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COLOMBIA – MEASURES CONCERNING IMPORTED SPIRITS

REQUEST FOR CONSULTATIONS BY THE EUROPEAN UNION

The following communication, dated 13 January 2016, from the delegation of the European Union to the delegation of the Republic of Colombia and to the Chairperson of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the Government of the Republic of Colombia ("Colombia"), pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the DSU) and Article XXII of the *General Agreement on Tariffs and Trade, 1994* (the GATT 1994), with respect to the discriminatory and other WTO-inconsistent treatment that Colombia accords, without justification, to imported alcoholic beverages at national and departmental level. These measures adversely affect exports of spirits classified under HS 22.08 ("spirits") from the European Union to Colombia.

1 DISCRIMINATORY TAXATION OF IMPORTED SPIRITS

Under the Colombian fiscal regime, all spirits appear to be subject to national excise tax on consumption, except in departments or local subdivisions exercising the so-called fiscal monopoly over spirits. These local departments levy instead a charge connected to the fiscal monopoly (*participación*). Both the tax and the charge are levied per degree of alcohol.¹ The amounts of the tax and of the charge increase above a point set at 35% ABV (alcohol by volume).

The products that are taxed or charged at the higher rates are spirits, including whiskey, gin, vodka, aniseed vodka, liqueur and rum, whether imported or domestic, with an ABV of more than 35%. The products that are taxed or charged at the lower rates are spirits, including *aguardiente* and rum, whether imported or domestic, with an ABV equal to or less than 35%. Even if the Colombian fiscal regime on spirits is on its face origin neutral, it results in the unjustified imposition of a higher fiscal burden on like or directly competitive and substitutable imported spirits than the one applied on domestically produced spirits, mostly rums and *aguardientes*. It appears that all or most of the products that the European Union imports or aims to import into Colombia are subject to the higher rate of the tax or charge, whilst all or most of the products that are produced and sold in Colombia are subject to the lower rate.

In addition, it appears that, in certain departments, domestically produced spirits destined for promotion are unjustifiably exempt from the payment of the charge, whilst no such exemption is available for imported spirits.

For these reasons, the European Union is concerned that Colombia's fiscal regime for spirits, as described above and as provided in or evidenced by, *inter alia*, the provisions of the legal instruments identified in this consultations request (including its Annex), as well as any amendments, supplements, extensions, replacement measures, renewal measures, related and implementing measures, is inconsistent with the obligation or each of the obligations (and any combination thereof) contained in the following provisions (including the Ad note or Ad notes related to each provision):

¹ The current tax rate is set out in Law no 1393 of 12 July 2010, last adjusted by *Certificación* no 3 of 21 December 2015. The rate of the *participación* shall be in no case lower than the rate of the tax.

- Article III:1 of the GATT 1994;
- Article III:2 of the GATT 1994, first sentence;
- Article III:2 of the GATT 1994, second sentence.

2 OTHER WTO INCONSISTENT MEASURES APPLIED ON IMPORTED SPIRITS

In addition to fiscal measures, Colombia subjects imported spirits to a number of unjustified marketing restrictions connected to the administration and implementation of the fiscal monopolies over the introduction and sale of spirits in the departments.

2.1. Introduction contracts

Once a department establishes a monopoly over introduction or sales of spirits in the territory of its jurisdiction, the introduction of imported spirits in that department is made subject to an authorization or license. This is in turn subject to the conclusion of a contract of introduction (*convenio de introducción*) with the department in the majority of cases. Once introduced into a department, imported spirits cannot circulate freely between the departments.

Prior to granting the introduction contract, Colombian authorities carry out a study on its economic and fiscal suitability. Introduction contracts are concluded with the departments for a period of several months to a number of years. The contracts for the introduction of imported spirits vary per department and appear to include, *inter alia*, the following typical clauses: authorization to introduce spirits in the department; list of products (name, alcohol by volume, SKU or space-keeping unit); duration of the contract; amount of the local charge (*participación*); obligation to contract an insurance policy (*póliza de seguro*) to guarantee, *inter alia*, the payment of the local charge for the duration of the contract; other liabilities; and sanctions and/or fines for lack of compliance with the terms of the introduction contracts.

In certain cases, the contracts for the introduction of imported spirits in the departments include also the following requirements: (i) minimum introduction quotas, i.e. the obligation to sell a pre-established volume or value of imported spirits, (ii) minimum prices, i.e. the obligation to sell imported spirits at prices no lower than the minimum sale prices fixed by the Colombian authorities and which would, in some or most cases, be benchmarked on a competing departmental distillery's prices, (iii) additional charges, and (iv) obligations to provide confidential information.

Furthermore, Colombian authorities impose a number of other administrative requirements that apply solely to imported spirits, such as a) the obligation to affix strip stamps which is not imposed on like or directly competitive or substitutable domestic spirits, b) the requirement to advance the payment of the amount of the national excise tax at the time of importation to the Fund-Account for Taxes on Consumptions of Foreign Products (*Fondo-Cuenta de Impuestos al Consumo de Productos Extranjeros*), even though the taxable event is not yet triggered and even though the product will have to be declared again in the department of destination, where the difference between the national excise tax and the participation will be levied before the product can enter the market in the department, and c) the necessary completion of additional legal or administrative procedures to permit the introduction of such spirits (legalization of the *tornaguía*, storage requirements (*bodegas de rentas*), etc.). These aspects of the administration and implementation of the fiscal monopoly over the introduction and commercialization of spirits result in higher transaction costs and - in particular with regard to the *Fondo-Cuenta* - a higher fiscal burden for imported spirits, placing them at a disadvantage in the Colombian market.

For these reasons, the European Union is concerned that each of the Colombian measures, as described above and as provided in or evidenced by, *inter alia*, the provisions of the legal instruments identified in this consultations request (including its Annex), as well as any amendments, supplements, extensions, replacement measures, renewal measures, related and implementing measures, is inconsistent with the obligation or each of the obligations (and any combination thereof) contained in the following provisions (including the Ad note or Ad notes related to each provision):

- Article III:1 of the GATT 1994;
- Article III:4 of the GATT 1994;

And to the extent that they concern fiscal measures:

- Article III:1 of the GATT 1994;
- Article III:2 of the GATT 1994, first sentence;
- Article III:2 of the GATT 1994, second sentence.

2.2. Other trade restrictive measures

In addition, Colombian departments have and appear to exercise the authority to ban the entry of spirits into their jurisdiction by, *inter alia*, (i) declining the grant of the contract of introduction or the relevant authorization or license to a certain operator introducing spirits, (ii) delaying the grant of the contract or relevant authorization or license to a certain operator introducing spirits (renewals are non-automatic and entail a lengthy process, during which period the introduction and marketing of imported spirits in the department is prohibited), and/or (iii) by refusing to extend the contract or the authorization or license to additional brands of spirits.

It further appears that certain departments steer imports towards the higher bracket of taxation by arbitrarily refusing access to their markets for imported spirits at or under 35% ABV, or otherwise use contracts of introduction to control the entry of spirits into their territory, distorting the conditions of competition in the market to the detriment of imported spirits.

For these reasons, the European Union is concerned that each of these Colombian measures, as provided in or evidenced by, *inter alia*, the provisions of the legal instruments identified in this consultations request (including its Annex), as well as any amendments, supplements, extensions, replacement measures, renewal measures, related and implementing measures, as well as all of those measures considered together, are, by according a less favourable treatment to imported spirits than the treatment granted to domestic spirits and by otherwise restricting imports of spirits into the departments in Colombia, inconsistent with the obligation or each of the obligations (and any combination thereof) contained in the following provisions (including the Ad note or Ad notes related to each provision):

- Article III:1 of the GATT 1994;
- Article III:4 of the GATT 1994;

And to the extent that they concern fiscal measures:

- Article III:1 of the GATT 1994;
- Article III:2 of the GATT 1994, first sentence;
- Article III:2 of the GATT 1994, second sentence.

In addition, or in the alternative, it appears that these measures entail prohibitions or restrictions, instituted or maintained by Colombia on the importation of spirits of the European Union, inconsistently with the obligation or each of the obligations (and any combination thereof) contained in Article XI:1 of the GATT 1994.

2.3. Lack of uniform, impartial and reasonable administration

In addition, it appears that Colombia, including through its departmental governments and authorities, implements and administers its system of fiscal monopolies over the introduction and sale of spirits in a way that is not uniform, impartial and reasonable, in particular by failing to treat imported products in a transparent and predictable way. The European Union is concerned that this is inconsistent with the obligation or each of the obligations (and any combination thereof) contained in Article X:3(a) of the GATT 1994.

3. OBLIGATIONS OF COLOMBIA UNDER ARTICLE XXIV: 12 OF THE GATT 1994

Finally, in connection to the measures at issue described above, and for the reasons already set out above, Colombia is obliged to take such reasonable measures as may be available to it to ensure observance of the cited provisions of the GATT 1994 by the regional and local governments

and authorities within its territories, and by failing to do so, Colombia is acting in a manner that is inconsistent with the provisions of Article XXIV:12 of the GATT 1994.

4. CONCLUDING OBSERVATIONS

The measures described above appear to nullify or impair the benefits accruing to the European Union directly or indirectly under the covered agreements.²

This consultation request relates to the measures at issue and to any additional measures that prolong, replace, amend, implement, extend or apply the measures at issue, as well as other related measures adopted by Colombia at national, regional, local or departmental level.

The European Union reserves the right to address additional issues under the provisions of the covered agreements regarding the above matters during the course of the consultations.

The European Union looks forward to receiving Colombia's reply to this request and expresses its readiness to consider a mutually convenient date and place for the consultations.

² In addition, under the *Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part* ("Trade Agreement"), Colombia committed to remove the inconsistency of its regime on spirits with the national treatment provisions under the Trade Agreement, which incorporate Colombia's GATT obligations, by 1 August 2015. Colombia has not fulfilled that obligation.