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

(DS461)

Executive Summary of the
Third Party Oral Statement and
Responses to the Panel's Questions for Third Parties of
the United States of America

January 9, 2015

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

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

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

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

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

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

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

necessarily impose tariffs in excess of those provided in Colombia's Schedule. It is not necessary for Panama to present examples of actual products that are subject to WTO-inconsistent tariffs due to the challenged measure.

III. Article XX(a) of the GATT 1994

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

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

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

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

IV. Article XX(d) of the GATT 1994

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

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

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

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

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

2. The type and extent of evidence that will be required to satisfy this burden of proof will vary from dispute to dispute. In *US – Carbon Steel*, the Appellate Body stated: "Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars." The United States understands this statement not to mean that in every case the text of the relevant legal instrument will be sufficient. Rather, it means that, absent contrary argument or evidence, it may be sufficient for a Member to raise a *prima facie* case of the meaning of a domestic legal instrument if its meaning and effect are clear

from the text, but where the text supports different meanings, or where its meaning has been contested, it is for the complaining party to present additional evidence supporting its understanding. That evidence would need to be relevant within the legal system of the Member complained against. Where the Member's legal system provides rules for determining the meaning of domestic law, a panel would need to apply those rules to arrive at the meaning that the domestic legal system would provide.

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

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

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

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

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

6. Article II:1(b) applies to "products described in Part I of the Schedule relating to any Member" "on their importation" and requires that they be exempt from duties in excess of those provided in that Member's schedule. The text of Article II:1(b) does not support an interpretation that would limit the scope of the provision based on the circumstances of the import transactions at issue. Similarly, the text of Article II:1(a) indicates that it applies to all "commerce of the other Members" covered by the "appropriate Schedule." Nothing in the text of Article II:1(a) suggests a limitation on the commerce that would be covered, or indicates that the obligation contained in that provision only applies to legal "commerce."

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

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

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

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

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

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

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

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

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

Question 8: The United States notes that it is unclear whether the relationship that Colombia has described between Decree No. 456 and the anti-money laundering law falls within the scope of to "secure compliance" in Article XX(d). The United States points out that Article XX(d) requires "a genuine relationship of ends and means between the objective pursued and the measure at issue", and that this provision would not support an interpretation that enforcement measures having "any relationship, even if only coincidental", with a WTO-consistent measure can be considered "necessary to secur[ing] compliance" with such measure. Please comment.

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

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

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

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

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