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

(DS461)

Third Party Submission
of the United States of America

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I. Introduction

1. The United States makes this third party submission to provide the compliance Panels with its view of the proper legal interpretation of certain provisions of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and the *General Agreement on Tariffs and Trade 1994* (GATT 1994) that are relevant to the parties' claims and arguments in these proceedings.

2. The United States addresses the following two issues: (1) the Panels' terms of reference in these proceedings; and (2) the proper interpretation of Article XI:1 of the GATT 1994. The United States takes no position on the merits of Panama's or Colombia's claims or defenses in this dispute, nor on the facts in dispute.

II. Terms of Reference of Panels in These Proceedings

3. The Parties advance competing arguments concerning the legal instruments and claims that fall within the Panels' terms of reference in these proceedings. In particular, the Parties disagree as to whether Decree 1745 falls within the Panels' terms of reference and whether Panama's claims under Articles XI:1, X:3(a), and VIII of the GATT 1994 and under various articles of the Customs Valuation Agreement (CVA) fall within the terms of reference of one or both Panels. The United States will address these issues in subsections B.1 and C of this section, after describing the legal standard of Article 21.5 of the DSU in subsection A. In subsection B.2, the United States will address an additional issue, namely the relevance in these proceedings of a legal instrument enacted after the establishment of the Panels.

A. Interpretation of Articles 7.1, 6.2, and 21.5 of the DSU

4. 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)".[1] Under Article 6.2, the "matter" consists of "the specific measures at issue" and "a brief summary of the legal basis of the complaint."[2] Thus, the task of any panel, including one to which a disagreement is referred pursuant to Article 21.5 of the DSU, is examining the "matter" referred to the DSB in the

[1] The DSB referred "the matter raised by Colombia in document WT/DS461/17" to the Panel with "standard terms of reference" at its meeting on March 6, 2016 and "the matter raised by Panama in document WT/DS461/22" to the Panel with "standard terms of reference" at its meeting on July 19, 2016.

[2] *See US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 201 ("As in original dispute settlement proceedings, the 'matter' in proceedings brought pursuant to Article 21.5 of the DSU consists of two elements: the specific measures at issue and the legal basis of the complaint (that is, the claims)."); *see also US – FSC (Article 21.5 – EC II) (AB)*, para. 59.

complaining Member's panel request, with the "matter" consisting of the "specific measures at issue" and the "legal basis of the complaint."

5. Articles 6.2 and 7.1 of the DSU establish the relevant time for identifying the measures at issue in any panel proceeding by providing that the "specific measures at issue" are those that form part of the "matter 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 measures that are in existence at the time of the establishment of the panel"[3] and that a panel's review should "focus[] on [the] legal instruments as they existed . . . at the time of establishment of the panel."[4] Article 11 of the DSU reinforces this conclusion, providing that "a panel should make an objective assessment of the matter before it," *i.e.,* of the matter defined in Articles 6.2 and 7.1.

6. The second component of the "matter" falling within a panel's terms of reference – the "legal basis of the complaint" – refers to the claims at issue in the proceeding.[5] 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."[6] 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.[7]

7. Article 21.5 of the DSU further defines the terms of reference of panels established under that provision with respect to the measures that panels can assess. It provides that "[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel." The text of Article 21.5 therefore limits the scope of a compliance proceeding, which concerns only whether "measures taken to comply" exist or are consistent with the WTO Agreement.[8] Therefore, in contrast to original panel proceedings, a complaining Member's panel request may list some measures that, by definition, do not fall within a panel's terms of reference.[9]

8. Thus, the measures within the terms of reference of a panel established under Article 21.5 of the DSU – *i.e.*, the "specific measures at issue" in the proceeding – are the "measures taken to comply." The relevant period for defining the "measures taken to comply" is the time of panel

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[3] *EC – Chicken Cuts (AB)*, para. 156; *EC – Selected Customs Matters (AB)*, para. 187.

[4] *EC – Selected Customs Matters (AB)*, para. 187; *EC – Selected Customs Matters (Panel)*, para. 6.20.

[5] *See US – Carbon Steel (AB)*, para. 125.

[6] *China – Raw Materials (AB)*, para. 220.

[7] *DR – Cigarettes (AB)*, paras. 120-121; *see also China – Raw Materials (AB)*, para. 234.

[8] *See US – Zeroing (Article 21.5 – EC) (AB)*, para. 199; *Canada – Aircraft (Article 21.5 – Brazil) (AB)*, para. 36.

[9] *See, e.g., US – Softwood Lumber IV (Canada) (Article 21.5) (AB)*, para. 77.

establishment. The claims within the terms of reference of panels established under Article 21.5 are, as in all panel proceedings, those set out in a Member's panel request.

B. Measures within the Panels' Terms of Reference

9. In light of the above, the United States has the following observations concerning: (1) the scope of the measures taken to comply, and (2) the relevance in these proceedings of Decree 2218 of 2017.

1. Scope of Measures Taken to Comply under Article 21.5

10. Colombia and Panama disagree about the scope of the "measure taken to comply" for purposes of these proceedings. Colombia declares that Decree 1744, which repealed the compound tariff challenged in the original proceeding and established *ad valorem* tariffs at or below Colombia's tariff bindings, is the only "measure taken to comply" with the DSB recommendations and rulings and, therefore, the only measure within the terms of reference of the Panels.[10] Panama argues that Decree 1745 is also part of Colombia's "measure taken to comply" under Article 21.5 and that, therefore, two measures set out in Decree 1745 – the customs bond and the special import regime – are within the terms of reference of both Panels.[11]

11. As explained above, the scope of an Article 21.5 proceeding is more limited than that of an original panel proceeding because a 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."[12] Thus, the scope of 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.[13] Identifying the measure taken to comply in a proceeding involves an examination of "the factual and legal background against which relevant measures are taken, so as to determine the existence, or consistency with the covered agreements, of measures taken to comply."[14]

12. 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

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[10] *See* Colombia's first written submission as complainant, paras. 4, 29; Colombia's first submission as respondent, paras. 10, 19-47; Colombia's second submission as respondent, paras. 16-40.

[11] Panama's first submission as complainant, paras. 14-15; Panama's first submission as respondent, paras. 37-48.

[12] *See US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 202 (quoting *Canada – Aircraft (Article 21.5 – Brazil) (AB)*, para. 36).

[13] *US – Softwood Lumber IV (Canada) (Article 21.5) (AB)*, para. 66 (emphasis omitted); *US – Zeroing (Article 21.5 – EC) (AB)*, para. 202.

[14] *US – Softwood Lumber IV (Canada) (Article 21.5) (AB)*, para. 69; *see US – Zeroing (Article 21.5 – EC) (AB)*, paras. 200-203.

Article 21.5 panel's analysis of the "measure taken to comply," but it is not "conclusive."[15] In particular, 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.[16] For example, a complaining party may claim that another Member has failed to come into compliance and challenge in an Article 21.5 proceeding one measure. The responding party would be free to contest that claim by bringing forward evidence of another measure that achieves compliance, or affects the operation of the measure challenged by the complaining party, demonstrating that the challenged measure is not WTO-inconsistent.

13. The DSB recommendations and rulings in the original proceeding are naturally the starting point for identifying the "measures taken to comply."[17] In this dispute, the DSB recommended that Colombia bring into conformity with its WTO obligations the compound tariff, as applied to imports "classified in Chapters 61, 62, 63, and 64 . . . of Colombia's Customs Tariff" and priced below thresholds set in Colombian law of $10 per kg or $7 per pair, respectively.[18]

14. Colombia suggests that Decree 1745 is not part of the "measure taken to comply" for several reasons. First, Colombia argues that the measures set out in Decree 1745 are different "in nature" from the measure that was the subject of the DSB recommendations and rulings because the original measure was a tariff measure and the measures in Decree 1745 are not.[19] Second, Colombia asserts that Decree 1745 was enacted to "reinforce[e] [its] risk management and customs control system" – specifically combating use of low-value textiles and apparel to launder money – not to comply with the DSB recommendations and rulings in the original proceeding.[20] Third, Colombia argues that accepting that a "common policy objective" between the original measure and Decree 1745 "brings [the] new measure within the scope of Article 21.5 proceedings" would set a "dangerous precedent" whereby all measures with a "similar policy objective" to a measure found to be WTO-inconsistent could be brought into a subsequent Article 21.5 proceeding.[21] Fourth, as complainant, Colombia argues that Colombia's panel

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[15] *US – Softwood Lumber IV (Canada) (Article 21.5) (AB)*, para. 70; *US – Zeroing (Article 21.5 – EC) (AB)*, para. 204.

[16] *See EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US) (AB)*, para. 245; *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 77 ("[d]etermining whether this is the case requires a panel to scrutinize these relationships, which may, depending on the particular facts, call for an examination of the timing, nature, and effects of the various measures"); *US – Upland Cotton (Article 21.5 – Brazil) (Panel)*, para. 9.26.

[17] *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 202; *US – Zeroing (Article 21.5 – EC) (AB)*, para. 200.

[18] *See Colombia – Textiles (AB)*, para. 6.3; *Colombia – Textiles (Panel)*, paras. 8.2-8.3.

[19] Colombia's first submission as respondent, paras. 19-24, 32-33; *see* Colombia's second submission as complainant, paras. 27-34.

[20] Colombia's first submission as respondent, paras. 25-31.

[21] Colombia's first submission as respondent, paras. 38-43; *see* Colombia's second submission as respondent, paras. 31-32.

request mentions only Decree 1744 and, therefore, it is the only measure within that Panel's terms of reference.[22]

15. The United States does not consider that a measure taken to comply is necessarily limited to the type or kind of measure found to be inconsistent with a Member's commitments in the original proceeding. Rather, as noted above, assessing whether a new measure has a sufficiently close relationship to the measure subject to the DSB recommendations (or the declared measure taken to comply) is a fact-specific inquiry that may require examination of "the timing, nature, and effects" of various measures.[23] 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, for example, from a tariff to an import ban or from an import restriction to a domestic restriction on sale or from an import licensing system to a tariff.

16. Thus, in this dispute, the United States considers that other factors, including those concerning the timing, nature, and effects of the measure, may be relevant to assessing the relationship between Decree 1745 and the WTO-inconsistent measure subject to the DSB recommendation. With respect to timing, these factors could include that Decree 1745 was enacted after the DSB recommendations and rulings in the original proceeding and on the same day as the declared measure taken to comply.[24] Factors relevant to the "nature" of Decree 1745 might include: (1) that it applies to the same categories of products as the compound tariff;[25] (2) that, like the compound tariff, it applies additional measures to imports of these products below certain threshold prices;[26] and (3) that it was implemented with the same declared purpose as the compound tariff, namely, preventing imports of low-cost textiles and apparel in order to launder money.[27] Factors relevant to the effect of Decree 1745 might include that, according to Colombia, it contributes to the achievement of the same objectives as the compound tariff and in the same manner.[28]

17. With regard to Colombia's additional argument in the compliance proceeding it initiated, 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

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[22] Colombia's second submission as complainant, paras. 7-10.

[23] *See US – Softwood Lumber IV (Article 21.5 – Canada) (AB),* para. 77.

[24] *See US – Zeroing (EC) (Article 21.5 – EC) (AB),* para. 222 (finding that "measures taken to comply with recommendations and rulings of the DSB ordinarily post-date the adoption of the recommendations and rulings"); Panama's first submission as respondent, para. 43; Panama's second submission as respondent, para. 85.

[25] Panama's first submission as respondent, para. 44.

[26] Panama's first submission as respondent, para. 36; Panama's second submission as respondent, paras. 42-44.

[27] Panama's first submission as respondent, para. 44; Panama's second submission as respondent, para. 55

[28] *Compare* Colombia's first submission as respondent, paras. 110-113, 128-131 *and Colombia – Textiles (AB),* paras. 5.97-99.

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 a panel established under Article 21.5 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.

2. Relevance of Decree 2218 of 2017

18. As mentioned above, the Panels in these proceedings were established on March 6, 2016 and July 19, 2016, respectively. The parties' first three submissions, covering both proceedings, were due on October 18, November 29, and December 19 of 2017. On January 26, 2018, Panama submitted a new exhibit to the Panels containing Decree 2218, which Colombia had enacted on December 27, 2017. In its second submission as respondent, due on February 12, 2018, Panama incorporated Decree 2218 into its description of the customs bond and special import regime.[29] Additionally, Panama brought a new claim, discussed further below, challenging only Decree 2218.[30]

19. As explained above, Article 7.1 of the DSU establishes that it is "the matter referred to the DSB" by the complaining party that is within a panel's terms of reference unless otherwise decided. Under DSU Article 6.2, the "matter" consists of "the specific measures at issue" and "a brief summary of the legal basis of the complaint."[31] Thus, as set out by Articles 6.2 and 7.1 of the DSU, the general rule is that "the measures included in a panel's terms of reference," and thus the measures on which the panel makes findings, "must be measures that are in existence at the time of the establishment of the panel."[32] Further, panels should concern themselves with whether the measures at issue are consistent with the relevant obligations "*at the time of establishment of the Panel.*"[33] Article 21.5 of the DSU does not modify this rule for compliance panels. Thus, for all panels, it is the challenged measures, as they existed at the time of the panel's establishment, when the DSB tasked the panel to examine the "matter", that are properly within the panel's terms of reference and on which the panel should make findings.

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[29] *See, e.g.*, Panama's second submission as respondent, paras. 11, 136, 153-154, 187, 196, 207-210, 215, 219, 230-234, 301-307, 312-335, 336-337, 382, 436.

[30] *See* Panama's second submission as respondent, sec. VII, paras. 421-433.

[31] DSU, Art. 6.2; *see US – Carbon Steel (AB)*, para. 125; *Guatemala – Cement I (AB)*, para. 72.

[32] *EC – Chicken Cuts (AB)*, para. 156.

[33] *See, e.g., EC – Selected Customs Matters (AB)*, para. 187 (emphasis added) (finding that the panel's review of the consistency of the challenged measure with the covered agreements properly should "have focused on these legal instruments as they existed and were administered at the time of establishment of the Panel"); *id.*, para. 259 (finding the panel had not erred in declining to consider three exhibits, which concerned a regulation enacted after panel establishment, because although they "might have arguably supported the view that uniform administration had been achieved by the time the Panel Report was issued, we fail to see how [they] showed uniform administration at the time of the establishment of the Panel"); *see also EC – Approval and Marketing of Biotech Products*, para. 7.456.

20. The Panels in these proceedings were established with standard terms of reference on March 6 and July 19. Consequently, it is the "measures taken to comply," as they existed on those dates, that are properly within the Panels' respective terms of reference, and the Panels should make findings on those measures. It is uncontested that Decree 2218 was enacted long after the Panels were established and that the relevant legal instruments in effect when the Panels were established were Decree 1744 and 1745. Therefore, Decree 2218 does not form 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 any measures it sets out.

21. 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. Panama has put forward no argumentation or evidence that Decree 2218 forms part of the "measures taken to comply." Its argumentation in its second submission as respondent seems to presume that Decree 2218 is within the Panels' terms of reference, but its argumentation concerning the "measures taken to comply" has related exclusively to Decrees 1744 and 1745.[34] Further, given the timing of Panama's submission, Colombia has had no meaningful opportunity to respond to Panama's argumentation or evidence concerning Decree 2218. Thus, these proceedings demonstrate that addressing "measures taken to comply" as a moving target leads to procedural unfairness and gaps in argumentation that could result in incoherent findings.

22. In short, defining the "matter" within a panel's terms of reference based on the measures as they existed at the time of panel establishment, as set out in the DSU, benefits all parties and the WTO dispute settlement system. It provides for adequate time for parties to submit and respond to argument and evidence. Further, it benefits all parties by balancing the interests of complainants and respondents. Complainants may not obtain findings on substantively new measures introduced after the establishment of a panel.[35] On the other hand, respondents may not avoid findings by altering or revoking measures after the date of panel establishment.[36] As the Appellate Body has recognized, it does not serve the interests of the WTO dispute settlement system to require or allow a complaining or responding party to continually adjust their arguments throughout dispute settlement proceedings in order to deal with a disputed measure as a moving target.[37]

23. For all these reasons, the Panels should reject Panama's invitation to review Decree 2218 as part of the "measure taken to comply."

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[34] *See, e.g.*, Panama's second submission as respondent, paras. 14-134.

[35] *See, e.g., EC – Chicken Cuts (AB)*, paras. 155-162.

[36] *See, e.g., EC – IT Products*, para. 7.167; *US – Wool Shirts and Blouses (Panel)*, para. 6.2; *Indonesia – Autos*, para. 14.9; *Dominican Republic – Imports and Sale of Cigarettes (Panel)*, para. 7.344; *EC – Approval and Marketing of Biotech Products*, para. 7.456; *China – Raw Materials (AB)*, para. 260.

[37] *See China – Raw Materials (AB)*, paras. 257, 261-262.

C. Claims within the Panels' Terms of Reference

24. Colombia and Panama disagree as to which claims are within the Panels' terms of reference. In its second submission as complainant, Colombia argued that Panama's claims under Articles X:3(a) and XI:1 of the GATT 1994 are outside the terms of reference of the Panel requested by Colombia because its panel request did not identify those claims.[38] These were the only claims Panama had raised at that time,[39] so it may be assumed that the same arguments apply to the claims under Article VIII of the GATT 1994 and various articles of the CVA raised for the first time in Panama's second submission as respondent.[40] Panama argues that all its claims are within the terms of reference of both Panels, because Article 21.5 proceedings by definition cover an assessment of whether the measure taken to comply is *fully* consistent with the WTO Agreement.[41] Panama also suggests that the terms of reference of the Panels requested by Panama and Colombia are necessarily the same because they are assessing one fundamental question – compliance with the DSB recommendations and rulings.[42] Finally, Panama argues that, regardless of the terms of reference of the Panel requested by Colombia, all Panama's claims are within the terms of reference of the Panel requested by Panama.[43]

25. As explained above, the terms of reference of a panel established under Article 21.5 of the DSU are set out in the DSU. Like all panels, an Article 21.5 panel's terms of reference, unless otherwise decided, are to examine the "matter referred to the DSB" by the complaining Member in its panel request. As to measures, an Article 21.5 panel's terms of reference cover the "measures taken to comply with the DSB recommendations and rulings" in the original proceeding. As to claims, they cover the existence or consistency with the covered agreements of those measures taken to comply, and with respect to the latter, consistency is assessed against the legal claims set out in the panel request.[44]

26. Both Panels in these proceedings were established with standard terms of reference. Thus, the Panel established in the proceeding initiated by Colombia's terms of reference extend to the "matter raised by Colombia in document WT/DS461/17." The only provisions mentioned in this document are Articles II:1(a) and (b), XX(a), and XX(d) of the GATT 1994.[45] Further, the only obligations described relate to the imposition of customs duties (and no other duties) not in excess of Colombia's bound rates, *i.e.*, the obligations set out in GATT 1994 Article II:1(a)-

[38] Colombia's second submission as complainant, paras. 7, 11-14.

[39] *See* Panama's first submission as respondent, paras. 49-89; *see also* Panama's first submission as complainant, paras. 16-72.

[40] *See* Panama's second submission as respondent, paras. 421-472.

[41] *See* Panama's second submission as respondent, paras. 28-29.

[42] *See* Panama's second submission as respondent, para. 30.

[43] *See* Panama's second submission as respondent, paras. 34-36.

[44] *See US – Carbon Steel (AB)*, para. 125.

[45] *See* Colombia's request for the establishment of a panel, WT/DS461/17, at 1-3.

(b).[46] Therefore, these are the claims within the terms of reference of the Panel established pursuant to Colombia's request.

27. 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,[47] 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.[48] 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.

28. The argument that the two Article 21.5 proceedings necessarily 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 text of the DSU. Further, 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 given dispute and their schedules are harmonized. [49]

29. Thus, in situations where the original respondent initiates an Article 21.5 proceeding alleging its implementation of the DSB's recommendations, the terms of reference of the panel in that proceeding, pursuant to the panel request, would cover the inconsistencies resulting in the DSB recommendations. If the original complaining Member wishes to allege other WTO inconsistencies, it should itself request the establishment of a compliance panel.

30. In this proceeding, the schedules of the two Panels have been harmonized to a significant extent, and a combined set of working procedures has been adopted. However, the two proceedings remain distinct in terms of the panel requests, in addition to the parties' submissions and the planned presentation at the meeting with the parties.[50] The terms of reference of the two

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[46] *See* Colombia's request for the establishment of a panel, WT/DS461/17, at 2.

[47] *See* Panama's second submission as respondent, paras. 28-29.

[48] *EC – Bed Linen (Article 21.5 – India) (AB)*, para. 79.

[49] *EC – Continued Suspension (AB)*, paras. 353-354.

[50] *See* Working Procedures (setting out the harmonized working procedures of the "Grupos Especiales"); *id.* paras. 5 (referring to "a joint substantive meeting"), 11, (stating that "to facilitate the maintenance of a single file *for both proceedings* and to give maximum clarity to the communications, the parties and third parties will consecutively number their documentary evidence throughout the course *of both proceedings*"), 14(a) (stating that each party may make one statement in its capacity as complainant and one in its capacity as respondent); Harmonized Timetable (referring to "low grupos especiales" and setting different deadlines for the Parties' submissions and complainant and respondent).

panels are not identical simply because the DSB referred two matters to the panels pursuant to Article 21.5. And, indeed, the panels' terms of reference are not identical because, as described above, Colombia's panel request does not refer to all the claims subsequently raised by Panama.

31. With regard to Panama's third argument – that all the claims it has raised as complainant are nevertheless covered by the terms of reference of the Panel established pursuant to its own Panel request – the United States will make two observations.

32. First, the terms of reference of the Panel requested by Panama are governed by Panama's panel request. Therefore, any claims that Panama raises must have been set out in its Panel request. In this regard, 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 the terms of reference of the Panel established pursuant to Panama's request.[51] With respect to provisions listed in Panama's panel request, for example certain provisions of the CVA, the Panel in the proceeding initiated by Panama would still have to consider whether the references in Panama's panel request meet the standard of Article 6.2 of the DSU.

33. Second, and relatedly, Panama's submissions as complainant are not necessarily part of the record in the proceeding initiated by Colombia simply because the proceedings are both Article 21.5 proceedings in the same dispute. Therefore, Panama's argument that *all* the provisions and arguments it has referenced as respondent are within the terms of reference of the Panel established pursuant to Panama's panel request should be substantiated. This could be done by reference to the working procedures of the Panels (if Panama considers that they provide for incorporation of its submissions as respondent into record of the proceeding in which it is the complainant) or by reference to Panama's submissions as complainant.[52] In this regard, however, the United States notes that, as the complainant, Panama has not yet put forward argumentation concerning the arguments under Article VIII:3 of the GATT 1994 and Articles 1, 2, 3, 5, 6, 7, and 13 of the CVA that it raised for the first time in its second submission as the respondent.[53]

34. For all these reasons, each Panel should carefully consider which claims are within its respective terms of reference.

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

35. The Parties disagree on the interpretation and application in this dispute of Article XI:1 of the GATT 1994. The United States does not take a position on the merits of any of the claims

[51] *See* Panama's request for the establishment of a panel, WT/DS461/22.

[52] *But see* Panama's second submission as respondent, paras. 30-36.

[53] *See* Panama's first submission as complainant; Panama's second submission as complainant; Panama' first submission as respondent, para. 66 (mentioning Article VIII:3 of the GATT 1994 and Articles 1, 2, 3, 5, 6, and 7 of the Customs Valuation Agreement but not putting forward any argumentation or evidence).

advanced in these proceedings. However, the United States has the following comments concerning the appropriate interpretation of Article XI:1.

A. Legal Standard of Article XI:1

36. Article XI:1 of the GATT 1994 states:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any Member on the importation of any product of the territory of any other Member or on the exportation or sale for export of any product destined for the territory of any other Member.

Under the customary rules of interpretation of public international law, as referenced in Article 3.2 of the DSU, "[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 the light of its object and purpose."[54]

37. 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."[55] 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."[56] 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."[57]

38. 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 ("importation" / "exportation") reach the process of importing or exporting.[58] Similarly, the Appellate Body in *Argentina – Import Measures*

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[54] *US – Gasoline (AB)*, pp. 16-17 (quoting Article 31 of the Vienna Convention on the Law of Treaties and stating: "That general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the 'customary rules of interpretation of public international law' which the Appellate Body has been directed, by Article 3(2) of the *DSU*, to apply in seeking to clarify the provisions of the *General Agreement* and the other 'covered agreements'").

[55] *India – Quantitative Restrictions (Panel)*, para. 5.128.

[56] *India – Autos (Panel)*, para. 7.265 (original emphasis omitted); *see also Dominican Republic – Import and Sale of Cigarettes (Panel)*, para. 7.269 (citing same).

[57] *See China – Raw Materials (AB)*, para. 319 (citing *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2553); *Argentina – Import Measures (AB)*, para. 5.217.

[58] *See The New Shorter Oxford English Dictionary*, 4th edn, Lesley Brown et al. (eds.) (Oxford University Press, 1993), Vol. 1, at 1324 (Exh. US-45) (defining "importation" as, "the action of importing or bringing in something");

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."[59]

39. Further, the intervention of some level of private action does not insulate measures from being inconsistent with Article XI:1. As the Appellate Body recognized in the context of Article III:4 of the GATT 1994, "the intervention of some element of private choice does not relieve [a Member] of responsibility under the GATT 1994 for" effects of the measure.[60] Rather, "where private actors are induced or encouraged to take certain decisions because of the incentives created by a measure, those decisions are not 'independent' of that measure."[61] Past panels have confirmed that this holds true in the context of Article XI:1.[62]

40. 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."[63] Indeed, numerous provisions of the GATT 1994 and other agreements recognize that there may be formalities and fees associated with importation.[64] By definition, such formalities and fees will place some burden on importation. However, interpreting Article XI:1 as proscribing all such burdens would be inconsistent with the principle

The New Shorter Oxford English Dictionary, 4th edn, Lesley Brown et al. (eds.) (Oxford University Press, 1993), Vol. 1, at 889 (Exh. US-46) (defining "exportation" as "the action or practice of exporting").

[59] *Argentina – Import Measures (AB)*, para. 5.217; *see Argentina – Import Measures (Panel)*, para. 6.455; *Colombia – Ports of Entry*, para. 7.240; *US – Poultry (China)*, para. 7.454; *Argentina – Hides and Leather*, para. 11.20.

[60] *Korea – Various Measures on Beef (AB)*, para. 146.

[61] *US – COOL (AB)*, para. 291.

[62] *See, e.g.*, *Indonesia – Import Licensing Regimes (US) (Panel)*, para. 7.178 (finding: "[E]ven if there is a degree of private choice in determining the numerical limitation of imports . . . the existence of the limiting effect on importation is not a consequence of the importer's decision but rather of the design, architecture and revealing structure of Measure 5."); *India – Autos*, para. 7.268 (finding that a trade-balancing requirement was inconsistent with Article XI:1 because, although it "does not set an absolute numerical limit on the amount of imports," "in reality . . . the limit on imports set by this condition is induced by the practical threshold that a signatory will impose on itself as a result of the obligation to satisfy a corresponding export commitment"); *Argentina – Import Measures (Panel)*, para. 6.256 (finding that a trade-balancing requirement was inconsistent with Article XI:1 even when private actors, "in order to continue to import, *opt* for increasing their level of exports," because the requirement "imposes an artificial threshold which restricts the level of imports of economic operators irrespective of commercial considerations").

[63] *Argentina – Import Measures (AB)*, para. 5.217.

[64] *See, e.g.*, GATT 1994, articles VIII, IX, ad article VI; Import Licensing Agreements, articles 1, 2; Customs Valuation Agreement, article 13; Trade Facilitation Agreement, articles 6, 7, 10.

that the WTO Agreement constitutes a single undertaking[65] and, therefore, the provisions of the various covered agreements should be interpreted harmoniously.[66]

B. Application of Article XI:1 in This Dispute

41. Panama challenges two measures under Article XI:1 of the GATT 1994 – the "customs bond" and the "special import regime." It appears uncontested that, as set out in Decree 1745, the customs bond consists of the requirement that, as a condition for the release of the goods, importers of covered footwear and apparel valued below the threshold prices set in Colombian law must provide, for three years, a bank or insurance company guarantee of 200% of the relevant threshold multiplied by the quantity of goods being imported.[67] The "special import regime" consists, as Panama argues, of the following requirements imposed as a condition of importing covered footwear and apparel below the threshold prices: (1) obtaining and submitting five documents and certifications a month prior to the importation of goods; (2) provision of the customs bond; and (3) physical presence of the importer or the importer's representative (other than the customs representative) during the inspection of the goods.[68]

1. Panama's Claim Concerning the Customs Bond

42. Panama advances a number of arguments as to why the customs bond is inconsistent with Article XI:1. Panama argues, *inter alia*: (1) that the creation of the guarantee has a cost that would not exist in the absence of the requirement;[69] (2) that the value of the bond is not related to the extent of the obligations it seeks to guarantee;[70] (3) that the bond requirement prevents access to the market because not all importers can qualify for a guarantee;[71] and (4) that it generates "uncertainty" because not all importers will be able to qualify.[72] Colombia argues, *inter alia*, that customs bonds are "permissible instruments under the WTO Agreements," and, as such, the

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[65] *Agreement Establishing the World Trade Organization* ("WTO Agreement"), article II:2.

[66] *See US – Upland Cotton (AB)*, para. 549 (finding that "a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously"); *see also Argentina – Footwear (EC) (AB)*, para. 81 ("[A] treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously."); *Japan – Alcoholic Beverages II (AB)*, p. 12 ("A fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 is the principle of effectiveness . . . . In [*US – Gasoline*], we noted that 'one of the corollaries of the general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.'").

[67] *See* Panama's first submission as complainant, paras. 27-28; Colombia's first submission as complainant, paras. 61-80.

[68] Panama's first submission as complainant, paras. 44-52.

[69] Panama's first submission as complainant, para. 37; Panama's first submission as respondent, paras. 53-54.

[70] Panama's first submission as complainant, para. 37; Panama's first submission as respondent, para. 54; Panama's second submission as respondent, paras. 190-197.

[71] Panama's second submission as respondent, paras. 146-152.

[72] Panama's first submission as complainant, para. 40; Panama's first submission as respondent, para. 55; Panama's second submission as respondent, paras. 161-172.

existence of a customs bond and associated fees or costs "cannot, without more give rise to a prohibited restriction under Article XI:1."[73] Colombia also argues that Panama has failed to "provide any evidence of how any costs and uncertainty give rise to a limitation on the quantities or amounts of products that may be imported" such that it is a "restriction" under Article XI:1.[74]

43. As described above, the critical question in determining whether Panama has met its burden of demonstrating that these measures are inconsistent with Article XI:1 is whether they impose a limitation or limiting condition on importation, or have a "limiting effect" on importation, of products into Colombia. It is not the case that any measure that burdens importation is inconsistent with Article XI:1. To the extent that some of Panama's arguments suggest that any "condition" placed on importation – including all importation fees and formalities – is necessarily inconsistent with Article XI:1,[75] the Panels should reject those arguments. A showing that a measure is a "condition" on importation that imposes some burden or cost on importers is not sufficient to establish a claim under Article XI:1.[76] 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.[77]

44. Further, Article XI:1 refers to the importation of "product[s] of . . . any other contracting party," and the critical inquiry is thus a measure's effect on the *products* of WTO Members, not its effect on *importers* in Colombia. A number of Panama's arguments seem premised on the idea that Article XI:1 requires that equal conditions be maintained for all Colombian importers (particularly those that are not credit worthy).[78] This is incorrect. The text of Article XI:1 is clear that it refers to limitations on the importation of *products*, not 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 limiting condition on importation, or had a "limiting effect" on importation, of the relevant products.

45. 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, including associated costs and formalities, is not sufficient to establish an Article XI:1 claim.[79]

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[73] Colombia's first submission as respondent, paras. 59-60.

[74] Colombia's first submission as respondent, para. 79.

[75] *See, e.g.*, Panama's first submission as complainant, para. 37; Panama's first submission as respondent, paras. 53-54; Panama's second submission as respondent, paras. 146-152, 190-197.

[76] The United States is not suggesting that all of Panama's arguments fall into this category, merely that the Panels should focus their analysis on the argumentation and evidence that is probative of whether the challenged measures have a "limiting effect" on importation.

[77] *See* Panama's second submission as respondent, paras. 143-145; *Argentina – Import Measures (AB)*, para. 5.217.

[78] *See, e.g.*, Panama's first submission as complainant, para. 40; Panama's second submission as respondent, paras. 161-172.

[79] *See* Colombia's first submission as respondent, paras. 53-60; Colombia's second submission as complainant, paras. 48-55.

The WTO Agreement and its annexed agreements are a single undertaking and should be read harmoniously.[80] If all customs bonds were inconsistent with Article XI:1, provisions of the covered agreements would be rendered meaningless.[81] The United States also agrees that customs bonds inherently involve some burdens or costs on importers, although Members should endeavor to minimize these. Therefore, the existence of some burden or cost imposed by a customs bond is likewise not sufficient to establish that the bond is inconsistent with Article XI:1. This is consistent with the text of Article XI:1, which requires that a measure impose a "restriction" on "importation" (that is, a limitation or limiting condition on importation, or have a "limiting effect" on importation), and with past reports that have emphasized that not every mandatory condition that imposes some burden or inconvenience on importers rises to the level of being inconsistent with Article XI:1.[82]

46. The United States considers that 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. GATT 1994 Article VII and articles of the CVA emphasize that the customs value of the imported goods should be the basis for customs assessments and transactions.[83] Valuation based on other considerations – *e.g.*, the use of reference or minimum prices – raises concerns under the CVA and can undermine the benefits of Members' market access commitments. Article 7.3 of the Trade Facilitation Agreement states that the amount of a customs guarantee should 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" and that the guarantee should be "discharged when it is no longer required."[84] Article VIII of the GATT 1994 provides that any "fees and charges" imposed in connection with importation should be "limited in amount to the approximate cost of services rendered" and should not represent an "indirect protection to domestic products."

47. At a minimum, a customs bond – including any associated fees and charges – that is *consistent* with these relevant provisions of other covered agreements would presumably not be inconsistent with Article XI:1.

2. Panama's Claim Concerning the Special Import Regime

48. Panama argues that the special import regime is inconsistent with Article XI:1 of the GATT 1994 for several reasons, including because: (1) requiring five documents and certifications makes importation more difficult and costly and therefore has an impact on the

[80] *See US – Upland Cotton (AB)*, para. 549; *Argentina – Footwear (AB)*, para. 81; *Japan – Alcoholic Beverages II (AB)*, p. 12.

[81] *See, e.g.*, Trade Facilitation Agreement, article 7.3; GATT 1994, ad article VI; Customs Valuation Agreement, article 13.

[82] *E.g.*, *Argentina – Import Measures (AB)*, para. 5.217.

[83] *See* GATT 1994, article VII(1)-(2); Customs Valuation Agreement, articles 1-8.

[84] *See* Customs Valuation Agreement, articles 7.3.3, 7.3.5.

competitive opportunities of importers;[85] (2) the in-person inspection requirement imposes costs and burdens on importers;[86] (3) the costs imposed by the regime are not supported;[87] (4) the costs are so significant that they have a restrictive effect on imports;[88] and (5) the requirement to submit the documents and certifications a month in advance reduces the flexibility of importers to respond to market conditions and prevents the importation of goods other than those for which documents were submitted at least 30 days previously.[89] Colombia argues, *inter alia*, that customs formalities are permissible under the WTO Agreement and, therefore, the fact that they exist and have "associated fees or costs cannot, without more," establish and Article XI:1 breach.[90] Colombia also argues that Panama has failed to demonstrate that the costs it alleges have a "limiting effect on the quantities of imports" such that it is inconsistent with Article XI:1,[91] and that costs or burdens imposed by private banks or translators cannot be attributed to Colombia's measure.[92]

49. In considering these contentions, the Panels should carefully assess which of the arguments and evidence presented are probative of whether the special import regime imposes a limitation or limiting condition "on importation" or has a "limiting effect" on importation. Arguments about burdens or costs imposed on *importers* are relevant only in conjunction with evidence and argument that these impacts result in a restriction on the "importation" of the covered goods. Further, not any mandatory condition on importation is a "restriction" under Article XI:1, as shown by the fact that the covered agreements recognize the existence of fees and formalities associated with importation.[93] To show a limitation on importation under Article XI:1, a complaining Member does not need to demonstrate trade effects,[94] but it does need to show that the challenged measure restricts importation of the relevant products – the existence of costs or difficulties for individual importers alone is not sufficient.

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[85] *See* Panama's first submission as complainant, paras. 56-57; *see* Panama's second submission as respondent, paras. 231-232, 248, 265, 292.

[86] Panama's first submission as complainant, para. 59; Panama's second submission as respondent, paras. 231-232.

[87] *See* Panama's first submission as complainant, para. 60; Panama's first submission as respondent, para. 61;

[88] *See* Panama's first submission as complainant, para. 62; Panama's first submission as respondent, para. 64; Panama's second submission as respondent, para. 294.

[89] *See* Panama's first submission as complainant, paras. 62-68; Panama's first submission as respondent, paras. 62-63; Panama's second submission as respondent, paras. 268-274.

[90] *See* Colombia's first submission as respondent, paras. 85-87; Colombia's second submission as complainant, paras. 71-72; Colombia's second submission as respondent, para. 59.

[91] *See* Colombia's first submission as respondent, paras. 85-87; 88-96; Colombia's second submission as complainant, paras. 75-86; Colombia's second submission as respondent, para.71.

[92] *See* Colombia's first submission as respondent, para. 89; Colombia's second submission as respondent, paras. 63, 65; *see also id.* paras. 46-51.

[93] *See, e.g.*, GATT 1994, article VIII; Trade Facilitation Agreement, articles 1, 6.

[94] *Argentina – Import Measures (AB)*, para. 5.217; *see Argentina – Import Measures (Panel)*, para. 6.455; *Colombia – Ports of Entry*, para. 7.240; *US – Poultry (China)*, para. 7.454.

50. Further, as with the customs bond, provisions of other covered agreements on import fees and formalities provide useful context for analyzing whether aspects of the special import regime rise to the level of being a "restriction" under Article XI:1. In particular, Article VIII of the GATT 1994 and Article 6 of the Trade Facilitation Agreement suggest that fees and charges should be "limited in amount to the approximate cost of services rendered" and should not be an "indirect protection to domestic production." At a minimum, fees and charges that meet this standard are presumably not inconsistent with Article XI:1.

51. Finally, as discussed above, the intervention of some element of private action does not relieve a Member of responsibility for the effects of a measure.[95] Thus, if Panama has shown 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.

IV. Conclusion

52. The United States appreciates the opportunity to comment on the issues in this proceeding, and hopes that its comments will be useful to the Panels.

[95] *See US – COOL (AB)*, para. 291; *Indonesia – Import Licensing Regimes (Panel)*, para. 7.178; *India – Autos*, para. 7.268; *Argentina – Import Measures (Panel)*, para. 6.256.