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

(DS461)

Third Party Oral Statement
of the United States of America

November 26, 2014

Mr. Chairman, members of the Panel:

1. Thank you for this opportunity to present the views of the United States. In this statement, we will briefly address several interpretative issues arising in this dispute. We will first address the interpretation of Article II:1 of the GATT 1994,[1] in particular the scope of measures covered by Article II:1 and the requirements of a *prima facie* showing under Article II:1(b). We will then address the defenses raised by Colombia under Articles XX(a) and (d) of the GATT 1994.

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

2. Colombia asserts that the goods at issue in this dispute are imported at artificially low prices and are likely being used to launder money associated with the drug trade or organized crime.[2] Consequently, Colombia argues, such goods are "illegal" trade not covered by Article II:1, which applies only to *legitimate* "imports" and "commerce."[3]

3. Article II:1(a) states that a Member "shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for" in that Member's tariff Schedule. Article II:1(b) sets forth a specific kind of practice that would also be inconsistent with paragraph (a), providing that the products listed in Part I of a Member's Schedule shall, on their importation, be exempt from "ordinary customs duties in excess of those set forth and provided therein."[4]

4. The text of Article II:1 does not appear to support an interpretation that excludes all "illegal" trade from the scope of this provision. Rather, Article II:1 refers to "trade" and

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[1] *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

[2] *See* Colombia's First Written Submission, para. 66.

[3] *See* Colombia's First Written Submission, paras. 53-54, 61-62 (quoting Article II:1(b) and II:1(a) of the GATT 1994).

[4] *Argentina – Textiles and Apparel (AB)*, para. 45.

"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 coverage of a Member's WTO obligations, the obligation under Article II:1 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 Member's commitments less secure. To the contrary, 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 in other contexts.[5]

5. Further, we do not understand Colombia's measure to apply only to illegal trade. Decree 456 is not limited to trade conducted in violation of Colombian law or to trade related to money laundering or organized crime.[6] Rather, the tariffs applied under Decree 456 that exceed Colombia's scheduled commitments apply to all covered products imported at certain prices.[7]

6. Further, it appears unclear from Colombia's arguments whether, and to what extent, the act of importing a good covered by Decree 456 is itself "illegal." Article 323 of Colombia's penal code, on money laundering, prohibits a list of actions involving assets originating from drug trafficking or other illegal activities. "Importation" is not mentioned in Article 323, and Colombia does not explain where in its list of proscribed conduct the act of importing goods

[5] *See US – Large Civilian Aircraft (2nd complaint) (AB)*, para. 586 (citing *US – Softwood Lumber IV*, para. 56).

[6] *See* Colombia's First Written Submission, para. 64.

[7] *See* Colombia's First Written Submission, para. 64.

falls. Thus it is not clear what, if any, activity covered by Decree 456 is illegal under Colombian law.

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

7. 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.

8. Panama claims that Colombia's measure breaches this article "as such" because, for certain categories of imports (namely, low-value imports of covered products), the *ad valorem* equivalent of the compound tariff imposed under Decree 456 exceeds Colombia's tariff bindings.[8]

9. Colombia does not appear to dispute that this will be the case for the categories of imports that Panama identifies.[9] Rather, Colombia argues that Panama has failed to discharge its burden of presenting a *prima facie* case with respect to its claims under Article II:1, because Panama relies only on hypothetical examples of Decree 456 resulting in tariffs that exceed Colombia's commitments.[10] In Colombia's view, Panama instead must provide evidence of actual instances where Decree 456 resulted in the imposition of tariffs in excess of Colombia's tariff bindings.

10. The Appellate Body has found that the complaining Member has the burden of presenting a *prima facie* case that the measure at issue is inconsistent with the relevant treaty obligation.[11]

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[8] *See* Panama's First Written Submission, paras. 4.20-26, 4.30-31, 4.35-41.

[9] *See* Colombia's First Written Submission, paras. 64-67.

[10] *See* Panama's First Written Submission, para. 4.53; Colombia's First Written Submission, paras. 68-74.

[11] *India – Additional Import Duties (AB)*, para. 186; *US – Carbon Steel (AB)*, para. 157; *US – Wool Shirts and Blouses*, p. 14.

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"[12] 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.

11. However, a complainant need not demonstrate that the measure has been applied in a WTO-inconsistent manner in any particular instance in order to satisfy its burden; an analysis of the measure itself may be sufficient. For example, the panel in *China – Auto Parts* stated that its inquiry under Article II:1 was "limited to [the] very narrow question [of] whether *any aspect of the criteria set out in the measures will necessarily lead to a violation* of China's obligations under its Schedule and consequently Article II:1(a) and (b) of the GATT 1994."[13] Similarly, the *EC – IT Products* panel rejected the argument that, to satisfy its burden, the complaining Member had to describe with specificity the types of products that would be excluded from the treatment promised in the European Union's (EU) Schedule. The panel found that if "complainants are able to establish that *the measures operate in such a way as to necessarily deny*" the treatment promised, "a breach of Article II has been established."[14]

12. Thus, in order 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.[15] It is not necessary, however, for Panama to present examples of actual products

[12] *See US – Carbon Steel (AB)*, para. 157; *see also EC – IT Products*, para. 7.107.

[13] *China – Auto Parts (Panel)*, para. 7.540 (emphasis added).

[14] *EC – IT Products*, para. 7.116 (emphasis added).

[15] *Argentina – Textiles and Apparel (AB)*, para. 45.

from Panama that are subject to WTO-inconsistent tariffs due to application of the challenged measure.

III. Article XX(a) of the GATT 1994

13. Article XX(a) provides that, subject to the requirements of the chapeau, the GATT 1994 does not prevent Members from adopting or enforcing any measure that is "necessary to protect public morals."

14. The Appellate Body in *EC – Seal Products* recently affirmed that 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."[16]

15. Colombia asserts that Decree 456 is a measure "to protect public morals" because it is an anti-money laundering measure. Colombia cites Colombian law, international conventions, and the laws of other Members as support for the proposition that money laundering violates norms of right and wrong conduct, as defined by Colombian society.[17] Regarding the relationship of the measure to this end, 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 that lead to the use of apparel and footwear to launder money.

16. As the Appellate Body stated in *EC – Seal Products*, 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.[18] The

[16] *EC – Seal Products (AB)*, para. 5.169.

[17] *See* Colombia's First Written Submission, paras. 80-81.

[18] *EC – Seal Products (AB)*, para. 5.144 (citing *US – Tuna II (Mexico) (AB)*, para. 314).

EC – Seal Products panel, for example, determined the "primary objective" of the measure at issue 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."[19] The Appellate Body confirmed the panel's analysis.[20]

17. Therefore, in order to make out a defense under Article XX(a), Colombia must first show – based on the text, legislative history, or the design, structure, and operation of the measure – that the primary objective of Decree 456 is to prevent money laundering in Colombia.

18. In this respect, 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. Colombia argues that the measure has increased the average price of covered imports and that this increase is meant to disincentivize the use of trade in textiles and apparel in money laundering operations. The United States questions whether the alleged effect of the measure, a rise in the price of these goods, alone is sufficient to show that the objective of the measure is the reduction or prevention of money laundering in Colombia.[21]

19. Regarding the issue of whether a measure is "necessary" to protect public morals, the Appellate Body recently confirmed that there is no "pre-determined threshold of contribution in analysing the necessity of a measure under Article XX of the GATT 1994."[22] 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" to achieving the objective. Contribution to a covered objective exists when there is "a genuine relationship of ends and

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[19] *EC – Seal Products (AB)*, paras. 5.32 n.913 (citing *EC – Seal Products (Panel)*, para. 7.410).

[20] *EC – Seal Products (AB)*, para. 5.167.

[21] *See* Philippines Third Party Submission, para. 4.58; European Union Third Party Submission, para. 44.

[22] *See EC – Seal Products (AB)*, para. 5.213.

means between the objective pursued and the measure at issue."[23] In terms of the level of contribution required, a "necessary" measure is "significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to' [its objective]."[24] Generally, the analysis may also entail consideration of whether a complaining party has identified a reasonably available, less trade-restrictive alternative.[25]

20. 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 imports covered by the decree, which reduces profit margins and, in turn, reduces incentives to use these products to launder money.[26] 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 in the affected products. If a less trade-restrictive alternative is reasonably available to Colombia, the measure will not be "necessary" within the meaning of Article XX, and several examples of alternative measures have been suggested that the Panel might evaluate.[27]

IV. Article XX(d) of the GATT 1994

21. We now turn to Article XX(d) of the GATT 1994, which Colombia has also invoked in its defense. 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'

[23] *Brazil – Retreaded Tyres (AB)*, para. 210; *EC – Seal Products (AB)*, para. 5.180 (citing *EC – Seal Products (Panel)*, para. 7.633).

[24] *See Korea – Various Measures on Beef (AB)*, para. 161; *Brazil – Retreaded Tyres (AB)*, para. 141.

[25] *EC – Seal Products (AB)*, para. 5.214; *Korea – Various Measures on Beef (AB)*, para. 166.

[26] Colombia's First Written Submission, para. 87.

[27] *See, e.g.*, European Union's Third Party Submission, paras. 45-46.

to secure such compliance."[28] "Secure" means to "[m]ake (something) certain or dependable" or to ensure an outcome or result.[29] "Compliance" refers to "the action of complying with a request [or] command."[30] As the panel in *Colombia – Ports of Entry* stated, "secure compliance" "has been described to mean 'to enforce obligations' rather than 'to ensure the attainment of the objectives of laws and regulations.'"[31] The Appellate Body also has found that, to fall under Article XX(d), a measure need not "be guaranteed to achieve its result with absolute certainty."[32]

22. Colombia makes similar arguments in this context to those raised with respect to Article XX(a). That is, 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 and other laws against the financing of criminal activities.[33]

23. However, it is unclear whether the relationship that Colombia has described between Decree 456 and the anti-money laundering law – that the former reduces the margin of profit and thus reduces the incentives for money laundering – 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 only coincidental, with a WTO-consistent measure can be considered "necessary to secur[ing] compliance" with such measure. Rather, as under Article XX(a), necessity under Article XX(d) requires "a genuine relationship of ends and

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[28] *Korea – Various Measures on Beef (AB)*, para. 157.

[29] *The New Shorter Oxford English Dictionary* (Clarendon Press, 1993) Vol. II, at 2754 (Exh. US-1).

[30] *The New Shorter Oxford English Dictionary* (Clarendon Press, 1993) Vol. I, at 461 (Exh. US-2).

[31] *See Colombia Ports of Entry*, para. 7.538; *Canada – Periodicals (Panel)*, para. 5.9; *Mexico – Taxes on Soft Drinks (Panel)*, para. 8.175.

[32] *Mexico – Taxes on Soft Drinks (AB)*, para. 73.

[33] *See* Colombia's First Written Submission, para. 93.

means between the objective pursued and the measure at issue."[34] 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 price effects on certain textile and apparel products.

V. Conclusion

24. This concludes the U.S. oral statement. We thank the Panel again for its consideration of the views of the United States, and look forward to answering any questions the Panel may have.

[34] *Brazil – Retreaded Tyres (AB)*, para. 210; *EC – Seal Products (AB)*, para. 5.180 (citing *EC – Seal Products (Panel)*, para. 7.633).