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

**(DS461)**

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

**December 16, 2014**

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| *EC – IT Products* | Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010 |
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| *Mexico – Olive Oil* | Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008 |
| *US – 1916 Act (AB)* | Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000 |
| *US – Anti-Dumping and Countervailing Duties (China) (AB)* | Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011 |
| *US – Carbon Steel (AB)* | Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, circulated on 8 December 2014. |
| *US – Carbon Steel (India) (AB)* | Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R and Add.1, circulated 14 July 2014 |
| *US – Hot-Rolled Steel (AB)* | Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001 |
| *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina) (AB)* | Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/AB/RW, adopted 11 May 2007 |
| *US – Wool Shirts and Blouses (AB)* | Appellate Body Report, United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1 |

**Question 1: (Both parties and the third parties) In paragraphs 10 and 11 of its third party submission, the United States points out that in the case of "as such" claims, such as Panama's challenge, 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 the burden of proof, however, 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, referring to the citations that the United States has made to panel and Appellate Body reports.**

1. As the United States explained in its oral statement, 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 domestic legal system of the responding Member, to demonstrate that the challenged measure is inconsistent with a provision of the covered agreements.[1] The scope and meaning of a domestic law instrument is not an issue of WTO law – that is, of the interpretation and application of a WTO agreement. Rather, the domestic legal instrument needs to be understood for what it means and what effects it has as a matter of that Member's domestic legal order.[2] That is, a panel determines as a matter of fact what meaning and effect would that legal system give to that instrument in order to determine the action that would result (e.g., the treatment that would be given to imports from another Member) that may be inconsistent with the Member's WTO obligations.

2. The type and extent of evidence that will be required to satisfy this burden of proof will vary from dispute to dispute.[3] 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.[4]

The United States understands this statement not to mean that in every case the text of the relevant legal instrument will be sufficient. In fact, whether a legal instrument can be read simply according to the ordinary meaning to be given to its terms, or according to some other rule of interpretation, would be a matter of that Member's domestic law. Rather, the United States understands this statement to mean 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 sufficiently clear based on the text. But where the text supports different meanings, or where its meaning has been contested, it would be for the complaining

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[1] *US – Carbon Steel (AB)*, para. 157 (citing *US – Wool Shirts and Blouses (AB)*, para. 335).

[2] *Mexico – Olive Oil*, paras. 7.29-7.30; *EC – Fasteners (China) (Panel)*, para. 7.68; *US – 1916 Act (Panel)*, paras. 6.49-6.51; *US – Hot-Rolled Steel (AB)*, paras. 21-23.

[3] *US – Carbon Steel (AB)*, para. 157.

[4] *US – Carbon Steel (AB)*, para. 157.

party to bring forward additional evidence supporting its understanding. And that evidence would need to be relevant within the legal system of the Member complained against. Where the Member's domestic legal system provides for specific rules to determine the meaning of domestic law, a panel would need to consider and apply those rules in order to arrive at the meaning that the domestic legal system would itself provide.[5]

3. In short, a panel may not interpret a domestic law in isolation, and without regard to the context in which that law is applied. Additional evidence may be required, in particular, where the interpretation of law in the domestic legal system of the responding Member would require examination of such evidence where the text alone does not unequivocally establish the meaning of that law. In such a case, a complaining Member may need to present evidence of how a measure is applied or interpreted by the responding Member to satisfy its burden of proof. Otherwise, a domestic measure may be found to be inconsistent with the WTO provision based on an interpretation that may be markedly different from the interpretation a municipal court might have made, for example.

4. Aside from the issue of the evidence required in order to ascertain the meaning of the domestic law, 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. For 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.[6] That is, based on a proper interpretation of the meaning of the domestic law in question, the measure, at least in certain circumstances, will result in a breach of the WTO provision in question.

5. For example, in *EC – IT Products*, the complaining Members argued that the challenged regulation would deny the duty-free tariff treatment promised in the European Union's (EU) Schedule to certain flat panel display devices and set top boxes.[7] The complaining Members did not present evidence of particular instances where this occurred but, rather, argued that the structure of the measure meant that it necessarily would exclude from duty free treatment "any display with particular technical characteristics."[8] The EU argued that the complaining Members did not identify in sufficient detail the products that would be denied duty-free treatment because

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[5] *US – 1916 Act (Panel)*, paras. 6.54-6.56, 6.60.

[6] *See EC – IT Products*, para. 7.116; *China – Auto Parts (Panel)*, para. 7.540; *see also Argentina – Textiles and Apparel (AB)*, para. 62 (upholding the finding of the Panel that Argentina's tariff measure was inconsistent with Article II:1 because "the structure and design of the DIEM will result, with respect to a certain range of import prices within the relevant tariff category, in an infringement of Argentina's obligations under Article II:1 for all tariff categories in Chapters 51 to 63 of the N.C.M").

[7] *EC – IT Products*, para. 7.104.

[8] *EC – IT Products*, para. 7.105.

it failed to specify particular models or categories of products.[9] The panel found that it was not necessary for the complaining Members to specify product models or categories to satisfy its burden of proof. Instead, it found that if the complaining Members were able "to establish that the measures operate in such a way as *to necessarily deny* duty-free treatment," then a breach of Article II would be established.[10]

6. In *US – Carbon Steel (India)*, the Appellate Body applied similar reasoning in considering India's claim that the "mandatory use of as delivered benchmarks" provided for in the challenged U.S. measure rendered the measure, as such, inconsistent with Article 14(d) of the SCM Agreement.[11] The Appellate Body upheld the panel's finding that India had not proven its claim on the grounds that the U.S. measure did not, in fact, preclude adjustments to ensure that the benchmarks used reflected prevailing market conditions in the country of provision.[12] In addressing another measure in the same dispute, the Appellate Body found that the measure was not, as such, inconsistent with Article 12.7 because it did not, on its face, require the investigating authority to act inconsistently with Article 12.7.[13] The Appellate Body then went on to consider other evidence India had submitted, which, it found, also did not establish that the measure required actions inconsistent with Article 12.7.[14]

7. The Appellate Body made a similar finding in *US – Sunset Review (21.5)*.[15] Similarly, the panel in *China – Auto Parts* stated that its inquiry under Article II:1 was limited to the 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."[16]

8. Thus, in this dispute, the Panel must examine the Colombian measure to determine its meaning under Colombian law. Based on this interpretation, if the Panel finds that the law will, in certain circumstances, necessarily impose tariffs in excess of those provided in Colombia's

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[9] *EC – IT Products*, para. 7.110.

[10] *EC – IT Products*, para. 7.116.

[11] *See US – Carbon Steel (India) (AB)*, para. 4.263.

[12] *US – Carbon Steel (India) (AB)*, paras. 4.259-4.260; *see also id.* paras. 4.469-4.482 (finding that the measure, on its face, did not require the investigating authority to act inconsistently with Article 12.7 and that other evidence submitted by India did not establish conclusively that the measure required such inconsistent actions)..

[13] *US – Carbon Steel (India) (AB)*, para. 4.469.

[14] *US – Carbon Steel (India) (AB)*, paras. 4.471-82.

[15] *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina) (AB)*, para. 121 (finding: "we are not persuaded that the amended waiver provisions preclude the USDOC from making a reasoned determination with a sufficient factual basis, as required by Article 11.3 of the Anti-Dumping Agreement").

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

Schedule, that would be sufficient to support a finding that the measure is inconsistent, "as such," with Article II:1 of the GATT 1994.[17]

**Question 2: (Both parties and the third parties) Please comment on the statement by the European Union in paragraph 23 of its written submission according to which 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*.**

9. As discussed further in response to Question 3 below, 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 of the GATT 1994. Therefore, the Panel need not determine whether the transactions covered by Decree 456 are illegal in order to assess whether Decree 456 is consistent with Colombia's obligations under Article II:1.

10. The United States notes, however, that the sentence to which the Panel refers seems to suggest that "misrepresenting the price of goods being valued in a declaration" and "the fact that the transaction is being used to launder money" *could not possibly* render a transaction illegal.[18] The United States does not agree that this is the case. Any Member could, in theory at least, establish in law that the importation of under-invoiced goods or the importation of goods for purposes of laundering money is illegal.[19] Whether Colombia has actually enacted such a law would be a fact-specific inquiry based on Colombian law, as applied in Colombia and as interpreted by Colombian courts.[20] As the United States explained in its oral statement, it is not clear from the text of Article 323 of Colombia's Penal Code whether, and to what extent, the act of importing goods in connection with money laundering operations is proscribed under Colombian law.[21]

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

[18] *See* European Union's Third Party Written Submission, para. 23.

[19] Whether any such law would be consistent with that Member's obligations under the covered agreements would be a separate question.

[20] *See US – Hot-Rolled Steel (AB)*, para. 200 (stating: "Although it is not the role of panels or the Appellate Body to interpret a Member's domestic legislation as such, it is permissible, indeed essential, to conduct a detailed examination of that legislation in assessing its consistency with WTO law.").

[21] *See* U.S. Third Party Oral Statement, para. 6.

**Question 3: (Both parties and the third parties) Please comment on the statement by the European Union in paragraph 23 of its written submission and the statement by the United States in paragraph 4 of its third party submission 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 legal or not under its own jurisdiction.**

11. Article II:1(b) of the GATT 1994 states, in relevant part:

> The products described in Part I of the Schedule relating to any Member, which are the products of territories of other Members, shall, on their importation into the territory to which the Schedule relates . . . be exempt from ordinary customs duties in excess of those set forth and provided therein.

12. Thus, 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 Appellate Body in *China – Auto Parts* recognized the limitations of this provision, noting that the word "products" and the phrase "on their importation" limit the scope of, "ordinary customs duties" and, consequently, the scope of Article II:1(b), first sentence.[22] However, the text of Article II:1(b) does not support an interpretation that would further limit the scope of the provision based on the circumstances of the import transactions at issue. Where a product is covered by a Member's schedule, Article II:1(b) shall apply, and the bound rates of duty inscribed in that schedule may not be exceeded.

13. 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".[23]

14. Further, as the United States discussed in its oral statement, the consequences of adopting Colombia's proposed interpretation of Article II:1 – that any commerce prohibited by a Member's domestic laws is excluded from the scope of Article II:1 – would be serious. Under such an 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 when imported from one Member but not from another.[24]

15. Additionally, Members could alter the scope of their WTO obligations by making illegal trade in certain types of products. Under Colombia's proposed interpretation, if a Member made trade in a certain type of product illegal, that restriction would be immune from challenge under

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[22] *China – Auto Parts (AB)*, para. 153.

[23] "Commerce" means "buying and selling; the exchange of merchandise or services, esp. on a large scale." *See The New Shorter Oxford English Dictionary* (Clarendon Press, 1993) Vol. I, at 451 (Exh. US-3)

[24] *See* U.S. Third Party Oral Statement, para. 4.

the WTO agreements. It may be useful to illustrate with an example. Assume Member A passed a law making it *illegal* to import socks – an import ban. Under Colombia's proposed interpretation, that law would fall outside the scope of the WTO agreements because imports of socks would be "illegal" under Member A's law.[25] However, Article XI of the GATT 1994 prohibits a Member from applying an import ban or other quantitative restriction. That is, the act of making it illegal to import socks into a Member's market itself is inconsistent with the GATT 1994. Colombia's interpretation that "illegal" trade falls outside the scope of a Member's WTO obligations is not based on the text of the covered agreements and could render many of those obligations ineffective and easily circumvented.

**Question 4: (Both parties and the third parties) In paragraph 61 of its first written submission, 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 (including Article II), it must be borne in mind that these provisions "were not designed to facilitate criminal activities".**

16. Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT) states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

17. The reference to good faith has been interpreted by the Appellate Body to mean that the purpose of treaty interpretation is to reach the interpretation that reflects the common intent of the parties.[26] In *EC – Computer Equipment*, for example, the Appellate Body rejected the panel's interpretation that interpreting the meaning of a tariff concession "in the light of the legitimate expectations of the exporting Members is consistent with the principle of good faith interpretation under Article 31."[27] The Appellate Body found that the panel's interpretation was not consistent with customary rules of interpretation, because the "common intentions" of the parties "cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of one of the parties."[28]

18. The Appellate Body in *Japan – Alcoholic Beverages* also addressed the customary rule of interpretation reflected in Article 31 of the VCLT, finding that it required a provision to be interpreted "based above all upon the text of the treaty," in light of provisions' ordinary meaning and context and the treaty's object and purpose.[29] The Appellate Body quoted the passage from

[25] *See* Colombia's First Written Submission, paras. 61-62.

[26] *See, e.g., EC – Computer Equipment (AB)*, paras. 83-84.

[27] *EC – Computer Equipment (AB)*, para. 83

[28] *EC – Computer Equipment (AB)*, paras. 83-84.

[29] *Japan – Alcoholic Beverages (AB)*, pp. 9-11.

the Yearbook of the International Law Commission that "[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."[30]

19. In this dispute, therefore, the customary rules of interpretation would 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. As noted above in response to question 3, a proper interpretation of Article II:1 suggests that the provision covers any commerce in the products included in a Member's schedule, regardless of its legal status under that Member's domestic laws.

**Question 5: (Both parties and the third parties) Please comment on the statement by the Philippines in paragraphs 4.27 and 4.28 of its written submission 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.**

20. The Philippines' statement in paragraphs 4.27 and 4.28 of its third party written submission is based on the premise set out in paragraph 4.26 that the GATT 1994 does not cover "imports entering at artificially low prices and violat[ing] the rules of the importing country."[31] As explained in our response to the Panel's question 3, the United States does not agree with this premise. The United States considers that the text of Article II:1 of the GATT 1994 does not support the interpretation that a measure is outside the scope of the provision where the measure makes illegal certain transactions .[32] Consequently, the United States considers that the Philippines' statement is not relevant to the inquiry whether a measure falls within the scope of Article II:2.

[30] *Japan – Alcoholic Beverages (AB)*, p. 11, n.21 (quoting *Yearbook of the International Law Commission*, vol. II, at 219 (1996).

[31] Philippines' Third Party Submission, para. 4.26.

[32] *See* United States' Response to Panel Question No. 3, paras. 11-13.

**Question 6: (Both parties and the third parties) 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?**

21. Theoretically at least, it is possible that goods traded at the prices indicated in the Panel's question could be legally traded and not under-invoiced. First, it may be that the true market price of some covered products is below the thresholds of US$10 per gross kg (for apparel) and US$7 per pair (for footwear). Dumped imports could be another example of products priced below these thresholds. A Member may not consider dumped imports "legitimate", but they are legal and may be properly invoiced. Dumped goods do not fall outside the scope of Article II of the GATT 1994. Rather, as Article II:2(b) provides, a Member may be justified in applying duties in excess of its bound commitment levels if it complies with the obligations of Article VI of the GATT 1994 and the Anti-Dumping Agreement.[33] Further, it is also possible that goods traded as part of a money laundering or other illegal scheme may be sold at normal or even higher prices than other goods entering under the same HTS number.

22. Therefore, and as discussed in response to questions 3 and 5 above, the United States does not consider that whether transactions covered by a challenged measure are illegal under the domestic law of the responding Measure is relevant to whether the challenged measure falls within the scope of Article II:1 of the GATT 1994.[34] 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: (Both parties and the third parties) Regardless of whether or not the measure in dispute is designed to protect public morals and to combat money laundering, is it possible, in your opinion, to consider the fight against money laundering to be an objective that is both vital and important in the highest degree for Colombia and that it constitutes an objective that can be included among the policies aimed at protecting public morals in Colombia?**

23. The United States agrees with Colombia that the objective of combatting drug trafficking and transnational organized crime, including by combatting money laundering, could be among the policy objectives covered by Article XX(a) of the GATT 1994. The questions of whether combatting money laundering is, in fact, a public moral and, if so, whether a challenged measure

[33] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "Anti-Dumping Agreement").

[34] *See* United States' Response to Panel Question No. 3, paras. 11-15; United States' Response to Panel's Question No. 5, para. 23.

is "adopted or enforced" to protect that public moral are questions that a panel must consider on a case-by-case basis.[35]

**Question 8: (Both parties and the third parties) In paragraph 23 of its third party statement 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 further 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 on these statements, in particular regarding the type of relationship there should be between the measure in dispute and the law or regulation with which compliance is sought.**

24. Article XX(d) of the GATT 1994 entails a two-part test: (1) the measure must be "designed to secure compliance with laws or regulations" not inconsistent with the GATT 1994; and (2) the measure must be "necessary to secure such compliance."[36] The United States considers that the approaches that the Appellate Body and previous panels have taken in determining whether a challenged measure meets these requirements illustrate 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.

25. With respect to the first prong of this test, previous 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. For example, the panel in *Korea – Various Measures on Beef* relied on evidence concerning the circumstances in which the challenged measure was enacted to conclude that it was "put in place, at least in part, in order to secure compliance with" the WTO-consistent law Korea had identified.[37] The panel emphasized that non-compliance with the identified WTO-consistent law had increased, creating an "exceptional situation" in which the challenged measure was enacted.[38]

26. In finding that Colombia had shown that the challenged measure was taken "to secure compliance" with the identified WTO-consistent regulation, the panel in *Colombia – Ports of Entry* emphasized that: 1) the preamble of the challenged measure referred to the WTO-

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

[36] *Korea – Various Measures on Beef (AB)*, para. 157 (internal quotation omitted).

[37] *Korea – Various Measures on Beef (Panel)*, paras. 657-658; *see Korea – Various Measures on Beef (AB)*, para. 158.

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

consistent regulation[39]; 2) the challenged measure referred to the need to "strengthen and improve customs controls" (which related to the authority granted by the WTO-consistent measure)[40]; and 3) the circumstances surrounding the imposition of the challenged measure "support the view that the measure was imposed at a time when custom fraud-related problems existed."[41]

27. Similarly, the panel in *China – Auto Parts* looked to the language of the challenged measure, the "circumstances leading up to [its] introduction," and the measure's operation in determining whether China had satisfied the first prong of the Article XX(d) test.[42] In finding that China had not done so, the panel noted that: 1) the title, the preamble, and the objectives section of the challenged measure made no mention of enforcing the WTO-consistent measure China had identified[43]; 2) China had not presented evidence that the challenged measure was enacted to address a perceived problem of non-compliance with the identified WTO-consistent measure[44]; and 3) that the conduct at which the challenged measure was directed was not actually inconsistent with the WTO-consistent measure China had identified.[45]

28. Further, to satisfy the first prong of the Article XX(d) test, it is not sufficient for a challenged measure merely to secure compliance with the *objectives* of WTO-consistent laws and regulations. This finding was first articulated by the GATT 1947 panel in *EEC - Regulations on Imports of Parts and Components*, which found that "to secure compliance" "means 'to enforce obligations under laws and obligations' and *not* 'to ensure the attainment of the objectives of the laws and regulations.'"[46] WTO panels have also adopted this interpretation.[47]

29. Thus, with respect to the first prong of the Article XX(d) defense, panels have examined whether the text, structure, context (of its enactment), and operation of the challenged measure show that it was designed to enforce the obligations of the WTO-consistent law or regulation that the responding Member identified.

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[39] *Colombia – Ports of Entry*, para. 7.539.

[40] *Colombia – Ports of Entry*, para. 7.541.

[41] *Colombia – Ports of Entry*, para. 7.542.

[42] *China – Auto Parts (Panel)*, para. 7.299, 7.312. The findings of the panel under Article XX(d) were not appealed. *China – Auto Parts (AB)*, para. 113, n.141.

[43] *China – Auto Parts (Panel)*, para. 7.306-308.

[44] *China – Auto Parts (Panel)*, para. 7.310.

[45] *China – Auto Parts (Panel)*, para. 7.345.

[46] *EEC – Regulations on Imports of Parts and Components (GATT)*, para. 5.17.

[47] *Canada – Wheat Exports and Grain Imports (Panel)*, para. 6.248; *EC – Trademarks and Geographical Indications (US)*, para. 7.447; *Canada – Periodicals (Panel)*, para. 5.9.

30. With respect to the second prong, the Appellate Body and previous 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" to the achievement of its objective. The Appellate Body has affirmed that a measure need not be "indispensable" to its objective to be considered "necessary" to it.[48] However, "necessary" is "located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to.'" Thus the challenged measure must actually make a significant contribution to its objective in order to be considered "necessary." For a contribution to exist, there must be between the measure and its objective of securing compliance with a WTO-consistent law and regulation a "genuine relationship of ends and means."[49]

**Question 9: (Both parties and the third parties) In paragraph 112 of its first written submission, 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, on the other hand, states in paragraph 4.108 of its third party submission and paragraph 4.20 of its third party statement 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, since they would not have to pay tariffs. Could you please explain or comment on this argument?**

31. The chapeau of Article XX requires that any measure found inconsistent with a GATT 1994 provision and provisionally justified under one of the Article XX subparagraphs not be "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." United States considers that the issue of whether the incentives to establish artificially low prices for the purposes of laundering money are comparatively 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.[50]

**Question 10: (Both parties and the third parties) 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. If so, please explain the reasons.**

32. 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

[48] *Korea – Various Measures Affecting Beef (AB)*, para. 161.

[49] *Brazil – Retreaded Tyres (AB)*, para. 210.

[50] *See, e.g., Brazil – Retreaded Tyres (AB)*, paras. 226-234.

with a Member's obligations under the GATT 1994. The United States has presented its comments on the specific defenses raised by Colombia in this case in the U.S. oral statement and in the responses to Questions 7 and 8 above.