENT WITH ARTICLES 1, 2, 3, 5, 6, 7 AND 13 OF THE CUSTOMS VALUATION AGREEMENT (CVA)

83. Both in its panel request and in its first submission as respondent, Panama gave an indication of its concern that the special import regime, because of its burdensomeness, is in effect a means of circumventing the case-by-case application of transaction value and the other permitted valuation methods, contrary to the provisions of Articles 1, 2, 3, 5, and 6, or as a result of the application of the methods prohibited by Articles 7(b), (f) and (g) of the Customs Valuation Agreement (CVA). Moreover, in its panel request, Panama also expressed its position that the specific bond was inconsistent with Article 13 of the CVA. However, given that Colombia itself, through the third paragraph of Article 7 of Decree No. 1745, made the distinction between the specific bond imposed by that regulation and the guarantee required in its "valuation dispute" legislation, making it implicitly clear that the specific bond of the Decree was not a customs valuation dispute guarantee, Panama held back its claim on this point until the moment Decree No. 2218 was issued. The terms of Article 7 of Decree No. 2218 leave no room for uncertainty that the specific bond is a guarantee based on doubts about the value of the merchandise, for which reason Panama considers that the specific bond is inconsistent with Article 13 of the CVA.

[133] DIAN, Report on the Estimated Level of Distortion in the Value of Colombian Imports 2016, Exhibit PAN-106, page 28.
[134] Article 4, para. 3 of Decree No. 2218 (Exhibit PAN-43); Article 2 of Decree No. 436 (Exhibit PAN-84).
[135] Article 2 of Decree No. 436 (Exhibit PAN-84).

A. THE SPECIAL IMPORT REGIME IS INCONSISTENT WITH ARTICLES 1, 2, 3, 5, 6 AND 7 OF THE CUSTOMS VALUATION AGREEMENT

84. Panama is of the view that the thresholds established by Colombia in Decrees No. 1745 and No. 2218 are clearly "arbitrary or fictitious" values; the methodology for determining them has never been explained by Colombia, but their technical characteristics are questionable as they do not reflect an objective methodology and constitute the minimum above which the methodologies provided for in the CVA are taken into account. With these thresholds and with its position that the values they cover reflect "artificially low prices", Colombia's opening premise is one of doubt that the values of the imports in question are *not* the price "actually paid or payable" for the goods. Colombia's prejudice regarding the accuracy of the transaction value is not assuaged either by pre-import checks, and the documents submitted for that purpose, or by the DIAN inspection at the time of importation and thereafter. Colombia authorizes release of the goods only if payment of the customs duties is assured for a value that is not based on the application by Customs of any of the valuation methods provided for in the CVA. This results in a customs valuation for the establishment of a guarantee for customs duties that are to be paid, without this valuation being adjusted to the case-by-case analysis required by the Agreement, based on the particular conditions of each sale.[136]

85. The thresholds are established on a fixed basis, without adjustment or possibility of adjustment in the light of the specific characteristics of the products in question (e.g. products of high or low quality), or the particular circumstances of the transactions involved (e.g. sale of remaindered goods, promotion or market penetration operations, including operations between related companies). This is a fixed amount, therefore, unaffected by the specificities of the various imports in question, with no margin of discretion for the customs official to value the goods in the establishment of coverage on the basis of the valuation criteria foreseen in the CVA.

86. The inevitable result of an importer declaring a value equal to or less than these thresholds is to be made subject to prohibitive consequences for importation under this regime. The options available to an importer are limited. It is not clear that Colombia's existing customs procedures allow the declared value to be "corrected" or "adjusted" in order to pass the threshold. Moreover, the option of re-exporting the goods is also not a genuine option. Consequently, as things stand at present, the possible scenarios are that either customs duties are collected on the basis of a value higher than the thresholds, or the goods are not imported into Colombian customs territory.[137] In practice, therefore, customs duties should not be collected on the basis of a value equal to or below the thresholds. In fact, Colombia's reply to the question concerning levels of imports below or above the thresholds shows that the levels below are insignificant compared with total imports. This amounts to saying that the thresholds operate as "minimum prices" above which customs valuation in accordance with the CVA is indeed possible, but that this is not the case below the thresholds. These thresholds are inconsistent with Article 7.2(f) of the CVA.

87. By its design, structure and architecture, therefore, the special import regime is conceived in such a way as to penalize the importation of products for which the "price actually paid or payable" is equal to or below the thresholds. It also penalizes the importation of products with a declared value resulting from the application of any of the methods foreseen in Articles 2, 3, 5, 6 and 7 of the CVA.

88. However, in the context of a market characterized by its dynamism and high turnover, the option of discontinuing imports (even on a temporary basis) does not appear to be realistic. Importing goods at higher prices would certainly be a commercially viable option (and hence Panama's claim that the special import regime imposes a minimum price system inconsistent with Article XI:1 of the GATT). According to Colombia, Panama did not consider that the option of declaring an import value above the threshold that does not correspond to the price actually paid or payable for the goods would have been a legally viable option for importers. However, it would appear that the Colombian legal system, Article 128, point 5.1.3 of Decree No. 2685, permits such "overvaluation" or "correction" of the import value with a view to avoiding the application of the special import regime; Panama would take this as an indication that importers "may", "freely and voluntarily", ignore the "price actually paid or payable" for their goods and adjust to the minimum, arbitrary and fictitious value given by the thresholds, in violation of Articles 1, 7.2(f) and 7.2(g) of the CVA.

[136] Panel Report, *Colombia – Ports of Entry*, para. 7.142.
[137] Panel Report, *Colombia – Ports of Entry*, para. 7.150.

89. In addition, the specific bond is required in the light of the final collection of customs duties. However, the final determination of the bond is not based on the substantive obligations governing the final determination of customs value in the CVA. The determination of the coverage of the specific bond takes not the slightest account of the substantive provisions governing the determination of the value of the goods, in particular through application of the valuation methods established in the CVA "on a case by case basis, so as to reflect the particular conditions of the sale of the product in question."[138] This case by case consideration is impossible to observe when specific coverage is required *a priori* for the specific bond, on a fixed basis established prior to any importation (200% of the threshold price for the quantity imported, or 200% of the difference between the threshold price and the value declared for the imported quantity). Without making this evaluation, the Colombian customs authorities do not have the necessary information to implement the valuation methods provided for in Articles 1, 2, 3, 5, 6 and 7 of the CVA and to establish whether or not it is necessary to delay the valuation and the determination of the appropriate scope of the guarantee. For this reason, the special import regime is inconsistent with Articles 1, 2, 3, 5, 6 and 7.2(f) and (g) of the CVA.

B. THE SPECIFIC BOND IS INCONSISTENT WITH ARTICLE 13 OF THE CUSTOMS VALUATION AGREEMENT

90. With the issuance of Decree No. 2218, the specific bond would presumptively be a guarantee subject to the disciplines of Article 13 of the CVA. Panama considers that this change in perspective does not free the specific bond of its inconsistency with WTO law. Article 13 of the CVA requires that the determination as to the need to delay the final determination of customs value should be made on a case-by-case basis. However, in the case of Decree No. 1745, it is clear that the requirement of the specific bond and its coverage are not established on a case-by-case basis. Nor is this case-by-case approach adopted under Decree No. 2218, as Panama has already demonstrated, because the prices concerned are characterized by Colombia as "artificially" or "manifestly low".

91. Panama also finds problematical the fact that Article 13 allows the specific bond to be required only if the importer wishes to withdraw the goods, so that customs valuation may not be seen as an obstacle to importation. However, through its Article 7, Decree No. 1745 makes a specific bond a requirement for all imports, including those where the importer has no intention of withdrawing the goods and is prepared to leave the goods in customs for the latter to conclude the final determination already initiated. This requirement would also exist in all cases under Decree No. 2218.

92. Panama also notes that the coverage of the specific bond does not correspond to the requirement under Article 13 of the CVA that the guarantee should cover "the ultimate payment of customs duties for which the goods may be liable". This provision is clear and does not foresee the possibility of requiring a guarantee beyond that which relates to the payment of customs duties. Thus, Article 13 does not authorize the requirement of a guarantee to cover non-existent penalties, for example. In the same vein, Article 7(3)(4) of the Trade Facilitation Agreement allows for a customs guarantee to be required "[i]n cases where an offence … <u>has been detected</u>" (emphasis added). Therefore, the coverage of the guarantee provided for in Articles 7 of Decree No. 1745 and Decree No. 2218 exceeds the scope of Article 13 of the CVA.

93. In addition, as a subsidiary obligation, the specific bond must be sufficient to cover the ultimate payment of customs duties "for which the goods may be liable". Its coverage should therefore be in line with the coverage of the primary obligation. In this connection, the use of the threshold as reference value is not in keeping with the specific import characteristics and the methods of evaluation permitted by the CVA. It is not therefore a valid reference value for determining the coverage of the guarantee. Panama does not consider that Members have given "carte blanche" for the national authorities to establish amounts of coverage not subject to any discipline. If that were the case, the disciplines of the CVA could easily be circumvented by requiring guarantees with a coverage that bears no relation to the primary obligation that has to be guaranteed. In fact, echoing what was said by the United States in its third-party submission[139], Panama observes that Article 7.3 of the Trade Facilitation Agreement makes it clear that the amount of coverage of a customs guarantee "shall not be greater than the amount the Member requires to ensure payment of customs duties, taxes, fees, and charges ultimately due for the goods covered by the guarantee". Panama considers that the standard of "customs duties for which the goods may

[138] Panel Report, *Colombia – Ports of Entry*, para. 7.142.
[139] United States' third-party submission, para. 46.

be liable" in Article 13 of the CVA must be read in conjunction with the standard of the "the amount the Member requires to ensure payment of customs duties" in Article 7.3 of the Trade Facilitation Agreement. This balanced reading of the provisions in question calls for the application on a case-by-case basis of the valuation methods provided for in the CVA, instead of pre-established criteria of the kind foreseen in Decrees Nos. 1745 and 2218.

94. Panama also notes that the requirement of a specific bond to cover possible penalties is not included in Article 13 of the Customs Valuation Agreement. It is inappropriate, therefore, to rely on this provision as justification for requiring the specific bond for the payment of penalties, as is done by Colombia in Decree No. 2218. In addition, it has to be borne in mind that Article 7.3.4 of the Trade Facilitation Agreement allows a customs guarantee to cover penalties and fines *only* if the existence of an offence requiring the imposition of such penalties and fines has previously been detected.

95. In view of the foregoing, Panama considers that the specific bond under Articles 7 of Decree No. 1745 and Decree No. 2218 is inconsistent with Article 13 of the Customs Valuation Agreement.

IX. THE INCONSISTENCY OF THE SPECIFIC BOND AND THE SPECIAL IMPORT REGIME WITH THE CUSTOMS VALUATION AGREEMENT IS NOT JUSTIFIED UNDER ARTICLE XX OF THE GATT

96. Article XX of the GATT cannot be used to justify violations of the specific bond with regard to Article 13 of the CVA, and violations of the special import regime with regard to Articles 1, 2, 3, 5, 6 and 7 of the same Agreement. In order for Article XX to be able to justify a violation of the CVA, it would have to be understood that Article VII contains the same obligations as the CVA. That is not the case. Article VII is ambiguous and establishes only exhortative rules regarding the primacy of the transaction value ("should be") or of certain prohibited criteria ("should not be based on") (Article VII:2(a)), without however prescribing the sequence of methods or the case-by-case approach foreseen in the CVA. Although Article VII of the GATT may be considered as the basis on which Members have been devising stronger customs valuation disciplines, this rule does not contain the "positive obligations" that are in fact contained in Articles 1, 2, 3, 5, 6 and 7 of the CVA. Moreover, Article VII does not provide for the possibility of requiring a guarantee when an importer wishes to withdraw the goods from customs pending determination of the corresponding customs value. The *chapeau* of Article XX of the GATT textually limits the applicability of GATT exceptions to the provisions of that Agreement. It does not allow the coverage of such exceptions to be read as extending to other WTO agreements, all the more so if the obligations that are at issue in a dispute are not "enforceable" under the provisions of the GATT.

97. Moreover, none of the provisions of the CVA refers to Article XX of the GATT. Not even Article 17 of the CVA establishes the "exceptionality" sought by Colombia. This provision merely acknowledges that the customs authorities shall have the right to satisfy themselves as to the truth or accuracy of the information submitted in respect of customs valuation, without this implying disregard for the enforceability of the valuation methods provided for in the CVA. For these purposes, the corresponding authority could make use of the procedures set out in the "Decision Regarding Cases where the Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value". However, these procedures are far from bearing any resemblance to the content of Article 7 of Decrees No. 1745 and No. 2218. Therefore, Colombia would have no justification even for a defence under Article 17 of the CVA.

98. It should be noted that, when another WTO agreement is applicable under the CVA, its applicability is expressly provided for. For example, Article 19.1 of the CVA provides that the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under the CVA. This is not the case for Article XX of the GATT or any other exceptional rule contained in that Agreement.

99. Even if Article XX were applicable to violations of the CVA, Panama considers that there would be no justification for such violations on this legal basis, for the reasons given in respect of the invocation of Article XX on the inconsistency of the measures in question with the GATT in all Panama's communications, written and oral, as both complainant and respondent, including the replies to questions and Panama's comments on the replies of Colombia. Panama takes it that, pursuant to its position regarding claims of violation of the GATT, Colombia is invoking Articles XX(a) and XX(d) of the GATT as defence.

100. With regard to the violation of Article 13 of the CVA, the specific bond is not a measure necessary to combat money laundering resulting from a problem of underinvoicing. As Colombia explains in its replies to the questions of the panels, the incidence of valuation dispute investigations in relation to total imports is minimal (6.1% of imports under the threshold), and it is even negligible in relation to imports liable to underinvoicing (between 2.5% and 3% of imports as a whole), and there is not even any evidence at present of possible underinvoicing for the purpose of laundering money. A measure of this nature, therefore, like the specific bond, which has a highly trade-restrictive effect, with almost total suppression of trade subject to the thresholds (Colombia's response to question 6(b)), can in no way be considered a measure "necessary" to address this problem. It is a prohibitive measure which if anything creates the possibility of overvaluation of the goods (to avoid falling below the thresholds) and ultimately of money laundering. An alternative measure to address this problem is a guarantee applied on a case-by-case basis which has variable coverage according to the circumstances of each transaction.

101. In any event, Panama observes that there is no reason to exclude from the administration of the specific bond goods entering the international logistical distribution centres, since the same concerns relating to underinvoicing and money laundering may arise in these settings. The administration of the measure at issue would therefore necessarily give rise to discriminatory treatment as between situations where the same conditions (risk of money laundering through underinvoicing) prevail.

102. Nor does Panama consider, with regard to the violation of Articles 1, 2, 3, 5, 6 and 7 of the CVA, that the special import regime is a measure necessary to combat money laundering resulting from a problem of underinvoicing. For the same reasons as with respect to the bond, the incidence of valuation dispute investigations is minimal (6.1% of imports under the threshold) and it is negligible in respect of underinvoicing (between 2.5% and 3% of imports overall), while there is not even any evidence of possible underinvoicing leading to money laundering. In the circumstances, a measure with a highly trade-restrictive effect (or even a prohibitive effect with regard to certain imports) cannot be considered as a measure "necessary" to address this problem. Panama considers that random controls or some of the measures indicated in its previous submissions (Panama's rebuttal as complainant, paras. 201-261; Panama's rebuttal as respondent, paras. 392-420) are alternative, less trade-restrictive measures that would be available to Colombia.

103. In any event, Panama notes that there is no reason to exclude from the application of the special import regime goods entering the international logistical distribution centres, since the same concerns relating to underinvoicing and money laundering may arise in those settings.

X. CONCLUSION

104. In the light of all of the foregoing, Panama requests the Panels under Article 21.5 of the DSU to find that:

(i) in response to Colombia's objection, the specific bond and the special import regime, as well as all of Panama's claims are covered by the Panels' terms of reference;

(ii) the specific bond and the special import regime are Colombian "measures taken to comply" within the meaning of Article 21.5 of the DSU;

(iii) the specific bond requirement is inconsistent with Article XI:1 of the GATT, and does not meet the requirements of Article 13 of the Customs Valuation Agreement;

(iv) the special import regime is inconsistent with Article XI:1 of the GATT and with Articles 1, 2, 3, 5, 6 and 7(f) and (g) of the Customs Valuation Agreement;

(v) the specific bond requirement necessarily gives rise to an administration of Article 8 of Decree No. 390 that is not uniform, impartial and reasonable, contrary to the provisions of Article X:3(a) of the GATT;

(vi) the special import regime necessarily gives rise to an administration of Articles 493 and 486 of Decree No. 390 that is not uniform, impartial and reasonable, contrary to the provisions of Article X:3(a) of the GATT;

(vii) Colombia has not demonstrated that the requirements of the specific bond and the special import regime, and the administration to which they give rise, are justified under Articles XX(a) and (d) of the GATT;

(viii) the special import regime results in the application of substantial penalties for minor infringements, such as failure to comply with certain requirements of Decree No. 2218, in a manner inconsistent with Article VIII:3 of the GATT.

105. Consequently, Panama requests the Panels to find that Colombia has not brought its compliance measures into conformity with its obligations under the GATT and to make the relevant recommendations in accordance with Article 19 of the DSU.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF ECUADOR*

This statement constitutes Ecuador's opinion on the "Compliance Proceedings under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes".

Bearing in mind that the current proceedings relate to the determination to be made by the original panel regarding the measures taken by Colombia to comply with the recommendations made by the Dispute Settlement Body (DSB) in *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear (Colombia – Textiles)*, Ecuador considers it necessary to raise some legal points concerning the obligation incumbent on all Members to adhere to the provisions of the covered agreements, as a general matter, and in particular to the recommendations that may be addressed to a Member in a dispute settlement proceeding.

The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) provides that "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members". The time factor is of fundamental importance in the dispute settlement system of the World Trade Organization (WTO), as it is in any other organization, since justice administered slowly cannot be considered and denominated as such.

Hence, with the aim of achieving a "prompt" and "effective" resolution of disputes, the procedure established in Article 21.5 is an expedited procedure inasmuch as the panel report must be circulated within a period of 90 days, in contrast to the nine months available to the original panel.[1]

As has been highlighted by the Appellate Body, Article 21.5 "promote[s] the prompt compliance with DSB recommendations and rulings and the consistency of "measures taken to comply" with the covered agreements by making it unnecessary for a complainant to begin new proceedings and by making efficient use of the original panelists and their relevant experience".[2]

The DSU states that compliance must be immediate but also recognizes that it is not always practicable to comply immediately with all rulings and recommendations. Consequently, Members have what is known as a "reasonable period of time" to bring the challenged measure into conformity with the provisions of the covered agreements that have been breached.

In that connection, the DSB is responsible for maintaining surveillance of the implementation of recommendations and rulings; however, the standard of implementation may prove to be subjective, and the DSU therefore envisages a procedure whereby the original panel may intervene to determine whether the necessary measures have been taken to secure compliance with the DSB's recommendations and rulings and, if so, whether those measures are consistent with the provisions of the WTO covered agreements.

For this procedure in particular, the point of contention appears to be that of determining what measures are to be assessed by the Panel as having been taken by Colombia to "comply" with the recommendations of the DSB, since Panama alleges that the Panel should also consider as a measure taken to comply the measure contained in Decree 1745, issued simultaneously with Decree 1744, and that the latter is identified by Colombia as the only measure taken to comply with the Panel's findings.

In this connection, Ecuador considers it important that the Panel take account, in its analysis, of the full scope of the letter and spirit of the DSU rule, as set out in the opinion expressed by the Appellate Body in its report[3], to the effect that compliance proceedings cannot be conducted in such a way as

* Ecuador requested that its oral statement be considered as its executive summary. The original statement was made in Spanish.

[1] Articles 3.3 and 21.1 of the DSU.

[2] Appellate Body Report, US – Upland Cotton (Article 21.5 – Brazil), para. 212, referring to Appellate Body Report, US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina), para. 151.

[3] Appellate Body Report, US – Zeroing (EC) (Article 21.5 – EC), para. 250, citing Appellate Body Report, US – Softwood Lumber IV (Article 21.5 – Canada), para. 71.

to allow a Member "to comply through one measure, while, at the same time, negating compliance through another". In order to prevent the avoidance of effective compliance with the determinations made by a panel, the designation of certain measures by the responding Member as "measures taken to comply" with the DSB's recommendations and rulings is not determinative of the compliance panel's mandate.[4] A compliance panel's mandate may cover both the measures that the responding Member designates as being "taken to comply" and those that the responding Member does not consider to have that purpose, but which the panel, following a careful legal analysis, considers to be relevant for clarifying all the existing variables that will enable it to establish beyond any doubt the compliance or non-compliance with the determinations made by the DSB.

Conclusion

Ecuador considers that the essential purpose of initiating a dispute settlement proceeding under the DSU is to achieve the thorough verification of compliance with the determinations made by the DSB regarding measures taken by the defending and losing Member to comply with the provisions of the covered agreements. This is the direction taken by the rulings and recommendations adopted by the DSB, prior to the determinations made by the original panel, and by the Appellate Body where applicable.

Thus, the Member to which the recommendations were addressed has a "reasonable period of time" to adopt compliance measures, for which reason Ecuador considers that such compliance measures must be directed towards a single objective, namely full adherence to the obligations stemming from the WTO covered agreements.

[4] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 204.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES

THIRD PARTY WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

I. Terms of Reference of Panels in These Proceedings

1. Articles 7.1 and 6.2 of the DSU reflect the standard terms of reference for a panel, and Article 21.5 contains a more specific focus on a disagreement as to a measure taken to comply. Under Article 7.1, when the DSB establishes a panel, it may give the panel standard terms of reference, which are "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request and "to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)". Under Article 6.2, the "matter" consists of "the specific measures at issue" and "a brief summary of the legal basis of the complaint." Thus, the task of any panel, including one established pursuant to DSU Article 21.5, is examining the "matter" referred to the DSB in the complaining Member's panel request, with the "matter" consisting of the "specific measures at issue" and the "legal basis of the complaint."

2. With regard to the "legal basis of the complaint," this refers to the claims at issue in the proceeding. Where a single provision of a covered agreement contains multiple obligations, "a panel request might need to specify which of the obligations contained in the provision is being challenged." Claims must be "set out clearly in a panel request" and where a panel request fails to specify adequately a claim, such claim will not form part of a panel's terms of reference.

3. With regard to the "specific measures at issue," Articles 6.2 and 7.1 of the DSU establish the relevant time for identifying these measures in any panel proceeding is when the "matter [is] referred to the DSB." Thus, when the DSB establishes the panel and sets the panel's terms of reference, the measures subject to the panel's examination are those within "the matter" "referred to the DSB" when the panel was established. Accordingly, panels and the Appellate Body have recognized that the general rule set out by Articles 6.2 and 7.1 is that "the measures included in a panel's terms of reference" "must be [those] that are in existence at the time of the establishment of the panel" and that a panel's review should "focus[] on [the] legal instruments as they existed … at the time of establishment of the panel."

4. DSU Article 21.5 further defines the terms of reference of panels established under that provision. It provides that an Article 21.5 panel's terms of reference are limited to assessing the "existence" or "consistency with a covered agreement" of "measures taken to comply." "Measures taken to comply" refers to "measures which have been, or should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB." Thus, an Article 21.5 proceeding extends to measures that were "taken in the direction of, or for the purpose of achieving, compliance" and to measures that should have been so taken. Identifying the measure taken to comply involves examining "the factual and legal background against which relevant measures are taken." The DSB recommendations and rulings in the original proceeding are the starting point for identifying the "measures taken to comply."

5. Therefore, in contrast to original panel proceedings, a complaining Member's panel request may list some measures that, by definition, do not fall within an Article 21.5 panel's terms of reference or may fail to list some measures that nevertheless do fall within a panel's terms of reference. For example, the implementing Member may declare that a particular legal instrument is the "measure taken to comply" for purposes of an Article 21.5 proceeding. This declaration is "relevant" to an Article 21.5 panel's analysis of the "measure taken to comply" but is not "conclusive." Legal instruments other than the declared "measure taken to comply" may in effect be part of the "measure taken to comply" because of their relationship to the measure found WTO-inconsistent or effect on a Member's compliance.

6. In this dispute, with regard to the scope of measures taken to comply, Colombia suggests that Decree 1745 is not part of the "measure taken to comply" because the measures set out in Decree

1745 are different "in nature" from the original measure because the original measure was a tariff measure and the measures in Decree 1745 are not. As complainant, Colombia also argues that its panel request mentions only Decree 1744 and, therefore, it is the only measure within that Panel's terms of reference.

7. The United States does not consider that a measure taken to comply is necessarily limited to the type or kind of measure found in the original proceeding to be WTO-inconsistent. Rather, assessing whether a new measure has a sufficiently close relationship to the measure subject to the DSB recommendations (or to the declared measure taken to comply) is a fact-specific inquiry that may require examining "the timing, nature, and effects" of various measures. This analysis does not depend on whether a new measure is the same *type* of measure as the WTO-inconsistent measure. If it did, a Member could evade a DSB recommendation by simply changing the character of a measure. Thus, various factors may be relevant to assessing the relationship between Decree 1745 and the WTO-inconsistent measure subject to the DSB recommendation.

8. With regard to Colombia's other argument, the United States does not understand that the analysis of the "measure taken to comply" differs depending on which party initiated an Article 21.5 proceeding. As discussed above, one feature of Article 21.5 proceedings that is different from original proceedings is that, with regard to the measures within a panel's terms of reference, Article 21.5 sets out specific rules that may supersede the description of the challenged measure in the panel request. Thus, a complaining Member may not draw into an Article 21.5 proceeding a measure other than a "measure taken to comply" by referring to that measure in its panel request. Conversely, a Member may not constrain an Article 21.5 panel from assessing the effect on its claim of a "measure taken to comply" that the other party brings forward in the course of that proceeding simply by omitting that measure from its panel request.

9. Concerning Decree 2218 of 2017, as explained above, Articles 6.2 and 7.1 of the DSU set out the general rule that "the measures included in a panel's terms of reference," and thus those on which the panel makes findings, "must be . . . in existence at the time of the establishment of the panel." DSU Article 21.5 does not modify this rule. The Panels were established with standard terms of reference. Thus, it is the "measures taken to comply," as they existed on the dates of the Panels' establishment – March 6 and July 19, respectively – that are properly within the Panels' terms of reference. It is uncontested that Decree 2218 was enacted long after the Panels were established. Therefore, it is not part of the "matter" referred to the DSB. As such, it is not within the Panels' terms of reference, and the Panels should not make findings on it.

10. Indeed, these proceedings illustrate that, in addition to being consistent with the text of the DSU, defining the "matter" within a panel's terms of reference based on the measures as they existed at the time of panel establishment is the appropriate outcome. First, addressing "measures taken to comply" as a moving target leads to procedural unfairness and gaps in argumentation that can cause incoherent findings. Colombia has had no meaningful opportunity to respond to Panama's arguments or evidence on Decree 2218. Further, Panama has put forward no arguments or evidence that Decree 2218 forms part of the "measures taken to comply," simply presuming that it is within the Panels' terms of reference. Second, defining the "matter" within a panel's terms of reference based on the measures as they existed at the time of panel establishment benefits all parties, and the WTO dispute settlement system, by balancing the interests of complainants and respondents. Complainants may not obtain findings on substantively new measures introduced after the establishment of a panel. On the other hand, respondents may not avoid findings by altering or revoking measures after the date of panel establishment. As the Appellate Body has recognized, it does not serve the interests of the WTO dispute settlement system to require or allow parties to adjust their arguments throughout dispute settlement proceedings in order to deal with a disputed measure as a moving target.

11. With regard to the claims within the Panels' terms of reference, as explained above, a panel's terms of reference are generally to examine the "matter referred to the DSB" by the complaining Member. The claims falling within these terms of reference are those set out in the panel request. Both Panels in these proceedings were established with standard terms of reference. Thus, the terms of reference of the Panel established in the proceeding initiated by Colombia extend to the "matter raised by Colombia in document WT/DS461/17." The provisions mentioned in this document are Articles II:1(a) and (b), XX(a), and XX(d) of the GATT 1994, and the only obligations described relate to the imposition of customs duties not in excess of Colombia's bound rates. Therefore, these are the claims within the terms of reference of the Panel established pursuant to Colombia's request.

12. The argument that the terms of reference of an Article 21.5 panel extend to *any* inconsistency with any covered agreement, no matter the claims identified in the panel request, has no support in the text of the DSU, and Panama points to none. Further, as discussed above, it is refuted by Articles 7.1 and 6.2. The Appellate Body report in *EC – Bed Linen*, which Panama cites as supporting this argument, does not do so. In that dispute, the Appellate Body stated that the "complainant in Article 21.5 proceedings may well raise *new* claims, arguments and factual circumstances different from those raised in the original proceedings," due to differences between the original measure and the measure taken to comply. There was no suggestion, however, that the complainant could raise claims not raised in the panel request pursuant to which the compliance panel was established. Similarly, the Appellate Body did not suggest that a respondent in an Article 21.5 proceeding could raise claims not covered by the panel request.

13. The argument that the two Panels must have the same terms of reference because they are both considering the issue of compliance with the DSB recommendations and rulings in the original proceeding also has no support in the DSU. Even under the approach of the Appellate Body in *EC – Continued Suspension*, the terms of reference of Article 21.5 panels remain tied to the panel request pursuant to which they were established, even if there are two such panels in a dispute and their schedules are harmonized. The schedules of the two Panels in this proceeding have been harmonized and a combined set of working procedures adopted. But the proceedings remain distinct in terms of the panel requests and the parties' submissions. Thus, the terms of reference of the two Panels are not identical simply because the DSB referred two matters to the Panels pursuant to Article 21.5. And, indeed, they are not identical, as Colombia's panel request does not cover all the claims subsequently raised by Panama.

14. As to Panama's argument that all the claims it has raised as complainant are covered by the terms of reference of the Panel established pursuant to its own panel request, the United States has two points. First, the terms of reference of the Panel requested by Panama are governed by Panama's panel request. Therefore, the fact that Panama's panel request does not refer to Article VIII:3 of the GATT 1994 suggests that claims under that provision are not within that Panel's terms of reference. Further, for the provisions listed in Panama's panel request, the Panel will still have to consider whether the references meet the standard of DSU Article 6.2. Second, Panama's submissions as complainant are not part of the record in the proceeding initiated by Colombia simply because the proceedings are in the same dispute. Therefore, Panama's argument that *all* the provisions and arguments it has raised as respondent are within the terms of reference of the Panel established pursuant to Panama's panel request must be substantiated, for example, by reference to the working procedures of the Panels or to Panama's submissions as complainant. However, as the complainant, Panama seems not to have put forward argumentation concerning the claims under Article VIII:3 of the GATT 1994 and Articles 1, 2, 3, 5, 6, 7, and 13 of the CVA that it raised in its second submission as respondent.

II. Interpretation of Article XI:1 of the GATT 1994

15. The ordinary meaning of the term "restriction," in the context of Article XI:1, is "a limitation on action, a limiting condition or regulation." The panel in *India – Quantitative Restrictions* thus found that "[t]he scope of the term 'restriction' is . . . broad, as seen in its ordinary meaning." The panel in *India – Autos* reached the same conclusion, finding that "any form of limitation imposed on, or in relation to importation constitutes a restriction on importation within the meaning of Article XI:1." The Appellate Body endorsed this approach in *China – Raw Materials* and *Argentina – Import Measures*, finding that "restriction" refers to "[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation" and thus "refers generally to something that has a limiting effect."

16. A finding that a measure constitutes a restriction within the meaning of Article XI:1 does not require a showing that trade flows have been affected. Article XI:1 proscribes restrictions "on the importation" or "on the exportation" of any product, not restrictions on the *level* of imports or exports. The terms used reach the process of importing or exporting. Similarly, the Appellate Body in *Argentina – Import Measures* recently concluded that the "limiting effect" of a restriction under Article XI:1 "need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context."

17. On the other hand, it is not the case that any measure that makes importation more difficult is inconsistent with Article XI:1. As the Appellate Body recognized in *Argentina – Import Measures*, "not every condition or burden placed on importation or exportation will be inconsistent with Article XI, but only those that are limiting, that is, those that limit the importation or exportation of products." Numerous provisions of the covered agreements recognize that there may be formalities and fees associated with importation, which will inevitably place some burden on importation. Interpreting Article XI:1 as proscribing all such burdens would contradict the principle that the WTO Agreement is a single undertaking and, therefore, the provisions of the various covered agreements should be interpreted harmoniously.

18. Thus, the critical question in determining whether Panama has shown that the customs bond is inconsistent with Article XI:1 is whether it has shown that the measure imposes a limitation or limiting condition on importation, or have a "limiting effect" on importation, of products into Colombia. The Panels should reject arguments suggesting that any "conditions" placed on importation – including all importation fees and formalities – are necessarily inconsistent with Article XI:1. A showing that a measure is a "condition" on importation that imposes some burden or cost on importers is not sufficient to establish an Article XI:1 claim. On the other hand, Panama is correct that it is not necessary for it to demonstrate a measure's effect on trade flows in order to show it is inconsistent with Article XI:1.

19. Also, as Article XI:1 refers to the importation of "product[s] of . . . any other contracting party," the key inquiry is a measure's effect on the *products* of Members not on *importers* in Colombia. A number of Panama's arguments seem premised on the idea that Article XI:1 requires Colombia to maintain equal conditions for all Colombian importers (particularly those that are not credit worthy). This is incorrect. The text of Article XI:1 refers to limitations on the importation of *products*, not limitations on importation by particular importers. Limitations on importation by particular persons would be relevant to the Panels' analysis only to the extent that the limitations on individuals' ability to import are a limitation or limiting condition on importation, or had a "limiting effect" on importation, of the relevant products.

20. With respect to the argument that customs bonds are "permissible instruments" and thus not inconsistent with Article XI:1, the United States agrees that the existence of a customs bond is not sufficient to establish an Article XI:1 claim. The WTO agreements are a single undertaking and should be read harmoniously. If all customs bonds were inconsistent with Article XI:1, provisions of the covered agreements would be rendered meaningless. And because customs bonds inherently involve some burdens or costs on importers, the existence of some burden or cost imposed by a customs bond is not sufficient to establish that the bond is inconsistent with Article XI:1. The provisions of other covered agreements on customs bonds and import fees and formalities provide useful context for analyzing whether a customs bond rises to the level of being a "restriction" under Article XI:1. At a minimum, a customs bond that is *consistent* with such provisions would presumably not be inconsistent with Article XI:1.

21. Panama also argues that the special import regime is inconsistent with Article XI:1. In considering Panama's arguments, the Panels should assess which of them are probative of whether the special import regime imposes a limitation or limiting condition "on importation" or has a "limiting effect" on importation. A successful Article XI:1 claim requires a Member to show that the measure restricts importation of the relevant products; the existence of costs or difficulties for individual importers is not sufficient. On the other hand, the intervention of some element of private action does not relieve a Member of responsibility for the effects of a measure. If Panama shows that the special import regime necessarily results in costs and burdens that are a limitation or limiting condition on importation or have a "limiting effect" on importation of the covered products, the fact that private actors are involved in imposing or implementing these costs and burdens does not mean that the restriction does not stem from the challenged measure.

RESPONSES OF THE UNITED STATES TO THE PANELS' QUESTIONS TO THE THIRD PARTIES

Questions 1, 2, and 7

1. Article 21.5 of the DSU establishes that the question in assessing whether a measure is within the terms of reference of an Article 21.5 panel is whether it forms part of, or undermines the existence of, the "measure taken to comply." The "closely connected" analysis from *US – Zeroing*

does not suggest that measures other than a "measure taken to comply" could be within the terms of reference of a compliance panel. Rather, the report explains that measures other than the *declared* "measure taken to comply" can in fact be measures taken to comply and within the panel's terms of reference. It states that a panel's task is to determine whether "measures that are ostensibly *not* 'taken to comply'" have "sufficiently close links" with the declared measure taken to comply and the recommendations and rulings of the DSB "for [the panel] to characterize such other measures as 'taken to comply' and, consequently," within the panel's terms of reference. The Appellate Body took the same approach in *US – Softwood Lumber IV*. Thus, the "closely connected" analysis can assist an Article 21.5 panel in its analysis of whether a measure other than the declared "measure taken to comply" is within its terms of reference.

Question 12

2. One of the fundamental principles of Article XX is that it reflects the right of a responding Member "to achieve its desired level of protection with respect to the objective pursued." Thus, for a measure to be "necessary" under Article XX(a), it does not need to *fully* achieve its public morals objective. Similarly, a Member is not required to address all aspects of an objective together and equally because it chooses to address one aspect. The Appellate Body addressed this issue explicitly in its report in *EC – Seal Products*. Thus, contrary to Japan's suggestion, Colombia does not need to explain why the measures at issue concern only textiles and apparel products, or show that the measures' scope is "necessary" to combating money laundering, to meet the standard of Article XX(a).

Question 13

3. The first step of the Article XX chapeau analysis entails assessing whether a measure "results in discrimination" between countries where the "conditions" are relevantly "the same." Arguments by Japan and the EU ignore this step and thus misstate the chapeau legal standard.

4. Japan's argument omits this element of the chapeau analysis as a result of its focus on the "calibration test" applied in *US – Tuna II*. However, the "calibration test" was not put forward as a generally applicable approach to the chapeau. Rather, the Appellate Body found that, based on the arguments of the parties and the facts of the dispute, it was an appropriate way of assessing whether the U.S. tuna measure met the chapeau requirements. Moreover, the "calibration" analysis was applied *after* the complaining party demonstrated that the U.S. tuna measure discriminated between countries where the conditions were relevantly the same. Thus, even if the "calibration" test were a generally applicable approach to the "arbitrary and unjustifiable discrimination" standard, it would not displace the first step of the chapeau analysis.

5. The EU's argument that Colombia's measure may treat two categories of products "similarly" even though they represent "different situations" and that this may constitute "discrimination" suffers from a similar flaw. The chapeau concerns discrimination "between countries where the same conditions prevail," not merely discriminating among "different situations." The EU's hypothetical of genuinely low-priced products and under-valued products has no connection to the national origin of the two alleged types of products, and thus does not suggest that the measure discriminates "between countries where the same conditions prevail." The United States respectfully suggests that the Panels ground their analysis of Colombia's defenses in the text of the chapeau and the relevant arguments of the parties.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF HONDURAS[*]

1. Honduras wishes to express its views on one aspect of this dispute that is of a systemic nature: the possibility that a Member could use the protection of public morals or the prosecution of offences under domestic law as a basis for imposing measures that affect international trade.

2. Honduras acknowledges that this possibility forms part of the public policy space available to every government for the management of its domestic affairs. However, Honduras considers that WTO panels should evaluate this type of argument with extreme care. The characterization of an international trade operation as a threat to public morals or to the domestic criminal justice system of a State is not a matter that should be taken lightly, since it should have the highest priority for the government making such an allegation. Because of this very priority, however, such a characterization should not be based solely on mere assertions or general explanations.

3. Honduras is of the opinion that, despite the deference that Panels and the Appellate Body may accord to governments in the characterization of their domestic affairs, because of the fact that commitments assumed towards other Members of this Organization are at stake, these organs must base their assessment on the evidence supplied by the parties and not just on the assertions made or on mere explanations, which may appear plausible but are not supported by documentation. Without evidence based on actual facts and not mere hypotheses, Panels should be reluctant to accept without scrutiny allegations that a form of corporate conduct is contrary to public morals or the domestic legal order of the government seeking to restrict imports.

4. Honduras considers that this standard of review is also applicable to the matter of the contribution of the measure to the proposed objectives and its degree of trade restrictiveness. Panels must carefully consider the explanatory material and evidence supporting these arguments. Particular attention must be paid to what Honduras would call the "collateral effects" of the measure. It must be assessed whether the measure's secondary effects on international trade would not give rise to the occurrence in a different form of the same problem that the measure is allegedly intended to prevent. If that is the case, the contribution of the measure should be called into question.

5. In the instant case, Honduras has serious doubts as to whether the restriction on imports below certain prices might not have the opposite effect of encouraging traders to manipulate their prices upwards, above the reference prices, which would also constitute a situation of customs fraud, and Honduras also has doubts as to whether this situation might not lend itself to the commission of a money laundering offence, which is meant to be prevented by the challenged measures. Honduras hopes that the Panel will examine this situation with the utmost care.

6. Honduras considers that Article XX of the GATT already provides ample public policy space for Members to pursue the domestic policies they deem necessary. Panels, and the Appellate Body in particular, should be extremely careful not to apply these rules in such a way as to loosen the existing standards even further.

[*] Honduras requested that its oral statement be considered as its executive summary. The original statement was made in Spanish.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF JAPAN

I. ARTICLE 21.5 OF THE DSU

A. Measures Taken to Comply pursuant to Article 21.5 of the DSU

1. Compliance panels examine the existence or the WTO-consistency of "measures taken to comply" pursuant to the DSU Article 21.5. Both of the measures that Members declare as measures which have been, or should be, adopted to bring about compliance with the DSB's recommendations and rulings, and the measures that are closely connected to such measures and the DSB's recommendations and rulings, constitute such "measures taken to comply" under Article 21.5. While Japan does not take any specific position on the facts of this dispute, Japan considers that if the measures at issue (i.e., the customs bond and the special import regime) constitute "measures taken to comply" and are specified in the panel request, they fall within the scope of the compliance Panel.

2. In this regard, Japan is of the view that where a Member which was the respondent in the original proceeding has initiated a compliance proceeding with respect to its measures it refers to as "measures taken to comply" in its panel request, the other Member, which was the complainant in the original proceeding, will be free to initiate another compliance proceeding with regard to other measures in its panel request, if such measures truly constitute "measures taken to comply".

3. In the compliance panel proceeding initiated by the original respondent Member, the original complainant Member may refer to the measures other than those the original respondent Member referred to in order to prevent the panel from concluding that the original recommendations and rulings are fully implemented. However, in such a proceeding initiated by the original respondent Member, the panel should not make findings on the WTO-consistency of the measures other than those the original respondent Member referred to, because they are not specified as measures in the panel request.

B. The Close Nexus Test

4. The Appellate Body has laid out a set of criteria that a compliance panel should analyze when determining whether an undeclared measure taken to comply has sufficiently close links to the declared measures "taken to comply" with the DSB's recommendations and rulings to fall within the scope of a compliance proceeding ("close nexus test").[1] The determination requires a panel to "scrutinize the links, in terms of *nature*, *effects*, and *timing*, between those [undeclared] measures, the declared measures 'taken to comply', and the recommendations and rulings of the DSB."[2]

5. In this regard, Japan considers that in *US – Large Civil Aircraft (2nd Complaint) (21.5 – EC)*, the compliance panel applied the close nexus test by examining "nature" and "effects", but not "timing" while, in other parts of its analysis, the panel examined "nature", but not "effects" and "timing".[3] Japan considers that such inconsistent application of the close nexus test by compliance panels may lead to arbitrary determinations on the proper scope of compliance panels. Japan requests that the Panel apply the close nexus test in a holistic manner "based on a careful weighing and balancing of all of the close nexus factors—nature, effects, and timing."[4]

6. Japan notes that the application of the close nexus test in a holistic manner on "nature", "effects" and "timing" may involve the examination of factors relevant to said three elements. Japan considers that in examining the "nature" and "effects" of the measures, the Panel may want to look

[1] See e.g., Appellate Body Report, US – Zeroing (EC) (Article 21.5 – EC), para. 207.
[2] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 229.
[3] Panel Report, US – Large Civil Aircraft (2nd Complaint) (Article 21.5 – EC), paras. 7.76-7.79 and 7.162-7.168.
[4] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 262.

at the policy objective of the measures. The Panel may benefit from some articulation by the implementing member of the objectives of the measures that the member takes, yet if the Panel is to conduct a close nexus test, it should not rely on the mere assertions of the parties, and should not give disproportionate weight on the asserted objectives of the measures at issue.

II. ARTICLE XI OF THE GATT 1994

7. The text of Article XI:1 of GATT 1994 is very broad and comprehensive in its scope as it does not contain any qualification on the subject "prohibitions or restrictions" on the importation of products. Japan is aware that the Appellate Body in *Argentina – Import Measures* stated that "only [measures that] have a limiting effect on the importation [of products]"[5] can be found to be inconsistent with Article XI:1. Japan also notes that the Article does not specify any threshold for such "a limiting effect". While Article XI:1 refers to "prohibitions or restrictions … on the importation of any product," limitations on importation by a particular person fall within the scope of Article XI insofar as they produce any limiting effect.

8. In Japan's view, customs bond constitutes a limitation on the "importation" of products and, by nature it has a "limiting effect" thus would fall under prohibited measures under Article XI:1. However, measures prohibited under Article XI:1 may be justified pursuant to Article XX of the GATT 1994 to the extent that they serves legitimate public policy purposes, and other specific requirements under the provision are met. The imposition of customs bond on imports may be justified, under Article XX (d), to the extent "necessary to secure compliance with [certain WTO-consistent] laws or regulations."

III. ARTICLE XX(A) OF THE GATT 1994

9. What is at dispute is whether the customs bond and the special import regime under Decree 1745 are "necessary" to achieve the objective of combatting money laundering, that, in principle, falls under public morals purpose. While Japan is aware that the Appellate Body stated that "[m]embers have the right to determine the level of protection that they consider appropriate,"[6] Japan is of the view that the Member seeking to justify a measure under Article XX(a) of the GATT 1994 must identify the level of protection which it is pursuing through the measure. The Appellate Body has noted that when assessing whether a measure can be justified pursuant to Article XX, an analytical process entails a consideration of whether the measure has been adopted or enforced to achieve its objective, and whether the measure is necessary for achieving that objective.[7] It is only when the responding Member identifies the policy objective pursued by the measure that the Panel would be able to determine whether the measure is "necessary" to achieve the objective by engaging in a "holistic analysis of the relationship between the measure and the protection of public morals."[8] Japan is of the view that for a measure to be provisionally justified under Article XX(a) of the GATT 1994, it must be designed to meet the policy objective pursued by the measure.

10. In this regard, Japan notes that, while the relevant policy objective is to combat money laundering, it is not clear to Japan why the measure is limited to certain textiles, apparel, and footwear, rather than being more broadly applicable to all or most imports or sectors. As such, Japan considers that it would be important for the Panel to take into consideration the lack of a reasonable explanation as to why the measure's narrow product scope is "necessary" or for combatting money laundering.

11. Finally, Japan adds that the Panel should carefully assess the lack of explanation as to why the measure is limited to certain products in determining whether the measure complies with the chapeau of Article XX. The Appellate Body confirmed that the calibration test can be applied in the context of Article XX of the GATT. In *US – Tuna*, the Appellate Body relied on a "calibration test" and reviewed whether any differences in treatment under the measure at issue can be justified by

[5] Appellate Body Reports, *Argentina – Import Measures*, para. 5.241.
[6] Appellate Body Report, *EC – Seal Products*, para. 5.200; *see* Appellate Body Report, *Brazil – Retreaded Tyres*, para. 140.
[7] *See* Appellate Body Report, *EC – Seal Products*, para. 5.169.
[8] Appellate Body Report, *Colombia – Textiles*, para. 5.70.

reference to the policy objective pursued because such differences reflect the differences in, or are calibrated to, the different risks.[9]

12. While Japan does not take any specific position on the facts of this dispute, Japan believes that the Panel should carefully review whether the customs bond and custom formalities under Decree 1745 take into account different risks that may arise, depending on each transaction. If it is the case that a measure applies a single threshold of transaction prices, and thus does not calibrate it to any differences in the risks of money laundering arising from different transactions, it is possible that such a measure constitutes arbitrary or unjustifiable discrimination. By the same token, however, if a measure is not applicable uniformly to different product groups or countries, even though the risks do not differ, this may also run afoul of the requirements of the chapeau. In this situation, the responding Member must be able to explain the rationale for adopting a single and uniform measure or, by contrast, a measure that differentiates in a discriminatory way.

13. In this dispute, Colombia would have to explain why a measure setting a uniform price threshold, which by its design and structure may capture transactions that are not at all connected to money laundering, is rationally related to the measure's stated objective of combating money laundering. Colombia should also explain why it is reasonable to regulate low-value imports of this limited category of products and not other goods that may be easier or equally easy to be used for money laundering purposes. It is Japan's view that, in the absence of this type of rational explanation, a panel would normally need to find that a measure results in arbitrary or unjustifiable discrimination under the chapeau of Article XX of the GATT 1994, and consequently, it could not be justified.

[9] Appellate Body Report, *US – Tuna II (Mexico)(Article 21.5 – Mexico)*, paras. 7.153, 7.155, 7.239, 7.347.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE EUROPEAN UNION

I. INTRODUCTION

1. The European Union (the EU) exercises its right to participate as a third party in this case because of its systemic interest in the correct and consistent interpretation and application of the provisions of the covered agreements at issue in this dispute, in particular the General Agreement on Tariffs and Trade (the GATT 1994), the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU) and the Customs Valuation Agreement (CVA).

2. Whilst not taking a final position on all the facts of this case, the EU provides its views on certain legal claims and arguments advanced by the Parties to the dispute.

II. THE PANELS' TERMS OF REFERENCE

A. Whether Decree No. 1745 falls within the scope of the present compliance proceedings

3. The EU considers that subject to compliance proceedings can be both declared and undeclared measures taken to comply. A panel's mandate under Article 21.5 of DSU is not necessarily limited to an examination of an implementing Member's measure declared to be taken to comply, but may include a review of other measures which have close relationship to the recommendations and rulings of the DSB and the declared measure taken to comply.

4. In *EC – Bananas III (Article 21.5 - US)* the Appellate Body considered that it has to be analyzed first whether the measure at issue is in itself a measure taken to comply and only if that analysis cannot provide a clear answer, then the analysis of *US – Softwood Lumber IV (Article 21.5 – Canada)* is of application. In other words, if the measure at issue is found to constitute in itself a measure taken to comply, it will not be necessary to establish a "particularly close relationship" of the measure at issue to the declared measure taken to comply in order to subject the measure at issue to the scope of Article 21.5 proceedings.

5. The EU recalls that not only declared, but also undeclared measures can be reviewed by a panel in Article 21.5 proceedings. A panel's mandate under Article 21.5 of DSU is not necessarily limited to an examination of an implementing Member's measure declared to be taken to comply, but may include a review of other measures which have close relationship to the declared measure taken to comply and to the recommendations and rulings of the DSB.

6. Undeclared measures cannot be excluded *a priori* from the scope of compliance proceedings. Otherwise, the complainant would have to bring new procedures to challenge any measure with respect to which the respondent continues to deny compliance.

7. Accordingly, it is relevant to examine certain relevant aspects such as the timing, nature, and effects of the various measures in order to conclude if they have a sufficiently close relationship to the recommendations and rulings of the DSB and the declared measures taken to comply. The EU concurs with Japan in this regard.

8. With respect to the timing, the EU notes that both Decree No. 1744 and Decree No. 1745 were adopted on 2 November 2016, before the expiry of the RPT on 22 January 2017. While the first decree modified certain customs duties and brought them in line with the DSB recommendations and rulings, Decree No. 1745 instituted measures for the prevention and control of customs fraud in apparel and footwear imports.

9. The EU also notes that Colombia itself explained the link between the two future decrees in the RPT arbitration proceeding. The EU reckons that statements made by the parties within the framework of Article 21.3(c) of DSU arbitrations are relevant and may offer guidance to a panel. However, the EU considers that such statements are not dispositive.

10. In order to ascertain whether there is a close nexus, for instance, between an undeclared measure taken to comply and the DSB's recommendations and rulings, it is necessary to examine the 'design' of the measure, including its content, structure and expected operation. A panel needs to take into account objective factors in undertaking such an assessment, so as to enable it to analyse the nature, timing and effects of the measures at issue.

11. The EU also considers that the arbitrator's factual findings in Article 21.3(c) proceedings are relevant, but not dispositive. The purpose of Article 21.3(c) proceedings is to determine a reasonable period of time to comply, while the purpose of Article 21.5 proceedings is to determine if the respective party complied with the recommendations and rulings of the DSB.

12. The nature of the initial measure and of the new measure seems to be similar: Colombia's new mechanism is analogous to the previous compound tariff, as it is activated when the prices of the imports of apparel and footwear are below certain thresholds prescribed by Colombia itself, as was the case with the compound tariff. When this situation occurs, a higher *ad valorem* tariff is applied (within the bound limits - Decree No. 1744), together with several specific requirements (Decree No. 1745). For imports below the threshold there is in fact a presumption that they are of an illicit nature. Thus, the effect of this single package of measures seems to be the same as that of the compound tariff: it combines a price sensitive component (an *ad valorem* duty) with a price insensitive component (customs bonds and documentary requirements).

13. Furthermore, the objectives of the previous and the new measure are the same. The new measure has also as justification the fight against money laundering. In fact, with respect to the customs bond requirement and the special importation regime in Decree No. 1745 Colombia raises similar defenses under the general exceptions in Articles XX(a) and (d) as it did in the original proceedings with regard to the compound tariff in Decree No. 456.

14. With respect to the effects of the original measure and of Decree No. 1745, the EU notes that the measure at issue in the original proceedings covered the importation of apparel and footwear classified in Chapters 61, 62, and 64 of the Colombian Customs Tariff. At the same time, the new Decree No. introduces special customs controls for the importation of apparel and footwear classified in the very same chapters 61, 62, and 64 of the Colombian Customs Tariff. Furthermore, the goods initially subject to Decree No. 456 were those having artificially low prices, while the imports subject to the customs bonds requirements under Decree No. 1745 "are those that are suspected to have declared values that are artificially low". The effects of both the original measure and the new measure seem to be the limitation of imports of the targeted products.

15. Finally, the measures contained in Decrees No. 1744 and 1745 are the response of Colombia to the recommendations and ruling of the original panel and the Appellate Body with respect to the compound tariff in Decree No. 456. If the compound tariff had not been found incompatible with Article II of GATT and not justified under Article XX of GATT, there would have been no reason to replace Decree No. 456 with new measures. Therefore, Decrees No. 1744 and 1745 were adopted as a consequence of the recommendations and rulings in the original proceedings.

16. Thus, the EU considers that the Panels should follow the previous relevant guidance from the Appellate Body and ascertain whether the measures at issue are measures taken to comply or have a particularly close relationship with those measures, taking into account the factual configuration of the present case.

B. Whether Decree No. 2218 falls within the scope of the present compliance proceedings

17. The EU recalls that the Appellate Body in *US/Canada - Continued Suspension* referred to possible new violations, not covered in the implementing Member's Article 21.5 panel request. The EU considers that in a particular configuration like the one in the present proceedings, when the initial respondent is bringing first compliance proceedings, subsequently followed by the original complainant, the matter before the Panels is as described in both panel requests. It can be compared to the existence of one panel request consisting of two parts.

18. With regard to whether a measure adopted after the panel request is within a panel's terms of reference, the EU considers that it should be assessed on a case by case basis. Consultations requests must be consistent with Article 4.4 of DSU and panel requests must be consistent with Article 6.2 of DSU. A panel may examine in compliance proceedings declared measures taken to comply and undeclared measures taken to comply that satisfy the close nexus test (nature, timing and effects). However, all such measures must be within the panel's terms of reference. If an original complainant considers that a compliance panel request filed by an original respondent is incomplete, it must file its own panel request if it wishes to include other measures in the scope of the compliance proceedings.

19. Measures coming into existence during the course of compliance panel proceedings can only be within the terms of reference of the compliance panel if they are covered by specific language in the panel request that is consistent with Article 6 of DSU, or if either party files a modified panel request.

20. The EU notes that at page 7 of Panama's panel request there is a "catch-all" clause referring to "any possible amendments, extensions or additions, where applicable". However, even in the presence of such a catch-all clause, the new measure must remain "the same in essence" as the old measure, in order to be validly captured. Thus, the EU invites the Panels to assess whether Decree 2218, repealing Decree 1745 and containing largely identical provisions (albeit with certain important differences) can be considered an amendment, extension or addition which does not change the essence of the measure.

21. Furthermore, throughout its panel request Panama describes the security for release of goods and certain documentary and certification requirements, which are similar to a certain extent both under Decree 1745 and subsequently under Decree 2218.

22. In light of the above, the Panels will have to ascertain whether Colombia, as well as the third parties, received sufficient notice with regard to Panama's claims in the present dispute also with regard to the content of Decree 2218, in light of the terms of Panama's panel request.

23. Finally, should the Panels consider that Decree 2218 is within their terms of reference, then due process should be respected. Panama seems to have submitted Decree 2218 to the Panels' attention with the first procedural opportunity. The EU welcomes the possibility to comment on these aspects.

24. This being said, the EU shares the other third parties' "moving target" concerns and considers that it should be a case-by-case assessment in light of the existing relevant guidance from the Appellate Body.

III. ARTICLE XI OF GATT 1994

25. The EU agrees that Article XI:1 refers to restrictions on the importation of products. Different provisions of the GATT contain express references to products. As a matter of example, the non-discrimination provisions (MFN, national treatment) refer to 'like products' in the GATT 1994. However, the GATS, for instance, expressly refers to like services and service suppliers, while the GATT 1994 does not contain similar references to like products and like producers.

26. Previous panel reports shed light on the meaning of "restrictions" in Article XI:1. Those panels applied a legal test considering the implications on the competitive situation of an importer. Measures found in breach of Article XI:1 comprised measures which created uncertainties and affected investment plans, restricted market access for imports or made importation prohibitively costly. This is a rather broad interpretation, taking into account different circumstances that can act as limiting conditions on imports, discouraging importation.

27. Previous panels constantly based their findings on the design, structure of the measure and its potential to adversely affect importation, as opposed to a standalone analysis of the actual impact of the measure on trade flows.

28. The EU understands that in the present case Colombia requires the constitution of a customs bond covering 200% of the threshold price and the quantity of the respective goods with three-year validity.

29. Certain provisions of other WTO agreements are relevant in ascertaining whether customs bonds and import fees and formalities are consistent with Article XI:1 of GATT 1994. Customs bonds and customs formalities are in general legitimate instruments that are permitted under the GATT 1994, the CVA and the Agreement on Trade Facilitation (TFA). If applied in conformity with those provisions customs bonds are trade facilitating measures and not restrictions to trade.

30. However, if customs bonds and customs formalities are applied in a manner inconsistent with the relevant provisions of the CVA and TFA, then this may be a strong indication that they amount to restrictions within the meaning of Article XI of GATT 1994.

31. Indeed, customs bonds are permitted under different WTO agreements, in particular Article 13 of CVA and Article 7(3) of Trade Facilitation Agreement.

32. The EU notes that Article 13 of CVA refers to those situations when, in the course of determining the customs value of imported goods, it becomes necessary to delay the final determination of that customs value. In such circumstances, the importer of the goods is nevertheless able to withdraw the respective goods from customs if it provides sufficient guarantee in the form of a surety, a deposit or another appropriate instrument, covering the ultimate payment of customs duties for which the goods may be liable.

33. Thus, a customs bond requirement on all imports of the products at issue (whereas the importation price is below a certain threshold established by Colombia) would mean that it is necessary to delay the final determination of the customs value in all those cases. It establishes a presumption of illegality on all such imports, while each import should normally be treated in accordance with the relevant individual circumstances, as per Articles 1-7 of CVA.

34. The EU also notes that Article 7(3) of TFA differentiates between guarantees related to the payment of customs duties, taxes, fees, and charges ultimately due for the goods, and guarantees related to the detection of an offence requiring imposition of monetary penalties or fines. While the first type of guarantees may be imposed in all cases, in order to facilitate the release of goods prior to the final determination of customs duties, taxes, fees, and charges, the second type of guarantees are related to the detection of an offence.

35. In light of the above, a cumulative reading of Article 13 of CVA and Article 7(3) of TFA denotes that the role of those provisions is to facilitate trade and not to discourage importation. However, the EU could imagine situations when guarantees, whether in the form of customs bonds or in other forms, may rather discourage importation instead of facilitating trade. Take for instance the example of a prohibitively high guarantee, which has no link to the customs value of those goods, resulted from the application of Articles 1-7 of CVA. Such instances may very well amount to hindrances to importation, impacting on the competitive situation of importers.

36. Similarly to our understanding of the relationship between Article XI of GATT 1994 and other relevant provisions with respect to the customs bond requirement, the EU considers that other provisions of the GATT 1994 can offer useful context in understanding whether customs fees and formalities amount to restrictions within the meaning of Article XI.

37. Indeed, Article VIII of GATT 1994 mentions that all fees and charges shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products. It can be inferred that fees and charges which conform to Article VIII are not inconsistent with Article XI.

38. Similarly, Article 6(2) of TFA provides that fees and charges for customs processing shall be limited in amount to the approximate cost of the services rendered on or in connection with the specific import or export operation in question. Such fees and charges should not be inconsistent with Article XI.

IV. ARTICLE XX OF GATT 1994

39. Similarly to the original proceedings, Colombia attempts to justify the possible GATT violations under paragraphs (a) and (d) of Article XX of GATT 1994.

40. The EU does not dispute that combating money laundering (linked with drug trafficking and other criminal activities) is one of the policies designed to protect public morals in Colombia. In light of the Appellate Body Report in the original proceedings, it also seems that Decree No. 1745 is not "incapable" of addressing the purported objective of protecting the public morals. Accordingly, the Panels would have to closely look into the second element, of whether the measure at issue is "necessary" for the protection of public morals.

41. The EU notes that the initial critique from the Appellate Body with respect to the contribution of the initial measure to the objective of combating money laundering seems to be relevant also in the context of the measures taken to comply. Thus, Colombia may need to further clarify the degree of contribution of the measure at issue to the objective of combating money laundering.

42. As explained in the original proceedings, with regard to 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, a possible example of a WTO consistent measure is the targeting of under-invoicing more directly by applying the correct customs value to those artificially low priced imports. Thus, the money laundering operation may be frustrated, while not restricting at the same time imports which may be priced at a low level because of a different reason.

43. Colombia's measure applies to all relevant imports of textiles, apparel and footwear coming from all countries, if the price is below a certain threshold established by the Colombia authorities. However, the EU has doubts about the appropriateness of requiring bonds for certain imports based solely on their low declared customs values. The EU 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.

44. The measures at issue may amount to a disguised restriction on international trade within the meaning of the *chapeau* of Article XX. Article 7(3) of TFA refers to the requirement of a guarantee linked to the imposition of penalties and fines only in cases where an offence has been detected, and not in all cases, on the basis of a sweeping presumption of illegality.

45. The EU also recalls that Members also enjoy a certain regulatory autonomy. In *EU - Seal Products*, when discussing Article XX(a) of GATT, Canada suggested that the EU must recognize the same level of animal welfare risk in seal hunts as it does in its slaughterhouses and terrestrial wildlife hunts. Thus, Canada appeared to argue that a responding Member must regulate similar public moral concerns in similar ways for the purposes of satisfying the requirement "to protect" public morals under Article XX(a). The Appellate Body disagreed.

V. CONCLUSIONS

46. The EU hopes that its contribution in the present case will be helpful to the Panels in objectively assessing the matter before them and in developing the respective legal interpretations of the relevant provisions of the covered agreements.